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SYMPOSIUM

THE JURISPRUDENCE OF JUSTICE SAMUEL ALITO

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PREFACE

It is with immense pride, excitement, and gratitude that we present this special issue of the *Harvard Journal of Law & Public Policy* Volume 46, a republication in print of *The Jurisprudence of Justice Samuel Alito: A Symposium* which was published by *JLPP: Per Curiam* just a few months ago. We are proud of the hard work of the entire *Per Curiam* staff to put this project together; each member of the masthead spent many hours across several months editing the essays in this Issue. We are excited to share these essays with the traditional *JLPP* readership, while also further establishing our *Per Curiam* platform as a home for first class legal scholarship. And we are gracious for the many people whose tireless work made this project possible: Professor Robert P. George and Yuval Levin for organizing the March 2022 symposium at which most of these essays were introduced, the James Madison Program in American Ideals and Institutions at Princeton University and the American Enterprise Institute for co-hosting the symposium, the fourteen brilliant scholars for authoring the essays you now hold in your hand, and, of course, Justice Samuel Alito, for his years of public service and dedication to the Constitution.

The essays in this Issue delve into Justice Alito's jurisprudence on several levels. Some focus on his overarching philosophy, categorizing him as originalist, "contextual textualist," Fullerian, Burkean, and fact-bound "prudent" judge. Other essays identify Justice Alito's positions on specific areas of doctrine, including criminal law and procedure, the First Amendment guarantees of free speech and religious liberty, separation of powers, and federal courts. Finally, some essays zoom in on specific opinions Justice Alito has authored, such as his majority opinion in *Dobbs v. Jackson*

Women's Health Organization.¹ The authors of these pieces include federal judges, prominent law professors, eminent scholars, and former clerks from Justice Alito's chambers.

The publication of this symposium in April 2023 was the crowning achievement of *JLPP: Per Curiam*'s second year. As an online counterpart to the regular print journal, *Per Curiam* was designed to "add[] a new dimension" to *JLPP*, allowing the Journal "to participate in the day-to-day legal debates that animate much of our public discourse" and "to serve as a home for cutting edge commentary, reaction, opinion, and shorter scholarship."² The leadership of *JLPP* Volume 46 took substantial steps to further realize these goals, creating new masthead positions dedicated solely to *Per Curiam* beginning in the summer of 2022, thereby substantially increasing the platform's publishing capacity. Accordingly, in the year since, *Per Curiam* has published over fifty articles. This was the product of considerable effort and dedication, and we are grateful to everyone on the *Per Curiam* team—as well as other *JLPP* editors who chipped in from time to time—for their hard work, without which we could not have achieved these successes.

Running and growing the *Per Curiam* platform was a highlight of our time in law school. After hundreds of drafts reviewed, thousands of footnotes edited with a fine-toothed comb, and innumerable "*id.*"s italicized, we are exceedingly proud of what we have been able to accomplish this past year. *Per Curiam* will undoubtedly continue to soar to even greater heights this year, under the leadership of *JLPP* Editor-in-Chief Hayley Isenberg and *JLPP: Per Curiam* Director Marcos Mullin.

In the meantime, we are thrilled to present this special issue to our many dedicated readers. We hope you find these essays thought-provoking, and that you enjoy engaging with the jurisprudence of one of the great jurists of our time. And finally, if this Issue ever makes its way onto Justice Alito's desk, we hope that he finds

¹ 142 S.Ct. 2228 (2022).

² Eli Nachmany & Alexander Khan, *An Introduction to JLPP: Per Curiam*, 2021 HARV. J. L. & PUB. POL'Y PER CURIAM 8, *2 (2021).

it a worthy exception to his general rule: “It would be good if what originates in Cambridge stayed in Cambridge.”³

Ari Spitzer
Director, JLPP: Per Curiam

Mario Fiandeiro
Editor-in-Chief

³ Justice Samuel A. Alito Jr., *Remarks to the 2020 Federalist Society National Lawyers Convention*, 45 HARV. J. L. & PUB. POL’Y 83, 88 (2021).

INTRODUCTION: THE JURISPRUDENCE OF JUSTICE

SAMUEL ALITO

ROBERT P. GEORGE*

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*.¹

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

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

conservative judicial philosophy”² (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*.³ 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 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.⁴

While the focus of this collection is Justice Alito’s jurisprudence, certain vignettes from his personal life supply important context.

2. 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>].

3. 142 S. Ct. 2228 (2022).

4. 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.

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.⁵ 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.⁶ 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.”⁷

5. Adam J. White, *Samuel Alito’s Conservatism—Burkean and American*, 46 HARV. J.L. & PUB. POL’Y 831 (2023).

6. Kate Stith, *Justice Alito on Criminal Law*, 46 HARV. J.L. & PUB. POL’Y 743, 743 (2023).

7. 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).

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.⁸ **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.⁹ Indeed, seven of those colleagues—including judges 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

8. 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].

9. Stephanos Bibas, *Judge Alito's First Amendment Vigilance on the Third Circuit*, 46 HARV. J.L. & PUB. POL'Y 687, 687 (2023).

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.¹⁰ 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.¹¹ 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.

* * *

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,

10. 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).

11. 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].

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 McGinnis** argue that Alito is actually the *ultimate* exemplar of both approaches.¹² 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."¹³

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

12. J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 46 HARV. J.L. & PUB. POL'Y 653 (2023); John O. McGinnis, *The Contextual Textualism of Justice Alito*, 46 HARV. J.L. & PUB. POL'Y 671 (2023).

13. Samuel A. Alito, Jr., Assoc. J., Sup. Ct. of the U.S., The Wriston 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>]).

on their close observation, and now emulation, of Alito's work as a judge.¹⁴ **Professor Adrian Vermeule** identifies some of Alito's "enduring" substantive commitments, which we can "glimpse . . . through a cloud of concrete facts and issues."¹⁵ 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.¹⁶

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,"¹⁷ 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 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

14. Steven Menashi, *The Prudent Judge*, 46 HARV. J.L. & PUB. POL'Y 703 (2023); Andrew S. Oldham, *Justice Alito on Criminal Procedure*, 46 HARV. J.L. & PUB. POL'Y 765 (2023).

15. Adrian Vermeule, *Reason and Fiat in the Jurisprudence of Justice Alito*, 46 HARV. J.L. & PUB. POL'Y 861, 861 (2023).

16. Amul Thapar, *Justice Alito: A Justice of Foxes and Hedgehogs*, 46 HARV. J.L. & PUB. POL'Y 787 (2023); Keith E. Whittington, *Justice Alito's Free Speech Jurisprudence*, 46 HARV. J.L. & PUB. POL'Y 879 (2023); White, *supra* note 5.

17. ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 11 (1975).

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.¹⁸

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.¹⁹ 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

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

19. Alicea, *supra* note 12, at 655 (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>]).

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.

In a similar vein, **Professor John O. McGinnis** celebrates Justice Alito's approach to interpreting statutes, which he terms “contextual textualism.”²⁰ 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,²¹ departs from the approach sometimes applied by professed textualists today.²²

20. McGinnis, *supra* note 12, at 671.

21. 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).

22. *Compare* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (criticizing lack of sensitivity to temporal context when interpreting statutory terms),

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 issue²³ 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.²⁴ 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

with *id.* at 1749–51 (majority opinion) (rejecting any look at the linguistic expectations of the time of enactment).

23. 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).

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

Amendment doctrine while protection religious freedom for members of all faiths.²⁵

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."²⁶ Under this standard, he clarified, the government must provide religious exemptions when it offers comparable secular carve-outs. 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*.²⁷

With respect to the Establishment Clause, Judge Alito applied the Supreme Court's unoriginalist test in *Lemon v. Kurtzman*²⁸ 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*²⁹ and in the final repudiation of the *Lemon* test in *Kennedy v. Bremerton*

25. Bibas, *supra* note 9, at 691 ("[Justice Alito's] free-exercise commitment protects people of all faiths, just as the Constitution demands.").

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

27. 141 S. Ct. 63, 66–67 (2020) (per curiam).

28. 403 U.S. 602 (1971).

29. 139 S. Ct. 2067, 2089–90 (2019).

School District.³⁰ 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*³¹ and *Carson v. Makin*.³²

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*.³³

Judge Steven J. Menashi identifies Justice Alito as the quintessentially "prudent judge."³⁴ 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 monuments and

30. 142 S. Ct. 2407, 2427–28 (2022).

31. 140 S. Ct. 2246 (2020).

32. 142 S. Ct. 1987 (2022).

33. *303 Creative LLC v. Elenis*, No. 21-476 (argued Dec. 5, 2022).

34. Menashi, *supra* note 14.

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."³⁵ 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."³⁶ In its watershed 1938 decision *Erie Railroad Company v. Tompkins*,³⁷ the Supreme Court overruled a century of cases endorsing the federal courts' ability to develop a

35. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2280 (2022).

36. Jack Goldsmith, *Erie and Contemporary Federal Courts Doctrine*, 46 HARV. J.L. & PUB. POL'Y 727 (2023).

37. 304 U.S. 64 (1938).

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.³⁸ By way of contrast, Professor Stith shows what happens when the Supreme Court loses sight of the law's ordinary 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

38. Stith, *supra* note 6, at 727.

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.³⁹ 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 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

39. Oldham, *supra* note 14.

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.⁴⁰ 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

40. Thapar, *supra* note 16.

accountable for its regulatory decisions and prevent 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.

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.⁴¹ 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,

41. Gabrielle Girgis, *An Architect of Religious Liberty Doctrines for the Roberts Court*, 46 HARV. J.L. & PUB. POL'Y 811 (2023).

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.⁴² 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.

42. 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*⁴³ 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.⁴⁴ 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

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

44. Vermeule, *supra* note 15.

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.

Justice Alito's free speech jurisprudence receives more extended treatment from **Professor Keith Whittington**.⁴⁵ 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

45. Whittington, *supra* note 16.

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.⁴⁶ 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 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.

46. Kevin C. Walsh, *The Elevation of Reality over Restraint in Dobbs v. Jackson Women's Health Organization*, 46 HARV. J.L. & PUB. POL'Y 901 (2023).

THE ORIGINALIST JURISPRUDENCE OF JUSTICE SAMUEL ALITO

J. JOEL ALICEA*

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

This disagreement largely stems from the failure of many commentators to appreciate the complex ways in which Justice Alito's understanding of the judicial role affects his constitutional methodology. He sees judging as a "practical activity" rather than

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

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

a “theoretical” endeavor, a “craft” rather than a “science.”³ Judging is a trade passed down through generations of eminent jurists and learned “primarily from experience and from the example of others,” not a set of postulates to be mastered or a series of axioms to be applied.⁴ This view of the judicial role leads him to a methodology that is attuned to characteristics of our legal tradition that have long defined Anglo-American judicial practice, such as respect for the limits that the adversarial system imposes on judicial decisions. What emerges is a methodology drawn *from* the Founding era rather than imposed *on* it, a methodology that, I will argue, is rightly described as originalist.

Indeed, I would go further: Justice Alito is uniquely positioned to address two of the most significant dangers originalism faces in the coming years. The first is the difficulty of changing current doctrine to better accord with the original meaning of the Constitution, a challenge the originalist justices will confront more and more now that they constitute a majority of the Court. The second is the recent tendency of originalism to become increasingly abstract and difficult to distinguish from its longtime foe, living constitutionalism.

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

I. JUSTICE ALITO’S ORIGINALISM

In assessing how Justice Alito approaches constitutional adjudication, it makes sense to begin with his own description of

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

4. *Id.* For a similar contrast, see Michael Oakeshott, *Rationalism in Politics, in Rationalism in politics and other essays* 5, 5–17 (1991).

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

They also explain why, in cases presenting novel constitutional issues, he finds the original meaning of the Constitution dispositive. He joined the majority opinion in *District of Columbia v. Heller*,¹⁰ a model originalist opinion by Justice Scalia recognizing that the Second Amendment secures an individual right to keep and bear arms, and he joined originalist opinions by Justices Scalia

5. 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>].

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

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

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

9. Wriston Lecture, *supra* note 3.

10. 554 U.S. 570 (2008).

and Thomas, respectively, in cases involving the meaning of the Recess Appointments Clause¹¹ and the Treaty Power.¹²

But Justice Alito has not only *joined* originalist opinions; he has also *authored* some of the most powerful originalist opinions in recent history. His majority opinion in *Gamble v. United States* so compellingly analyzed the text and history of the Double Jeopardy Clause¹³ that Justice Thomas—who had previously expressed his skepticism of the dual-sovereignty doctrine at issue in that case—joined Justice Alito’s opinion reaffirming the doctrine.¹⁴ His majority opinion in *Department of Homeland Security v. Thuraissigiam*¹⁵ (a case involving the original meaning of the Suspension Clause) and his separate opinion in *Fulton v. City of Philadelphia*¹⁶ (where he urged the Court to return to the original meaning of the Free Exercise Clause) are masterpieces of originalist analysis. These are not the opinions of a jurist who views originalism as “faintly ridiculous,” as some scholars have asserted.¹⁷ Rather, they confirm that Justice Alito is a sophisticated practitioner of originalist methodology.

Why, then, have some commentators questioned whether Justice Alito is an originalist? One reason is that his opinions tend to rely on non-originalist arguments, such as those employing judicially created tests.¹⁸ But this deviation from arguments based on text or history is simply the result of the fact that, as Justice Alito acknowledges, he “almost always follow[s] past decisions,”¹⁹ and

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

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

13. *Gamble v. United States*, 139 S. Ct. 1960 (2019).

14. *Id.* at 1980–81 (Thomas, J., concurring).

15. 140 S. Ct. 1959 (2020).

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

17. Epps, *supra* note 1.

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

19. *TAC Town Hall*, *supra* note 7.

most of current Supreme Court doctrine is non-originalist in at least some respect. Indeed, in many instances, Justice Alito's use of non-originalist arguments makes him no different from other originalists. For example, although scholars sometimes cite Justice Alito's solo dissenting opinion in *Snyder v. Phelps*²⁰ as demonstrating his willingness to depart from originalism and bring his own moral or political philosophy to bear in deciding cases,²¹ both the majority (which included Justices Scalia and Thomas) and the dissent in that case employed the same judicially created tests dictated by precedent. Since current free-speech doctrine has long been unmoored from the original meaning of the Free Speech Clause,²² none of the justices relied on the original meaning in *Snyder*. Justice Alito's *Snyder* dissent thus sheds little light on whether he is an originalist.

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

It is widely accepted among originalist scholars and jurists alike that some version of *stare decisis* is compatible with originalism. While a few scholars have argued that adherence to non-originalist

20. 562 U.S. 443 (2011).

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

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

precedent is never (or almost never) justified,²³ theirs is a minority view. Justice Alito has expressly rejected that minority argument (which he has described as having “elegant simplicity”), arguing — based on the Founders’ understanding of Article III’s grant of “the judicial Power” — that the Constitution “authorizes [judges] to continue to follow with appropriate modifications the preexisting doctrine of *stare decisis*.”²⁴

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

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

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

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

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

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

originalist disagreement, not a reason to consider Justice Alito a non-originalist.

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

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

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

29. 556 U.S. 332, 355 (2009) (Alito, J., dissenting).

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

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

concurrence arguing against such deference because he wanted “full briefing and argument” on the issue.³²

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

By contrast, Justice Thomas often expresses his willingness to overrule or reconsider precedents because they are inconsistent with the original meaning, even when no party has asked him to do so. In addition to the *Perez* and *Randall* examples, numerous others could be cited, such as his dissent in *Carpenter v. United States* (calling for overruling *Katz v. United States*, the principal Fourth Amendment precedent governing what constitutes a “search”),³⁶ his concurrence in *Michigan v. EPA* (calling for reconsidering *Chevron v. NRDC*, a major case about deference to administrative agency interpretations of statutes),³⁷ and his concurrence in *Elk Grove Unified School District v. Newdow* (calling for reconsidering whether the Establishment Clause applies against the states).³⁸

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

33. Wriston Lecture, *supra* note 3.

34. *Id.*

35. *Id.*

36. 138 S. Ct. 2206, 2235–36 (2018) (Thomas, J., dissenting).

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

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

Most recently, in *Dobbs v. Jackson Women's Health Organization*, Justice Thomas called for reconsidering major substantive due process cases like *Griswold v. Connecticut* (right to contraception), *Lawrence v. Texas* (right to engage in sodomy), and *Obergefell v. Hodges* (right to same-sex marriage), even though the parties had not asked the Court to do so and the Court had gone out of its way to avoid calling those cases into question.³⁹ This is not to say that Justice Thomas departs from the original understanding of the judicial role when he issues such opinions, but it is to say that his willingness to issue them reflects a rarely acknowledged disagreement between him and Justice Alito about the original understanding of the judicial role, another *intra-originalist* disagreement.

It is true that Justice Alito has, in a very small number of cases, been willing to join a majority opinion that overruled a precedent without a party having asked, but in at least some of those cases, the Court first called for supplemental briefing on whether to overrule the case.⁴⁰ Others presented unusual circumstances,⁴¹ such as the Court's recent decision in *Edwards v. Vannoy*, which overruled part of an important criminal procedure precedent without having been asked because the overruled portion was essentially a dead letter anyway.⁴²

When, however, a party expressly asks the Court to reconsider a constitutional precedent, Justices Thomas and Alito generally agree on whether to overrule the precedent.⁴³ When they disagree, the disagreement is usually explicable based on Justice Alito's greater deference to precedent,⁴⁴ disagreement about whether it is

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

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

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

42. 141 S. Ct. 1547, 1559–60 (2021).

