

## INTRODUCTION: THE JURISPRUDENCE OF JUSTICE SAMUEL ALITO

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### INTRODUCTION

Samuel A. Alito, Jr. was sworn into office as an Associate Justice of the Supreme Court of the United States on January 31, 2006. As we can say with the benefit of hindsight, that proved to be one of the most pivotal moments in the Supreme Court’s modern history, with deep and lasting effects on our constitutional law and culture, as well as on the nation as a whole. Justice Alito filled the seat vacated by Sandra Day O’Connor. Over the course of her 25-year tenure, O’Connor had at times departed from the text and original public understanding of the Constitution in the service of evolving values or a professed concern for the Court’s public standing. Most notably, on both grounds, O’Connor in 1992 joined Justices Anthony Kennedy and David Souter to uphold the abortion right fabricated in 1973 in *Roe v. Wade*.<sup>1</sup>

Over his own more than 15 years on the Court, Alito has consistently honored our longstanding legal traditions and the text, logic, structure, and original understanding of the Constitution. This comes as no surprise; Alito had established himself on the Third Circuit as a judge “both admired and assailed for his conservative judicial philosophy”<sup>2</sup> (as some today characterize a policy of respect for the Constitution’s text and history). Once on the Supreme Court, Alito’s judicial philosophy changed not a whit even in high-profile cases, where the pressure from intellectuals, journalists, and other cultural elites hits its peak. Instead, Alito’s opinions—whether for the majority or in concurrence or dissent—have promoted the rule of law by honoring the text, logic, structure, and historical understanding of the Constitution as a whole and of its specific provisions. And if *Casey* captures much about his predecessor’s approach, the best distillation of Alito’s own tenure is and will surely remain his opinion for the Court overturning *Casey* and *Roe* in *Dobbs v. Jackson Women’s Health Organization*.<sup>3</sup> That opinion showcased his acumen and precision, his fidelity to the Founding, and his courage under enormous pressure—the unprecedented leak of a draft opinion, death threats, offensive and often intimidating protests at the Justices’ homes, and an assassination plot against one of them.

Now more than ever, that jurisprudence and judicial temperament deserve a closer look. So, it is my especially great honor to introduce this collection of Essays offering the most sustained

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<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (discussing and upholding *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>2</sup> David Stout, *Alito is Sworn In as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), <https://www.nytimes.com/2006/01/31/politics/politicsspecial1/alito-is-sworn-in-as-justice-after-5842-vote-to.html> [<https://perma.cc/QB4P-R5H6>].

<sup>3</sup> 142 S. Ct. 2228 (2022).

and systematic analysis of Justice Alito's work over 30 years on the bench and 16 terms on the Supreme Court. In each Essay to follow, a prominent legal scholar or leading jurist analyzes Alito's general approach to law or his thought on substantive areas ranging from criminal law and federal courts to constitutional and statutory interpretation.<sup>4</sup>

While the focus of this collection is Justice Alito's jurisprudence, certain vignettes from his personal life supply important context. Alito has a penchant for focusing on the practical and particular in each decision, so it is no surprise that, as **Adam White** recounts, the young Alito first encountered a lofty legal ideal—the Supreme Court's "one person, one vote" mandate—through his father's work to implement it on the ground by drawing new district lines for New Jersey.<sup>5</sup> The senior Alito had been raised by poor Italian-American immigrant parents, attended college through the kindness of a benefactor, fought for his country in World War II, and then served a non-partisan role in the New Jersey Legislature. The image of his son hearing Mr. Alito's mechanical adding machine clank away late into the night is a portrait of the quiet personal and professional virtues that Alito, Jr., would carry into the rest of his life.

Indeed, Alito's whole career reflects his commitment to finding the law as it is and grappling with its meaning from the perspective of ordinary people who must live under its rule. As **Professor Kate Stith** observes, Alito has spent his whole adult life in the public sector, serving in positions defined by ethical obligations and rule of law norms—as an Army officer, government lawyer, prosecutor, and then judge.<sup>6</sup> Alito got his start as a clerk for Judge Leonard Garth on the Third Circuit who instilled in him respect for precedent and attention to factual details. Alito's career coincided with Judge Garth's a second time, years later, when they served together as circuit judges. Judge Garth later testified that what made Alito a "sound jurist" was his respect for "the institutions and the precepts that led to the decisions in the cases under review" and his sense of "fairness," "judicial demeanor," and "commitment to the law," which "did not permit him to be influenced by individual preferences or any personal predilection."<sup>7</sup>

Most strikingly, Justice Alito's rise to prominence never came at the expense of his humility or unwavering civility. Before his confirmation, the *New York Times* wrote that Alito had demonstrated "civility in engaging ideological opponents" during his years at left-leaning institutions such as Yale Law School.<sup>8</sup> **Third Circuit Judge Stephanos Bibas** reports that Alito's reputation as a smart, fair, and humorous circuit judge respected and liked by all remains fresh in the memory of his former colleagues.<sup>9</sup> Indeed, seven of those colleagues—including judges

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<sup>4</sup> These Essays were first delivered as addresses at a March 2022 symposium hosted by the American Enterprise Institute and the James Madison Program in American Ideals and Institutions at Princeton University. After the *Dobbs* decision was released, another Essay was commissioned to analyze Justice Alito's opinion for the Court.

