

## THE ORIGINALIST JURISPRUDENCE OF JUSTICE SAMUEL ALITO

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Since Justice Alito's appointment to the Supreme Court in 2006, constitutional theorists have struggled with how to characterize his approach to constitutional adjudication. Many scholars have argued that "Justice Alito is not to any significant extent an originalist" but is, instead, "a methodological pluralist" who uses both originalist and non-originalist tools of constitutional adjudication.<sup>1</sup> Others have contended that "Justice Alito's jurisprudence is originali[st], though not in the traditional sense."<sup>2</sup>

This disagreement largely stems from the failure of many commentators to appreciate the complex ways in which Justice Alito's understanding of the judicial role affects his constitutional methodology. He sees judging as a "practical activity" rather than a "theoretical" endeavor, a "craft" rather than a "science."<sup>3</sup> Judging is a trade passed down through generations of eminent jurists and learned "primarily from experience and from the example of others," not a set of postulates to be mastered or a series of axioms to be applied.<sup>4</sup> This view of the judicial role leads him to a methodology that is attuned to characteristics of our legal tradition that have long defined Anglo-American judicial practice, such as respect for the limits that the adversarial system imposes on judicial decisions. What emerges is a methodology drawn *from* the Founding era rather than imposed *on* it, a methodology that, I will argue, is rightly described as originalist.

Indeed, I would go further: Justice Alito is uniquely positioned to address two of the most significant dangers originalism faces in the coming years. The first is the difficulty of changing current doctrine to better accord with the original meaning of the Constitution, a challenge the

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<sup>1</sup> Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, YALE L.J.F. 164, 166 (2016); see also Mike Rappaport, *The State of Originalism 2021*, THE ORIGINALISM BLOG (Apr. 1, 2021), <https://originalismblog.typepad.com/the-originalism-blog/2020/04/the-state-of-originalism-mike-rappaport.html> [<https://perma.cc/255M-B5DR>]; Garrett Epps, *The Free Speech Jurisprudence of Justice Samuel Alito*, KNIGHT FIRST AMEND. INST. (May 1, 2018), <https://knightcolumbia.org/content/free-speech-jurisprudence-justice-samuel-alito> [<https://perma.cc/7JMP-GSSF>].

<sup>2</sup> Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019); see also John O. McGinnis, *Alito's Way*, LAW & LIBERTY (Dec. 3, 2020), <https://lawliberty.org/alitos-way/> [<https://perma.cc/C3KT-MW99>].

<sup>3</sup> Samuel A. Alito, Jr., Assoc. Just. Sup. Ct. U.S., *The Wriston Lecture: Let Judges Be Judges* (Oct. 13, 2010) [hereinafter *Wriston Lecture*] (transcript available at <https://www.manhattan-institute.org/html/2010-wriston-lecture-let-judges-be-judges-8897.html> [<https://perma.cc/L4MC-5STU>]).

<sup>4</sup> *Id.* For a similar contrast, see Michael Oakeshott, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 5, 5–17 (1991).

originalist justices will confront more and more now that they constitute a majority of the Court. The second is the recent tendency of originalism to become increasingly abstract and difficult to distinguish from its longtime foe, living constitutionalism.

My argument will, therefore, be surprising to many readers: far from being an ersatz originalist, Justice Alito is originalism's best chance at remaining a viable theory of constitutional adjudication in the years to come.

#### JUSTICE ALITO'S ORIGINALISM

In assessing how Justice Alito approaches constitutional adjudication, it makes sense to begin with his own description of his methodology: "I think I would consider myself a practical originalist."<sup>5</sup> As Lawrence Solum has argued, originalists agree on at least two core propositions: (1) the meaning of constitutional provisions is fixed the moment they are ratified and (2) the outcomes of constitutional controversies must be consistent with the original meaning (though originalists disagree about the role of precedent with respect to this latter proposition).<sup>6</sup> Justice Alito has embraced the first proposition by defining originalism as "the idea that the Constitution has a fixed meaning; it doesn't change. It means what people would have understood it to mean at the time it was written."<sup>7</sup> And he has embraced the second proposition as well: "[I]t is the job of a judge, the job of a Supreme Court Justice, to interpret the Constitution, not distort the Constitution, not add to the Constitution or subtract from the Constitution."<sup>8</sup> These originalist propositions are, in Justice Alito's view, fully consistent with the Founding-era understanding of the judicial role.<sup>9</sup>