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

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

necessary for the Court to overrule the precedent to decide the case,⁴⁵ or a difference of opinion about the original meaning of the Constitution.⁴⁶ To be sure, there may be cases that are not explicable in those terms, but those explanations capture a large portion of the relevant cases.

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

Finally, some commentators point to Justice Alito's past remarks at oral argument or in opinions that could be seen as dismissive of originalist arguments. To take one example, at oral argument in *Brown v. Entertainment Merchants Association*,⁴⁸ a case concerning the constitutionality of a California statute restricting the sale of violent

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

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

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

48. 564 U.S. 786 (2011).

video games to children, after Justice Scalia had asked a lengthy question about whether the original meaning of the First Amendment allowed for prohibitions on speech depicting violence, Justice Alito asked: “Well, I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?”⁴⁹

This (hilarious) interjection was certainly designed to push back against Justice Scalia’s originalist argument, but it was not a rejection of *originalism*. Justice Alito’s concurring opinion in *Entertainment Merchants* made clear that he agreed with Justice Scalia’s majority opinion that the constitutional principles involved were “unchanging.”⁵⁰ But because Justice Alito did not think Justice Scalia’s analogies to Founding-era depictions of violence in literature or art were comparable to video games in terms of their ability to influence human behavior, he did not think those analogies were dispositive of whether the First Amendment allowed the regulation of video games.⁵¹ To put it another way: whereas Justice Scalia framed the originalist inquiry at a high level of generality (whether depictions of violence are protected by the First Amendment), Justice Alito framed it in more specific terms (whether depictions of violence in a form unknown at the Founding and with uncertain effects on human behavior are protected by the First Amendment). That is a good-faith disagreement about originalist methodology, not a disagreement about originalism’s relevance.⁵²

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

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

51. *Id.* at 816–21.

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

II. JUSTICE ALITO AND THE FUTURE OF ORIGINALISM

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

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

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

53. 410 U.S. 113 (1973).

54. 494 U.S. 872 (1990).

55. 467 U.S. 837 (1984).

56. 539 U.S. 306 (2003).

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

A great example is *American Legion v. American Humanist Association*,⁵⁸ a case concerning the constitutionality of a large cross-shaped memorial on public land. Justice Alito's majority opinion was joined by the Chief Justice and Justices Breyer, Kavanaugh, and (for most of the opinion) Kagan. To retain the votes of Justices Breyer and Kagan, it had to frame its analysis in a way that only accorded "a strong presumption of constitutionality" to longstanding "religiously expressive monuments, symbols, and practices," rather than plainly stating that religious monuments like a cross simply do not violate the Establishment Clause.⁵⁹ Justice Alito's opinion also stopped short of overruling *Lemon v. Kurtzman*,⁶⁰ a non-originalist framework under which Establishment Clause cases are purportedly analyzed.

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

And, indeed, that is precisely what happened three years later. In *Kennedy v. Bremerton School District*, Justice Gorsuch's majority opinion principally relied on *American Legion* in overruling *Lemon*.⁶²

58. 139 S. Ct. 2067 (2019).

59. *Id.* at 2085.

60. 403 U.S. 602 (1971).

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

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

In fact, *Kennedy* suggested that *American Legion*, in combination with other decisions, had already overruled *Lemon*.⁶³ Thus, while Justice Alito's opinion in *American Legion* may not have been as pure or as satisfying as many originalists would have liked, it demonstrated a masterful ability to navigate the practical, doctrinal, and theoretical difficulties of moving the Court in an originalist direction in the face of internal disagreement among the justices—and to bring about exactly the result that originalists seek.

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

The second major challenge to originalism is internal to the theory itself. Since its emergence in the early 1970s, modern originalist theory has become increasingly complex. Some of those changes have been salutary,⁶⁴ but as Steven D. Smith has warned, as originalism has become more complex, scholars have introduced distinctions and concepts that “threaten to dissolve originalism as a distinctive position by collapsing it into its long-time nemesis, the

63. *Id.*

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

idea of the ‘living Constitution.’”⁶⁵ The paradigmatic example of this is Jack Balkin’s originalism. Balkin distinguishes between the semantic meaning of the Constitution and the so-called “original expected applications” of the Founders.⁶⁶ Semantic meaning refers to the kind of meaning found in dictionary definitions, while original expected applications refer to how the Founders would have expected the Constitution’s principles to apply to phenomena with which they were familiar. For example, we know that the Founders expected that the Establishment Clause would permit legislative assemblies to open their proceedings with a prayer, since that practice was very common at the Founding.⁶⁷ Balkin argues that the original meaning is based only on the semantic meaning, not original expected applications.

Balkin’s approach would have two important implications. First, by ignoring how the Founders themselves would have applied the principles they placed in the Constitution, it creates a gap between the constitutional text and the Founders who gave that text its authoritative status through their act of ratification. Balkin’s solution to this problem is to adopt a theory by which the Constitution’s legitimacy is based on its ability to reflect the views of those living *today*,⁶⁸ but that is precisely the concept of constitutional legitimacy that has always undergirded living constitutionalism. This is related to the second implication of the semantic/original expected applications distinction: by adopting such an abstract understanding of original meaning, Balkin’s theory allows him to simultaneously argue that *power-constraining* provisions like the Commerce Clause impose *few* constraints on federal power⁶⁹ but that *rights-protecting* provisions like the Equal

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

66. JACK M. BALKIN, *LIVING ORIGINALISM* 104–08 (2011).

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

68. BALKIN, *supra* note 66, at 59–99.

69. *Id.* at 138–82.

Protection Clause *broadly* protect rights that none of the Clause's ratifiers would have believed were found there, such as the right to abortion.⁷⁰ Thus, Balkin's originalism leads to theoretical and doctrinal results that have long been seen as hallmarks of living constitutionalism.

Justice Alito has shown a keen awareness of, and ability to respond to, this danger emanating from originalism's increasing theoretical complexity. The best example is his dissent in *Bostock v. Clayton County*, in which Justice Gorsuch's majority opinion held that Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation or gender identity because such discrimination constitutes "discriminat[ion] . . . because of . . . sex."⁷¹ Although *Bostock* was a statutory interpretation case, the theoretical and methodological debate between Justice Gorsuch's majority opinion and Justice Alito's dissent maps on to the same debate occurring within constitutional theory.⁷²

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

70. *Id.* at 214–18.

71. 140 S. Ct. 1731, 1754 (2020).

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

73. *Bostock*, 140 S. Ct. at 1739–41.

74. *Id.* at 1751.

75. *Id.* at 1750.

76. *Id.* at 1749–54.

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

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

* * *

Justice Alito's constitutional jurisprudence has long confounded commentators because it defies simple definition. He is an originalist, yet his view of the judicial role leads him to make non-originalist arguments in most cases. He pursues a principled jurisprudence, yet he is a skilled craftsman of compromise opinions. He is skeptical of academic abstractions, yet he is one of

77. *Id.* at 1755–56 (Alito, J., dissenting).

78. *Id.* at 1766.

79. *Id.* (emphasis in original).

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

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

the most sophisticated originalist theorists on the Court. These are not contradictions; they are internally consistent features of a jurisprudence whose subtlety has long been underappreciated by commentators. It is the jurisprudence of a mature originalism.

THE CONTEXTUAL TEXTUALISM OF JUSTICE ALITO

JOHN O. MCGINNIS*

INTRODUCTION

Justice Samuel Alito is one of the best craftsmen of statutory interpretation opinions on the Court. The Chief Justice certainly thinks so: the Chief has often assigned him the majority opinion in statutory cases when the Court is closely divided. His analyses of legislation are particularly comprehensive and clear. Like most judges, he has not offered a theoretical defense of a particular approach, content to let his opinions speak for themselves.

Nevertheless, Alito does have a consistent approach, which would best be described as “contextual textualism.” He is a textualist and frequently resorts to dictionaries to help determine the meaning of words.¹ He is also willing to enforce the plain meaning of a text as against justices who would like to create ambiguities from whole cloth.² Nevertheless, the most important

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1. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 460–61 (2007) (Alito, J., concurring) (using dictionary to show that a “component” of a physical device is most likely a physical part of that device).

2. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 333–34 (2007) (Alito, J., concurring) (the plain meaning of a law requiring pleading “with particularity” facts that give rise to a strong inference that the defendant acted with the required state of mind precludes inferences from facts that are not particular); *see also* *Fowler v. United States*, 563 U.S. 668, 688 (2011) (Alito, J., dissenting) (refusing to require that a statute,

characteristic of Alito's brand of textualism is his recognition that the text of a statute, like all language, cannot always be understood by combining the semantic content of individual words, but must be enriched by context. That context includes the overall context of the statute as well as the social context in which the words are written. But importantly, it also regularly includes the legal context. The most important context for a legal text is often the law itself because most statutes are written in light of the language of the law. As a result, the text is not created *ex nihilo* but against a rich background of legal tools of interpretation and thus must be interpreted to reflect that tradition.

Jurists must thus understand the legal gloss on the meaning of words, phrases, and provisions. These glosses include Court precedent that interpreted words in similar statutes. Moreover, interpretative rules, both linguistic and legal, can clarify text. They also provide part of the context of the statute.

Alito may seem to resemble Justice Antonin Scalia, to whom he was compared at the time of his appointment, to the point of being called "Scalito." Like Scalia, he is a textualist. And, like Scalia, he is open to using the context, particularly the legal context, including the context of legal interpretative rules, to ascertain meaning. He has even cited Scalia's book, *Reading Law*, with approval.³ But there are subtle differences between the two Justices. For instance, Alito

which penalized murders of informer added a requirement that the kill prevented "a reasonable likelihood" of information about a possible federal crime being communicated, when "reasonable likelihood" appeared nowhere in the statute); *Corley v. United States*, 556 U.S. 303, 325–26, 331 (2009) (Alito, J., dissenting) (enforcing plain meaning of provision that admitted "voluntarily given" testimony against majority who found it ambiguous); *Begay v. United States*, 553 U.S. 137, 158–59 (2008) (Alito, J., dissenting) (refusing to limit the plain meaning of the residual clause of the Armed Career Criminal Act); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 381 (2007) (Alito, J., dissenting) (refusing to read requirement of good faith into debtor's decisions to switch type of bankruptcy proceeding where no such requirement is in the statute).

3. See *Nielsen v. Preap*, 139 S. Ct. 954, 965, 969 (2019).

does not completely oppose the use of legislative history,⁴ although he gives it low priority and sometimes goes out of his way to dismiss its relevance.⁵ And he is more explicit than was Scalia that canons of interpretation cannot be applied by rote. Instead, context determines the appropriate weight to give them.⁶

Both his points are well taken. Assuming that, as appears to be the case, legislative history has traditionally been deployed as a legal resource to clarify ambiguity in text, it too is part of the legal context and a rule of legal interpretation. Scalia's attempt to banish legislative history is an effort at law reform rather than the proper aim of legal interpretation—to recover the meaning of the words at the time of enactment. Alito is also right that rules of interpretation are rules of thumb that provide evidence of meaning whose weight itself depends on the context. Even effective tools of legal contextualism are themselves creatures of context. Above, all, Alito

4. See, e.g., *Zedner v. United States*, 547 U.S. 489, 501, 510 (2006) (citing legislative history over Justice Scalia's objections).

5. *Samantar v. Yousuf*, 560 U.S. 305, 326 (2010) (Alito, J., concurring) (observing that the majority's "citations to legislative history are of little if any value."); see also *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (rejecting reference to legislative history that other courts had found persuasive); *Corley v. United States*, 556 U.S. 303, 329–30 (Alito, J., dissenting) (dismissing legislative history on the which the majority relied); see generally *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. 504 (2006) (statement of then-Judge Samuel Alito) ("I think [reference to legislative history] needs to be done with caution. Just because one member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation.").

6. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring); see also *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 589–90 (rejecting sovereign immunity canon because of compelling other contextual evidence). Alito makes the same points about rules of grammar. In *Flores-Figueroa v. United States*, 556 U.S. 646, 659 (2009) (Alito, J., concurring), he expresses concern about possible misinterpretation of the majority's statement that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." This may be a presumptive rule, but other contexts can overcome its presumptive force.

recognizes that what is often scarce in statutory interpretation is context.

Alito is thus an exemplar of a textualism that might be better seen as a statutory analogue to originalism because both methods of interpretation share positive and normative premises. Positively, like constitutional originalism, Alito's form of statutory interpretation considers the object of interpretation contextually, often requiring an understanding of the social context of the statute.⁷ Moreover, the statute and the Constitution share a salient similarity: they are both legal texts, requiring an understanding of a distinctively legal context, including the interpretive rules applicable to such texts. To be sure, it is possible that statutes and the Constitution, a kind of superstatute, may be subject to slightly different interpretative rules on account of their somewhat different contexts and traditions, but these differences are a matter of empirical investigation, like the rest of original meaning. Normatively, the moral and political justification for textualism is also similar to originalism. We believe that something like majority legislative rule is best for producing ordinary law, just as we think that supermajority rule—a consensus-making process—is needed to make a good constitution.⁸ Thus, in both cases, the meaning that attracted the support for passage, necessarily a full contextual meaning, should be the object of interpretation.

And there is one more parallel to constitutional originalism in Alito's kind of statutory interpretation. He has called himself a "practical originalist"⁹ by which I believe he means that interpretation should consider the practical working of law when context and other methods of disambiguation do not yield a clear

7. See *infra* note 14 and accompanying text.

8. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 12 (2012).

9. See Matthew Walther, *Sam Alito: A Civil Man*, AMERICAN SPECTATOR (Apr. 21, 2014, 12:00 AM), <https://spectator.org/sam-alito-a-civil-man> [<https://perma.cc/XD92-CVGH>] ("I think I would consider myself a practical originalist.").

answer. Analogously, he is a strong supporter of *Chevron* in the context of statutory interpretation, criticizing the Court for ignoring it,¹⁰ and is in fact arguably the Justice who joined positions giving *Chevron* deference to agencies more than any other Justice.¹¹ After all, judges do not always hold the best understanding of the law's practice. Per *Chevron*, agencies with their expertise can give a practical interpretation to a statute when the traditional tools of statutory interpretation cannot provide an answer.

Alito also believes that one should consider the practical implications of interpretations when ambiguity cannot be otherwise resolved. He has thus been a consistent and strong critic of the Court's categorical rule for interpreting what crimes warrant sentence enhancement under the Armed Career Criminal Act—a notoriously poorly-written statute, because the test is so difficult to apply that it will confuse lower courts. For instance, he notes the Court's metaphysical distinctions in interpreting that statute requires lower courts to “decide whether entering or remaining in a building is an “element” of committing a crime or merely a “means” of doing so,” sardonically wishing these courts “good luck” in doing so.¹² Whatever the correctness of the “practicality approach”, this is yet another parallel between Alito's brand of originalism and his brand of statutory interpretation.

Some have suggested Alito's pragmatism indicates his willingness to prioritize facts over theory, but his statutory interpretation approach shows this claim is an exaggeration.¹³ He is committed to following plain meaning and looking to context to resolve ambiguity. But he acknowledges that there may be

10. *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (saying “[b]ut unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.”).

11. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 840 (2010).

12. See *Mathis v. United States*, 579 U.S. 500, 539 (2016) (Alito, J., dissenting).

13. See Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 511 (2019).

irreducible ambiguities that call for an interpretation that takes account of the facts—what will best work in the real world.

I. A BRIEF THEORETICAL DEFENSE OF ALITO'S APPROACH

Because Alito, like most judges, does not mount a full defense of his approach to statutory interpretation, it is worth sketching out what such a defense would resemble. Briefly, legal contextual textualism is superior to what might be termed “four corners textualism” which looks more narrowly to the literal meaning of words, because language depends on context and because the context of a language in a legal enactment—at least the complex ones that now comprise the United States Code—is often presumptively legal.

Philosophers of language understand the meaning of words to depend not only on semantics and syntax but also on context which they describe as pragmatics.¹⁴ Pragmatics focuses on usages of language in contexts that depart from the literal meaning of the language. In many contexts, a person asserts something that differs from the literal meaning of their words. If I tell my daughter not to hit her sister, she would violate my injunction if she instead kicked or bit her, despite an acontextual argument (popular, as it happens, with young children) to the contrary.

Alito himself provides an excellent example and effectively similar defense of contextualism in his concurrence in *EEOC v.*

14. The leading theory of how context can contribute to meaning is that of Paul Grice. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 22–40 (1st ed. 1991). Geoffrey Miller was the first to explore the implications of Grice for legal interpretation. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182–84 (1990). Mike Rappaport and I have together developed these ideas more fully and applied them to constitutional interpretation. See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. MY. L. REV. 1321, 1347–53 (2018). This brief discussion of a view of statutory interpretation is an application of that joint work in constitutional theory to statutes and Professor Rappaport deserves equal credit or blame for an extension that we have discussed over the years.