<sup>5</sup> Adam J. White, *Samuel Alito's Conservatism—Burkean and American*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 22 (2023).

<sup>6</sup> Kate Stith, *Justice Alito on Criminal Law*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 18, \*1 (2023).

<sup>7</sup> Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. 663 (2006) (statement of Leonard I. Garth, Senior Judge, U.S. Court of Appeals for the Third Circuit).

<sup>8</sup> Neil A. Lewis & Scott Shane, *Alito is Seen as a Methodical Jurist with a Clear Record*, N.Y. TIMES (Nov. 1, 2005), <https://www.nytimes.com/2005/11/01/politics/politicsspecial1/alito-is-seen-as-a-methodicaljurist-with-a-clear.html> [<https://perma.cc/XV6R-3QTC>].

<sup>9</sup> Stephanos Bibas, *Judge Alito's First Amendment Vigilance on the Third Circuit*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 15, \*1 (2023).

nominated by presidents of both parties—testified before the Senate in support of Alito’s nomination to the Supreme Court. Those who have worked for him also attest that he is singularly solicitous of subordinates, bending over backward to lighten their load. He returns drafts of opinions on Mondays, not Fridays, so his law clerks can spend the weekend with their families; readily takes on independent research or the whole burden of preparing for a case if the assigned clerk has had something come up; chides clerks whom he finds in chambers on a son or daughter’s birthday; and (for better or worse) scrupulously avoids expressing the slightest hint of criticism or displeasure with assistants or clerks.

As other points recalled by Judge Bibas show, and my own interactions with Justice Alito and those of our mutual friends confirm, he is also self-effacing to a degree that is remarkable for anyone, much less for someone in the highest echelons of public life. In an age of moral preening, he is constitutionally incapable of virtue-signaling. He never does anything calculated to draw attention to himself or enhance his image and chafes at attention from others (as I can attest, based on my experience preparing this symposium!). All of this makes Alito a sign of contradiction in a culture where, as Yuval Levin has observed, public figures use institutions as platforms for performance, molding them for their private purposes rather than being molded by them to serve the public good.<sup>10</sup> Alito is, in this best and highest sense, an institutionalist—submitting himself to the internal disciplines, duties, and defining ends of the judicial art, without regard to the impact on his personal image or on the Court’s popularity in fluctuating polls. Observers of all stripes would concede that he is driven by nothing but his deeply held principles and ideals.

This self-forgetfulness and singleness of purpose have liberated Justice Alito. They have enabled the courage that has defined his tenure. The Justices, breathing the same air as everyone else in our hyper-connected political climate, surely know of the most common criticisms leveled against them. Indeed, more than once, Alito has answered some of the more pointed critiques of the Court’s work.<sup>11</sup> He and the others must know, too, how they are typecast, and feel some human temptation to go against type, even if it means compromising on matters of principle. Yet as these Essays suggest and not even his harshest critics would deny, Alito has never pulled punches to win favor or avoid opprobrium—or even to abate a real and credible risk to his life.

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The Essays in this collection portray Justice Alito as a jurist and lawyer *par excellence*. While most focus on specific areas of law, there emerge a few general points worth pausing on here.

First, Alito’s legal reasoning tends to be less theoretical—lighter on general and abstract observations about the proper method for interpreting legal texts—than that of, say, Justices Scalia, Thomas, and Gorsuch. The latter Justices, in their opinions, often lay down general requirements of textualism (for reading statutes) or originalism (for reading the Constitution) before applying those requirements to the case at hand. Does the relative lack of explicit theorizing make Alito less textualist and originalist? **Professor J. Joel Alicea** and **Professor John**

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<sup>10</sup> See YUVAL LEVIN, A TIME TO BUILD: FROM FAMILY AND COMMUNITY TO CONGRESS AND THE CAMPUS, HOW RECOMMITTING TO OUR INSTITUTIONS CAN REVIVE THE AMERICAN DREAM (2020).

<sup>11</sup> See, e.g., Adam Liptak, *Alito Responds to Critics of the Supreme Court’s ‘Shadow Docket’*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [<https://perma.cc/LN32-JH6F>].

**McGinnis** argue that Alito is actually the *ultimate* exemplar of both approaches.<sup>12</sup> His application of both is informed by longstanding judicial traditions in our adversarial and precedential legal system, and by a sensitivity to the facts of each case and to the context of (and interpretive norms specific to) *legal* texts. These features, as well as the paucity of theoretical overhead in his opinions, may reflect Alito’s belief that, as he once said, “judging is not an academic pursuit; it is a practical activity.”<sup>13</sup>

Judging surely is that, and no practical excellence is reducible entirely to a system of abstract rules capable of mechanical application. No general and tractable formula will capture every kind of fact that might be legally relevant to a given case or every kind of argumentative move that might be sound in a given system. Just so, Justice Alito’s approach to the law defies easy categorization because of the nuance of his craft, his lawyerly skepticism of abstractions, and his commitment to judging each case in light of all relevant facts. Those tendencies reflect the limits of judicial theory. More than algorithm, sound judging requires judgement.

