

## THE PRUDENT JUDGE

HON. STEVEN MENASHI\*

When I was a law clerk to Justice Alito in 2010, the Supreme Court heard oral argument in *Brown v. Entertainment Merchants Association*.<sup>1</sup> The case concerned whether California could permissibly restrict the sale of violent video games to minors. Justice Scalia suggested the case was easy. “[I]t was always understood that the freedom of speech did not include obscenity,” he told California’s lawyer, but “[i]t has never been understood that the freedom of speech did not include portrayals of violence” and therefore “you’re asking us to create a . . . whole new prohibition which the American people never . . . ratified when they ratified the First Amendment.”<sup>2</sup> How, then, “is this particular exception okay?” he asked.<sup>3</sup>

Alito interjected: “Well, I think what Justice Scalia wants to know is what James Madison thought about video games. . . . Did he enjoy them?”<sup>4</sup>

Commentators have understood the interjection as a criticism of originalism.<sup>5</sup> But I do not think it was. It was a criticism of

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\* Circuit Judge, U.S. Court of Appeals for the Second Circuit. The author gratefully acknowledges the assistance of Ugonna Eze, William Foster, Joshua Ha, and Eli Nachmany in preparing this essay.

1. 564 U.S. 786 (2011).

2. Transcript of Oral Argument at 16, *Schwarzenegger v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448).

3. *Id.*

4. *Id.* at 17.

5. RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* 40–41 (2018) (“Scalia has been one of the most important voices espousing the theory of ‘originalism’ for interpreting the Constitution, and Alito’s

oversimplification. Scalia had insisted that the courts had experience with, for example, books that depict violence, so the question of what to do with “portrayals of violence” was already settled. As Scalia’s eventual opinion explained, the interactive character of video games is “nothing new” because “all literature is interactive.”<sup>6</sup> Alito took issue with that assumption: “it’s one thing to read a description” of violence, he said at the argument, but “[s]eeing it as graphically portrayed” is another thing, and “doing it” oneself in a virtual reality environment “is still a third thing.”<sup>7</sup> As Alito explained in his own opinion:

[T]he Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future[, including] alternative worlds in which millions of players immerse themselves for hours on end [and] visual imagery and sounds that are strikingly realistic[, which soon] may be virtually indistinguishable from actual video footage.<sup>8</sup>

No tenet of originalism holds that a judge must obscure the details of the case before him to fit the case more easily into an

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snarky remark was a slam on this method.”); ERWIN CHERMERINSKY, *WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY* 27 (2018) (“Finally, Justice Alito interjected and said, ‘Well, I think what Justice Scalia wants to know is what James Madison thought about video games.’ Putting it that way shows the absurdity of trying to answer today’s constitutional questions by looking at the world of 1787 when the Constitution was drafted or 1791 when the First Amendment was ratified or 1868 when the Fourteenth Amendment was approved.”); JAMES D. ZIRIN, *SUPREME PARTISAN: HOW RAW POLITICS TIPS THE SCALES IN THE UNITED STATES SUPREME COURT* 200 (2016) (“During oral argument in the video games case, where the issue was whether violent video games were protected speech under the First Amendment, Alito appeared to poke fun at Scalia’s originalism.”).

6. *Ent. Merchs.*, 564 U.S. at 798.

7. Transcript, *supra* note 2, at 37–38.

8. *Ent. Merchs.*, 564 U.S. at 816 (Alito, J., concurring in the judgment).

abstract category that prior cases have addressed. That is a general temptation. To be sure, an originalist might be tempted to treat some historical antecedent as dispositive of the new case. But an adherent of a purposivist approach might also want to define the question at a high level of generality in order to vindicate some broad principle. And it is a constant desire of judges to fit new cases into old precedents. Alito's objection was to the quick resort to abstraction while failing to take a full account of the circumstances of the individual case before the court. This objection has been a consistent theme in his opinions.<sup>9</sup>

My term as a clerk also saw the emergence of commentators describing Alito as the "Burkean Justice."<sup>10</sup> That description risks over-theorizing. "Judging is not an academic pursuit," Alito has cautioned, "[i]t is a practical activity."<sup>11</sup> But Burkeanism generally stands for the propositions that human life cannot be governed by

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9. See *infra* Part I.

10. See Adam J. White, *The Burkean Justice*, WKLY. STANDARD (July 18, 2011), <https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice> [<https://perma.cc/XY9Y-EHTX>]; see also Stephen M. Bainbridge, *Burkean Justice*, PROFESSORBAINBRIDGE.COM (July 11, 2011, 9:14 AM), <https://www.professorbainbridge.com/professorbainbridge.com/2011/07/burkean-justice.html> [<https://perma.cc/8CHX-793Y>]; Michael Ramsey, *Justice Alito on Burkean Constitutionalism*, ORIGINALISM BLOG (Apr. 28, 2012), <https://originalismblog.typepad.com/the-originalism-blog/2012/04/justice-alito-on-burkean-constitutionalismmichael-ramsey.html> [<https://perma.cc/8XRD-3ZKW>]; Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507 (2019). In fact, the same suggestion was made at the time of Alito's confirmation, but it was not yet a popular theme. See *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. 1179 (2006) [hereinafter *Confirmation Hearing*] (Statement of Anthony Kronman) ("In my view, the tradition of conservatism to which Judge Alito belongs is the tradition championed by my constitutional law professor at Yale, Alexander Bickel. Bickel made prudence the judge's central virtue, and spoke of the importance of deference in deciding cases, of what he called the 'passive virtues,' especially in the work of the Supreme Court. Bickel himself claimed descent from Edmund Burke, the great eighteenth century writer and statesman who warned against the dangers of abstraction and the loss of a sense of responsible connection to the past.").