They also explain why, in cases presenting novel constitutional issues, he finds the original meaning of the Constitution dispositive. He joined the majority opinion in *District of Columbia v. Heller*,<sup>10</sup> a model originalist opinion by Justice Scalia recognizing that the Second Amendment secures an individual right to keep and bear arms, and he joined originalist opinions by Justices Scalia and Thomas, respectively, in cases involving the meaning of the Recess Appointments Clause<sup>11</sup> and the Treaty Power.<sup>12</sup>

But Justice Alito has not only *joined* originalist opinions; he has also *authored* some of the most powerful originalist opinions in recent history. His majority opinion in *Gamble v. United States* so compellingly analyzed the text and history of the Double Jeopardy Clause<sup>13</sup> that Justice Thomas—who had previously expressed his skepticism of the dual-sovereignty doctrine at issue in that

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<sup>5</sup> Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014), <https://spectator.org/sam-alito-a-civil-man/> [https://perma.cc/EX62-4QH8].

<sup>6</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

<sup>7</sup> *Justice Alito Discusses Faith & Originalism at TAC Town Hall*, THOMAS AQUINAS COLL. (Nov. 9, 2021), <https://www.thomasaquinas.edu/news/justice-alito-discusses-faith-originalism-tac-town-hall> [https://perma.cc/278B-WESR] [hereinafter TAC Town Hall].

<sup>8</sup> Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 465 (2006) (statement of Samuel A. Alito, Jr.).

<sup>9</sup> Wriston Lecture, *supra* note 3.

<sup>10</sup> 554 U.S. 570 (2008).

<sup>11</sup> NLRB v. Noel Canning, 573 U.S. 513, 569 (2014) (Scalia, J., concurring in the judgment).

<sup>12</sup> Bond v. United States, 572 U.S. 844, 882 (2014) (Thomas, J., concurring in the judgment).

<sup>13</sup> Gamble v. United States, 139 S. Ct. 1960 (2019).

case—joined Justice Alito’s opinion reaffirming the doctrine.<sup>14</sup> His majority opinion in *Department of Homeland Security v. Thuraissigiam*<sup>15</sup> (a case involving the original meaning of the Suspension Clause) and his separate opinion in *Fulton v. City of Philadelphia*<sup>16</sup> (where he urged the Court to return to the original meaning of the Free Exercise Clause) are masterpieces of originalist analysis. These are not the opinions of a jurist who views originalism as “faintly ridiculous,” as some scholars have asserted.<sup>17</sup> Rather, they confirm that Justice Alito is a sophisticated practitioner of originalist methodology.

Why, then, have some commentators questioned whether Justice Alito is an originalist? One reason is that his opinions tend to rely on non-originalist arguments, such as those employing judicially created tests.<sup>18</sup> But this deviation from arguments based on text or history is simply the result of the fact that, as Justice Alito acknowledges, he “almost always follow[s] past decisions,”<sup>19</sup> and most of current Supreme Court doctrine is non-originalist in at least some respect. Indeed, in many instances, Justice Alito’s use of non-originalist arguments makes him no different from other originalists. For example, although scholars sometimes cite Justice Alito’s solo dissenting opinion in *Snyder v. Phelps*<sup>20</sup> as demonstrating his willingness to depart from originalism and bring his own moral or political philosophy to bear in deciding cases,<sup>21</sup> both the majority (which included Justices Scalia and Thomas) and the dissent in that case employed the same judicially created tests dictated by precedent. Since current free-speech doctrine has long been unmoored from the original meaning of the Free Speech Clause,<sup>22</sup> none of the justices relied on the original meaning in *Snyder*. Justice Alito’s *Snyder* dissent thus sheds little light on whether he is an originalist.