Of course, sound judgment is subject to *some* general norms, including several discussed in this collection. To identify the general patterns and virtues of Alito’s approach, former clerks and current circuit judges **Steven Menashi** and **Andrew Oldham** draw on their close observation, and now emulation, of Alito’s work as a judge.<sup>14</sup> **Professor Adrian Vermeule** identifies some of Alito’s “enduring” substantive commitments, which we can “glimpse . . . through a cloud of concrete facts and issues.”<sup>15</sup> And **Judge Amul Thapar**, **Professor Keith Whittington**, and **Adam White** applaud Alito’s resolve to apply the law evenhandedly, interpret legal texts with fidelity to their original meaning, and heed real-life consequences.<sup>16</sup>

As to the last factor, the Essays suggest, Alito takes a nuanced approach. While never allowing broad policy goals to override the clear import of a legal text, he does consult the proximate purposes evident from context to resolve indeterminacies in the text, and seems to require stronger arguments for a legal position the steeper the practical costs may be of adopting it.

How else does Alito negotiate “the unruliness of the human condition,”<sup>17</sup> to borrow the memorable phrase of Alexander Bickel, a constitutional theorist whom Alito has cited as an early and major influence? One source of guidance, absent a neat and exhaustive set of rules, is tradition. By anyone’s lights, some traditions are proper lodestars for law and adjudication. And Alito is their foremost judicial champion, as these Essays also illustrate. On the most vexed legal issues of our day—concerning abortion, same-sex marriage, sexuality and “identity,” racial tensions, religious liberty, and free speech—our law makes some traditions legally relevant even

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<sup>12</sup> J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 13 (2023); John O. McGinnis, *The Contextual Textualism of Justice Alito*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 14 (2023).

<sup>13</sup> Samuel A. Alito, Jr., Assoc. J., Sup. Ct. of the U.S., *The Wrinston Lecture at the Manhattan Institute for Policy Research: Let Judges Be Judges* 4 (Oct. 13, 2010) (transcript available at <https://media4.manhattan-institute.org/pdf/wriston2010.pdf> [<https://perma.cc/C25X-2V4P>]).

<sup>14</sup> Steven Menashi, *The Prudent Judge*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 16 (2023); Andrew S. Oldham, *Justice Alito on Criminal Procedure*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 19 (2023).

<sup>15</sup> Adrian Vermeule, *Reason and Fiat in the Jurisprudence of Justice Alito*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 23, \*1 (2023).

<sup>16</sup> Amul Thapar, *Justice Alito: A Justice of Foxes and Hedgehogs*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 20 (2023); Keith E. Whittington, *Justice Alito’s Free Speech Jurisprudence*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 24 (2023); White, *supra* note 5.

<sup>17</sup> ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 11 (1975).

when they are now disfavored in some quarters. And Alito gives those traditions their due weight.

Case law itself is a kind of tradition, embodying the practices and judgments of courts spanning vast expanses of time and space, and it plays a key role whenever a text's original meaning delivers no clear resolution of the case at hand. Cases of that sort, too, showcase Alito's distinctive strengths—especially his skill at processing a tangle of data points to draw a legally tenable line of best fit. That is the legal analogue of his ability, also discussed in these Essays, to pierce through a thicket of a record to the facts on which the case properly turns. And the same skill shines through Alito's questions at oral arguments, which reflect an unparalleled knack for cutting to the heart of a case, and sometimes devastating a position, in a few quick strokes.<sup>18</sup>

Where have these intellectual virtues led Alito as a judge and justice?

#### PART I: INTERPRETATIVE PRINCIPLES

**Professor J. Joel Alicea** opens our collection with the provocative claim that Justice Alito, who has called himself a “practical originalist,” is the exemplary originalist.<sup>19</sup> Alicea begins by rejecting the notion that Alito's reasoned adherence to precedent—as a companion to the text, structure, and history of the Constitution itself—represents a departure from the traditional craft of judging (or from the “judicial Power” vested by Article III of the Constitution) as understood at the Founding. Alito's opinions reveal that he is a sophisticated practitioner of originalist methodology, whose versatility and rigor have shaped the views of fellow originalists on the Court. Where Alito has parted ways with some originalists on a particular case, it has generally been out of concern for those deep-rooted principles of our constitutional order that limit and restrain judicial power. These grounding principles commit Alito to real, albeit far from absolute, respect for *stare decisis* and the limited role of judges in an adversarial system, and a lawyerly approach to analogical reasoning in cases that feature fact patterns unforeseeable at the Founding. As Alicea observes, Alito's positions in these debates fall squarely under the originalist banner.