11. Samuel A. Alito, Jr., *The Wriston Lecture: Let Judges Be Judges* (Oct. 13, 2010).

abstractions<sup>12</sup> and that we should instead respect the complexities of human life and the realities of experience.<sup>13</sup> These principles are also part of a longstanding tradition of judging.<sup>14</sup> Yet on a Supreme Court that—as Alito has put it—could be described as “the most academic in the history of the country,” with a resulting tendency

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12. See, e.g., 2 EDMUND BURKE, *An Appeal from the New to the Old Whigs*, in WORKS OF EDMUND BURKE 3, 10 (1857) (1791) (“Nothing universal can be rationally affirmed on any moral or any political subject. Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence.”).

13. See, e.g., 2 EDMUND BURKE, *Reflections on the Revolution in France*, in SELECT WORKS OF EDMUND BURKE 85, 93 (Liberty Fund 1999) (1790) (“Circumstances . . . give in reality to every political principle its distinguishing colour, and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind.”).

14. To Alexander Bickel, the main institutional advantage of the judicial branch was its ability to focus on the particulars of a case rather than abstract principles. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962) (“Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone’s view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.”); *id.* at 115 (“[T]here are sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments.”). He also emphasized that the judicial power authorized judges only to consider these particulars. See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (“It follows [from the judicial power] that courts may make no pronouncements in the large and in the abstract, by way of opinions advising the other departments upon request; that they may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere; and that they may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results.”).

to “tip into the purely theoretical realm,” this tradition appears distinct.<sup>15</sup>

Alito’s commitment to avoiding abstraction and focusing on circumstances finds expression in his opinions. I want to mention a few ways in which Alito’s opinions reflect this judicial method and provide a model for the judicial craft. Part I illustrates Alito’s resistance to resolving cases by reference to high-level abstractions. Part II describes how Alito’s reliance on history reveals a kind of epistemic humility about a judge’s ability to describe lived experience in terms of singular purposes or principles. Part III considers how these features of Alito’s jurisprudence affect his views about adherence to precedent.

### I.

Justice Alito’s fact-bound approach to judging reflects the view that human life should not be governed by abstractions. Alito has written that “[t]he Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result.”<sup>16</sup> In numerous cases, when one side of the Court would shove the messy facts of a particular case into an abstract category, Alito would focus on the details, often vividly, to illustrate how far the abstraction departs from reality. In the *Entertainment Merchants* case, he understatedly pointed out that “[t]here are reasons to suspect that the experience of playing violent video games just might be very different from

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15. Press Release, Columbia Law School, U.S. Supreme Court Justice Samuel Alito Says Pragmatism, Stability Should Guide Court (Apr. 24, 2012), <https://www.law.columbia.edu/news/archive/us-supreme-court-justice-samuel-alito-says-pragmatism-stability-should-guide-court> [https://perma.cc/LGH2-EJYR ] (quoting Justice Alito).

16. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1512 (2018) (Alito, J., dissenting); see also *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2242 (2021) (Alito, J., dissenting) (“If we expect the lower courts to respect our decisions, we should not twist their opinions to make our job easier.”).

reading a book, listening to the radio, or watching a movie or a television show.”<sup>17</sup> In fact, it seems very different:

[T]hink of a person who reads the passage in *Crime and Punishment* in which Raskolnikov kills the old pawnbroker with an ax. Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an ax, to raise it above the head of the victim, and then to bring it down; who hears the thud of the ax hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same.<sup>18</sup>

*Entertainment Merchants* was decided the same term as *Snyder v. Phelps*,<sup>19</sup> another case in which First Amendment generalities obscured the realities on the ground. Considering the case at a high level of generality, the majority could describe the Westboro Baptist Church’s protest of a soldier’s funeral as addressing “matters of public import” such as “the political and moral conduct of the United States and its citizens” and “the fate of our Nation.”<sup>20</sup> Yet Alito explained, with some vivid detail, that “this portrayal is quite inaccurate” and the specific “attack on Matthew [Snyder] was of central importance” to the church’s protest.<sup>21</sup> The majority sought to describe the protest as speech on a matter of public concern, rather than a directed attack on a private person, so it would fit more neatly into an established First Amendment category. But in

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17. *Schwarzenegger v. Ent. Merchs. Ass’n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring in the judgment).

18. *Id.* at 820 (citation omitted); *see also* *Packingham v. North Carolina*, 582 U.S. 98, 118 (2017) (Alito, J., concurring in the judgment) (“[C]ontrary to the Court’s suggestion, there are important differences between cyberspace and the physical world. . . . [W]e should be cautious in applying our free speech precedents to the internet.”).

19. 562 U.S. 443 (2011).

20. *Id.* at 454.