More relevant are those cases in which one or more members of the Court would have decided a case on originalist grounds, yet Justice Alito declined to do so. Justices Thomas and Alito frequently diverge in this way, but as noted above, that has not been true in cases of first impression, when there is no precedent on point. Instead, they have differed as to whether to apply the original meaning when there *is* precedent on point, and that implicates issues of *stare decisis* that are related to—but distinct from—the question of whether a jurist is an originalist.

It is widely accepted among originalist scholars and jurists alike that some version of *stare decisis* is compatible with originalism. While a few scholars have argued that adherence to non-originalist precedent is never (or almost never) justified,<sup>23</sup> theirs is a minority view. Justice Alito has expressly rejected that minority argument (which he has described as having “elegant simplicity”), arguing—based on the Founders’ understanding of Article III’s grant of “the judicial

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<sup>14</sup> *Id.* at 1980–81 (Thomas, J., concurring).

<sup>15</sup> 140 S. Ct. 1959 (2020).

<sup>16</sup> 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring in the judgment).

<sup>17</sup> Epps, *supra* note 1.

<sup>18</sup> *See, e.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2154–2165 (2020) (Alito, J., dissenting).

<sup>19</sup> TAC Town Hall, *supra* note 7.

<sup>20</sup> 562 U.S. 443 (2011).

<sup>21</sup> Adam J. White, *The Burkean Justice*, THE WKLY. STANDARD (July 18, 2011), <https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice> [<https://perma.cc/UJQ3-N4BK>].

<sup>22</sup> *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263 (2017).

<sup>23</sup> *See, e.g.*, Gary S. Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 5–8 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289–98 (2005).

Power”—that the Constitution “authorizes [judges] to continue to follow with appropriate modifications the preexisting doctrine of *stare decisis*.”<sup>24</sup>

Of course, originalists disagree about the *strength* of the *stare decisis* principle authorized by Article III. Justice Thomas has adopted a weak understanding of *stare decisis*, arguing that *stare decisis* does not require courts to adhere to “demonstrably erroneous precedent.”<sup>25</sup> Justice Alito—though not specifically addressing Justice Thomas’s view—has suggested that he disagrees with this “narrow view of *stare decisis*” and instead applies what have become conventional factors for determining whether to overrule precedent.<sup>26</sup> This stronger view of *stare decisis* is embraced by several originalist scholars.<sup>27</sup> While these different theories of precedent mean that, all else being equal, where originalism and the Court’s precedents are in conflict, Justice Alito is less likely to apply the original meaning than Justice Thomas, their disagreement about the force of *stare decisis* is a well-known *intra-originalist* disagreement, not a reason to consider Justice Alito a non-originalist.

More importantly, while their disagreement about the strength of *stare decisis* explains a few cases where Justices Thomas and Alito have diverged on whether to apply the original meaning,<sup>28</sup> it is not the primary reason. The main reason why Justice Alito applies precedent more often than Justice Thomas is that Justice Alito consistently refuses to overrule or expressly call into question precedent unless one of the parties has asked him to do so, whereas Justice Thomas is much more willing to say that a precedent should be overruled or reconsidered even if no party has raised that issue. This is a point that scholars and commentators frequently overlook.

Justice Alito has repeatedly made clear his view that, as a general matter, the Court should not reexamine precedents unless one of the parties has asked the Court to do so. He criticized the Court for ignoring this practice in his dissent in *Arizona v. Gant*,<sup>29</sup> a case that he saw as effectively overruling a Fourth Amendment precedent relating to searches incident to arrest. He also cited the lack of any meaningful request by a party as the reason for declining to address whether to overrule an important campaign-finance precedent in *Randall v. Sorrell*,<sup>30</sup> even though Justice Thomas would have proceeded to overrule it.<sup>31</sup> And while agreeing that Justice Thomas’s concurring opinion in *Perez v. Mortgage Bankers Association* raised “substantial reasons why” deference to administrative agencies’ interpretation of their own regulations might be

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<sup>24</sup> Wriston Lecture, *supra* note 3 (relying on *Federalist* No. 78).