At this moment in particular, Alicea argues, Alito's brand of originalism is the soundest path forward and the antidote to some of originalism's lingering infirmities. The presence of an originalist majority on the Court creates an unprecedented opportunity to harmonize constitutional doctrine with the original meaning of the Constitution—but also new pitfalls to navigate. This, Alicea argues, only increases the importance of Alito's balanced approach to navigating a precedential system, and his sensitivity to the ways in which the threat of “living constitutionalism” still looms, but now under the guise of literalist, history-thwarting textualism. Alicea presents Alito's *Bostock* dissent as an admonition against the temptation to a blinkered textualism and originalism that actually *divorces* texts from the understandings of their adopters. In this and other ways, Alicea concludes, Alito is not just fairly called an originalist; he is the “mature originalist” needed to guide the Court through uncharted waters.

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<sup>18</sup> See, e.g., Transcript of Oral Argument at 38–40, *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (No. 16-1435).

<sup>19</sup> Alicea, *supra* note 12, at \*2 (citing 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>]).

In a similar vein, **Professor John O. McGinnis** celebrates Justice Alito's approach to interpreting statutes, which he terms "contextual textualism."<sup>20</sup> Professor McGinnis uses this phrase to describe Justice Alito's willingness to take social and legal context into account when a legal text's meaning or application is ambiguous. This context-sensitive method, though it aligns with Justice Scalia's formulations of textualism,<sup>21</sup> departs from the approach sometimes applied by professed textualists today.<sup>22</sup> Professor McGinnis argues that Justice Alito's brand of textualism better aligns with constitutional originalism by considering what the text meant to the constitutionally relevant authority—the political community at the time of its adoption into law.

Professor McGinnis also emphasizes Justice Alito's relative deference (vis-à-vis other judicial conservatives) to administrative agencies as expert and localized policymakers, as well as his criticism of the unwieldy "categorical approach" to interpreting the federal Armed Career Criminal Act. While Alito always begins, and whenever possible ends, with a law's ordinary meaning. But where that meaning runs out, he is willing to consider context and proximate purpose in a manner that sets him apart from more literal-minded textualists. His attention to context includes both the legislative bargains reflected in the particular statute at issue<sup>23</sup> and the broader regulatory context and legal principles within which the statute operates. Even his occasional interpretative innovations—e.g., requiring clear statement rules or interpreting statutes to avoid constitutional shoals—are aimed at bringing greater harmony to the *corpus juris*.

Like Alicea, McGinnis showcases Alito's dissent in *Bostock*. McGinnis identifies a pronounced concern for context in Alito's rejection of the majority's approach to Title VII, which treats the statute as a self-updating algorithm unhinged from its original public meaning. Alito, by contrast, propounds an understanding of the law grounded in the particular mischief it sought to cure.<sup>24</sup> That, Professor McGinnis says, is contextual textualism at its best.

Focusing on the Third Circuit (on which he himself sits), **Judge Stephanos Bibas** shows how during his time as a circuit judge Alito presciently anticipated and even shaped key developments in First Amendment doctrine while protection religious freedom for members of all faiths.<sup>25</sup>

In a decision still deeply influential today, at the Supreme Court and below, then-Judge Alito brought clarity to the Court's doctrine authorizing scrutiny of (and exemptions from) laws that are not "neutral" toward religion and "generally applicable."<sup>26</sup> Under this standard, he clarified, the government must provide religious exemptions when it offers comparable secular carve-outs.

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<sup>20</sup> McGinnis, *supra* note 12, at \*1.

<sup>21</sup> In Justice Scalia's view, "the textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text. . . . The evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 20 (2012).

<sup>22</sup> Compare *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., concurring) (criticizing lack of sensitivity to temporal context when interpreting statutory terms), with *id.* at 1749–51 (majority opinion) (rejecting any look at the linguistic expectations of the time of enactment).

<sup>23</sup> Cf. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 68–69 (1988); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 96–110 (2006).

<sup>24</sup> Cf. Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

<sup>25</sup> Bibas, *supra* note 9, at \*3 ("[Justice Alito's] free-exercise commitment protects people of all faiths, just as the Constitution demands.").

<sup>26</sup> See generally *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

Thus, when Newark allowed police officers to grow a beard while undercover or facing medical issues, Muslim officers were equally entitled to forgo shaving for religious reasons. Similarly, because Pennsylvania exempted zoos and circuses from a wildlife owner fee, it had to waive that fee for a tribal shaman who used black bears in religious ceremonies. Some thirty years later, this equality principle proved dispositive in a number of free exercise cases involving pandemic restrictions, including in a Supreme Court decision holding invalid New York's targeted restrictions on houses of worship in *Roman Catholic Diocese of Brooklyn v. Cuomo*.<sup>27</sup>

With respect to the Establishment Clause, Judge Alito applied the Supreme Court's unoriginalist test in *Lemon v. Kurtzman*<sup>28</sup> in a way meant to ensure that (wherever possible) displays of faith remained as welcome in America's public squares as they were at the Founding. In passing on the lawfulness of religious displays, Judge Alito focused more on their historical pedigree as a class than on detailed comparisons of each new display to the assortment featured in jumbled caselaw. Decades later, Alito's historical approach has decisively prevailed, most notably in his majority opinion in *American Legion v. American Humanist Association*<sup>29</sup> and in the final repudiation of the *Lemon* test in *Kennedy v. Bremerton School District*.<sup>30</sup> So too, Judge Alito's pruning of restrictions singling out religious activities in public schools presaged the Supreme Court's rejection of laws discriminating against religious schools participation in the provision of public benefits, in such recent cases as *Espinoza v. Montana Department of Revenue*<sup>31</sup> and *Carson v. Makin*.<sup>32</sup>