21. *Id.* at 471 (Alito, J., dissenting).

doing so, Alito pointed out, the majority not only described the facts tendentiously but also ignored significant parts of the record.<sup>22</sup>

Another illustration of Alito's resistance to abstraction came in *Town of Greece v. Galloway*,<sup>23</sup> in which the Court concluded that a town could open its monthly board meetings with a prayer. That decision came over the dissent of Justice Kagan. Her dissent opened with a grand invocation of the American commitment to "religious freedom" and asserted that the town of Greece had violated the "norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian."<sup>24</sup> The dissent concluded that "the Town of Greece betrayed" that "remarkable guarantee" by "infus[ing] a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed."<sup>25</sup>

It sounds ominous—and abstract. Alito wrote separately to address the dissent by explaining what exactly happened on the ground. For four years, "a clerical employee in the [town's office of constituent services] would randomly call religious organizations listed in the Greece 'Community Guide,' a local directory published by the Greece Chamber of Commerce, until she was able to find

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22. The Westboro Baptist Church had published an "epic" account of its protest called "The Burden of Marine Lance Cpl. Matthew A. Snyder," which condemned Snyder for being Catholic and serving in the military, among other things. The Court did not consider it, even though it had been submitted to the jury at trial. Alito responded: "The Court refuses to consider the epic because it was not discussed in Snyder's petition for certiorari. The epic, however, is not a distinct claim but a piece of evidence that the jury considered in imposing liability for the claims now before this Court. The protest and the epic are parts of a single course of conduct that the jury found to constitute intentional infliction of emotional distress. The Court's strange insistence that the epic 'is not properly before us' means that the Court has not actually made 'an independent examination of the whole record.' And the Court's refusal to consider the epic contrasts sharply with its willingness to take notice of Westboro's protest activities at other times and locations." *Id.* at 470 n.15 (citations omitted).

23. 572 U.S. 565 (2014).

24. *Id.* at 615–16 (Kagan, J., dissenting).

25. *Id.* at 632, 637–38.

somebody willing to give the invocation.”<sup>26</sup> The employee eventually compiled a list of individuals who had agreed to give the invocation, “and when a second clerical employee took over the task of finding prayer-givers, the first employee gave that list to the second. The second employee then randomly called organizations on that list—and possibly others in the Community Guide—until she found someone who agreed to provide the prayer.”<sup>27</sup> The case became less dramatic when one focused on the actual circumstances of the case rather than a high level of abstraction: “despite all its high rhetoric, the principal dissent’s quarrel with the town of Greece really boils down to this: The town’s clerical employees did a bad job in compiling the list of potential guest chaplains.”<sup>28</sup>

Focusing on the facts of the case also clarified the implications of a holding that the town ought to have required nonsectarian prayer. Such a requirement would have burdened the town by requiring it to prescreen prayers to meet the “daunting, if not impossible,” standard of being acceptable to members of all religions.<sup>29</sup> Requiring “exactitude” rather than good faith in inviting prayer-givers of different backgrounds would impose administrative burdens that would lead a small town “to forswear altogether the practice of having a prayer before meetings of the town council.”<sup>30</sup> Treating the town of Greece as an abstraction, rather than as a real entity with limited capacities, would deny it its own constitutional prerogatives. If “prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up

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26. *Id.* at 592 (Alito, J., concurring).

27. *Id.*

28. *Id.* at 597. In a similar way, Alito wrote separately in *New York State Rifle and Pistol Association v. Bruen* to note that “[m]uch of the dissent seems designed to obscure the specific question that the Court has decided.” 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring).

29. *Town of Greece*, 572 U.S. at 595 (Alito, J., concurring).

30. *Id.* at 597.



guest chaplains does not comply in all respects with what might be termed a ‘best practices’ standard.”<sup>31</sup>

These are not the only examples of Alito writing separately to argue that the facts of the case were being lost in abstract categories.<sup>32</sup> In many cases, he reminds judges not to be captivated by abstraction but to take due account of individual circumstances. “A prudent judgment,” Anthony Kronman has written, describing Alexander Bickel’s philosophy, is “one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the ‘unruliness of the human condition.’”<sup>33</sup> Justice Alito’s jurisprudence exemplifies this prudent approach.

## II.

Given his view of abstraction, it is not surprising that Justice Alito’s attitude toward history may differ somewhat from that exemplified by Justice Scalia. Scalia often focused on history as clarifying; history liquidates meaning and helps to develop fixed standards.<sup>34</sup> For Alito, history provides a source of legitimacy for

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31. *Id.* at 597–98.

32. *See, e.g.,* *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (“The majority provides a bowdlerized version of the facts of this case and thus obscures the triviality of this petitioner’s claim.”); *Collins v. Virginia*, 138 S. Ct. 1663, 1681 (2018) (Alito, J., dissenting) (suggesting that the majority’s “legal rule . . . did not comport with the reality of everyday life”); *United States v. Stevens*, 559 U.S. 460, 485 (2010) (Alito, J., dissenting) (“In determining whether a statute’s overbreadth is substantial, we consider a statute’s application to real-world conduct, not fanciful hypotheticals.”); *Ricci v. DeStefano*, 557 U.S. 557, 596 (2009) (Alito, J., concurring) (noting that “the dissent . . . provides an incomplete description of the events that led to New Haven’s decision to reject the results of its exam,” and that “when all of the evidence in the record is taken into account, it is clear that” the petitioners in the case were entitled to summary judgment on their Title VII claim).

33. Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1569 (1985) (quoting ALEXANDER BICKEL, *Constitutionalism and the Political Process, in THE MORALITY OF CONSENT* 3, 11 (1975)).

34. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*

practice, but history is also a cause for humility about our own understanding. The idea that judges are fallible and ought to be humble is uncontroversial, though perhaps not always observed.<sup>35</sup> But Alito's opinions often highlight the role of history as a source not of clarity but of complexity and therefore as a reason to be humble.

The leading example of this theme is the opinion in *American Legion v. American Humanist Association*.<sup>36</sup> That case includes a direct statement about avoiding overly abstract reasoning. Alito wrote that the *Lemon* test "ambitiously attempted to find a grand unified theory of the Establishment Clause" but, "in later cases, we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."<sup>37</sup> History does not always provide clear answers. Alito explained that the *Lemon* test presents "particularly daunting problems" when it comes to old monuments.<sup>38</sup> It is not simply that finding a singular purpose may be difficult given the lack of documentation.<sup>39</sup> Rather, there might not be a single purpose: "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."<sup>40</sup> And "just as the purpose for maintaining a monument,

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3, 45 (1997) ("[T]he originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply.") (comparing originalism to living constitutionalism).

35. As Justice Jackson famously wrote, "[w]e are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

36. 139 S. Ct. 2067 (2019).

37. *Id.* at 2087.

38. *Id.* at 2081.

39. *Id.* at 2082 ("[T]hese cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult."); *id.* at 2085 ("The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation.").

40. *Id.* at 2082; *see also id.* at 2085 ("And no matter what the original purposes for the erection of a monument, a community may wish to preserve it for very different

symbol, or practice may evolve, the message conveyed may change over time.”<sup>41</sup> For this reason, a court would be anachronistically imposing its own view of a monument such as the Bladensburg Cross if it assumed it was nothing more than a religious symbol:

The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.<sup>42</sup>

Because “it is all but impossible” to determine the various meanings and purposes associated with a monument over time, we are left mainly with the fact of its existence.<sup>43</sup> Given that “retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones” the purpose of which we would perceive more clearly, “[t]he passage of time gives rise to a strong presumption of constitutionality.”<sup>44</sup>

History provides a reliable guide when it is possible to identify not a historical meaning but a historical “practice” such as the maintenance of a monument or the “tradition long followed in Congress and the state legislatures” regarding official prayer that made the difference in *Town of Greece*.<sup>45</sup> In the context of *Town of*

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reasons, such as the historic preservation and traffic-safety concerns the Commission has pressed here.”); *id.* at 2083 (“The existence of multiple purposes is not exclusive to longstanding monuments, symbols, or practices, but this phenomenon is more likely to occur in such cases. Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment.”).

41. *Id.* at 2084 (internal quotation marks and alterations omitted).

42. *Id.* at 2090.

43. *Id.* at 2085.

44. *Id.*

45. *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014).

Greece, it would have been difficult to define the exact contours of the Founders' understanding of the Establishment Clause. But whatever the Establishment Clause prohibits, "[i]t is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that [legislative prayer] was inconsistent with the Establishment Clause."<sup>46</sup> A grand theory of the Establishment Clause might have been useful, if a sound one were available. But in the absence of such a theory, historical practice provided a knowable answer to the question before the Court.

It would also have been useful to know the significance of the Bladensburg Cross to those who erected it and to those who maintained it or saw it over the years. But a humble judge recognizes that "[w]e can never know for certain what was in the minds of those responsible for the memorial."<sup>47</sup> Instead of attempting to read their minds, we can identify what we have in the present: a longstanding practice that has not previously been thought to depart from our constitutional traditions. For that reason, longstanding monuments have a "strong presumption of constitutionality."<sup>48</sup>

More recently, in *Dobbs v. Jackson Women's Health Organization*,<sup>49</sup> Alito examined historical practice to evaluate whether the Fourteenth Amendment guarantees a right to abortion. Answering that question did not require a comprehensive definition of the term "liberty" or a determination of whether the relevant provision is the Due Process Clause or the Privileges or Immunities Clause.<sup>50</sup> Instead, Alito recounted the historical practice from the thirteenth until the nineteenth century, when "[i]n this country . . . the vast majority of the States enacted statutes criminalizing abortion at all

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46. *Id.* at 602–03 (Alito, J., concurring).

47. *American Legion*, 139 S. Ct. at 2090.

48. *Id.* at 2085.

49. 142 S. Ct. 2228 (2022).

50. *See id.* at 2248 n.22.

stages of pregnancy.”<sup>51</sup> In other words, “an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”<sup>52</sup> As in *Town of Greece* and *American Legion*, Alito identified a longstanding practice that had not, until 1973, been thought to violate the Constitution.

This general approach—a presumption in favor of practice without resort to theory—resembles Burke’s approach to understanding evolving institutions. When Burke defended the 500-year-old House of Commons against reformers, he identified “a presumption in favor of any settled scheme of government against any untried project,” provided that “a nation has long existed and flourished under it.”<sup>53</sup> No *a priori* theory of English government was needed because “[a] prescriptive government, such as ours, never was the work of any legislator, never was made upon any foregone theory.”<sup>54</sup> To “take the theories, which learned and speculative men have made from th[e] government, and then, supposing it made on these theories, . . . to accuse the government as not corresponding with them” was, to Burke, “preposterous.”<sup>55</sup> According to Burke, “one of the ways of discovering that it is a false theory is by comparing it with practice.”<sup>56</sup> That idea echoes in Alito’s observation in *Town of Greece* that, “if there is any inconsistency between any of [the courts of appeals’ Establishment

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51. *Id.* at 2252.