<sup>25</sup> *Gamble*, 139 S. Ct. at 1980–81 (Thomas, J., concurring).

<sup>26</sup> *Montejo v. Louisiana*, 556 U.S. 778, 799–800 (2009) (Alito, J., concurring). Although Justice Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2280 (2022), suggests that there might be some cases in which he would be willing to overrule a precedent solely because it is “egregiously wrong,” the opinion does not say so expressly. Rather, *Dobbs* dutifully applies the other traditional *stare decisis* factors.

<sup>27</sup> See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.L. REV. 803, 829 (2009).

<sup>28</sup> Compare *McDonald v. City of Chicago*, 561 U.S. 742, 758–59 (2010) (Alito, J., plurality opinion) (refusing to overrule the *Slaughter-House Cases* despite being asked to do so), with *id.* at 850–58 (Thomas, J., concurring in part) (arguing for overruling the *Slaughter-House Cases*).

<sup>29</sup> 556 U.S. 332, 355 (2009) (Alito, J., dissenting).

<sup>30</sup> 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment).

<sup>31</sup> *Id.* at 265–73 (Thomas, J., concurring in the judgment).

unconstitutional, he declined to join Justice Thomas's concurrence arguing against such deference because he wanted "full briefing and argument" on the issue.<sup>32</sup>

For Justice Alito, this practice is not a mere preference for orderliness or incrementalism. Rather, it is part of his view that Article III's reference to "the judicial Power" "assumed that there was a common understanding [at the Founding] of what judges did" — that is, what it meant to "act like judges."<sup>33</sup> That understanding was "defined by reference to proceedings in the courts that preceded the adoption of the Constitution,"<sup>34</sup> and common-law courts (at least courts at law) relied *on the parties* to frame the relevant issues for decision. As Justice Alito has observed, while some judicial systems give judges a much more active role in shaping a case or controversy — even permitting a judge to "start a case on his own if he wants" — that was not the adversarial system contemplated by the Founders.<sup>35</sup>

By contrast, Justice Thomas often expresses his willingness to overrule or reconsider precedents because they are inconsistent with the original meaning, even when no party has asked him to do so. In addition to the *Perez* and *Randall* examples, numerous others could be cited, such as his dissent in *Carpenter v. United States* (calling for overruling *Katz v. United States*, the principal Fourth Amendment precedent governing what constitutes a "search"),<sup>36</sup> his concurrence in *Michigan v. EPA* (calling for reconsidering *Chevron v. NRDC*, a major case about deference to administrative agency interpretations of statutes),<sup>37</sup> and his concurrence in *Elk Grove Unified School District v. Newdow* (calling for reconsidering whether the Establishment Clause applies against the states).<sup>38</sup> Most recently, in *Dobbs v. Jackson Women's Health Organization*, Justice Thomas called for reconsidering major substantive due process cases like *Griswold v. Connecticut* (right to contraception), *Lawrence v. Texas* (right to engage in sodomy), and *Obergefell v. Hodges* (right to same-sex marriage), even though the parties had not asked the Court to do so and the Court had gone out of its way to avoid calling those cases into question.<sup>39</sup> This is not to say that Justice Thomas departs from the original understanding of the judicial role when he issues such opinions, but it is to say that his willingness to issue them reflects a rarely acknowledged disagreement between him and Justice Alito about the original understanding of the judicial role, another *intra-originalist* disagreement.

It is true that Justice Alito has, in a very small number of cases, been willing to join a majority opinion that overruled a precedent without a party having asked, but in at least some of those cases, the Court first called for supplemental briefing on whether to overrule the case.<sup>40</sup> Others presented unusual circumstances,<sup>41</sup> such as the Court's recent decision in *Edwards v. Vannoy*,

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<sup>32</sup> 575 U.S. 92, 107–08 (2015) (Alito, J., concurring in part and concurring in the judgment).