Finally, in the free speech context, Judge Alito was vigilant against even subtle discrimination against speech based on its religious character or unpopularity, especially in schools. Whether the speech was a kindergartner's Thanksgiving poster honoring Jesus or student comments expressing disapproval of homosexuality, Judge Alito maintained that schools could not ban speech just because others might find it offensive. Cases pitting free speech rights against antidiscrimination law have continued to divide the lower courts, and while the Supreme Court has not yet decisively intervened, we can hope that Judge Alito's insights will guide the Court as it confronts these issues this Term in *303 Creative LLC v. Elenis*.<sup>33</sup>

**Judge Steven J. Menashi** identifies Justice Alito as the quintessentially "prudent judge."<sup>34</sup> On Menashi's account, the essence of judicial prudence is to resist abstraction, attend to the facts of each case, and defer to practice and precedent unless there are compelling reasons to change course. As Judge Menashi shows, Justice Alito has each of these qualities in spades.

I have already mentioned Alito's allergy to abstractions and focus on historical practice and the settled judgments of past generations. Because Alito recognizes that history is nuanced and complex, he is skeptical of objections to established practices that invite courts to second-guess the constitutional judgments of past generations. For example, with respect to longstanding

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<sup>27</sup> 141 S. Ct. 63, 66–67 (2020) (per curiam).

<sup>28</sup> 403 U.S. 602 (1971).

<sup>29</sup> 139 S. Ct. 2067, 2089–90 (2019).

<sup>30</sup> 142 S. Ct. 2407, 2427–28 (2022).

<sup>31</sup> 140 S. Ct. 2246 (2020).

<sup>32</sup> 142 S. Ct. 1987 (2022).

<sup>33</sup> 303 Creative LLC v. Elenis, No. 21-476 (argued Dec. 5, 2022).

<sup>34</sup> Menashi, *supra* note 14.

monuments and legislative practices of a religious character, Alito presumes their validity unless there is good reason to think past constitutional actors underestimated their defects.

The convergence of these principles can be seen in Justice Alito's nuanced attitude toward *stare decisis*. He recognizes the need to respect precedent but also appreciates that "occasionally the Court issues an important decision that is egregiously wrong," and in such cases "*stare decisis* is not a straitjacket."<sup>35</sup> For example, Justice Alito has forcefully argued that *Employment Division v. Smith* should be overruled because of what he regards as its cramped misreading of the Free Exercise Clause and of the Court's prior precedent interpreting that provision.

Moreover, in the lion's share of cases in which the Court adheres to its prior rulings, Alito treats precedent with lawyerly adeptness. He has particular skill for identifying the specific legal question decided in previous cases and the kind of factual contrast that can fairly support a different approach in a new case. In sum, his understanding of judicial humility forbids cavalierly casting precedent aside but does not require setting it in stone or pulling it out of context.

## PART II: CRIMINAL LAW AND THE SEPARATION OF POWERS

In a thought-provoking historical Essay, **Professor Jack Goldsmith** reflects on how Justice Alito has grappled with the fundamental change in judicial power wrought by the Supreme Court's New Deal-era rejection of federal courts' authority to formulate "general common law."<sup>36</sup> In its watershed 1938 decision *Erie Railroad Company v. Tompkins*,<sup>37</sup> the Supreme Court overruled a century of cases endorsing the federal courts' ability to develop a body of common law independent of both federal statutory or constitutional law and underlying state law.

But what to do with the legal developments preceding *Erie* that relied on the general common law-making authority of federal courts? One potential substitute could be found in the genuinely *federal* common law that federal courts have fashioned since *Erie* to implement the Constitution or federal statutes. But gaps remain, confounding the operation of remedies that depend on common law causes of action. Justice Alito's view, which has informed the Supreme Court's recent decisions, is that the Constitution's separation of powers requires allowing Congress rather than courts to fashion new causes of action where needed, as in the *Bivens* context.

Yet Goldsmith argues that *Erie* was at odds with the Founding-era view of federal judicial power and, thus, with originalism. In particular, he argues, the Court has flouted the original understanding of federal judicial power in doctrines, long favored by judicial conservatives, that narrow parties' standing to sue in federal court as well as the range of available remedies. If originalists persuade the Court to revisit those doctrines, it may find guidance in Justice Alito's sophisticated approach to navigating tensions between originalism and settled precedent.

In her Essay on criminal law, **Professor Kate Stith** describes Alito as a "natural judge" who faithfully pursues the law's meaning as sensibly read in its practical context.<sup>38</sup> By way of contrast, Professor Stith shows what happens when the Supreme Court loses sight of the law's ordinary

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<sup>35</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>36</sup> Jack Goldsmith, *Erie and Contemporary Federal Courts Doctrine*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 17 (2023).