52. *Id.* at 2253–54.

53. 3 EDMUND BURKE, *Reform of the Representation of the Commons in Parliament*, in SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE 43, 46 (1816) (1782).

54. *Id.* at 48; see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765) (“[P]recedents and rules must be followed, unless fatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such deference to former times as not to suppose they acted wholly without consideration.”).

55. 3 BURKE, *supra* note 53, at 48. Burke typified what Bickel called the “Whig tradition.” BICKEL, *supra* note 33, at 11–12. According to Bickel, the “Whig model . . . begins not with theoretical rights but with a real society, whose origins in the historical mists it acknowledges to be mysterious.” *Id.* at 4.

56. 3 BURKE, *supra* note 53, at 48; see also Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295, 332 (2017) (“Custom is not perfect, but in government arrangements, as with standard industry practice, it tends to survive only if it has some clear efficiency properties.”).

Clause] tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.”<sup>57</sup>

Some Alito opinions do examine the historical record in a conventional way—always cautiously and with an eye toward what history does not say as much as to what it does. One might consider his separate opinion in *Evenwel v. Abbott*, the case in which the Court upheld Texas’s use of total population numbers—as opposed to voter population numbers—in drawing state senate districts.<sup>58</sup> The majority analyzed the Great Compromise and the Fourteenth Amendment, and it gleaned from the history a “principle of representational equality.”<sup>59</sup> Alito disagreed with the Court’s “suggest[ion] that the use of total population is supported by the Constitution’s formula for allocating seats in the House of Representatives among the States.”<sup>60</sup> He provided a lengthy discussion of how in 1787 and 1868 “the dominant consideration was the distribution of political power among the States” rather than “any abstract theory about the nature of representation.”<sup>61</sup> Alito considered Hamilton’s statements at the convention, Thaddeus Stevens’s proposal of apportionment by voter population, James Blaine’s opposition to that proposal, and the views of Roscoe Conkling, Hamilton Ward, and Jacob Howard.<sup>62</sup>

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57. 572 U.S. at 603 (Alito, J., concurring). Richard Epstein has suggested that a longstanding practice that works well might trump original meaning. See, e.g., Richard A. Epstein, *An Unapologetic Defense of the Classical Liberal Constitution: A Reply to Professor Sherry*, 128 HARV. L. REV. F. 145, 157 (2015) (“[E]ven strict originalists should not be so foolish as to seek to undo those institutions that have allowed the nation to flourish.”); Richard A. Epstein, *A Speech on the Structural Constitution and the Stimulus Program*, 4 CHARLESTON L. REV. 395, 416 (2010). Alito, on the other hand, refers to practice to establish what was understood to be encompassed within the original meaning of the Constitution. His argument is that an Establishment Clause test cannot have accurately captured the original meaning if it prohibits a practice in which the Framers engaged.

58. 578 U.S. 54, 63 (2016).

59. *Id.* at 69.

60. *Id.* at 94 (Alito, J., concurring in the judgment).

61. *Id.* at 96.

62. *Id.* at 97–103.

He did not reach a conclusion, however, about what the Framers were thinking when drafting Article I or the Fourteenth Amendment. Rather, “the history of Article I, § 2, of the original Constitution and § 2 of the Fourteenth Amendment” made clear only that “the apportionment of seats in the House of Representatives was based *in substantial part* on the distribution of political power and not *merely* on some theory regarding the proper nature of representation.”<sup>63</sup> Accordingly, “[i]t is impossible to draw any clear constitutional command from this complex history.”<sup>64</sup>

This sort of warning is characteristic of Alito’s opinions. Because the history of successive prosecutions under the laws of different sovereigns was “a muddle,” “spotty,” “equivocal,” and “dubious due to confused and inadequate reporting,” it was not appropriate to overturn precedent in *Gamble v. United States*—a case about the original meaning of the Double Jeopardy Clause.<sup>65</sup> Alito’s dissent in *Atlantic Sounding Co. v. Townsend*<sup>66</sup> is similar. In that case, the history of punitive damages prior to the Jones Act—as evidenced through case law—was “insufficient in . . . clarity” to depart, as the majority did, from precedent in the name of first principles.<sup>67</sup> And in *Ohio v. Clark*,<sup>68</sup> the absence of evidence that the Confrontation Clause was understood to bar the introduction of a child’s statement to his preschool teacher led Alito to decline to call the introduction of such a statement a Sixth Amendment violation.<sup>69</sup>

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63. *Id.* at 103 (emphasis added).

64. *Id.*

65. 139 S. Ct. 1960, 1969, 1973 (2019) (internal quotation marks omitted).

66. 557 U.S. 404 (2009).

67. *Id.* at 431 (Alito, J., dissenting).

68. 576 U.S. 237 (2015).

69. *See id.* at 248–49 (“It is . . . highly doubtful that statements like L. P.’s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding.”); *see also* *Williams v. Illinois*, 567 U.S. 50, 86 (2012) (“In short, the use at trial of a DNA report prepared by a modern, accredited laboratory bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.”) (internal quotation marks omitted).