Abercrombie & Fitch Stores.¹⁵ The question there was whether Title VII, which forbids an employer to discriminate in hiring because of an individual's religion, required the employer to know of her religion when it refused to hire her. In that case, Abercrombie and Fitch refused to hire a female applicant who wore a head scarf. Although the statute did not expressly require the company to know that the reason for wearing a headscarf was because of her religion, Alito concluded that knowledge was a requirement:

It is entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may not take an adverse action because of a practice that the employer knows to be religious. Consider the following sentences. The parole board granted the prisoner parole because of an exemplary record in prison. The court sanctioned the attorney because of a flagrant violation of Rule 11 of the Federal Rules of Civil Procedure. No one is likely to understand these sentences to mean that the parole board granted parole because of a record that, unbeknownst to the board, happened to be exemplary or that the court sanctioned the attorney because of a violation that, unbeknownst to the court, happened to be flagrant. Similarly, it is entirely reasonable to understand this statement—"The employer rejected the applicant because of a religious practice"—to mean that the employer rejected the applicant because of a practice that the employer knew to be religious.¹⁶

Alito then bolstered this argument using the legal context of the statute. Title VII forbids intentional discrimination. But without knowledge, a company could be held liable without fault—a legal concept alien to intentional culpability—which would thus be an anomalous reading of the statute.¹⁷

15. 575 U.S. 768 (2015) (Alito, J., concurring).

16. *Id.* at 778.

17. *Id.*

A modern statute of any complexity has a formal style and a legal context. The vocabulary and structure do not track that of ordinary conversation or indeed the prose of a newspaper or a novel, but have a distinctively legal feel. The legal language employed of course includes ordinary language, but does not stop there: it incorporates a background context made up of legal meanings and interpretive rules that resolve the ambiguities left in the ordinary language.

Thus, when people use the language of the law in statutes and indeed in constitutions, they are drawing on a rich corpus juris that has preceded the statute and of which the new statute becomes a part. Precedents attributing legal meaning to terms and legal interpretive rules are part of the context of that language. Thus, any theory that takes context into account should apply the legal interpretive rules and relevant linguistic precedents to utterances made in the language of the law. Such "precisified" meaning is the meaning that law prizes more than ever in the modern era because it allows for planning in a complex world.¹⁸

II. CONTEXTUAL TEXTUALISM IN ACTION

This section offers salient examples of Alito's contextual textualism. It discusses both obscure and important decisions, showing that Alito's approach is consistent whatever the stakes. Moreover, it is worth noting that these interpretations come on behalf of shifting majorities, showing that Alito applies his brand of textualism regardless of ideology.

The most important context for any statutory interpretation is the rest of the statute. Alito is a devotee of reading statutes holistically.

18. Of course, as Alito also recognizes, this does not necessarily result in all terms being given legal meanings. The language of law in which statutes are written incorporates much ordinary language and in some cases the law itself may prefer ordinary meanings. *See Mac's Shell Serv., Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 182–83 (2010) (reading "termination" in its ordinary meaning before concluding that its technical reading would be the same).

In *Ledbetter v. Goodyear Tire & Rubber*, the question was whether Ledbetter could sue based on the past actions that occurred before the charging period in which employees may bring complaints before the Equal Employment Opportunity Commission.¹⁹ Alito held for Goodyear. Much of his analysis centered on the structure of the act, noting that the reason for the unusual integrated, multistep procedure was Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation. He concluded that allowing plaintiffs to base complaints on acts beyond the charging period would undermine that structure.²⁰

Text in other statutes may be relevant for Alito as well, if not dispositive. Thus, when Congress refers to "person" in the Religious Restoration Act, Alito understands person to include corporations, because the Dictionary Act contains a cross-cutting definition of persons to include corporations.²¹ But even when a statute does not refer to directly to another law, that law when enacted previously may provide a guide to the subsequent act's interpretation. Thus, Alito interprets Title IX as not precluding section 1983 gender discrimination suits against universities, because it was modeled on Title VI, and Title VI had permitted

19. 550 U.S. 618 (2007).

20. *Id.* See also *Kellogg Brown & Root Services, Inc. v. United States*, 575 U.S. 650, 656–57 (2015) (reading offenses as limited to criminal wrongs in light of past structure of the Act in which it appeared); *Jones v. Harris Associates L.P.*, 559 U.S. 335, 345–46 (2010) (defining the nature of the fiduciary standard in the Investment Company Act in light of the role the shareholder action for breach of that duty plays in the rest of the Act); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271, 281–82 (2009) (Alito, J., concurring) (interpreting the opposition required to an illegal discrimination practice to trigger protection from retaliation to be active rather than silent opposition, because the other conduct triggering such protection under the statute is active and purposive); *United States v. Santos*, 553 U.S. 507, 532–535 (2008) (Alito, J., dissenting) (disambiguating "proceeds" as "total amount [of money] brought in" in a money laundering statute by referring to other statutes, international law, and model money laundering statute).

21. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014).

discrimination suits under section 1983.²² Moreover, the context can include the anomalous effects that choosing one of two interpretations would have on other ambiguous statutes.²³

A striking example of Alito's reading statutory language against the general corpus juris that extends beyond a particular statute is *Nielsen v. Preap*, which concerned a category of deportable aliens who may not be released on bail.²⁴ The alien argued that although the statute directs the Secretary to arrest certain classes of alien "when the alien is released from jail," the statute nevertheless did not apply to him because he was not arrested immediately upon release. Alito disagreed that this was the best reading of the statute even based on the rules of grammar. But he also argued that such a reading would conflict with the established legal rule that "an official's crucial duties are better carried out late than never."²⁵ That principle was a "legal backdrop" when Congress enacted the statute, and should be controlling here.²⁶ *Preap* thus exemplifies Alito's consistent view is that statutes should be read as part of complex woof and web of law.²⁷

Another example comes in *Global-Tech Appliances, Inc. v. SEB S.A.*²⁸ There, the question was the degree of knowledge required to hold a defendant liable for inducing infringement. The statutory

22. See *Fitzgerald v. Barnstable, School Committee*, 555 U.S. 246, 258–259 (2009).

23. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2124–25 (2018) (Alito, J., dissenting) (showing that narrow interpretation of meaning of the word "notice" in one immigration provision would cause confusion in the enforcement of the rest of immigration law).

24. *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

25. *Id.* at 967.

26. *Id.*

27. *Id.* Other cases in which Alito relies on legal meanings to resolve ambiguities include *Kellogg Brown & Root Services, Inc. v. United States*, 575 U.S. 650, 658 (noting that Black's Law Dictionary defines offenses to be criminal, not civil wrongs). See *F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012) (interpreting "actual damages" as a "legal term of art"); see also *Nken v. Holder*, 556 U.S. 418, 441–42 (2009) (Alito, J., dissenting) (relying on Black's Law Dictionary, statutes, and legal decisions to conclude that a stay was a form of injunction.)

28. 563 U.S. 754 (2011).

language simply stated that “whoever induces infringement of a patent shall be liable as an infringer.”²⁹ Alito noted that while the word “induce” suggested that some degree of intent was necessary, it remains ambiguous whether the requirement of intent also required knowledge that the product has a patent capable of infringement. After careful parsing of prior case law on similar statutes, Alito concluded that some degree of knowledge was required.

But even that initial resort to the corpus juris did not resolve the case, because the question then turned on the requisite degree of knowledge. Here, Alito concluded that the level of knowledge required could be inferred from the long-standing legal doctrine of willful blindness. Courts and commentators had long asserted “that defendants cannot escape the reach of . . . statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by circumstances.”³⁰ Resort to the background principles of law makes otherwise vague or ambiguous statutory language more precise.³¹

Drafting conventions recommended to legislative assistants in Congress are also relevant parts of the corpus juris. Since those conventions suggest that a statute should be written generally in the present tense and have effect whenever it was read, Alito argued that the majority was mistaken to take the present tense of “travel” to mean that the only interstate traveling after the enactment of Sex Offender Registration and Notification Act triggered the responsibility to register.³²

Another example of reading a term within the corpus juris comes in *Woodford v. Ngo*.³³ There, the question concerned the requirement

29. *Id.* at 760.

30. *Id.* at 766.

31. *Id.*; see also *James v. United States*, 550 U.S. 192, 210 (2007) (tentatively suggesting that extortion in the Armed Career Criminal Act should be given its common law definition).

32. See *Carr v. United States*, 560 U.S. 438, 462 (2010) (Alito, J., dissenting).

33. 548 U.S. 81 (2006).

in the Prison Litigation Act that prisoners exhaust their administrative remedies before going to Court. Alito looked to administrative law's use of the term "exhaustion" and thus concluded over the dissent of three other Justices that failures to meet administratively set deadlines should be understood as a failure to exhaust remedies.³⁴

One result of his general efforts to read the law against the background of the corpus juris is to preserve the status quo unless Congress has clearly indicated a change. For instance, in *Hamilton v. Lanning*, Alito, over dissent by Justice Scalia, declined to adopt a possible, but not compelled, mechanical reading of "projecting" future earnings because it would have greatly changed bankruptcy law, putting debtors in a worse position than before: Prior bankruptcy practice is telling because we "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."³⁵ The corpus juris reading of legislation is also generally a traditional reading.

Despite his recognition that canons of interpretation are not necessarily skeleton keys for unlocking legal meaning, Alito often relies on them to provide evidence for statutory meaning. In *Husted v. A. Philip Randolph Institute*, he read a provision about removing voters from the rolls more narrowly than the plaintiffs would like in part to prevent the provision from violating the canon that provisions should not be read to be redundant of other parts of the statute.³⁶ He also accepted the canon against surplusage urged by

34. See also *Chambers v. United States*, 555 U.S. 122, 131–345 (2009) (Alito, J., concurring) (suggesting that the Armed Career Criminal Act should have been interpreted against the background of a previous case in which enhanced sentences were determined on the basis of the individual facts of the crime rather than the crime's categorical nature).

35. 130 S. Ct. 2464, 2467 (2010) (quoting *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 454 (2007)).

36. 138 S. Ct. 1833, 1844 (2018).

the dissent to argue for its reading of the statute but shows as a matter of fact that the provision would not be superfluous.³⁷

Alito has also deployed legal canons as well as linguistic canons to resolve ambiguities. In *Cooper*, over the dissent of three Justices, he applied the canon that waivers of sovereign immunity must be unequivocally expressed to be effective and thus interpreted the term “actual damages” narrowly to exclude mental and emotional distress.³⁸ While a broader reading was not “inconceivable” the traditional canon was dispositive.³⁹ These legal canons also include clear statement rules that the Court has applied to protect constitutional values, like the clear statement rule on conditions that limit state spending of federal funds.⁴⁰

As a textualist, Alito does not believe in divining a general purpose of a statute untethered to specific text. In *Ledbetter*, in dissent, Justice Ruth Bader Ginsburg argued that the Court has not been faithful to Title VII’s core purpose, because it did not permit *Ledbetter* to use for past acts outside that charging period that may have a current effect. But Alito’s response is the classic textualist counter: statutes are compromises. Thus, even if purpose can furnish part of the context that disambiguates a text, it is wrong to infer that a general purpose can override something more specific

37. *Id.* at 1845.

38. *F.A.A. v. Cooper*, 566 U.S. 284, 299 (2012).

39. *See also* *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (applying “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor”); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (emphasizing repeals by implication are disfavored); *Johnson v. United States*, 576 U.S. 591, 631–32 (2015) (Alito, J., dissenting) (urging an application of constitutional avoidance to an ambiguous statute); *United States v. Stevens*, 559 U.S. 460 (Alito, J., dissenting) (employing same canon to avoid an overbroad reading of statute that would render it unconstitutional).

40. *See, e.g., Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291 (2006).

like a charging period since that was part of the legislative compromise.⁴¹

It would be unfair to say that Alito reads statutes in contested cases simply to reach conservative results. For instance, in *Gomez-Perez*, he interprets the Age Discrimination Act to encompass a retaliation cause of action, writing for six-person majority, with the Chief Justice and Justices Antonin Scalia and Clarence Thomas in dissent.⁴²

III. *BOSTOCK*

Bostock is the most well-known statutory interpretation case decided during Alito's time on the Court. His approach was consistent with that of his opinions in cases, like many discussed above, receiving no popular attention. He considered the context of the words, including their legal context, to conclude that the 1964 act did not cover discrimination based on sexual orientation.

Indeed, his dissent contains the best theoretical description of his contextual approach in any of his opinions:

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these

41. *Ledbetter*, 550 U.S. at 629–30. He is also not moved by appeals to purpose on other dissents from these statutory interpretations. See, e.g., *Gomez-Perez v. Potter*, 553 U.S. 474, 494–95 (2008) (Roberts, C.J., dissenting) (appealing to different purposes of antidiscrimination and retaliation claims).

42. *Gomez-Perez*, 553 U.S. at 494–95.

communications must therefore be interpreted as they were understood by that community at that time.⁴³

And then Alito showed persuasively that in historical context, it is impossible to interpret the key language of the Civil Rights Act as encompassing discrimination based on sexual orientation. Discrimination “because of sex” was a well-known concept meaning discrimination because of someone’s biological sex. It was also clear from the social context that it did not include discrimination because of sexual orientation even if that was a possible literal meaning of the words—a point on which he disagreed as well.⁴⁴

In part, Alito argued, based on what he called the “painful” facts of widespread and accepted discrimination against homosexuals, that such discrimination was not against social conventions.⁴⁵ But he also, as in other opinions, is sensitive to the *legal* context. He notes that in 1964, it was permissible for federal agencies to deny employment based on sexual orientation. Many state laws barred their employment in a variety of situations. No one argued that the 1964 act changed their application. And at the time, homosexuals were also barred from serving in the military and from immigrating to the United States. Thus, if there was some lack of clarity in the ordinary understanding of discrimination on the basis of sex, the

43. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting).

44. It might be objected that Alito is referencing the expected applications of the language of the Title VII rather than their objective meaning. But some of the best evidence of that meaning is often the expected applications, especially when widely held. Words, particularly those with moral content, are slippery things and dictionary definitions do not full capture their meaning in context. Recovering that context is important and the recovery of context can be greatly enhanced by considering how the words would have been applied in the sociopolitical usage of the day. See, e.g., John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007). Their usage in other statutes is particularly relevant. Once again it is context that is scarce in statutory interpretation.

45. *Bostock*, 140 S. Ct. at 1769.

legal context makes clear that it did not include discrimination on the basis of sexual orientation.

One of Gorsuch's mistakes in the majority opinion was looking at the provision as a kind of computer code, divorced from its social and legal context. Judge Don Willett of the Fifth Circuit summarized (perhaps approvingly) Gorsuch's mode of analysis with just this analogy: "In the *Bostock* majority's view, language codified by lawmakers is like language coded by programmers."⁴⁶

Alito recognizes that law is emphatically not a computer code, because it is not self-contained. It can be understood only through context. The non-contextual meaning often does fully not capture what the legislature "asserts" in a statute.⁴⁷ This fundamental proposition for legal interpretation is not surprising, because linguistic communication depends on the presuppositions and contexts that a speaker or groups of speakers share with their listeners. In this sense, communication in natural language is the opposite of a computer code where *nothing* depends on looking at the context outside the code. Interpreters need to recapture that context. Only then can one understand what the legislature asserted. In hard statutory cases, what separates good from bad opinions is the correct appreciation of context.

Alito's excellence as a jurist is that in hard cases, whether the stakes are large or small, he uses sound contextual judgment to recover the original meaning of a statute. His is the disciplined, but still recognizably humanistic, enterprise of judgment, rather than a calculus that can yet be outsourced to machines.

46. *Thomas v. Reeves*, 961 F.3d 800, 825 (5th Cir. 2020) (Willett, J., concurring).

47. See Scott Soames, *Toward a Legal Theory of Interpretation*, 6 NYU J.L. & LIBERTY 231, 239 (2011).

JUDGE ALITO'S FIRST AMENDMENT VIGILANCE ON THE THIRD CIRCUIT

HON. STEPHANOS BIBAS*

Seventeen years ago, Justice Alito ascended to the Supreme Court. His tenure there has just surpassed the fifteen-plus years that he served on the court where I sit, the U.S. Court of Appeals for the Third Circuit. When I interviewed them for this chapter, my colleagues who served with him all remembered him fondly as “well respected and well liked.” He got along with everyone, embodying the Third Circuit’s strong tradition of collegiality. And he “inspire[d] intense loyalty” in his friends and law clerks.

Judge Alito, they recall, was “very smart.” He was always “extraordinarily prepared” for oral argument, where his questions “zeroed in on the key issue.” He “wrote beautifully,” and his opinions got to the point. He was also “a lawyer’s lawyer,” following the law wherever it took him, even when he found the result distasteful. Despite his many accomplishments, he was humble and quiet. Yet he had a hilarious, “very dry sense of humor,” befitting a judge born on April Fools’ Day.

Judge Alito was not only a terrific guy, but also a brilliant jurist. He made valuable contributions to the Third Circuit’s case law, staking out robust defenses of religious liberty, free speech, and the role of religion in the public square. These precedents remain landmarks and presage many positions he has continued to champion at the Supreme Court. Collectively, they reflect now-

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Justice Alito's principled, consistent defense of the First Amendment.

I. FREE EXERCISE

Three decades ago, the Supreme Court greatly narrowed its reading of the Free Exercise Clause. Under *Smith*, "neutral law[s] of general applicability" do not implicate free exercise, even if they burden religious activity.¹ On the other hand, laws that target religious practice still trigger strict scrutiny.²

Smith and its progeny, though, did not fully define what made a law neutral or generally applicable. It was hard to tell what was constitutional: many laws do not openly target religious activity, yet they exempt some secular actions without likewise exempting their religious counterparts. Religious exemptions might be required sometimes, the Court suggested, but it did not explain when.³

In his time on the Third Circuit, Judge Alito did his best to fill this void. Twice, he carefully explained why policies could not exempt secular activities without doing the same for comparable religious ones. In so doing, he protected a diverse array of religious practices. His decisions two decades ago have foretold the high Court's direction since then.