<sup>37</sup> 304 U.S. 64 (1938).

<sup>38</sup> Stith, *supra* note 6, at \*1.



meaning in flights of academic fancy. In 1984, Congress decided to ramp up the sentencing provisions for serious, repeat offenders with the passage of the Armed Career Criminal Act (ACCA). That law introduced mandatory minimum sentences for offenders previously convicted on three or more occasions of a violent felony or serious drug offense. But in short order, the Supreme Court's doctrines dismantled the law. By the time Alito had reached the Court, the caselaw's "categorical approach" required courts to ignore the substance of an offender's past crimes and instead engage in an academic exercise involving comparisons between "generic" federal crimes and the least harmful conduct that *could* be prosecuted under the statute. In case of a gap between the two, courts could not treat *any* offense under the state law in question as a "violent" one potentially triggering heightened sentences under ACCA. Thus, defendants convicted of three or more counts of robbery or other serious crimes could successfully argue that their past crimes—however gruesome in fact—were not *categorically* violent because someone else could have committed the same statutory offense in a less violent fashion. As Alito has lamented, this unduly formalistic and counterfactual approach to statutory interpretation has upended the scheme to which Congress clearly gave effect in ACCA.

Alito has also objected to the Court's failure to clearly define the mental state required for commission of particular offenses when construing ambiguous federal statutes. In one case, the Court's silence on that question in the context of a law concerning threatening communications left attorneys, judges, and criminal defendants to guess whether reckless comments that were objectively threatening were punishable or whether the statute applied only when the speaker *knew* his words would be heard as a threat. Alito has been similarly critical of the Court's strained reading of federal gun laws prohibiting certain persons from possessing firearms as requiring that the defendant knew that he belonged to the specific class of persons forbidden from gun possession. In each case, the Court invited a flood of retroactive litigation on the basis of questionable readings of the statutory text and bowdlerized presentations of the factual record.

Above all, Professor Stith shows that Justice Alito abjures abstractions in defining the scope of criminal laws. Failure to heed his admonitions has caused untold practical difficulties for lower courts, defendants, and crime victims seeking finality through the criminal justice system—difficulties that lawmakers could not plausibly have chosen to create. Ultimately, Alito's fidelity to the law and its objective goals, not any theory or ideology, makes him a natural judge.

In the realm of criminal procedure, **Judge Andrew S. Oldham** shows that while Justice Alito prefers clear rules to open-ended standards, he is, again, not blind to the law's practical purposes.<sup>39</sup> Beginning with the Fifth Amendment, Judge Oldham illustrates how Justice Alito has understood *Miranda*—itself a prophylactic meant to institute a clear rule circumscribing the amorphous voluntariness standard—to require administrability, above all, regarding whether a suspect was objectively in police custody or had affirmatively invoked his right against self-incrimination.

Judge Oldham also demonstrates how Justice Alito pairs originalist reasoning with a deep understanding of the actual operation of the criminal justice system. In cases interpreting the Confrontation Clause, for example, Justice Alito has opposed efforts to require laboratory

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<sup>39</sup> Oldham, *supra* note 14.

technicians to appear personally in court to testify rather than having an expert summarize their findings. As a formal matter, the confrontation right never extended to the generation of such neutral scientific results. And as a practical matter, such a requirement would ultimately disserve defendants and the justice system by discouraging the use of reliable evidence.

Judge Oldham also emphasizes Justice Alito's judicial modesty and resulting respect for precedent. Most notably, Alito has resisted novel constitutional mandates in the area of criminal procedure that would upend settled convictions and introduce further confusion into fast-evolving, dangerous police encounters with suspects. He has similarly opposed stretching precedent to fit the case at hand in a way that leaves lower courts puzzling through a mess of self-contradictory doctrines. Alito's reluctance to adopt new formal distinctions has been especially pronounced in the Fourth Amendment context, where he has preferred the imperfect but well-established "reasonable expectation of privacy" test for whether a search has occurred.

Thus, while preferring rules to standards, Justice Alito has followed a judicial analogue of the Hippocratic Oath: "first, do no harm." His approach has disciplined the Court's excesses while steadily contributing to the coherence of individual rights doctrine in criminal adjudications.

In the separation of powers context, **Judge Amul Thapar** demonstrates how Justice Alito openly acknowledges the limitations of theory and yet remains committed to the formulation of clear legal rules.<sup>40</sup> This preference for decisional rules over broad, discretion-conferring standards serves to cabin the excesses of judicial power, keep the judiciary impartial and apolitical, and ensure that adjudication is a matter of principle rather than popularity.

A preference for clear rules dovetails with Alito's reining in of what he regards as suspect judicial practices, chief among them the practice of creating new judicially recognized causes of action in the mold of *Bivens*, rather than allowing Congress to create statutory remedies based on its own balancing of the competing policy interests. Alito's skepticism about extending *Bivens* stems from a reluctance to intrude on political branches' role where courts have no special expertise.