Avoiding easy generalizations and acknowledging history's complexity do not undermine an originalist approach to interpretation. Scalia also recognized "that historical research is always difficult and sometimes inconclusive."<sup>70</sup> Commentators acknowledge that "[o]riginalism doesn't provide determinate answers to every question."<sup>71</sup> Under an "inclusive" conception of originalism, "judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them," a position that accepts that not all cases are resolved solely by reference to the original public meaning of a text.<sup>72</sup> The scholarly recognition of the distinction between interpretation and construction follows from the fact that there is a point at which the semantic meaning runs out.<sup>73</sup>

These considerations get at what Alito meant when he called himself a "practical originalist."<sup>74</sup> "I start out with originalism," he has explained, because he believes "the Constitution means something and that that meaning does not change."<sup>75</sup> For example:

We can look at what was understood to be reasonable at the time of the adoption of the Fourth Amendment. But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it.<sup>76</sup>

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70. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989).

71. Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST. L. & PUB. POL'Y 103, 106 (2018).

72. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015).

73. See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

74. Matthew Walther, *Sam Alito: A Civil Man*, AMERICAN SPECTATOR (Apr. 21, 2014), <https://spectator.org/sam-alito-a-civil-man/> [<https://perma.cc/7X9X-U6FY>].

75. *Id.*

76. *Id.* In *United States v. Jones*, Justice Scalia applied a historically grounded property-rights framework to conclude that GPS tracking of automobiles was a search under the Fourth Amendment. 565 U.S. 400, 404–05 (2012). Concurring only in the judgment, Alito wrote that the "case requires us to apply the Fourth Amendment's prohibition of



Alito's approach to history humbly recognizes and rejects the limitations of singular purposes or principles of interpretation.

### III.

Skepticism of abstraction and epistemic humility converge in Justice Alito's approach to judicial precedent. *Stare decisis*, according to Alito, "is a doctrine that respects the judgment—the wisdom—of the past and that reflects a certain degree of humility about our ability to make sound decisions based on reason alone."<sup>77</sup> At his confirmation hearing, he described *stare decisis* as "reflect[ing] the view that courts should respect the judgments and

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unreasonable searches and seizures to a 21st-century surveillance technique" but "the Court has chosen to decide this case based on 18th-century tort law." *Id.* at 418 (Alito, J., concurring in the judgment). He observed that "it is almost impossible to think of late 18th-century situations that are analogous to what took place in this case," straining to imagine "a case in which a constable secreted himself somewhere in a coach . . . in order to monitor the movements of the coach's owner." *Id.* at 420. Scalia thought that example was plausible, noting that "[t]here is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled." *Id.* at 406 n.3 (majority opinion). Alito responded that "this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 420 n.3 (Alito, J., concurring in the judgment). In other cases, Justice Alito has similarly cautioned against assuming too readily that historical practice tells us what the framers and ratifiers thought about constitutional principles applied to new problems. In *Comptroller of the Treasury v. Wynne*, for example, Justice Thomas argued that "[t]here is no indication that . . . early state income tax schemes provided credits for income taxes paid elsewhere" and therefore "[i]t seems highly implausible that those who ratified the Commerce Clause understood it to conflict with the income tax laws of their States and nonetheless adopted it without a word of concern." 575 U.S. 542, 579–80 (2015). (Thomas, J., dissenting). Alito responded that "the number of individuals who earned income out of State in 1787 was surely very small," so "[e]ven if some persons were taxed twice, it is unlikely that this was a matter of such common knowledge that it must have been known by the delegates to the state ratifying conventions who voted to adopt the Constitution." *Id.* at 570–71 (majority opinion). In other words, the practice of not providing credits for income tax paid elsewhere had little to say about the original understanding of the Commerce Clause.

77. Samuel A. Alito, Jr., Remarks of Justice Alito: The Catholic University of America, Columbus School of Law Commencement, 58 CATH. U. L. REV. 1, 5 (2008).

the wisdom that are embodied in prior judicial decisions.”<sup>78</sup> Since then, Alito’s application of that doctrine has been described as “robust,”<sup>79</sup> and he has advocated its evenhanded implementation.<sup>80</sup>

The limits of “reason alone” inform both how Alito applies precedent and how he decides when a prior precedent ought to be overruled. In *Hein v. Freedom from Religion Foundation*, Alito noted that “[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic.”<sup>81</sup> In that case, the Court had to decide whether there was taxpayer standing to challenge discretionary Executive Branch expenditures under the Establishment Clause. In *Flast v. Cohen*,<sup>82</sup> the Court had held that taxpayers had standing to challenge a legislative appropriation to fund parochial schools. Justice Scalia thought that *Flast* articulated a broad principle applicable to “all challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power.”<sup>83</sup> Thus, according to Scalia, “[e]ither *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety.”<sup>84</sup> Alito, however, described how the doctrine had evolved in a different direction since *Flast*, with that case having “largely been confined to its facts.”<sup>85</sup> To “extend” *Flast* to the circumstances of *Hein* would push against the many precedents Alito identified that had refused “to

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78. *Confirmation Hearing*, *supra* note 10, at 318–19.

79. Calabresi & Shaw, *supra* note 10, at 512.

80. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 355–56 (2009) (Alito, J., dissenting); *Chambers v. United States*, 555 U.S. 122, 131–32 (2009) (Alito, J., concurring in the judgment); see also William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 324–29 (2020).

81. 551 U.S. 587, 615 (2007).

82. 392 U.S. 83 (1968).