A. *Clean-shaven cops and Muslim beards*

Police departments make their officers wear uniforms to create a disciplined image, make officers identifiable, and forge esprit de corps. For the same reasons, Newark's police department ordered its officers to shave off their beards. The Department granted

1. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

2. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

3. *Id.* at 537–38; James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 *ANIMAL L.* 295, 299 (2013).

exemptions from the policy for undercover officers and medical reasons, but not religious ones.⁴

Two Sunni Muslim officers objected. They believed that shaving off or refusing to grow a beard was a serious sin, equivalent to eating pork. As the Department prepared to discipline them, they sued to enjoin the policy. The Department responded that disability law required a medical exemption, but the First Amendment did not require a religious one.

Judge Alito held the policy unconstitutional. He rejected the disability-law defense, noting that civil-rights law equally requires religious accommodations. In any event, the First Amendment bars treating religious claims worse than medical ones. The government seemed to have decided that “secular motivations are more important than religious motivations.”⁵ And that apparent intent to discriminate triggered heightened scrutiny.

The policy could not survive that scrutiny. The relevant question, he reasoned, was whether religious exemptions would undermine the no-beard policy more than medical exemptions would.⁶ Here, it wouldn’t. The Department justified its policy as needed to preserve uniformity and morale. But religious exemptions wouldn’t affect those goals any more than medical exemptions would.

Thus, *Fraternal Order of Police* established that granting nonreligious exemptions, but denying individual religious exemptions, could show discriminatory intent.⁷ And it did so while protecting a minority religion.

B. Wildlife permits, zoos, Indian tribes, and bear rituals

Five years later, Judge Alito expanded *Fraternal Order of Police*’s rule from individual to categorical exemptions. This one involved

4. *Fraternal Ord. of Police Newark Lodge v. City of Newark*, 170 F.3d 359, 360, 365–66 (3d Cir. 1999).

5. *Id.* at 365.

6. *Id.* at 366–67; see also Oleske, *supra* note 4, at 309.

7. See Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 873–74 (2001).

Dennis Blackhawk, a holy man of the Lakota Indian tribe. Blackhawk owned two black bears that he used in religious ceremonies. Pennsylvania law required anyone who owned wildlife to get a permit and pay a fee. But it allowed waiver of these requirements for zoos and circuses, as well as for “hardship or extraordinary circumstance,” so long as the waiver was “consistent with sound game or wildlife management activities.”⁸

Blackhawk sought a religious exemption from the fee. But Pennsylvania denied it, regardless of hardship, because it thought that keeping wild animals captive conflicted with sound wildlife management.

Judge Alito rejected Pennsylvania’s justification. The Commonwealth gave zoos and circuses broad, categorical exemptions. So its opposition to keeping wild animals was not “firm or uniform.”⁹

Next, the court extended *Fraternal Order of Police* to categorical exemptions. That case, Judge Alito noted, had held that “individualized, discretionary exemptions” undercut a law’s general applicability.¹⁰ But the same is true of laws that broadly exempt secular actions that undermine the laws’ purposes without doing the same for comparable religious actions. By extending the doctrine to broad exemptions, Judge Alito deemphasized the role of suspected discriminatory intent. All that mattered was that the law was substantially underinclusive in pursuing its stated goals. Thus, Judge Alito applied strict scrutiny and invalidated the unequal exemption scheme.

The principles that Judge Alito announced in these two cases echo in his work on the Supreme Court. Two terms ago, Justice Alito criticized state COVID policies that restricted worship more than some secular activities. In one case, he reprimanded Nevada for capping worship services at fifty people while letting casinos

8. 34 PA. CONS. STAT. §§ 2901(d), 2965.

9. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 210 (3d Cir. 2004).

10. *Id.* at 209.

operate at half capacity.¹¹ In another, he would have made California prove that “nothing short of” its restrictions on churches would “reduce the community spread of COVID-19” as much as the laxer restrictions on “essential” activities.¹² In short, states may not treat secular activities better than religious ones without compelling reasons. And in *Fulton v. City of Philadelphia*, he drew on *Fraternal Order of Police* to advocate overruling *Smith*, in part because courts have struggled to discern whether laws target religion and whether exemptions are uneven.¹³

Critics knock Justice Alito as narrowly protecting conservative Christians.¹⁴ But as *Fraternal Order of Police* and *Blackhawk* illustrate, his free-exercise commitment protects people of all faiths, just as the Constitution demands.

II. ESTABLISHMENT

Confusion about the First Amendment and religion extends to the Establishment Clause too. Broad religious accommodation often gets criticized as violating the Establishment Clause.¹⁵ And courts remain unclear about how that provision interacts with the Free Exercise Clause.

Half a century ago, in *Lemon v. Kurtzman*, the Supreme Court read the Establishment Clause as requiring a law to satisfy a three-pronged test.¹⁶ First, it “must have a secular legislative purpose.”¹⁷ Second, its main effect must be neither to promote nor to retard

11. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of injunction).

12. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021).

13. 141 S. Ct. 1868, 1919–21 (2021) (Alito, J., concurring in the judgment) (citing *Fraternal Order of Police*).

14. See, e.g., Ronald Brownstein, *The Supreme Court Is Colliding With a Less-Religious America*, THE ATLANTIC, Dec. 3, 2020.

15. See, e.g., Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 787–88 & n.41 (2007).

16. 403 U.S. 602 (1971).

17. *Id.* at 612.

religion.¹⁸ And third, it must “not foster an excessive government entanglement with religion.”¹⁹ But the Court often used other standards, leaving the whole field muddled.²⁰ Only recently has the Court at last buried the zombified test.²¹

On the Supreme Court, Justice Alito criticized the *Lemon* test as obsolete.²² At worst, he said, it “puzzled” and “terrified” government officials into making the public square “a religion-free zone.”²³ But, as the Court now agrees, the Constitution does not require the government to erase religion from public life.²⁴

Justice Alito’s justified skepticism began with his work on the Third Circuit. Twice, he carefully drew the Establishment Clause’s lines to leave people free to express their beliefs in the public square.

A. *Crèche, menorah, and Frosty the Snowman*

The Supreme Court’s fact-intensive precedents on holiday displays have long puzzled judges and local officials in places like Jersey City. For years, Jersey City’s holiday display was comprised of only a menorah and a Christmas tree.²⁵ After a trial court enjoined that, the City added a crèche, sled, Santa Claus, Frosty the Snowman, and Kwanzaa symbols.²⁶

In reviewing the revised display, the Third Circuit panel struggled to make sense of the Supreme Court’s holiday-display cases. In *Lynch v. Donnelly*, a majority of the Court had upheld a

18. *See id.*

19. *Id.* at 613 (internal quotation marks omitted).

20. *See generally* Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. UNIV. L. REV. 660 (2020).

21. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (“abandon[ing]” *Lemon* for an “analysis focused on original meaning and history”).

22. *Am. Legion v. Am. Humanist Soc’y*, 139 S. Ct. 2067, 2080–81 (2019) (Alito, J., plurality opinion in relevant part).

23. *Town of Greece v. Galloway*, 572 U.S. 565, 597 (2014) (Alito, J., concurring).

24. *Kennedy*, 142 S. Ct. at 2431.

25. *ACLU of N.J. v. Schundler*, 168 F.3d 92, 94–95 (3d Cir. 1999) (Alito, J.) (describing the town’s several-decades-old Christmas tree and menorah display).

26. *Id.* at 95.

holiday display including a crèche under the *Lemon* test.²⁷ But Justice O'Connor, the deciding vote, had suggested that the right approach was to ask whether the display appeared to endorse religion.²⁸ Five years later, the full Court adopted her endorsement test in *County of Allegheny v. ACLU*, striking down a crèche-focused display but upholding one with a menorah and Christmas tree.²⁹

In the Jersey City case, Judge Alito spent pages summarizing both cases and comparing their facts.³⁰ Ultimately, he thought the modified display more closely resembled those upheld by the Court. But his reasoning drew a strident dissent, which read *Lynch* and *Allegheny* differently.³¹

Frustrated with parsing the precedents' factual minutiae, the dissent begged the Supreme Court to clarify its standard.³² In response, Judge Alito's opinion advanced a prescient suggestion: to decide how reasonable observers would view a practice, courts should consider the practice's "history and ubiquity."³³

Now on the Supreme Court, Justice Alito has continued this focus on history. In several cases, he has set aside the *Lemon* test. Instead, in upholding legislative prayer, he has focused on the history of the practice.³⁴ He has done likewise with monuments.³⁵ And the Court has since joined him, replacing *Lemon* with an "analysis focused on original meaning and history."³⁶ These opinions have given lower-court judges clearer guidance than he had while serving on the Third Circuit.

27. 465 U.S. 668 (1984).

28. *Id.* at 690 (O'Connor, J., concurring).

29. 492 U.S. 573, 592–94, 602 (1989).

30. *Schundler*, 168 F.3d at 107 (3d Cir. 1999) (Alito, J.).

31. *Id.* at 109–13 (Nygaard, J., dissenting).

32. *Id.* at 113 (Nygaard, J., dissenting) ("The inconsistent results in this Court can be directly attributed to the insufficient and inconsistent guidance given to the inferior federal courts[.]").

33. *Id.* at 106–07 (Alito, J.) (internal quotation marks omitted).

34. *Town of Greece v. Galloway*, 572 U.S. 565, 602–03 (2014) (Alito, J., concurring).

35. *Am. Legion*, 139 S. Ct. at 2087–89 (Alito, J., plurality opinion in relevant part).

36. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (citing *Town of Greece* and *American Legion*).

B. Boy Scouts as well as Bible games

Judge Alito's *Lemon* skepticism extended equally to after-school clubs, like the one in Stafford.³⁷ The Stafford School District sent home literature about lots of nonprofits, like the Parent-Teacher Association, Boy Scouts, Girl Scouts, Four-H Club, Lions Club, and Elks.³⁸ But when a Christian group wanted to publicize its Good News Club, offering after-school Bible education and games, the school said no.³⁹ It feared that distributing their flyers would violate the Establishment Clause or at least "create divisiveness."⁴⁰

Judge Alito rejected the Establishment Clause defense under any of three possible tests. First, the *Lemon* test was satisfied.⁴¹ Giving religious groups equal access to public fora advances the secular purpose of informing families of the diverse community groups available; helps religious groups only incidentally, no more than secular ones; and does not entangle states with religion.⁴²

Second, giving religious groups equal access would not reasonably be perceived as endorsing religion.⁴³ As the Supreme Court has repeatedly held, letting religious groups use school facilities to host a club or show a film does not, in context, endorse religion.⁴⁴ So too here. A "reasonable observer who is aware of the history and context of the community and forum" would know that Stafford was not endorsing the Club.⁴⁵

37. *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004).

38. *See id.* at 521.

39. *Id.* at 523.

40. *Id.* at 523 (3d Cir. 2004).

41. *Id.* at 534–35.

42. *Id.*

43. *Id.* at 530–34.

44. *Id.* at 530–31 (citing *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 252 (1990); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–97 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–20 (2001)).

45. *Id.* at 531–32 (internal quotation marks omitted); *accord* *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 212 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

Finally, Judge Alito reasoned, sending home the flyers would not coerce parents or their students to take part in religion.⁴⁶ So the Club's activities passed all three tests. The Club thus deserved equal access to the school.

His evenhandedness toward religion contrasts with that of another circuit. A panel of the Second Circuit upheld a school policy that let civic groups, but not church services, meet in its buildings after hours.⁴⁷ It reasoned that keeping religious groups out was a reasonable way to avoid the risk of violating the Establishment Clause.⁴⁸ That overreading of the Establishment Clause, to allow if not require discrimination against religion, is precisely what then-Judge Alito consistently rejected. Indeed, the Supreme Court has continued the same evenhanded approach in recent cases like *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, *Carson v. Makin*, and *Kennedy v. Bremerton School District*, supported by Justice Alito.⁴⁹ His thoughtful jurisprudence has carried the day.

III. FREE SPEECH

Schools also loom large in free-speech disputes. And in the same vein, Judge Alito consistently opposed efforts to discriminate against religious, controversial, or unpopular speech.

Even in school, the First Amendment guards against viewpoint discrimination. If school officials let a range of speakers express their views, they may not shut down some viewpoints just to avoid uncomfortable disagreement. Students do not lose all freedom of speech "at the schoolhouse gate."⁵⁰ As the Court held in *Tinker*, school officials must show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany

46. *Child Evangelism*, 386 F.3d at 535 (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

47. *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30 (2d Cir. 2011).

48. *Id.* at 46 (2d Cir. 2011).

49. 137 S. Ct. 2012 (2017); 140 S. Ct. 2246 (2020); 142 S. Ct. 1987 (2022); 142 S. Ct. 2407 (2022).

50. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)

an unpopular viewpoint.”⁵¹ To justify restricting speech, they must show that the suppressed speech would “materially and substantially disrupt the work and discipline of the school.”⁵²

Judge Alito zealously guarded speech from schools’ efforts to censor religious or unpopular content. In *Child Evangelism*, he rejected the school district’s argument that Good News’s flyers would amount to the school’s own speech. And the school district could not ban the Good News Club just because its speech was controversial. “To exclude a group simply because it is controversial or divisive is viewpoint discrimination,” Judge Alito held, relying on *Tinker*.⁵³ Religious speech is fully protected, he insisted, even if it might discomfit some hearers and even if its traditional views might clash with the school’s notion of “diversity and tolerance.”⁵⁴ In the process, he deftly punctured the school’s Orwellian use of “tolerance” to justify its intolerance of disfavored speech.

Two other times, Judge Alito stood up for students’ own speech. In each, he protected religious students’ right to speak their minds free of school officials’ censorship. Though *Tinker* lets school officials preserve a learning environment, he stressed, it does not let them scrub religious viewpoints for fear of giving offense.

A. *A kindergartner giving thanks for Jesus*

The first case involved a class assignment. Zachary Hood’s kindergarten teacher asked him to make a Thanksgiving poster showing what he was thankful for.⁵⁵ He made a poster of Jesus.⁵⁶ For a couple of days, his poster hung in the hallway alongside those of his classmates.⁵⁷ But then school officials took it down, allegedly

51. *Id.* at 509.

52. *Id.* at 513.

53. *Child Evangelism*, 386 F.3d at 527.

54. *Id.* at 530 (quoting the school lawyer’s defense of its actions).

55. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000) (en banc).

56. *Id.*

57. *Id.*

because its theme was religious.⁵⁸ Eventually, Zachary's teacher put it back up, but in a less prominent spot.⁵⁹ Zachary and his mother sued.

A panel of the Third Circuit upheld the school's actions as "reasonably related to legitimate pedagogical concerns."⁶⁰ It thought the school could restrict religious views in the classroom to avoid any misimpression that the school was promoting religious views.⁶¹ The full court then reheard the case en banc yet dodged the First Amendment question. But Judge Alito dissented.

In dissent, he rejected the panel's suggestion that schools could discriminate against religious viewpoints. Instead, he insisted that as long as it falls within the assignment or discussion's scope, "public school students have the right to express religious views in class discussion or in assigned work."⁶² Under *Tinker*, schools may still restrict disruptive speech. But discomfort or resentment of religion is not enough. "[V]iewpoint discrimination strikes at the heart of the freedom of expression."⁶³ And discriminating against religious speech is discriminating against religious viewpoints. "Zachary was entitled to give what *he* thought was the best answer" to the Thanksgiving assignment.⁶⁴ "He was entitled to be free from pressure to give an answer thought by [his] educators to be suitabl[y]" secular.⁶⁵

On the Supreme Court, Justice Alito still takes care to distinguish schools' own speech from that of their students. He joined an opinion letting schools censor speech at a school activity that advocated drug use, but wrote separately to underscore that schools may not invoke their "educational mission" to justify

58. *Id.*

59. *Id.*

60. C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 174 (3d Cir. 1999).

61. *Id.* at 175.

62. C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

63. *Id.* at 213.

64. *Id.*

65. *Id.*

censoring speech opposed to their own “political and social views.”⁶⁶ And he recently condemned a school’s effort to punish a student for venting anger at her cheerleading coach’s decisions. Schools, he wrote, cannot restrict their students’ off-campus expressions about “politics, religion, and social relations.”⁶⁷ Speech on such matters lies at the heart of the First Amendment’s protection,” so it “cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting.”⁶⁸

B. Offensive comments and robust debate

Judge Alito’s other school-speech case involved a broad ban on harassing or offensive remarks, including “negative name calling” based on sexual orientation.⁶⁹ The Saxe children were religiously opposed to homosexuality and believed they should voice their opposition, but feared punishment under the policy.⁷⁰ So they sued to enjoin it.

Judge Alito first rejected the school’s argument that the First Amendment does not protect harassing or offensive language. True, he noted, harassing *conduct* is not speech. And a pattern of “severe, pervasive, and objectively offensive” harassment is tortious if it “effectively denie[s] [students] equal” educations.⁷¹ But much speech that is just “deeply offensive” does not rise to that level.⁷² And “anti-discrimination laws are [not] categorically immune from First Amendment challenge.”⁷³

In any event, the school’s policy reached much further than anti-discrimination law does, to include disparaging another person’s values. But the First Amendment protects arguments over values. Quoting the flag-burning case, he explained that “a principal

66. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

67. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2055, (2021) (Alito, J., concurring).

68. *Id.* at 2055, 2058 (2021) (Alito, J., concurring).

69. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 203 (3d Cir. 2001).

70. *Id.*

71. *Id.* at 205–06 (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)).

72. *Id.* at 206.