Justice Alito has also revived lapsed doctrines to vindicate principles of federalism. Thus, Alito revitalized the anti-commandeering doctrine by rejecting an academically favored but ultimately facile distinction between affirmative mandates conscripting state officials to administer federal programs and prohibitory language that would ultimately achieve the same results. Alito restored analysis of the limits of congressional authority to the constitutional source: Article I's enumeration of specific powers for the regulation of individual conduct. That approach also rightly allows the public to hold Congress accountable for its regulatory decisions and preventing Congress from passing along the costs of its policies to state governments.

A similar logic compelled Alito's conclusion in a dissent that the Supreme Court could not review the decisions of courts martial because those courts exercise fundamentally executive rather than judicial power. Alito takes a similarly structuralist view of Article II, insisting that the President must have unfettered authority to remove the heads of putatively independent agencies.

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<sup>40</sup> Thapar, *supra* note 16.

The constant in Justice Alito's writing on the separation of powers is that the branches of our government must be held to account when they overstep their authority. The best way to do that is not to ask courts to weigh imponderables or balance policy interests, but to apply clear rules in light of constitutional text, history, and structure, as well as past precedents and the practices of our government over time. In marrying the best of rules and standards, Justice Alito upholds the system of checks and balances that safeguards individual liberty.

### PART III: SPEECH, RELIGION, ABORTION, AND THE COMMON GOOD

**Gabrielle Girgis** surveys Justice Alito's Free Exercise and Establishment Clause cases, where he has been an undisputed leader in shaping the Court's jurisprudence.<sup>41</sup> Girgis begins with a Third Circuit case in which then-Judge Alito clarified recent Supreme Court precedents in ways that still exert a strong gravitational pull on the Court decades later. She then traces Justice Alito's influence on a number of topics in law and religion, including the meaning of religious neutrality, the prongs of strict scrutiny analysis in free exercise cases, the proper test for assessing religious displays under the Establishment Clause, and the right of religious institutions to govern themselves without state interference. While much of Alito's legacy in this area is well-known, Girgis draws particular attention to unsung contributions, including his nuanced and historically grounded approach to determining whether a law serves a compelling interest—an approach that could guide the Court's application of heightened scrutiny when it comes to other constitutional liberties beyond religion. Animating all of these religion opinions, Girgis argues, is a common jurisprudential approach. Consistently, Justice Alito seeks a balance between continuity and renewal. He applies existing religion doctrines while clarifying and refining them. When they drift from the Constitution's text, history, and tradition, he urges revising them. As she shows, he has repeatedly anticipated tomorrow's questions far in advance, and has charted a path forward, in ways that preserve and even deepen the Court's roots to the past.

Picking up on Justice Alito's attention to history, **Adam J. White** presents the Justice as a Burkean, yet at the same time quintessentially American, conservative.<sup>42</sup> Setting Alito's personal story against the backdrop of legal history, White shows how Alito's traditionalist instincts, incrementalism, skepticism toward concentrated power, and aversion to abstraction grew out of the values of his small-town upbringing and into a conservative judicial philosophy that has remained constant as political currents have ebbed and flowed.

From William F. Buckley onward, American conservatism has struggled to combine republican institutionalism with moral populism. By the late 1960s, when Alito's hometown of Trenton was gutted by riots and crime, law and order had become an organizing principle. Meanwhile, as the liberal administrative state expanded and Nixon won the White House, conservatives shifted toward a robust view of presidential power as a check on the bureaucratic state. Then with the constitutional bicentennial in 1976, the movement re-centered the Constitution and the founding generation as the cornerstones of American legal doctrines.

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<sup>41</sup> Gabrielle Girgis, *An Architect of Religious Liberty Doctrines for the Roberts Court*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 21 (2023).

<sup>42</sup> White, *supra* note 5.

Alito was always a step ahead of the movement. It was Alexander Bickel's 1970 book *The Supreme Court and the Idea of Progress*<sup>43</sup> that inspired the young Alito to attend Yale Law School. Bickel famously identified the danger of high-minded judicial attempts to revitalize democracy by constitutional edict. This would become an organizing principle of the Federalist Society, which arrived on the scene in 1982, after Alito had joined the Solicitor General's Office. As originalism and textualism developed in the academy and took hold in the courts, Alito was quietly working within the legal machinery of the Reagan Administration. Even as Alito's star rose with his appointment as U.S. Attorney and circuit judge, it was not clear to the public what he thought of the originalist theories at the center of public debate—including in the contentious 1987 confirmation hearings over Robert Bork's nomination. Alito's ascent to the bench revealed his originalist sympathies, but also his practical bent, restraint, humility in deference to established wisdom, and mastery of the judicial craft. In that sense, Alito represents both sides of the conservative coin: a prudent Burkean institutionalist deeply rooted in the moral fabric of the American people and their way of life.