<sup>33</sup> Wriston Lecture, *supra* note 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 138 S. Ct. 2206, 2235–36 (2018) (Thomas, J., dissenting).

<sup>37</sup> 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring).

<sup>38</sup> 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment).

<sup>39</sup> *Dobbs*, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

<sup>40</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 322 (2010); *Montejo*, 556 U.S. at 792.

<sup>41</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2019).

which overruled part of an important criminal procedure precedent without having been asked because the overruled portion was essentially a dead letter anyway.<sup>42</sup>

When, however, a party expressly asks the Court to reconsider a constitutional precedent, Justices Thomas and Alito generally agree on whether to overrule the precedent.<sup>43</sup> When they disagree, the disagreement is usually explicable based on Justice Alito's greater deference to precedent,<sup>44</sup> disagreement about whether it is necessary for the Court to overrule the precedent to decide the case,<sup>45</sup> or a difference of opinion about the original meaning of the Constitution.<sup>46</sup> To be sure, there may be cases that are not explicable in those terms, but those explanations capture a large portion of the relevant cases.

The key point is that Justice Alito's tendency to make non-originalist arguments more often than Justice Thomas is generally the result of three factors: (1) Justice Alito's stronger view of *stare decisis*, (2) his consistent unwillingness to reexamine or overrule precedents without one of the parties having asked, and (3) the fact that most current precedent is non-originalist in at least some significant respect. While these factors make Justice Alito's use of originalist arguments highly context-specific, none of them detract from his description of himself as an originalist. Indeed, Justice Alito's respect for *stare decisis* and the adversarial system derives from his understanding of the original meaning of "the judicial Power" under Article III, and it reflects his view that the contours of the judicial office he occupies remain largely the same today as they were when his common-law predecessors occupied similar offices prior to the Constitution.<sup>47</sup>

Finally, some commentators point to Justice Alito's past remarks at oral argument or in opinions that could be seen as dismissive of originalist arguments. To take one example, at oral argument in *Brown v. Entertainment Merchants Association*,<sup>48</sup> a case concerning the constitutionality of a California statute restricting the sale of violent video games to children, after Justice Scalia had asked a lengthy question about whether the original meaning of the First Amendment allowed for prohibitions on speech depicting violence, Justice Alito asked: "Well, I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?"<sup>49</sup>

This (hilarious) interjection was certainly designed to push back against Justice Scalia's originalist argument, but it was not a rejection of *originalism*. Justice Alito's concurring opinion in *Entertainment Merchants* made clear that he agreed with Justice Scalia's majority opinion that the

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<sup>42</sup> 141 S. Ct. 1547, 1559–60 (2021).

<sup>43</sup> See, e.g., *Dobbs*, 142 S. Ct. at 2242; *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring in the judgment).

<sup>44</sup> Compare *McDonald*, 561 U.S. at 758–59 (plurality opinion of Alito, J.), with *id.* At 850–58 (Thomas, J., concurring in part).

<sup>45</sup> Compare *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2198–2201 (2020), with *id.* At 2218–19 (Thomas, J., concurring in part and dissenting in part).

<sup>46</sup> Compare *Alleyne v. United States*, 570 U.S. 99, 111–16 (2013) (majority opinion of Thomas, J.), with *id.* At 132–34 (Alito, J. dissenting).

<sup>47</sup> As I have argued elsewhere, these factors also explain, in part, why Justice Alito's majority opinion in *Dobbs* should be seen as an originalist opinion, despite its reliance on substantive due process doctrine. See J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), <https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists> [<https://perma.cc/L4ZP-DW6C>].

<sup>48</sup> 564 U.S. 786 (2011).