73. *Id.* at 209–10.

function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose [even] when it ... stirs people to anger.”⁷⁴

Next, Judge Alito followed *Tinker* in limiting school-speech regulations to disruptive speech. As he recognized, some student speech disrupts education.⁷⁵ But the school’s policy reached much further than that to forbid giving offense based on personal characteristics. In the schoolhouse, as in society, the government may not ban speech just because someone takes offense to it.⁷⁶

Judge Alito’s holding put him at odds with other jurists. Five years later, the Ninth Circuit suggested that anti-gay speech could be “verbal assaults” unprotected by the First Amendment.⁷⁷ In recent years, other courts have confronted the clash between free speech and gay rights.⁷⁸

Today, Justice Alito continues to contribute to this debate on the Supreme Court. Dissenting in *Obergefell v. Hodges*, he worried that opponents of same-sex marriage who voice their beliefs will “risk being labeled as bigots and treated as such by governments, employers, and schools.”⁷⁹ A few years later, he joined in overturning Colorado’s fine on a baker who refused to bake a cake for a same-sex wedding.⁸⁰ Especially in cases like these, he argues,

74. *Id.* at 210 (quoting *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989)) (internal quotation marks omitted).

75. *Id.* at 211; see also Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. UNIV. L. REV. 1501, 1521–22 (2008).

76. *Saxe*, 240 F.3d at 215.

77. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 n.28 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007). See generally Kristi L. Bowman, *Public School Students’ Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 205–07 (2007) (contrasting the two cases).

78. Compare, e.g., 303 *Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert granted* (U.S. Feb. 22, 2022) (No. 21-476), and *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), with *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

79. 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

80. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018).

we must keep free speech “from becoming a second-tier constitutional right.”⁸¹

Justice Alito’s commitment to the First Amendment remains critical as the Court continues to work through the clash between free speech and antidiscrimination laws. Based on his record, Justice Alito will keep vigilantly protecting free speech against incursions by those who take offense. Yet as he recognizes, “there is only so much that the judiciary can do” here.⁸² He understands that, as Learned Hand put it: “Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can do much to help it.”⁸³

IV. CONCLUSION

Judge Alito built a legacy of strong First Amendment precedent. On the Third Circuit, as at the Supreme Court, he championed robust free speech, religious freedom, and religious participation in the public square. He stood up not only for his own Christian faith, but also for small, powerless ones and unpopular points of view. As he has explained, “Sometimes you have to do things that are unpopular. Unpopular with your colleagues. Unpopular with the

81. Samuel A. Alito, Assoc. Just. Sup. Ct., *Keynote Address at the Federalist Society Lawyers Convention* (Nov. 12, 2020), <https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society> [<https://perma.cc/G9UN-KJRJ>].

82. *Id.*

83. *Id.* (quoting Learned Hand, District Court Judge, Speech in Central Park, New York: The Spirit of Liberty (May 21, 1944)).

District Judge. . . . Unpopular with the community.”⁸⁴ That takes “courage,” but it is the “right thing” for a judge to do.⁸⁵

His legacy on my court is admirable, one that I aspire to live up to.

84. Samuel A. Alito, Assoc. Just. Sup. Ct., *Remarks on the Leonard I. Garth Atrium Dedication* (2011), <https://web.microsoftstream.com/video/2107c44b-e006-4e28-a5d6-3948ea5fae05> (remarks at 58:31–58:59).

85. *Id.*

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*.¹ 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.”² How, then, “is this particular exception okay?” he asked.³

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

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

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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.”⁶ 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.”⁷ 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.⁸

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

snarky remark was a slam on this method.”); ERWIN CHEMERINSKY, *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, *SUPREMELY 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.⁹

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

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).

abstractions¹² and that we should instead respect the complexities of human life and the realities of experience.¹³ These principles are also part of a longstanding tradition of judging.¹⁴ 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

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.¹⁵

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.”¹⁶ 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

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.”¹⁷ 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.¹⁸

Entertainment Merchants was decided the same term as *Snyder v. Phelps*,¹⁹ 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.”²⁰ 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.²¹ 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

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.²²

Another illustration of Alito's resistance to abstraction came in *Town of Greece v. Galloway*,²³ 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."²⁴ 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."²⁵

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

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.”²⁶ 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.”²⁷ 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.”²⁸

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.²⁹ 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.”³⁰ 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

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.”³¹

These are not the only examples of Alito writing separately to argue that the facts of the case were being lost in abstract categories.³² 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.’”³³ 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.³⁴ For Alito, history provides a source of legitimacy for

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.³⁵ 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*.³⁶ 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."³⁷ History does not always provide clear answers. Alito explained that the *Lemon* test presents "particularly daunting problems" when it comes to old monuments.³⁸ It is not simply that finding a singular purpose may be difficult given the lack of documentation.³⁹ Rather, there might not be a single purpose: "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."⁴⁰ And "just as the purpose for maintaining a monument,

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.”⁴¹ 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.⁴²

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.⁴³ 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.”⁴⁴

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*.⁴⁵ In the context of *Town of*

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."⁴⁶ 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."⁴⁷ 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."⁴⁸

More recently, in *Dobbs v. Jackson Women's Health Organization*,⁴⁹ 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.⁵⁰ 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

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.”⁵¹ 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.”⁵² 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.”⁵³ 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.”⁵⁴ 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.”⁵⁵ According to Burke, “one of the ways of discovering that it is a false theory is by comparing it with practice.”⁵⁶ 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

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.”⁵⁷

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.⁵⁸ The majority analyzed the Great Compromise and the Fourteenth Amendment, and it gleaned from the history a “principle of representational equality.”⁵⁹ 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.”⁶⁰ 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.”⁶¹ 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.⁶²

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.”⁶³ Accordingly, “[i]t is impossible to draw any clear constitutional command from this complex history.”⁶⁴

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.⁶⁵ Alito’s dissent in *Atlantic Sounding Co. v. Townsend*⁶⁶ 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.⁶⁷ And in *Ohio v. Clark*,⁶⁸ 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.⁶⁹

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."⁷⁰ Commentators acknowledge that "[o]riginalism doesn't provide determinate answers to every question."⁷¹ 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.⁷² 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.⁷³

These considerations get at what Alito meant when he called himself a "practical originalist."⁷⁴ "I start out with originalism," he has explained, because he believes "the Constitution means something and that that meaning does not change."⁷⁵ 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.⁷⁶

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."⁷⁷ At his confirmation hearing, he described *stare decisis* as "reflect[ing] the view that courts should respect the judgments and

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.”⁷⁸ Since then, Alito’s application of that doctrine has been described as “robust,”⁷⁹ and he has advocated its evenhanded implementation.⁸⁰

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.”⁸¹ 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*,⁸² 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.”⁸³ 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.”⁸⁴ Alito, however, described how the doctrine had evolved in a different direction since *Flast*, with that case having “largely been confined to its facts.”⁸⁵ To “extend” *Flast* to the circumstances of *Hein* would push against the many precedents Alito identified that had refused “to

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.⁸⁶ In declining to extend *Flast* to the different context of discretionary Executive Branch expenditures, Alito “le[ft] *Flast* as we found it.”⁸⁷ Scalia called this position a “pose of minimalism.”⁸⁸ 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”⁸⁹—a limitation that applied equally to the *Flast* Court.

In *Hein* and other cases,⁹⁰ 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.”⁹¹ 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*,⁹² his majority opinion overruled *Abood v. Detroit Board of Education*⁹³ because in *Abood* the Court had not appreciated the circumstances before it. Alito criticized *Abood* for “fail[ing] to appreciate that a

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. LLEWELLYN, *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.”⁹⁴ Even “*Abood*’s proponents ha[d] abandoned its reasoning,” and cases on compelled speech since then had applied “exacting scrutiny” at least.⁹⁵ In other words, *Abood* was “an outlier among our First Amendment cases.”⁹⁶

Similarly, in *Fulton v. City of Philadelphia*,⁹⁷ Alito wrote separately to argue that the Court should have overruled *Employment Division v. Smith*.⁹⁸ *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.”⁹⁹ 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*,¹⁰⁰ *Smith* had “pigeon-holed” that precedent and suggested that other cases had never applied *Sherbert* anyway.¹⁰¹ “*Smith*’s rough treatment of prior decisions diminished its own status as a precedent,”¹⁰² according to Alito, and given its inconsistency with trends in the case law, *Smith*—like *Abood*—was an “anomaly.”¹⁰³

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*¹⁰⁴ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰⁵ 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."¹⁰⁶ 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."¹⁰⁷ "None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed 'potential life.'"¹⁰⁸ Within the larger *corpus juris*, Alito explained, *Roe* was an outlier.¹⁰⁹ 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."¹¹⁰

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

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,¹¹¹ the petitioners sought to overrule the Court's prior decision in *Nevada v. Hall*.¹¹² 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?¹¹³

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.¹¹⁴ Some observers suggest that the Court "overturning its own precedents inherently undermines . . . respect for judicial authority."¹¹⁵ That view tends to treat the Court itself as an abstract entity—to be defended as always authoritative—rather than a real, human institution.¹¹⁶ Alito's approach, again, eschews abstraction for experience.

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

* * *

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.”¹¹⁷ 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.”¹¹⁸ 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.”¹¹⁹

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

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.”¹²⁰ 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.”¹²¹ 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.”¹²² 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.”¹²³ That has been Justice Alito’s message, too.

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.

ERIE AND CONTEMPORARY FEDERAL COURTS DOCTRINE

JACK GOLDSMITH*

Justice Alito has written many important federal courts opinions but (like most Justices) does not have a distinctive federal courts jurisprudence. He has written most extensively in this field on standing, but his opinions on that topic do not yield a particular theory of standing or even a clear pattern of decision making.¹ His dissent in *Ortiz* is a commanding statement of the differences between judicial and executive power in the context of the Court's appellate jurisdiction—but it garnered only one other vote.² Justice Alito has, along with Justice Thomas, persistently challenged the Court's practice of exercising discretion to decline to decide cases within its exclusive original jurisdiction under 28 U.S.C. § 1251(a).³

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1. Justice Alito's standing opinions for the Court include *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); and *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007). His concurring and dissenting opinions on standing include *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting); *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (Alito, J., dissenting); *United States v. Windsor*, 570 U.S. 744 (2013) (Alito, J., dissenting); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (Alito, J., dissenting); *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Horne v. Flores*, 557 U.S. 433 (2009); *Davis v. FEC*, 554 U.S. 724 (2008).

2. *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (Alito, J., dissenting).

3. See *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting, joined by Justice Thomas); *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (statement by Alito, J., dissenting, joined by Justice Thomas); *Arizona v. California*, 140 S. Ct. 684 (2020) (Thomas, J., dissenting, joined by Justice Alito); *Nebraska v. Colorado*, 577 U.S. 1211 (2016) (Thomas, J., dissenting, joined by Justice Alito).

And he has taken a notable interest in the Alien Tort Statute (ATS), especially in questioning *Sosa*'s embrace of a federal common law power to recognize novel causes of action under the ATS.⁴

Justice Alito has also highlighted the ways that a federal courts chestnut, *Erie Railroad Co. v. Tompkins*, alters how other federal courts doctrines operate compared to an eighteenth and nineteenth century baseline.⁵ In this brief essay I will summarize Justice Alito's takes on *Erie*'s significance; ask how *Erie* fits with the Court's historically inflected constitutional jurisprudence; and then raise questions about how principled the Court has been, and how principled it can be, in its treatment of the common law post-*Erie* in other federal courts contexts.

I.

Simplifying quite a bit, *Erie* held that federal courts sitting in diversity jurisdiction lack the authority to develop their own judge-made common law tort rules and thus must apply state common law tort rules. In part, to continue to simplify, this was because the Court declared that the "general common law" that it had applied for 150 years—a law that ostensibly was neither federal law nor state law—no longer existed.⁶ With general common law no longer an option, the Court determined that it lacked authority to recognize, develop, or apply any common law tort rule other than

4. See *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1950 (2021) (Alito, J., dissenting) (discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (Alito, J., concurring in part and concurring in the judgment); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013) (Alito, J., concurring). Justice Alito has written many other notable federal courts opinions, including *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (declining to extend *Bivens* to cross-border shootings); *Kansas v. Colorado*, 556 U.S. 98 (2009) (avoiding ruling on Congress's authority to regulate remedies in Supreme Court original jurisdiction cases but electing to follow Congress's established district court procedures); and *FAA v. Cooper*, 566 U.S. 284 (2012) (inclusion of "actual damages" in Federal Privacy Act did not waive sovereign immunity for suits alleging "mental and emotional distress" because the term was ambiguous and so presumption of immunity prevails).

5. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

6. *Id.* at 78 ("There is no federal general common law.").

the one that prevailed in the state.⁷ But following *Erie*, the Court made clear that federal courts possessed the power to develop a “new” and genuinely *federal* common law if that law was in some sense authorized by the Constitution or a federal statute.⁸

It is hard to exaggerate what a radical decision *Erie* was at the time, or how extensively it upended what we today call the field of federal courts. Indeed, eighty-five years after *Erie* was decided, we are very much still working out its implications, as some of Justice Alito’s opinions make clear.

Consider Justice Alito’s opinion in *Jesner*, a case that held that foreign corporations cannot be defendants in ATS suits.⁹ Justice Alito concurred to explain why he believed that the ATS’s original purpose—to “avoid diplomatic friction”—informed the separation of powers that supported the majority’s rule.¹⁰ Along the way he explained why *Erie* posed a “problem” for how the ATS was originally designed to operate:

According to *Sosa*, when the First Congress enacted the ATS in 1789, it assumed that the statute would “have practical effect the moment it became law” because the general common law “would provide a cause of action for [a] modest number of international law violations.” That assumption, however, depended on the continued existence of the general common law. And in 1938—a century and a half after Congress enacted the ATS—this Court rejected the “fallacy” underlying the general common law, declaring definitively that “[t]here is no federal general common law.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 79 (1938). That left

7. This is, I think, the meaning of the Court’s statements: “Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’ In disapproving that doctrine we . . . merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.” *Id.* at 79–80.

8. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

9. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408–12 (2018) (Alito, J., concurring in part and concurring in the judgement).

10. *Id.* at 1410.

the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more.¹¹

The Court in *Sosa* resolved this problem by trying to approximate the 1789 operation of the ATS through the judicial development of narrow post-*Erie* federal common law causes of action that aimed to mirror the law of nations that courts applied as general common law in 1789.¹² In *Jesner* and again in *Nestle*, Justice Alito expressed sympathy for the view that *Sosa* was wrong on the ground that, after *Erie*, Congress, rather than the Court, should provide the cause of action in ATS cases.¹³

Justice Alito made a similar point in his majority opinion in *Hernandez*, which denied a *Bivens* claim based on a cross-border shooting.

Analogizing *Bivens* to the work of a common-law court, petitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available. But *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), held that “[t]here is no federal general common law,” and therefore federal courts today cannot fashion new claims in the way that they could before 1938. See [*Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)] (“Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals”).

11. *Id.* at 1409 (some internal citations omitted).

12. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–733 (2004).

13. This is the position argued by Justice Scalia in dissent in *Sosa*, by Justice Gorsuch in concurrence in *Jesner*, and is the direction the Court has been moving since *Sosa*. Justice Alito stated in *Jesner* that “[f]or the reasons articulated by Justice Scalia in *Sosa* and by Justice Gorsuch today, I am not certain that *Sosa* was correctly decided.” *Jesner*, 138 S. Ct. at 1409. See also *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1951 (2021) (Alito, J., dissenting) (noting that “Part III of Justice Thomas’s opinion and Part II of Justice Gorsuch’s opinion make strong arguments that federal courts should never recognize new claims under the ATS” and should instead defer to Congress, but declining to reach the issue because it was not raised).

With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, *see id.* at 286 ("private rights of action to enforce federal law must be created by Congress"), and no statute expressly creates a *Bivens* remedy. Justice Harlan's *Bivens* concurrence argued that this power is inherent in the grant of federal question jurisdiction, *see* 403 U.S. at 396 (majority opinion); *id.* at 405 (opinion of Harlan, J.), but our later cases have demanded a clearer manifestation of congressional intent, *see* [Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–58 (2017)].¹⁴

For Justice Alito a related issue arose in *Maine Community Health Options v. United States*.¹⁵ There the Court interpreted a provision in the Affordable Care Act (ACA) to allow insurance companies to bring a Tucker Act suit for damages to recover their ACA-related losses. Justice Alito argued in dissent that this holding was in tension with the Court's modern requirement of a plain statement to recognize a cause of action. Along the way he stated:

One might argue that the assumptions underlying the enactment of the Tucker Act justify our exercising more leeway in inferring rights of action that may be asserted under that Act. When the Tucker Act was enacted in 1887, Congress undoubtedly assumed that the federal courts would "[r]ais[e] up causes of action," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), in the manner of a common-law court. At that time, federal courts often applied general common law. But since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts have lacked this power. Yet the "money- mandating" test that the Court applies today, bears a disquieting resemblance to the sort of test that a common-law court might use in deciding whether to create a new cause of action. To be sure, *some* of the claims asserted under the Tucker Act, most notably contract claims, are governed by the new federal common law that applies in limited areas involving "uniquely federal interests." *Boyle v. United Technologies*

14. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

15. 140 S. Ct. 1308, 1331–35 (2020) (Alito, J., dissenting).

Corp., 487 U.S. 500, 504 (1988). And the recognition of an implied right to recover on such claims is thus easy to reconcile with the post-*Erie* regime. There may also be some sharply defined categories of claims that may be properly asserted simply as a matter of precedent. But the exercise of common-law power in cases like the ones now before us is a different matter.¹⁶

II.