83. *Hein*, 551 U.S. at 628 (Scalia, J., concurring in the judgment). Justice Scalia thought *Flast* was wrongly decided and should be overruled, thus his concurrence in the judgment.

84. *Id.* at 633.

85. *Id.* at 609 (plurality opinion).

lower the taxpayer standing bar” outside *Flast*’s narrow context.<sup>86</sup> In declining to extend *Flast* to the different context of discretionary Executive Branch expenditures, Alito “le[ft] *Flast* as we found it.”<sup>87</sup> Scalia called this position a “pose of minimalism.”<sup>88</sup> In Alito’s view it was a position of deference to the evolution of the case law in a greater number of cases and a recognition that the Constitution “limits our role to resolving the ‘Cases’ and ‘Controversies’ before us”<sup>89</sup>—a limitation that applied equally to the *Flast* Court.

In *Hein* and other cases,<sup>90</sup> Alito demonstrates a conception of stare decisis that is faithful not simply to precedential power but to precedential scope. A key “presupposition” of our law is that “[t]he court can decide only the particular dispute which is before it” and “when it speaks to any other question at all, it says mere words, which no man needs to follow.”<sup>91</sup> Alito’s opinions counsel caution not only in resorting to abstractions but also in too broadly reading a precedent as standing for a broader principle than was decided in the case.

The same prudential judgment informs when a prior decision should be overruled. When Alito has determined that a prior decision should be overturned, he has done so because that decision misread earlier precedent and failed to account for the particulars of the case. In *Janus v. AFSCME, Council 31*,<sup>92</sup> his majority opinion overruled *Abood v. Detroit Board of Education*<sup>93</sup> because in *Abood* the Court had not appreciated the circumstances before it. Alito criticized *Abood* for “fail[ing] to appreciate that a

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86. *Id.* at 609–10, 615.

87. *Id.* at 615.

88. *Id.* at 630 (Scalia, J., concurring in the judgment).

89. *Id.* at 615 (plurality opinion).

90. See, e.g., *Hurst v. Florida*, 577 U.S. 92, 104 (2016) (Alito, J., dissenting) (“Although the Court suggests that today’s holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us.”).

91. KARL N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 42 (1951).

92. 138 S. Ct. 2448 (2018).

93. 431 U.S. 209 (1977).

very different First Amendment question arises when a State *requires* its employees to pay agency fees” and for “not sufficiently tak[ing] into account the difference between the effects of agency fees in public- and private-sector collective bargaining.”<sup>94</sup> Even “*Abood*’s proponents ha[d] abandoned its reasoning,” and cases on compelled speech since then had applied “exacting scrutiny” at least.<sup>95</sup> In other words, *Abood* was “an outlier among our First Amendment cases.”<sup>96</sup>

Similarly, in *Fulton v. City of Philadelphia*,<sup>97</sup> Alito wrote separately to argue that the Court should have overruled *Employment Division v. Smith*.<sup>98</sup> *Smith*, according to Alito, was “a methodological outlier” because it “ignored the ‘normal and ordinary’ meaning of the constitutional text” and “made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment’s adoption.”<sup>99</sup> Moreover, *Smith* all but ignored the many earlier precedents at odds with its announced rule. In doing away with the existing Free Exercise rule of *Sherbert v. Verner*,<sup>100</sup> *Smith* had “pigeon-holed” that precedent and suggested that other cases had never applied *Sherbert* anyway.<sup>101</sup> “*Smith*’s rough treatment of prior decisions diminished its own status as a precedent,”<sup>102</sup> according to Alito, and given its inconsistency with trends in the case law, *Smith*—like *Abood*—was an “anomaly.”<sup>103</sup>

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94. *Janus*, 138 S. Ct. at 2479–80.

95. *Id.* at 2483, 2486.

96. *Id.* at 2482.

97. 141 S. Ct. 1868 (2021).

98. 494 U.S. 872 (1990).

99. *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring in the judgment) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)).

100. 374 U.S. 398 (1963).

101. *Fulton*, 141 S. Ct. at 1914–15 (Alito, J., concurring in the judgment).

102. *Id.* at 1915.

103. *Id.* at 1915–16. *Smith*’s refusal to provide religious exemptions to neutral and generally applicable laws is difficult to reconcile with the “ministerial exception” in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). Alito also noted *Smith*’s uneasy fit with *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*

Alito's decision in *Dobbs* to overrule *Roe v. Wade*<sup>104</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>105</sup> follows the same principles. Just as the *Abod* Court did not appreciate the relevant facts, Alito explained that the *Roe* Court "said almost nothing" about "the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted."<sup>106</sup> Just as *Smith*, in Alito's view, misapplied earlier precedents, Alito explained that *Roe* relied on decisions concerning "the right to shield information from disclosure," which it "conflated" with "the right to make and implement important personal decisions without governmental interference."<sup>107</sup> "None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'"<sup>108</sup> Within the larger *corpus juris*, Alito explained, *Roe* was an outlier.<sup>109</sup> And *Casey* had created an anomaly of its own: "an exceptional version of stare decisis that . . . this Court had never before applied and has never invoked since."<sup>110</sup>

Alito's willingness to reconsider cases such as *Abod*, *Smith*, and *Roe* follows from the same sort of institutional humility he displays in his other opinions. That humility is in deference to the larger body of case law that has evolved around earlier decisions. In

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*Commission*, 138 S. Ct. 1719 (2021), in which the Court said that "it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion," *id.* at 1727. *Smith* is also in tension with the Court's cases which permit exemptions on the basis of other First Amendment rights. See *Fulton*, 141 S. Ct. at 1916 (discussing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)).