<sup>49</sup> Transcript of Oral Argument at 16:17–21, *Schwarzenegger v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (No. 08-1448).

constitutional principles involved were “unchanging.”<sup>50</sup> But because Justice Alito did not think Justice Scalia’s analogies to Founding-era depictions of violence in literature or art were comparable to video games in terms of their ability to influence human behavior, he did not think those analogies were dispositive of whether the First Amendment allowed the regulation of video games.<sup>51</sup> To put it another way: whereas Justice Scalia framed the originalist inquiry at a high level of generality (whether depictions of violence are protected by the First Amendment), Justice Alito framed it in more specific terms (whether depictions of violence in a form unknown at the Founding and with uncertain effects on human behavior are protected by the First Amendment). That is a good-faith disagreement about originalist methodology, not a disagreement about originalism’s relevance.<sup>52</sup>

#### JUSTICE ALITO AND THE FUTURE OF ORIGINALISM

But perhaps more important than Justice Alito’s past contributions to originalist jurisprudence are those that he will make in the future. Originalism faces significant theoretical and practical challenges in the coming years. More than any current member of the Court, Justice Alito is positioned to steer originalist jurisprudence through the dangerous waters that lie ahead.

At least two significant problems confront originalism in the near future. First, with five self-identified originalists now on the Court, there will likely be a wave of cases over the coming decade asking the Court to overrule major precedents usually perceived to be inconsistent with the original meaning. Indeed, that has already begun. In the past year, the Court has agreed to hear cases urging the overruling of *Roe v. Wade* (abortion),<sup>53</sup> *Employment Division v. Smith* (the Free Exercise Clause),<sup>54</sup> *Chevron v. NRDC* (deference to agency interpretations of statutes),<sup>55</sup> and *Grutter v. Bollinger* (affirmative action).<sup>56</sup> The Court’s decision to overrule *Roe* in *Dobbs* is only likely to spur further challenges to longstanding non-originalist decisions.

In deciding these and other cases, there will inevitably be disagreements among the originalist justices about how far and how quickly to go in overruling non-originalist precedents.<sup>57</sup> Bridging these differences in a way that keeps the Court moving in an originalist direction will be a difficult and delicate task. No one on the Court has shown more skill at that task than Justice Alito.

A great example is *American Legion v. American Humanist Association*,<sup>58</sup> a case concerning the constitutionality of a large cross-shaped memorial on public land. Justice Alito’s majority opinion was joined by the Chief Justice and Justices Breyer, Kavanaugh, and (for most of the opinion)

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<sup>50</sup> 564 U.S. at 806 (Alito, J., concurring in the judgment).

<sup>51</sup> *Id.* At 816–21.

<sup>52</sup> I would argue that the same is true of Justice Alito’s (equally hilarious) description of Justice Scalia’s majority opinion in *United States v. Jones* as involving an originalist argument that required “either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.” 565 U.S. 400, 420 n.3 (2012) (Alito, J., concurring in the judgment).

<sup>53</sup> 410 U.S. 113 (1973).

<sup>54</sup> 494 U.S. 872 (1990).

<sup>55</sup> 467 U.S. 837 (1984).

<sup>56</sup> 539 U.S. 306 (2003).

<sup>57</sup> See, e.g., *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (seeming to agree with Justice Alito’s concurrence in the judgment arguing that *Smith* should be overruled, yet refusing to overrule *Smith* in *Fulton*).

<sup>58</sup> 139 S. Ct. 2067 (2019).

Kagan. To retain the votes of Justices Breyer and Kagan, it had to frame its analysis in a way that only accorded “a strong presumption of constitutionality” to longstanding “religiously expressive monuments, symbols, and practices,” rather than plainly stating that religious monuments like a cross simply do not violate the Establishment Clause.<sup>59</sup> Justice Alito’s opinion also stopped short of overruling *Lemon v. Kurtzman*,<sup>60</sup> a non-originalist framework under which Establishment Clause cases are purportedly analyzed.

Justices Thomas and Gorsuch both criticized Justice Alito’s opinion for not overruling *Lemon* and failing to fully return to the original meaning in analyzing religious symbols and monuments, and they refused to join his opinion for that reason.<sup>61</sup> While such an opinion would almost certainly have been the opinion that Justice Alito would have preferred to write in an ideal world, it seems very likely that the originalists on the Court lacked a majority to accomplish that goal at that time. But Justice Alito still managed to achieve something quite significant with his opinion: moving Establishment Clause doctrine toward an originalist, history-based analysis while laying the groundwork for the future overruling of *Lemon* by exposing its flaws and weak *stare decisis* support.