These cases, and many like them, raise questions about the modern conservative Court's posture toward *Erie* and separation of powers.

Erie is among the most dramatically anti-originalist opinions in Supreme Court history.¹⁷ The Framers assumed, and the Supreme Court for a very long time believed (and held), that federal courts can and should apply what came to be known as "general common law" (or "general law") in certain suits in federal court in the absence of authorization from the Constitution or a federal statute. What Holmes described in 1928 as a "fallacy" was the firm belief and consistent early practice of the Court. Federal courts were obliged to apply a non-state, non-federal "transcendental body of law outside of any particular State," the content of which federal courts could determine in "their independent judgment" regardless of the non-statutory law rule that prevailed in state courts.¹⁸ There is some question about how broad this general

16. *Id.* (some internal citations and cross-references omitted).

17. It is also among the most radical and unexpected. The Court had been applying the 20th century version of the *Swift* doctrine right up to the term that *Erie* was decided, and none of the parties asked the Court to reconsider the general common law regime. Yet the Court overruled *Swift* and, in the process, as Justice Jackson once noted, in effect "declared that thousands of decisions of federal courts, which are no longer subject to correction, were wrongly decided." ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 273 (1941).

18. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting).

common law was at the founding.¹⁹ And there is a question about how far into the nineteenth and twentieth centuries this non-positivistic conception of law prevailed.²⁰ But there is no doubt that the conception of law that *Erie* said did not “exist” did in fact exist at the founding and for a long time thereafter. And the eighteenth and nineteenth century versions of practically every federal courts doctrine assumed its validity.

Explanations abound for why the Court did what it did in *Erie*. An important one is that the background conception of the nature of the common law, and of the need for positive sources of law, had changed dramatically since the founding. Without getting into disputes here about the scope of these changes, it is clear that common law at the founding “was perceived as more natural than it is for us today — natural in the sense of being derived from nature and thus being something all people could reason about and, if they reasoned carefully enough, come to view in the same way.”²¹ It is also clear that courts at the founding applied many pockets of law, including general common law, without consideration of, or even the need for, some sovereign authorization to do so.²² By the time of *Erie*, these understandings about the nature of the common law had been rejected and replaced by the idea that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”²³ *Erie* in effect “overruled a particular way of looking at law” and replaced it with another.²⁴ The federalism and

19. At its core was the law merchant, the law maritime, and the law of nations. These categories later expanded dramatically. See generally TONY ALLAN FREYER, HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981).

20. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 682–83 (1998).

21. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 223 (2019).

22. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515, 1517–21 (1984).

23. *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting).

24. *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

separation of powers alterations in *Erie*, the implications of which we are still trying to figure out, followed from these changes.²⁵

Erie is a challenge to originalism and related historically minded constitutional theories of interpretation because so many constitutional and subconstitutional law doctrines at the founding rested on a conception of general law (and non-positivistic sources of law more generally) that the Court rejected in *Erie*, and because this rejection led the Court to craft many doctrines—the most obvious of which is the post-*Erie* federal common law—that would have been unrecognizable at the founding and that are unjustifiable today on originalist terms. The conservative Court is now in the process of rethinking and pushing back on a slew of innovative New Deal structural constitutional law doctrines, but not a single Justice has suggested that *Erie* should be rethought. Indeed, as Justice Alito’s comments above make plain, the Court, including the conservatives on the Court, has accepted the radical non-originalist change in *Erie* and are still working out the non-originalist implications for many federal courts doctrines.²⁶

III.

The question is whether the Court is working out these non-originalist implications in a principled or coherent way.

The Court’s main move after *Erie* has been to reconceptualize pre-*Erie* general common law to require application either of state law or federal common law, depending on the circumstances. *Erie* itself

25. For a full account of the conceptual and material changes that led to the Court’s massive change of direction in *Erie*, see LESSIG, *supra* note 21, and previous writings.

26. Many originalist scholars, by contrast, have grasped *Erie*’s challenge to originalism and questioned the validity of the decision and its rejection of general common law. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012). They have not, in my view, adequately grappled with how thoroughly *Erie* corrupts originalist and related historical approaches to federal courts doctrines.

ruled that courts in private diversity tort cases must apply state law, including state law as articulated by state courts, in place of general common law. In other contexts, the Court in the decades after *Erie* took a generous attitude toward its new federal common law powers.²⁷ It also, relatedly, took a generous attitude toward the Court's power to imply federal causes of action.²⁸

In more recent decades, however, the Court has come to view its post-*Erie* federal common law powers as a threat to Congress's lawmaking prerogatives. It has significantly narrowed the circumstances in which it will recognize or craft new federal common law rules.²⁹ And it has insisted that only Congress, and not the Court, can supply a cause of action in statutory and many constitutional contexts.³⁰

In short, the Court in these and other contexts has argued, especially in recent decades, that the elimination of general common law in *Erie* means that it should defer to Congress in the creation, or not, of new federal law and new federal causes of action. The common pattern in these newer cases is that the Court narrows access to federal court.

But in other federal jurisdiction contexts, the Court has taken something close to the opposite approach, albeit also in the service of narrowing access to federal court. The law of standing is a remarkable example.

The Court has recently come to view the common law as the touchstone for standing. Justice Thomas—who more than anyone else on the Court is responsible for this development—explained in

27. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

28. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

29. See, e.g., *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

30. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Alexander v. Sandoval*, 532 U.S. 275 (2001). For an early insightful account of the Court's use of *Erie* to justify these constrictions of judge-made causes of action, see George D. Brown, *Of Activism and Erie: The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984).

his *Spokeo* concurrence that “[t]he judicial power of common law courts was historically limited depending on the nature of the plaintiff’s suit.”³¹ This is right as far as it goes. Just as common law causes of action required various types of proof, they also sometimes were available only for certain types of plaintiffs. As Justice Thomas has said, “common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more,” but they “required a further showing of injury for violations of ‘public rights’ owed to the whole community (such as passage on public highways).”³² Federal courts applied these common law causes of actions guided by general common law or state law.

One might have thought that after *Erie*, this cause-of-action-centered structure governing who can sue in federal court would have been replaced by whatever types of cause of action survived *Erie*. This should have meant that private causes of action such as in *Erie* would be governed by state law (as opposed to general common law or federal common law). It also should have meant that Congress could supplement or replace common law causes of action (including matters previously governed by general common law) as it saw fit, as long as it acted within its Article I powers. And indeed, this is how things worked until recently. Before and for many decades after *Erie*, Congress often supplemented the common law to create new causes of action. And what came to be called standing was satisfied when a plaintiff met the requirements of the congressional cause of action.³³ There was nothing like an

31. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 343 (2016) (Thomas, J., concurring).

32. *Id.* at 344.

33. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). See also *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) (“The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder ‘could not show monetary loss.’”).

Article III standing limitation on Congress's ability to create new causes of action.³⁴

But the Court has gone in a quite different direction in recent years. In the 1970s it developed an "injury-in-fact" test for standing. The Court in the 1990s began to question whether and when violation of a congressional right could constitute an injury-in-fact. A seminal case was *Lujan*, which invalidated a global citizen-suit provision.³⁵ Then in 2016, the Court in *Spokeo*, through Justice Alito, identified two factors that were "instructive" in answering whether violation of a congressional right could constitute an injury-in-fact. The first factor was "whether [the harm] has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."³⁶ The second factor was the "judgment" of Congress, which the Court explained was "also

34. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Caleb Nelson and Ann Woolhandler have shown that some limitations on common law causes of action in the nineteenth century against federal and state governmental officials sometimes had a constitutional dimension. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004). But they rest their tentative historical case for Article III limits on Congress's ability to recognize interests and create causes of action unknown at common law primarily on *Muskrat v. United States*, 219 U.S. 346 (1911). *Muskrat* involved a statute that authorized four individuals to sue the United States "to determine the [constitutional] validity" of an earlier statute that had altered property rights on designated Native American land. The Court ruled that the authorized suit sought an impermissible advisory opinion because the Court's judgment would have been "no more than an expression of opinion upon the validity of the acts in question" and because the United States as designated defendant had "no interest adverse to the claimants." *Id.* at 361–62. Even taking *Muskrat* for all it is worth for modern standing doctrine, which isn't much, it provides no conceivable basis for the Court's broad new Article III limitation on new congressional causes of action in the private rights context. See discussion of *TransUnion*, *infra* note 42. Justice Thomas, who has relied on the work of Nelson and Woolhandler in developing his theory of standing, see *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring), has recognized this latter point. See *TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting).

35. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). See also *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Raines v. Byrd*, 521 U.S. 811 (1997).

36. *Spokeo*, 578 U.S. at 341 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)) (emphasis added).

instructive and important.”³⁷ The Court did not make clear why history and congressional action mattered, how the two factors related to one another, or which was more important.³⁸

From *Lujan* through *Spokeo*, the Court followed a meandering path on statutory standing and failed to make clear when violation of a federal statutory right counted as an injury-in-fact.³⁹ But in 2021, the Court in a decisive new majority made the common law the dispositive touchstone for congressional standing under Article III. In *TransUnion* (which Justice Alito joined), the Court ruled that a statutory right’s “close relationship” to traditional common law suits was not just relevant (as in *Spokeo*) but “central” and indeed dispositive of whether plaintiff alleged a concrete injury-in-fact.⁴⁰ And it reduced Congress’s conferral of a cause of action from “relevant” (as in *Spokeo*) to something that warranted “due respect” but that in the end was deemed irrelevant.⁴¹ On these premises, the Court held that Article III invalidated Congress’s creation of various personal rights to the proper treatment of private data because the plaintiffs lacked any “historical or common-law analogue for their asserted injury.”⁴²

Justice Thomas explained in dissent why the Court, in the name of nineteenth century practice, was unfaithful to that practice. The

37. *Id.*

38. Many viewed *Spokeo* as a compromise decision to avoid a 4-4 split in light of Justice Scalia’s death that Term.

39. See William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197 (2016).

40. *TransUnion*, 141 S. Ct. at 2200.

41. *Id.* at 2205.

42. *Id.* at 2204. The Court ruled specifically that Congress cannot give private parties a right to truthful information in the files of credit reporting firms, absent publication to third-parties, because the alleged harms (being identified within the firm as a possible terrorist, and not receiving statutorily guaranteed notice protections), were not ones “with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *Id.* at 2213. For accounts of why the “common law analogue” limitation in *TransUnion* has dramatic implications for the law of standing and for Congress’s ability to create new rights more generally, see Cass Sunstein, *Injury In Fact, Transformed*, 2021 SUP. CT. REV. 349 (2022); Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. 269 (2021).

common law defined rights to sue, but the common law was not the only institution that defined rights to sue.⁴³ “Congress and other legislatures” also had the power “to define legal rights.”⁴⁴ Courts “for centuries held that injury in law to a private right” —including ones created by Congress—“was enough to create a case or controversy.”⁴⁵ In a private lawsuit like *TransUnion*, that should have been the end of the matter, Justice Thomas correctly concluded. This conclusion should have been especially obvious because the Court had so often emphasized, by reference to *Erie*, that Congress was supreme, vis-à-vis federal courts, in creating new causes of action.

IV.

TransUnion does not directly implicate *Erie* or *Erie* problems. However, a slew of other federal courts doctrines that rely on the common law to inform the scope of “the Judicial power” or “Cases” and “Controversies” in Article III—including the scope of the federal injunctive power, state sovereign immunity, and federal officer suits—do directly implicate *Erie* questions. Together they demonstrate that the Court’s turn toward history and the common law to inform the contemporary meaning of Article III cannot work without consideration of the non-originalist impact of the non-originalist decision in *Erie*—a requirement that poses a serious challenge to the originalist project across many federal courts doctrines.

Consider the fate of *Ex parte Young*.⁴⁶ The Court and the academy are remarkably confused about the legal basis for and proper scope of the vital injunctive power recognized in that case.⁴⁷ Efforts to

43. He might also have added that the common law that the Court made the touchstone of standing was not stable in its definition of legal rights.

44. *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

45. *Id.*

46. 209 U.S. 123 (1908).

47. See *Green Valley Special Util. Dist. v. City of Schertz*, 969 F. 3d 460, 494–502 (5th Cir. 2020) (Oldham, J., concurring).

clarify the doctrine are being fought largely on the ground of historical practice. To simplify a great deal: on one prominent view, *Ex parte Young* was grounded in the nineteenth century equitable power to issue anti-suit injunctions.⁴⁸ On another prominent view, *Ex parte Young* was grounded in the common law tradition of administrative control through public actions.⁴⁹ (There are other views.)

Whatever the right answer to this debate is, assuming there is a coherent one, that answer cannot inform the proper post-*Erie* exercise of *Ex parte Young* until one figures out (a) the precise source of authority for courts to apply *Ex parte Young*-like injunctions prior to *Erie* (general common law, inherent equitable power under Article III, the Process Acts, no authority at all, something else?) and then (b) how that legal basis was altered by *Erie*. The answer to question (a) remains elusive even today. Question (b) does not have a principled answer in the post-*Erie* case law—the answer might plausibly be state law, federal common law, Article III, a federal statute, or something else.⁵⁰ And whatever that answer is to (b), it cannot be an answer that is true in any meaningful sense to the founding or nineteenth century practice.

In short, *Erie* stands as a major obstacle to the originalist project of reimagining *Ex parte Young* and many other federal courts doctrines. Which is why, I believe, so many originalist scholars seek to question the validity of *Erie* and to argue for the persistence of general common law.⁵¹ I think these arguments fail, but lack space here to explain why.

48. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008); see also *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring); *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring).

49. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269 (2020).

50. Harrison's imaginative and influential reconstruction of *Ex parte Young* devotes a conclusory sentence and footnote to this issue. See Harrison, *supra* note 48, at 1014 & n. 103.

51. See *supra* note 26.

JUSTICE ALITO ON CRIMINAL LAW

KATE STITH*

INTRODUCTION

Justice Samuel A. Alito is a natural judge—by temperament, character, disposition, and experience. What do I mean by a “natural judge”? It is difficult to conceive of Justice Alito accepting a legal position where he would have to perform as a pure *advocate*, which he knows may require mincing words, shading nuance, and hiding the ball. Indeed, Alito’s entire career as a lawyer—both within the U.S. Department of Justice and in the federal judiciary—has been defined, in part, by ethical norms and standards of straightforward and honest lawyering.¹

This chapter concerns itself with the corner of Justice Alito’s jurisprudence dedicated to the criminal law. Justice Alito’s criminal-law jurisprudence reflects his aversion to reasoning that will leave the Supreme Court (or the police, citizens, and lower courts) out on

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1. *See, e.g.*, U.S. DEP’T OF JUSTICE, JUST. MANUAL § 9-27.001 (2018) (“These principles of federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government . . . The intent is to assure regularity without regimentation, and to prevent unwarranted disparity without sacrificing necessary flexibility.”); CODE OF CONDUCT FOR U.S. JUDGES Canon 2A (U.S. COURTS 2019) (“[A judge must embody the values of] honesty, integrity, impartiality, temperament, or fitness . . . A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”).

a limb, in a place that threatens to undo social understandings and order.

To begin, I should clarify what I mean (and what I do not mean) by “criminal law.” When I say criminal law, what I really mean is *substantive* criminal law. “Substantive criminal law” refers to the set of laws within a jurisdiction that define and punish the acts and mental states that together constitute crimes. Criminal law is, of course, distinct from criminal procedure, which regulates the machinery by which the government can apprehend alleged violators of the criminal law and initiate a prosecution. Criminal procedure is largely a matter of constitutional interpretation, but the meat and potatoes of the criminal law is statutory interpretation.

As Justice Scalia once noted, “We live in an age of legislation, and most new law is statutory law.”² Every actor in a criminal case—whether the prosecutor, the defendant, or the judge—must engage in statutory interpretation. Prosecutors, first, must identify the statutory provision an individual allegedly violated and determine under that statute which facts must be proven beyond a reasonable doubt to the factfinder. Defendants, by contrast, will mine statutes to identify every burden the prosecutor must prove and what, if any, defenses the law affords. Judges must interpret criminal statutes to instruct the jury, assess the relevance of evidence, and impose a sentence within the lawfully authorized range.

I focus on two aspects of federal criminal law that have been of particular concern to Justice Alito—the categorical approach and *mens rea*. The former addresses primarily how Congress has instructed federal courts to sentence repeat offenders (or “career criminals” in the words of Congress),³ while the latter addresses what mental state is required while committing the crime at issue.

Justice Alito’s opinions in these two areas epitomize his pragmatic approach to the criminal law. He is not interested in

2. ANTONIN SCALIA, A MATTER OF INTERPRETATION 13 (1997).

3. As discussed in Part I, *infra*, the categorical approach also applies in the context of defining certain substantive criminal offenses. *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319 (2019); *United States v. Taylor*, 142 S. Ct. 2015 (2022).

constructing or in deducing from a grand theory, or any theory at all. Pragmatism is less a unified theory than a collection of related ideas, including intellectual humility, resistance to abstraction, and concern with real-world consequences. Over the years, Justice Alito has expressed unease that the Court conceives of itself as a tribunal of theoreticians rather than a tribunal of judges who must grapple with the concrete realities of the criminal-justice system at large and the facts of a particular defendant's case. If the Court nonchalantly opens the floodgates of litigation or delivers unclear instructions to the lower courts, Justice Alito is ready in the wings (often in solo concurrences or dissents) to remind the Court of its decisions' problematic real-world consequences. In one criminal-law dissent emblematic of his pragmatism, Justice Alito noted that the "well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well."⁴ As we shall see, this is a precept Justice Alito follows too.