104. 410 U.S. 113 (1973).

105. 505 U.S. 833 (1992).

106. *Dobbs*, 142 S. Ct. at 2267.

107. *Id.* at 2237.

108. *Id.* (quoting *Roe*, 410 U.S. at 163).

109. See also *id.* at 2267 (noting *Roe's* "failure even to note the overwhelming consensus of state laws in effect in 1868," that "what it said about the common law was simply wrong," and its contradiction of "Bracton, Coke, Hale, Blackstone, and a wealth of other authority").

110. *Id.* at 2266.

*Franchise Tax Board v. Hyatt*,<sup>111</sup> the petitioners sought to overrule the Court's prior decision in *Nevada v. Hall*.<sup>112</sup> The petitioners succeeded, and Alito joined the majority opinion. At oral argument, in response to the respondent's contention that *stare decisis* favored upholding *Hall* even if *Hall* was incorrect, Alito asked:

[D]o you think that the public would have greater respect for an institution that says, you know, we're never going to admit we made a mistake, because we said it and we decided it, we're going to stick to it even if we think it's wrong, or an institution that says, well, you know, we're generally going to stick to what we've done, but we're not perfect, and when we look back and we think we made a big mistake, we're going to go back and correct it. Which kind of institution would they respect more?<sup>113</sup>

In other words, reconsidering a decision is an admission by the Court that it made a mistake, but the Court must be willing to make that admission.<sup>114</sup> Some observers suggest that the Court "overturning its own precedents inherently undermines . . . respect for judicial authority."<sup>115</sup> That view tends to treat the Court itself as an abstract entity—to be defended as always authoritative—rather than a real, human institution.<sup>116</sup> Alito's approach, again, eschews abstraction for experience.

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111. 139 S. Ct. 1485 (2019).

112. 440 U.S. 410 (1979).

113. Transcript of Oral Argument at 52–53, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299).

114. See *Dobbs*, 142 S. Ct. at 2280 ("Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket.").

115. Transcript, *supra* note 113, at 50–51 (respondents' counsel).

116. Accordingly, Alito has been willing to criticize the Court as a human institution. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), he wrote of the nondelegation doctrine: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment." *Id.* at 2131 (Alito, J., concurring in the judgment). In *Chambers v. United States*, 555 U.S. 122 (2009), he wrote separately "to emphasize that only Congress can

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Burke himself had some admiration for lawyers. Law, in his opinion, was “one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together.”<sup>117</sup> Burke described “the science of jurisprudence” as “the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns.”<sup>118</sup> But legal reasoning has its limits, and as a result Burke thought the role of the legal profession should similarly be limited. It was not advisable, in Burke’s view, for the legislature to consist mainly of lawyers. “Lawyers . . . have their strict rule to go by,” he wrote, but “legislators ought to do what lawyers cannot; for they have no other rules to bind them but the great principles of reason and equity, and the general sense of mankind.”<sup>119</sup>

Legal reasoning is narrow and constrained by rules—and for those reasons it cannot fully exercise prudent judgment. Burke once illustrated the point by identifying “the difference between a

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rescue the federal courts from the mire into which ACCA’s draftsmanship and *Taylor’s* ‘categorical approach’ have pushed us.” *Id.* at 132 (Alito, J., concurring in the judgment); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1427–28 (2020) (Alito, J., dissenting) (“Everybody thought *Apodaca v. Oregon* was a precedent. But, according to three of the Justices in the majority, everyone was fooled. *Apodaca*, the precedent, was a mirage. Can this be true? No, it cannot.”); *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (“I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.”).

117. 1 EDMUND BURKE, *Speech on American Taxation*, in *WORKS OF EDMUND BURKE* 191, 203 (1857) (1774).

118. 2 BURKE, *supra* note 13, at 191.

119. EDMUND BURKE, *A Letter to John Farr and John Harris on the Affairs of America*, in *BURKE’S SPEECHES AND LETTERS ON AMERICAN AFFAIRS* 189, 195 (1931) (1777); see also LEO STRAUSS, *Liberal Education and Responsibility*, in *LIBERALISM ANCIENT AND MODERN* 9, 16–17 (1968).

legislative and a juridical act.”<sup>120</sup> As he put it: “A legislative act has no reference to any rule but these two, original justice, and discretionary application. Therefore it can give rights; rights where no rights existed before; and it can take away rights where they were before established.”<sup>121</sup> By contrast, “a judge, a person exercising a judicial capacity, is neither to apply to original justice, nor to a discretionary application of it. He goes to justice and discretion only at second hand, and through the medium of some superiors. He is to work neither upon his opinion of the one nor of the other; but upon a fixed rule, of which he has not the making, but singly and solely the *application* to the case.”<sup>122</sup> A “Burkean” judge, then, would recognize the important but limited role of legal reasoning and the judicial function. He would say “Let judges be judges.”<sup>123</sup> That has been Justice Alito’s message, too.

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120. 1 EDMUND BURKE, *Sir George Savile’s Motion for a Bill to Secure the Rights of Electors*, in SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE 73, 75 (1816) (1771).

121. *Id.*

122. *Id.* at 76.

123. Alito, *supra* note 11.