And, indeed, that is precisely what happened three years later. In *Kennedy v. Bremerton School District*, Justice Gorsuch’s majority opinion principally relied on *American Legion* in overruling *Lemon*.<sup>62</sup> In fact, *Kennedy* suggested that *American Legion*, in combination with other decisions, had already overruled *Lemon*.<sup>63</sup> Thus, while Justice Alito’s opinion in *American Legion* may not have been as pure or as satisfying as many originalists would have liked, it demonstrated a masterful ability to navigate the practical, doctrinal, and theoretical difficulties of moving the Court in an originalist direction in the face of internal disagreement among the justices — and to bring about exactly the result that originalists seek.

The skills that Justice Alito showed in *American Legion* will be essential in the years to come. It is one thing for a majority of the justices to be originalist; it is another thing for them to agree on a majority opinion. Crafting an opinion that can attract the votes of originalist justices who disagree about the pace and means of overruling non-originalist precedent is a fraught task. It is entirely conceivable, for example, that the *Dobbs* majority could have fractured in the face of such disagreements. Without a jurist who can maintain a majority of originalists pointed in the same direction, the originalists on the Court will fail to bring the doctrine more in line with the original meaning. Given that this is likely the most originalist Court we will see in our lifetimes, such a failure would be a devastating setback for originalism. Justice Alito is the best-positioned originalist on the Court to prevent that setback from occurring.

The second major challenge to originalism is internal to the theory itself. Since its emergence in the early 1970s, modern originalist theory has become increasingly complex. Some of those

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<sup>59</sup> *Id.* At 2085.

<sup>60</sup> 403 U.S. 602 (1971).

<sup>61</sup> *Am. Legion*, 139 S. Ct. at 2097–98 (Thomas, J., concurring in the judgment); *id.* at 2100–02 (Gorsuch, J., concurring in the judgment).

<sup>62</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022).

<sup>63</sup> *Id.*



changes have been salutary,<sup>64</sup> but as Steven D. Smith has warned, as originalism has become more complex, scholars have introduced distinctions and concepts that “threaten to dissolve originalism as a distinctive position by collapsing it into its long-time nemesis, the idea of the ‘living Constitution.’”<sup>65</sup> The paradigmatic example of this is Jack Balkin’s originalism. Balkin distinguishes between the semantic meaning of the Constitution and the so-called “original expected applications” of the Founders.<sup>66</sup> Semantic meaning refers to the kind of meaning found in dictionary definitions, while original expected applications refer to how the Founders would have expected the Constitution’s principles to apply to phenomena with which they were familiar. For example, we know that the Founders expected that the Establishment Clause would permit legislative assemblies to open their proceedings with a prayer, since that practice was very common at the Founding.<sup>67</sup> Balkin argues that the original meaning is based only on the semantic meaning, not original expected applications.

Balkin’s approach would have two important implications. First, by ignoring how the Founders themselves would have applied the principles they placed in the Constitution, it creates a gap between the constitutional text and the Founders who gave that text its authoritative status through their act of ratification. Balkin’s solution to this problem is to adopt a theory by which the Constitution’s legitimacy is based on its ability to reflect the views of those living *today*,<sup>68</sup> but that is precisely the concept of constitutional legitimacy that has always undergirded living constitutionalism. This is related to the second implication of the semantic/original expected applications distinction: by adopting such an abstract understanding of original meaning, Balkin’s theory allows him to simultaneously argue that *power-constraining* provisions like the Commerce Clause impose *few* constraints on federal power<sup>69</sup> but that *rights-protecting* provisions like the Equal Protection Clause *broadly* protect rights that none of the Clause’s ratifiers would have believed were found there, such as the right to abortion.<sup>70</sup> Thus, Balkin’s originalism leads to theoretical and doctrinal results that have long been seen as hallmarks of living constitutionalism.