I. THE CATEGORICAL APPROACH

The categorical approach is, in Justice Alito's words, the result of "pointless abstract questions" for "aficionados of pointless formalism."⁵ The Justice's sharp words make the categorical approach an irresistible—though highly convoluted—window into his pragmatic jurisprudence.

In its primary application, the categorical approach is a method of statutory interpretation that the Supreme Court has said federal courts must use during the sentencing stage of some criminal prosecutions. Most notably, the categorical approach has been applied to provisions of the Armed Career Criminal Act (ACCA)—a federal statute first enacted as part of the Comprehensive Crime Control Act of 1984. Pursuant to ACCA, the sentencing judge must determine whether the defendant's prior convictions are of the type that,

4. *Manuel v. City of Joliet*, 580 U.S. 357, 385 (2017) (Alito, J., dissenting).

5. *Mathis v. United States*, 579 U.S. 500, 538, 543 (2016) (Alito, J., dissenting).

under the 1984 statute (as further amended), trigger a higher penalty for the federal crime currently being sentenced.⁶

6. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185, *amended by* Career Criminals Amendment Act of 1986, Pub. L. 99-308, 100 Stat. 459 (codified as amended at 18 U.S.C. § 924(e) (2018)). The Armed Career Criminal Act (ACCA) has proven fertile ground for successful criminal appeals over the decades, and in recent terms, the Supreme Court has continued to grant certiorari in ACCA cases. *See, e.g.,* *Johnson v. United States*, 576 U.S. 591 (2015) (voiding ACCA's residual clause on Due Process grounds); *Welch v. United States*, 578 U.S. 120 (2016) (holding that *Johnson* applies retroactively on federal collateral review under 26 U.S.C. § 2255 (2018)); *Borden v. United States*, 141 S. Ct. 1817 (2021) (holding that under ACCA's elements clause, a criminal offense with a mens rea of recklessness does not qualify as a "violent felony"); *Wooden v. United States*, 142 S. Ct. 1063 (2022) (holding that a criminal defendant's ten prior burglary offenses—all of which arose from a single criminal episode—did not constitute distinct "occasions" and thus counted as a single prior conviction for ACCA purposes).

Although the categorical approach is most closely associated with ACCA, it also operates with respect to some substantive provisions of the criminal code that define the very federal crime of which the defendant has been convicted. *See, e.g.,* *United States v. Davis*, 139 S. Ct. 2319 (2019) (applying the categorical approach to 18 U.S.C. § 924(c)(3) (2018)); *United States v. Taylor*, 142 S. Ct. 2015, 2020–21 (2022) (applying the categorical approach to hold that attempted Hobbs Act robbery does not constitute a "crime of violence" under § 924(c)(3)(A)'s elements clause, which prohibits use of a firearm in connection with a "crime of violence"); *see also infra* notes 54–58, 80–84, discussing the categorical approach's application to substantive criminal offenses outside of the ACCA ambit in *Davis* and *Taylor*).

The categorical approach is also central to immigration law, where courts determine whether an immigrant's prior convictions may trigger removal. *See, e.g.,* 8 U.S.C. § 1227(a)(2)(B)(i) (2018) (authorizing deportation of an alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance"); *id.* § 1227(a)(2)(A) (authorizing deportation of an alien convicted of crimes of moral turpitude, multiple criminal convictions, and aggravated felony, among other crimes). As such, the categorical approach's pedigree may stretch back as far as the early twentieth century in the immigration context despite the Supreme Court's more active use of this tool over the last thirty years. *See* *Mellouli v. Lynch*, 575 U.S. 798, 805–06 (2015) ("The categorical approach 'has a long pedigree in our Nation's immigration law.' As early as 1913, courts examining the federal immigration statute" assessed past criminal convictions based on analysis of the statutory offense, not the underlying facts of the case (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)).

With immigration statutes incorporating provisions of the criminal code, the Court's use of the categorical approach in the criminal context may generate collateral

For instance, the bare crime of being a felon in possession of a firearm has a ten-year maximum penalty.⁷ But if an individual convicted under the felon-in-possession statute has three or more previous felony convictions for a “violent felony” or a “serious drug offense,” the sentencing consequences are much more severe. Instead of a ten-year maximum sentence, the defendant is subject to a mandatory *minimum* sentence of fifteen years.⁸ But how is the judge to determine whether a prior offense is “violent” or “serious”? In 1990, the Supreme Court in an opinion by Justice Blackmun,⁹ set the course that, amazingly, it still follows today: ACCA requires sentencing judges to engage in an inquiry that is, to put it mildly, highly abstract. Moreover, the inquiry is truncated; it requires the sentencing court, in most contexts,¹⁰ to ignore the facts of a defendant’s actual conduct and instead look only to the text of the statute under which the defendant was previously convicted.¹¹

For both the lawyers and nonlawyers among us, the categorical approach may seem a soporific example to pick in cataloguing Justice Alito’s jurisprudence. But as the Justice’s opinions in this area reveal, the practical implications of the categorical approach are significant and alarming. The approach leads to wild variations in sentencing (and deportation) consequences depending on the precise wording of the (usually state-law) statutes under which

consequences in immigration law. For example, if the Court has struck down a criminal provision using the categorical approach, immigration consequences will follow. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (striking the residual clause of 18 U.S.C. § 16(b) as unconstitutionally vague under the categorical approach in *Johnson v. United States*, 576 U.S. 591 (2015)); *see also infra* notes 49–58 and accompanying text (discussing the *Johnson* line of cases concerning the constitutionality of various residual clauses).

7. 18 U.S.C. § 924(a)(2) (2018).

8. *Id.* at §§ 922(g)(1), 924(e)(1).

9. *Taylor v. United States*, 495 U.S. 575 (1990).

10. As discussed below, *see infra* notes 26–29 and accompanying text, the “modified” categorical approach permits a federal court to look both to the statute of conviction and a “limited list of judicial sources,” referred to as “*Shepard* documents.” U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH 2 (2021), [<https://perma.cc/BL47-X3EE>]; *see Shepard v. United States*, 544 U.S. 13 (2005).

11. U.S. SENT’G COMM’N, *supra* note 10, at 1–2.

defendants have previously been convicted. Moreover, the Court's alteration and fine-tuning of the categorical approach has cascading effects across our entire criminal justice system. What may seem like an abstract, textual inquiry for the Court can undo the work of prosecutors, criminal-defense lawyers, and judges across the land. In this Part, I offer a brief historical primer on the categorical approach and highlight Justice Alito's most important opinions on this topic, which put his pragmatism on full display.

* * *

As noted, the categorical approach's journey began more than thirty years ago, with the Supreme Court's first interpretation of ACCA.¹² In the 1980s, Congress turned its attention to "career" criminals and sought to "increase the participation of the Federal law enforcement system in efforts to curb armed, habitual (career) criminals" in the states.¹³ Congress noted the proliferation of "crimes involving theft or violence . . . by a very small percentage of repeat offenders."¹⁴ In its contemporary and amended form, ACCA's fifteen-year mandatory minimum applies to a person who commits a felony punishable by greater than one year and "has three previous convictions by any court . . . for a violent felony or a serious drug offense."¹⁵ A prior conviction may arise from any court (state or federal).¹⁶ Because most felonies are prosecuted in state court, this means that in most cases, a federal court must determine whether a prior *state* offense counts as a "violent felony" or "a serious drug offense" under ACCA.

ACCA does not instruct judges how to make that determination. Neither Congress nor any state legislature has a list of "violent" offenses or of "serious" drug offenses; rather, each jurisdiction enacts

12. See *supra* notes 8–10 and accompanying text.

13. H.R. REP. NO. 98-1073, at 1 (1984); see also S. REP. NO. 98-225 (1983).

14. H.R. REP. NO. 98-1073, at 1 (1984).

15. 18 U.S.C. § 924(e) (2018).

16. *Id.* § 922(g).

prohibitions, which accumulate over the years.¹⁷ Some crimes may on their face sound unquestionably violent, such as murder and rape. Yet, as they are wont to do, lawyers begin to pose hypotheticals that bend these intuitions. Is murder by starvation a violent felony? Is consensual sex with an underage teenager also a violent felony? What makes a particular drug offense “serious”—the particular type of drug, the amount of the drug, or the role of the offender (as a “kingpin,” for example)?

In the critical 1990 case that adopted the “categorical” approach to answering these questions, *Taylor v. United States*,¹⁸ the Court confronted whether a defendant’s prior conviction for burglary in the state of Missouri constituted a violent felony within the meaning of ACCA. If Missouri burglary did count as a violent felony, then the defendant would be subject to the fifteen-year mandatory minimum.¹⁹ But if Missouri burglary did not count as a violent felony, then the defendant would not be subject to the enhanced sentence under ACCA.

In resolving the question, the Court refused to look at the facts of Taylor’s prior burglary conviction, which might have revealed whether Taylor actually burglarized violently or with a dangerous weapon.²⁰ Instead, the Court adopted a “formal categorical approach, looking only to the statutory definitions of the prior

17. In § 924(e), Congress has provided broad categories of what constitutes a “violent felony,” but it has provided few other details. A prior offense may constitute a violent felony if it falls within the elements clause of § 924(e)(2)(B)(i) (defining a violent felony to include an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another”) or within the enumerated-offenses clause of § 924(e)(2)(B)(ii) (defining a violent felony to include an offense that “is burglary, arson, or extortion, involves use of explosives”). In 2015, the Court held that the so-called “residual clause” of ACCA is unconstitutionally vague. See *Johnson v. United States*, 576 U.S. 591 (2015) (Scalia, J.) (holding 18 U.S.C. § 924(e)(2)(B)(ii) unconstitutional on the grounds of vagueness. That provision defined a “violent” felony to include an offense that “involves conduct that presents a serious potential risk of physical injury to another.”).

18. 495 U.S. 575 (1990).

19. *Id.* at 578–79.

20. *Id.* at 600.

offenses, and not to the particular facts.”²¹ This approach requires a sentencing court to do a side-by-side comparison of two statutes: first, the federal statute defining a generic “violent felony” or a “serious drug offense,” and, second, the statute defining the crime of prior conviction (e.g., the Missouri burglary statute at issue in *Taylor*).²²

After comparing the two statutes, the sentencing court must ask whether the statute of prior conviction punishes conduct that is not included in the generic definition of a “violent felony” or a “serious drug offense.” If the statute of prior conviction only reaches behavior within this definition of a “violent felony” or a “serious drug offense,” then the prior conviction counts toward the sentencing enhancement. If the statute of prior conviction sweeps more broadly and punishes conduct that is beyond the definition of a “violent felony” or a “serious drug offense” under federal law, then the prior conviction does *not* count toward the sentencing enhancement.

For example, in *Taylor* itself, the Court had to compare ACCA’s definition of “violent felony” to Missouri’s definition of second-degree burglary. ACCA includes “burglary” in a list of violent felonies, but it leaves that term undefined—a task the Supreme Court took on for itself. Whereas the federal definition of burglary only proscribes unauthorized entry into a “building or other structure,” the Missouri definition of burglary also includes unauthorized entry into a “boat or vessel.”²³ As a result of this mismatch, the Court held, *Taylor*’s prior conviction therefore did not count toward ACCA’s sentencing enhancement. The problem was that the Missouri statute punished certain types of conduct not prohibited under federal law (namely, burglary of a “boat or vessel”). It was irrelevant that *Taylor* may have, in fact, entered a building or structure and not a boat or vessel because the statute of prior

21. *Id.*

22. *Id.* at 602.

23. *Id.* at 599–600.

conviction, in the abstract, swept more broadly than the generic federal definition.

But why ignore the facts of Taylor's case to determine if his prior offense constituted a violent felony under ACCA? The Supreme Court supplied a handful of justifications for a side-by-side statutory comparison instead of digging into the factual record, including the "daunting" reality of rifling through the record, "practical difficulties[,] and potential unfairness" of fact-bound inquiries.²⁴ The categorical approach's prohibition on peering into the factual record relieves sentencing courts from the possibly cumbersome effort of retrieving state-court records, or being left without a paddle in some plea-bargaining cases. Avoiding judicial inquiry into the actual facts of the defendant's prior conviction also avoids the question whether such inquiry comes within *Apprendi*'s demands that sentencing factors enhancing punishment must be admitted by the defendant or proved beyond a reasonable doubt to a jury.²⁵

24. *Id.* at 601.

25. The rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Scalia, J.), would not surface until ten years after the Supreme Court's adoption of the categorical approach in 1990. The interplay between the two lines of doctrine is complex. For the most part, the Court has resisted the suggestion that sentencing judges peering into the factual record would violate *Apprendi*'s requirements of jury fact-finding and proof beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970). *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. As Justice Alito and others have noted, the categorical approach—as well as the modified categorical approach discussed below, see *infra* notes 26–29 and accompanying text—is more akin to statutory interpretation than to the judicial fact-finding addressed in *Apprendi*. To be sure, however, there is disagreement on this question. Compare *James v. United States*, 550 U.S. 192, 213–14 (2007) (Alito, J.) (noting that the categorical approach is statutory interpretation and thus not subject to *Apprendi*), and *Moncrieffe v. Holder*, 569 U.S. 184, 198 (2013) (Sotomayor, J.) ("But those [*Apprendi*] concerns do not apply in this context. Here we consider a 'generic' federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge, nor who has the burden of proving which facts in a federal prosecution."), with *James*, 550 U.S. at 231 (Thomas, J., dissenting) (dissenting on the ground that ACCA

And so the Court embarked on a course that would employ “uniform, categorical definitions to capture all offenses of a certain level of seriousness . . . regardless of technical definitions and labels under state law.”²⁶ By carefully sticking with categorical definitions, sentencing courts would avoid the “unfairness” of enhancing a defendant’s sentence based on the mere “label employed by the State of conviction.”²⁷

Fifteen years after *Taylor*, the Court (which Justice Alito would join the following Term) somewhat softened this aversion to reviewing the factual record of a prior conviction. In *Shepard v. United States* and its progeny, the Court has carved out an exception to the no-factual-record rule in what has come to be known as the “modified categorical approach.” Under the modified categorical approach, a sentencing court may review the terms of the charging document, plea agreement, colloquy transcript, or “some comparable judicial record” of the factual basis of the conviction.²⁸ *Taylor* had abjured any review of such documents (now known as *Shepard*

runs afoul of *Apprendi* because its sentencing enhancements require judges to “make a finding that raises [a defendant’s] sentence beyond the sentence that could have lawfully been imposed by reference to facts bound by the jury or admitted by the defendant.” (citing *United States v. Booker*, 543 U.S. 220, 313 (2005) (Thomas, J., dissenting)).

Justice Alito suggested in a recent case that the *Apprendi*-motivated push to adopt the categorical approach is inconsistent with the original meaning of the Sixth Amendment, which more likely envisioned sentencing as largely discretionary. See *United States v. Taylor*, 142 S. Ct. 2015, 2033 n.1 (2022) (Alito, J., dissenting) (first citing Michael McConnell, *The Booker Mess*, 83 DENVER U. L. REV. 665, 679 (2006)); then citing Jonathan Mitchell, *Apprendi’s Domain*, 2006 Sup. Ct. Rev. 297, 298–99; then citing Rory K. Little & Teresa Chen, *The Lost History of Apprendi and the Blakely Petition for Rehearing*, 17 FED. SENT’G REP. 69, 69–70 (2004); and then citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1123–32 (2001)).

Moreover, *Apprendi* concerns do not underlie all categorical-approach cases. For example, in the context of § 924(c) substantive offenses, the jury, not a sentencing judge, will determine whether a defendant’s conduct amounted to a “crime of violence” in breach of § 924(c)’s prohibition against use of a firearm in connection with a “crime of violence.” See *Taylor*, 142 S. Ct. at 2026–33 (2022) (Thomas, J., dissenting); *id.* at 2033 n.1 (Alito, J. dissenting) (“[N]o Sixth Amendment concern is implicated under § 924(c).”).

26. *Taylor*, 495 U.S. at 590.

27. *Id.* at 589.

28. *Shepard*, 544 U.S. at 26.

documents). While *Shepard* opened the door to some consideration of the actual facts of the defendant's prior offense, the Court has clarified in subsequent cases that the modified categorical approach is appropriate only when the statute of conviction describes *multiple crimes* and *Shepard* documents would be useful to determine which of those crimes the defendant was convicted.²⁹ Critically, this means that where a statute merely defines *multiple means* of committing a single crime, the traditional categorical approach of *Taylor* applies—and the factual basis of the conviction is entirely off the table.

When Justice Alito joined the Court in 2006, the contours of the (now modified) categorical approach had been set. In his first few Terms at the Court, Justice Alito showed himself to be a somewhat faithful adherent. In *James v. United States*, Justice Alito applied the categorical approach to find that the attempted burglary at issue counted as a “violent felony” under ACCA’s residual clause.³⁰ In *United States v. Rodriguez*, he similarly wrote for the Court that a Washington drug-trafficking felony counted as a “serious drug offense” under ACCA.³¹

Although he applied the categorical approach, even in these early cases he registered concerns about rigid application without attention to practical consequences. In *James*, he pointed out that this mode of statutory interpretation should not require “metaphysical certainty” as to the scope of the statute of prior conviction; rather,

29. See *Mathis v. United States*, 579 U.S. 500 (2016); *Descamps v. United States*, 570 U.S. 254, 258 (2013). The Court permits review of such documents where a statute is “divisible,” meaning it contains several different offenses or alternative elements under which a conviction may be sustained. See U.S. SENT’G COMM’N, *supra* note 10, at 9–10. Yet, where a statute describes a single crime and enumerates alternative means of committing the crime, the statute is considered indivisible, and the court may not use *Shepard* documents as permitted under the modified categorical approach. *Id.* at 3. However, if a statute of prior conviction is divisible (meaning *Shepard* documents are fair game), the Court has indicated that the sentencing court should look to the “least of [the divisible] acts” under the statute as the point of comparison to the federal statute. *Johnson v. United States*, 559 U.S. 133, 137 (2010).