**Professor Adrian Vermeule** situates Justice Alito's jurisprudence within a fundamental tension between, as he puts it, reason and fiat.<sup>44</sup> Professor Vermeule draws on the insights of Harvard legal theorist Lon Fuller, who in important work in the 1950s and 60s distinguished between discoverable principles of natural law and social order (ordinances of reason, as one might say), and the distillation of such principles into concrete rules (positive law) through a form of fiat—sheer choice by the competent officials. As Vermeule explicates Fuller's view, the judicial task is not to apply positive law mechanistically, but to *interpret* it in light of officials' reasoned choices and proximate purposes to serve certain human goods. This deference to officials' reasonable choices is a distinctively judicial way to contribute to the common good—the all-round flourishing of the community. It reflects a vision of positive law at work in various ways at the Founding and in work by great figures in Western legal thought, including early English, medieval Scholastic, and ancient Greek and Roman jurists.

Vermeule identifies several ways in which Alito has adhered to this vision of law. In administrative procedure, Alito has won over a majority of the Court to his view that agency actions must be consistent with certain basic principles of intrinsic procedural morality, including a strong disfavoring of retrospective liability and the consideration of reliance interests, even when those principles cannot be traced to any particular statute or constitutional provision. And in constitutional law, Alito has also hewn to a slightly narrower, more original-purpose-oriented and less abstract conception of free speech than his more libertarian colleagues of either the right or left. In his view, protected speech as originally understood must have some nexus to the flourishing of the community. So narrow categories of purely abusive or malicious speech would not qualify for the First Amendment's protections. As Professor Vermeule contends, the use of reasoned judgment is not in tension with, but rather is faithful to, the speech right's original meaning.

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<sup>43</sup> ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

<sup>44</sup> Vermeule, *supra* note 15.

Justice Alito's free speech jurisprudence receives more extended treatment from **Professor Keith Whittington**.<sup>45</sup> Whittington presents Alito as the legacy-bearer of liberal lions such as Louis Brandeis, Hugo Black, William Douglas, and William Brennan, who championed "the freedom to express the thought we hate." Yet Alito identifies a limit to this principle when unconscionably vicious speech targets private persons with no appreciable public benefit.

On the one hand, Whittington shows that Alito is rightly concerned about the serious threat to free speech presented by the coddling tendencies of "woke" political correctness increasingly at work in our law and society. The notion that free speech protections are for some views only — excluding an ever-expanding set of traditional beliefs deemed hateful, bigoted, or psychically harmful — makes a mockery of neutrality under the First Amendment.

But here as elsewhere, Alito is not doctrinaire. When the expression at issue is plainly destructive (like films of the crushing of small animals for sadistic gratification), tortiously vicious (like brutal rhetoric attacks directed at family members mourning at a loved one's funeral), or demonstrably fraudulent (like the use of a counterfeited medal to posture as a decorated servicemember), Alito draws a line. It is a fine line, for draconian speech codes, too, purport to shield innocent victims from harm—the "harm" of offensive expression—and prevent misinformation. But Whittington shows how Alito attempts to frame narrow rules to implement historic exceptions to free speech protection without licensing censorship.

Alito's fine-grained analysis is also on display in his approach to government speech. Because the government is generally free to express its own views, when it accepts a private monument for display in a public setting and thereby specifically authorizes a message, that does not bind it to adopt a take-all-comers policy towards other would-be donors. At the same time, Alito has argued, the government cannot restrict private speech it disfavors. Drawing this distinction requires fact-specific, nuanced judgments—but that is the path of the law and the mark of a careful judge.

Justice Alito's recognition of free speech limits has also served to protect other constitutionally significant interests, such as parents' rights to control the media or classroom lessons to which their children are exposed. Yet Alito has been equally vigilant to stave off the doctrinal creep that would permit viewpoint-based restrictions that would suppress student speech or compel individuals to speak, as through union fees. Free speech may not be absolute, but neither is it a makeweight. When its extremes are properly disciplined, free speech nurtures the moral and political discourse at the heart of constitutional self-government.

Finally, **Professor Kevin Walsh** analyzes an opinion released after the symposium but before its publication: Justice Alito's opinion for the Court in the most important Supreme Court case in nearly 70 years.<sup>46</sup> I refer, of course, to *Dobbs*, which overturned *Roe* and *Casey*, and held that states may prohibit elective abortions throughout pregnancy. *Dobbs* marks, in my view, the Court's finest moment, correcting one of the two or three worst crimes against the rule of law and justice ever perpetrated by the Court itself. Alito's opinion will surely be remembered as the most important writing by anyone on the Court during his tenure. And it is not only the crowning

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<sup>45</sup> Whittington, *supra* note 16.

<sup>46</sup> Kevin C. Walsh, *The Elevation of Reality over Restraint in Dobbs v. Jackson Women's Health Organization*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 25 (2023).

achievement of two generations' efforts at constitutional reform, but a fitting capstone to this volume, recapitulating all the strengths and trademarks of his opinions in other areas. Professor Walsh manages to say something new about it. With philosophical insight and learning, his Essay argues that Alito's opinion reflects the triumph of the virtue of prudence—an essential one for any official, and perhaps the defining virtue of a Justice attuned to the subtleties of factual and legal context, of doctrine and tradition, and of the demands of legal justice in our system.