Justice Alito has shown a keen awareness of, and ability to respond to, this danger emanating from originalism’s increasing theoretical complexity. The best example is his dissent in *Bostock v. Clayton County*, in which Justice Gorsuch’s majority opinion held that Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation or gender identity because such discrimination constitutes “discriminat[ion] . . . because of . . . sex.”<sup>71</sup> Although *Bostock* was a statutory interpretation case, the theoretical and methodological debate between Justice

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<sup>64</sup> See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999) (providing a more nuanced and compelling argument for popular-sovereignty-based originalism).

<sup>65</sup> Steven D. Smith, *That Old-Time Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 230 (Grant Huscroft & Bradley W. Miller eds., 2011).

<sup>66</sup> JACK M. BALKIN, LIVING ORIGINALISM 104–08 (2011).

<sup>67</sup> See *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983).

<sup>68</sup> BALKIN, *supra* note 66, at 59–99.

<sup>69</sup> *Id.* at 138–82.

<sup>70</sup> *Id.* at 214–18.

<sup>71</sup> 140 S. Ct. 1731, 1754 (2020).

Gorsuch's majority opinion and Justice Alito's dissent maps on to the same debate occurring within constitutional theory.<sup>72</sup>

Justice Gorsuch's majority opinion was Balkinian through and through. It relied on the semantic meaning of the words constituting the phrase "discriminat[ion] . . . because of . . . sex" drawn from dictionary definitions,<sup>73</sup> and it rejected as "irrelevant" "whether a specific application was anticipated by Congress,"<sup>74</sup> arguing that reliance on expected applications "impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it."<sup>75</sup> Rather, what mattered was that those living *today* could discern that the anti-discrimination principle embodied in Title VII—understood at a high level of generality based on semantic meaning—prohibited sexual-orientation and gender-identity discrimination.<sup>76</sup>

Justice Alito's dissent pointed out that Justice Gorsuch's approach, while purporting to rely on the original meaning of the statutory text, in fact did the opposite: "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."<sup>77</sup> Justice Alito argued that "what matters in the end is . . . [h]ow would the terms of a statute have been understood by ordinary people at the time of enactment?"<sup>78</sup> To that end, it was essential to consult original expected applications, since those expectations tell us what the words of the law "*conveyed to reasonable people at the time.*"<sup>79</sup> This is exactly the kind of argument that originalist scholars have made in criticizing Balkin's rejection of original expected applications.<sup>80</sup>

In subsequent public remarks, Justice Alito indicated that he is aware that his disagreement with Justice Gorsuch goes beyond *Bostock* to a fundamental question about the nature of originalism, and he has expressed his willingness to take the lead in defending originalism from theories that would collapse it into living constitutionalism.<sup>81</sup> Given his masterful dissent in *Bostock*, Justice Alito is well-suited to that role.

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Justice Alito's constitutional jurisprudence has long confounded commentators because it defies simple definition. He is an originalist, yet his view of the judicial role leads him to make non-originalist arguments in most cases. He pursues a principled jurisprudence, yet he is a skilled craftsman of compromise opinions. He is skeptical of academic abstractions, yet he is one of the most sophisticated originalist theorists on the Court. These are not contradictions; they are

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<sup>72</sup> See Tara Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

<sup>73</sup> *Bostock*, 140 S. Ct. at 1739–41.

<sup>74</sup> *Id.* at 1751.

<sup>75</sup> *Id.* at 1750.

<sup>76</sup> *Id.* at 1749–54.

<sup>77</sup> *Id.* at 1755–56 (Alito, J., dissenting).

<sup>78</sup> *Id.* at 1766.

<sup>79</sup> *Id.* (emphasis in original).

<sup>80</sup> John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 380–81 (2007).

<sup>81</sup> The Federalist Society, *Address by Justice Samuel Alito*, YOUTUBE (Nov. 12, 2020), <https://www.youtube.com/watch?v=VMnukCVIZWQ> [<https://perma.cc/U6L3-M46S/>].

internally consistent features of a jurisprudence whose subtlety has long been underappreciated by commentators. It is the jurisprudence of a mature originalism.