30. *James*, 550 U.S. 192.

31. 553 U.S. 377 (2008).

sentencing courts must look for a “realistic probability, not a theoretical possibility, that” the statute of prior conviction encompasses behavior not included in the federal definition.³² Moreover, in *Rodriguez*, Justice Alito rebuffed the claim that inquiries into “novel questions of state law and complex factual determinations” are necessarily “difficult.”³³ Sentencing courts could easily look to *Shepard* documents, including formal charging documents and plea colloquies.³⁴ And a “mere possibility that some future cases might present difficulties cannot justify a reading of ACCA that disregards the clear meaning of the statutory language.”³⁵

Justice Alito’s unease with the categorical approach became far more pronounced by 2010. In *Johnson v. United States*, the Supreme Court had to decide whether Florida felony battery by “actually and intentionally touching” the victim constituted a violent felony under ACCA.³⁶ Prosecutors sought an enhanced penalty under that Act, but Johnson objected to the categorization of his 2003 Florida conviction for simple battery as a “violent felony.”³⁷ Under Florida law, battery may occur in any of three ways: if the defendant “[i]ntentionally caus[ed] bodily harm,” “intentionally str[uck]” the victim, or “[a]ctually and intentionally touche[d]” the victim.³⁸ The court records of Johnson’s prior simple-battery conviction were unavailable, so no *Shepard* documents could illuminate which of the three divisible crimes Johnson had committed. As a result, the majority, in an opinion by Justice Scalia, applied the pure categorical approach to look only at “the least of these acts,” namely “actually and intentionally touching.”³⁹ The Court read ACCA’s “physical force” provision to require force that is violent.⁴⁰ Following this

32. *James*, 550 U.S. at 207–08.

33. *Rodriguez*, 553 U.S. at 388.

34. *Id.* at 389.

35. *Id.*

36. 559 U.S. 133, 136–38 (2010).

37. *Id.* at 136.

38. *Id.* at 137.

39. *Id.* at 137.

40. *Id.* at 140.

definition, the majority reasoned that “touching” may lack sufficient violence to reach the level of physical force necessary to constitute a violent felony under federal law. Defendants in Florida, including Johnson, could therefore be convicted of felony battery without having committed a violent felony within the meaning of ACCA.⁴¹

In dissent, Justice Alito strongly objected on several grounds to the majority’s characterizations and reasoning. He first challenged the Court’s tortured understanding of “physical force” as requiring violence—which he persuasively demonstrated does not accord with the common-law definition of “force.”⁴² From there, Justice Alito noted the inevitable “untoward consequences” of the majority’s interpretation of Florida’s battery offense for the purposes of ACCA.⁴³ Numerous states are like Florida: they have indivisible battery provisions “govern[ing] both the use of violent force and offensive touching,” and charging instruments and jury instructions that “simply track the language of the statute” without distinguishing the type of force used by the defendant.⁴⁴ The inevitable result would be a windfall to defendants who in fact have used violence in committing a battery, solely because of the statutory grouping-conventions and the record practices of the state of conviction. More generally, once a crime is labeled categorically “non-violent” under the Court’s approach, it cannot qualify as an ACCA predicate even if committed in a violent manner.

The Court waved away Justice Alito’s concerns, noting that the government had on some occasions successfully used the modified categorical approach with *Shepard* documents. At the same time, the court did acknowledge that the “absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well.”⁴⁵

41. *Id.* at 138–40.

42. *Id.* at 147–48 (Alito, J., joined by Thomas, J., dissenting).

43. *Id.* at 151.

44. *Id.* at 152.

45. *Id.* at 145 (majority opinion).

Justice Alito also worried in *Johnson* that the majority would “hobble at least two federal statutes” that also contain the term “physical force.”⁴⁶ Under 18 U.S.C. § 922(g)(9), a person convicted of a “misdemeanor crime of domestic violence” may not lawfully possess a firearm, and “misdemeanor crime of violence” is defined to include crimes with “an element, the use or attempted use of physical force.”⁴⁷ And under 8 U.S.C. § 1227(a)(2)(E), an alien convicted of a “crime of domestic violence” is subject to removal, with “crime of domestic violence” defined to include an offense with “an element the use [or] attempted use . . . of physical force.”⁴⁸ If *Johnson*’s definition of “physical force” and its strict adherence to the categorical approach were to govern interpretation of these terms, many persons convicted of serious spousal or child abuse would be allowed to possess firearms or remain within the United States.

Justice Alito was prescient on this score. The interconnectedness of various criminal statutes has permitted defendants to apply categorical-approach arguments across different statutes, both state and federal. Consider, for example, the recent litigation over the constitutionality of “residual clauses.” Residual clauses generally encompass any “violent felony” (or the analogous “crime of violence”), as defined to include offenses that pose a sufficient degree of “risk” of physical injury.⁴⁹ Since the dawn of the categorical era, judges had been required to apply that approach to determine whether the “ordinary case” of the prior crime at issue surpassed the risk threshold so to count as a violent felony under the applicable residual clause.⁵⁰ However, in 2015, the Supreme Court held (per Justice Scalia) in *Johnson v. United States* that ACCA’s residual clause was unconstitutionally vague because of the “unpredictability and arbitrariness” of judges applying the categorical approach

46. *Id.* at 152 (Alito, J., joined by Thomas, J., dissenting).

47. 18 U.S.C. §§ 921(a)(33)(A)(ii), 922(g)(9) (2018).

48. 8 U.S.C. § 1227(a)(2)(E) (2018); 18 U.S.C. § 16(a) (2018).

49. *See, e.g.*, 18 U.S.C. §§ 16(b), 924(c)(3)(B), 924(e)(2)(B)(ii) (2018); *see also supra* note 17 and accompanying text.

50. *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) (Gorsuch, J.) (invalidating the residual clause of the federal felon-in-possession statute).

to determine what conduct possessed sufficient risk.⁵¹ And in 2018⁵² and 2019⁵³ the Court applied *Johnson* to hold nearly identical residual clauses in two other federal statutes unconstitutionally vague.

Moreover, even though the wording of these residual clauses is virtually identical, the consequences of the Court nullifying these clauses are not identical. In *Johnson*, the Court considered ACCA's residual clause—which, had it not been struck down as unconstitutionally vague, would have had the effect of enhancing an already convicted defendant's sentence on his current federal offense. In the 2019 case, *United States v. Davis*, the residual clause at issue also sought to define "crime of violence."⁵⁴ But the operative effect of applying this residual clause would not be to enhance the sentence for the defendant's current offense. Rather, the residual clause in *Davis* was part of the substantive offense that the defendant was convicted of in the case-at-hand—here, using a gun in furtherance of any federal "crime of violence."⁵⁵ Simply put, if the residual clause in *Davis* was found unconstitutional, then the prohibition itself was unconstitutional and a defendant could not be prosecuted under it. In light of the Court's holding, post-*Davis* defendants challenging their convictions under this residual clause will have their convictions thrown out entirely.

Writing in dissent,⁵⁶ Justice Kavanaugh—joined by Justices Thomas and Alito and in relevant part by Chief Justice Roberts—despaired the practical implications that Justice Alito had predicted in *Johnson*: namely, all sorts of offenders convicted under the residual clause could now seek to vacate their convictions. To illustrate the absurdity of the Court's decision, Justice Kavanaugh offered up

51. 576 U.S. 591, 592 (2015).

52. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (Kagan, J.) (concerning California first-degree burglary).

53. *Davis*, 139 S. Ct. 2319 (concerning the use of firearms in connection with a federal crime of violence).

54. 18 U.S.C. § 924(c)(1)(A) (2018).

55. *Id.*

56. *Davis*, 139 S. Ct. at 2354 (Kavanaugh, J., joined in part by Roberts, C.J., Thomas & Alito, JJ., dissenting).

several examples of defendants now off the hook due to the nullification of the firearm-in-furtherance residual clause: a defendant convicted of assault with intent to murder after shooting his wife multiple times, a defendant convicted of arson for throwing a Molotov cocktail to firebomb a shop, a defendant who kidnapped a man and severely beat him with threats to kill him, and so on.⁵⁷ By constraining the Court to consider the “imagined conduct of a hypothetical defendant rather than [] the actual conduct of the actual defendant,” the categorical approach has yielded “serious consequences.”⁵⁸

Justice Alito reserved his strongest criticisms of the categorical approach for his dissent in *Mathis v. United States*, issued in 2016.⁵⁹ As others have noted, Justice Alito’s *Mathis* dissent is “crucial [to an] understanding of his jurisprudence.”⁶⁰ In *Mathis*, the Supreme Court confronted a categorical-approach question nearly identical to *Taylor*’s: whether Iowa burglary, which reaches unauthorized entry into any “building, structure, [or] land, water, or air vehicle,” counts as a burglary under ACCA, which only reaches unauthorized entry into a “building or other structure.”⁶¹ The more precise (if mind-numbing) question before the Court was whether the modified categorical approach (where the sentencing court may review *Shepard* documents to narrow its inquiry) applied to a statute listing “multiple, alternative *means* of satisfying one (or more) of its elements,” as opposed to *alternative* elements.⁶²

57. *Id.* at 2353–54 (citing cases).

58. *Id.* at 2355.

59. 136 S. Ct. 2243, 2266 (Alito, J., dissenting).

60. Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 513 (2019).

61. Compare 18 U.S.C. § 924(e) (2018), with IOWA CODE § 702.12 (2013). See generally *supra* notes 26–29 and accompanying text.

62. *Mathis v. United States*, 579 U.S. 500, 503 (2016) (Kagan, J.) (emphasis added); see also *supra* note 29 and accompanying text. What’s more, Justice Alito has also held the Court to account when it fails to properly adhere to its modified-categorical-approach precedents. In *United States v. Taylor*, for example, the majority overlooked the fact that § 924(c)(3)(A)’s definition of “crime of violence” contains disjunctive elements, which

The Iowa burglary statute was undoubtedly broader than the federal definition of burglary under the approach of *Taylor*. But in *Mathis*, the Solicitor General invited the Court to loosen its formalism. If the sentencing court could review *Shepard* documents, it might conclude that Mathis had in fact burglarized a “building or other structure” within the meaning of ACCA and his prior conviction for Iowa burglary would “count” toward ACCA’s sentencing enhancement.⁶³ Six members of the Court declined the Solicitor

would typically trigger the modified categorical approach. 142 S. Ct. 2015, 2033–37 (2022) (Alito, J., dissenting). In *Taylor*, applying the approach of *Shepard*, Justice Alito looked to Taylor’s plea agreement, which admitted that Taylor “and his accomplice intended to lure [the victim] into an alleyway, hold him at gunpoint, and take his money ‘by force’ in the event that he resisted.” *Id.* at 2036. In the Justice’s view, this should have been more than enough “to show that Taylor’s actual crime ‘ha[d] as an element the . . . use of physical force against the person . . . of another’ under § 924(c)(3)(A).” *Id.*

Justice Alito’s willingness to remind the Court of its own precedents recalls recent administrative-law cases where Justice Alito has noted the Court’s failure to even mention *Chevron* deference where such deference is likely owed to a federal agency’s interpretation of a statute. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (“[T]he Court’s decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron* . . . [but] the Court, for whatever reason, is simply ignoring *Chevron*.” (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984))). This Term, the Court arguably continued its *sub silentio* overruling of *Chevron* in *West Virginia v. EPA* (this time with Justice Alito joining in Justice Gorsuch’s concurrence). 142 S. Ct. 2587 (2022). In this case, the Court refused to defer to the EPA’s interpretation of the Clean Air Act as permitting the promulgation of carbon-emission caps based on a generation-shifting approach. *Id.* Instead, the majority held that through the Clean Air Act Congress did not intend to house such authority in the EPA because carbon-emissions regulation represents a “major question” of “economic and political significance” best left for congressional resolution absent an unambiguous delegation to an agency. *Id.* at 2605 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Justice Alito joined Justice Gorsuch’s concurrence, which made no mention of *Chevron* but supplied further support for the majority’s use of the major-questions doctrine. In her dissent, Justice Kagan critiqued the majority for failing to follow the Court’s *Chevron* precedent, specifically “step one” of the *Chevron* framework where courts are meant to apply the “normal principles of statutory interpretation” before reaching substantive canons of interpretation, such as the major-questions doctrine. See *id.* at 2635 (Kagan, J., dissenting).

63. *Mathis*, 579 U.S. at 503–05.

General's invitation,⁶⁴ reasoning that the Iowa burglary statute's elements are broader than the federal definition of battery no matter "[h]ow a given defendant actually perpetrated the crime . . . [or] the 'underlying brute facts or means' of commission."⁶⁵ The Court refused to stray course from *Taylor* and *Shepard* based on the text of ACCA, Sixth Amendment *Apprendi* concerns, and avoiding unfairness arising from possible "errors" in the trial record related to statutory means of committing an offense.⁶⁶

In his memorable and withering dissent, Justice Alito compared the Court's refusal to deviate from the categorical approach to the story of Sabine Moreau, a Belgian woman whose refusal to deviate from her GPS led to her driving 900 miles in the wrong direction toward Zagreb instead of Brussels.⁶⁷ With the categorical approach first programmed into the Court's GPS in *Taylor* in 1990, "the Court set out on a course that has increasingly led to results that Congress could not have intended."⁶⁸

Here we may review a few examples from cases in which Justice Alito had previously opined. As the Justice noted in *Mathis*, the result of that decision would be that burglary convictions in many states could be disqualified from counting as violent felonies under ACCA,⁶⁹ just as under *Descamps v. United States*, no California burglary conviction could count under ACCA.⁷⁰ *Moncrieffe v. Holder* had rendered convictions in nearly half the states for large-scale drug trafficking to not count as "illicit trafficking in a controlled substance" under the immigration laws.⁷¹ We may add that the year

64. In addition to the dissenting Justice Alito, Justice Breyer, joined by Justice Ginsburg, also rejected the "means/elements distinction" in a separate dissent. *See id.* at 523 (Breyer, J., joined by Ginsburg, J., dissenting).

65. *Id.* at 501 (majority opinion) (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

66. *Id.* at 510–513.

67. *Id.* at 536–537 (Alito, J., dissenting).

68. *Id.* at 538.

69. *Id.*

70. *Id.* n.2 (citing *Descamps v. United States*, 570 U.S. 254 (2013)).

71. *Id.* (citing *Moncrieffe v. Holder*, 569 U.S. 184 (2013)).

before *Mathis*, Justice Alito joined Justice Thomas's dissent in *Mellouli v. Lynch*,⁷² rejecting the majority's holding that if a state's drug schedule includes substances not included on the federal drug schedule, a state drug offense may not constitute a "violation of . . . any law . . . relating to a controlled substance," which is a ground for removal under the Immigration and Nationality Act.⁷³ This Term, in *United States v. Taylor*, Justice Alito dissented from the Court's "veer[ing] off into fantasy land" when it held that an attempted Hobbs Act robbery did not constitute a "crime of violence" in a case where a defendant's accomplice shot and killed the attempted-robbery victim.⁷⁴ As Justice Alito proclaimed in *Mathis*, the Court had ignored the "warning bell" of such anomalous results and "ke[pt] its foot down and drive[n] on" with the categorical approach.⁷⁵ Justice Alito despaired that such anomalies are the inevitable result of the Court's unceasing formalism.

Adding insult to injury, the categorical approach's premium for abstract inquiry often leaves sentencing courts up a creek without a paddle. The threshold element/means distinction at issue in *Mathis* is hardly an insignificant undertaking for a sentencing court, which must typically identify a state-court precedent addressing whether a provision of a criminal statute is a means or element. Where no precedent exists, a sentencing court has to make this distinction itself. The means/element determination in *Mathis* only seemed "easy," Justice Alito explained—in a not-atypical insight borne of his penchant for legal realism—because *Mathis* had a "fortified legal team that took over [his] representation after this Court granted review [and] found an Iowa case on point."⁷⁶ This belated discovery evinces, in the real world of state statutes being consulted by federal sentencing judges, the inordinate difficulty of

72. 575 U.S. 798, 813–14 (2015) (Thomas, J., joined by Alito, J., dissenting).

73. *Id.* at 808–13 (majority opinion).

74. *United States v. Taylor*, 142 S. Ct. 2015, 2033 (2022) (Alito, J., dissenting).

75. *Mathis*, 579 U.S. at 538 (Alito, J., dissenting).

76. *Id.* at 540.

determining whether a statutory provision constitutes a means or an element.

Drawing on his decade on the Supreme Court bench at the time of *Mathis*, Justice Alito offered an alternative, an approach for the “real world,”⁷⁷ that would avoid the mess of the categorical approach:

Allow a sentencing court to take a look at the record in the earlier case to see if the place that was burglarized was a building or something else. If the record is lost or inconclusive, the court could refuse to count the conviction. But where it is perfectly clear that a building was burglarized, count the conviction.⁷⁸

As Justice Alito had suggested before in *Descamps*,⁷⁹ the Court should drop its formalistic inquiry into whether a statute is divided into elements or means and instead delve into the factual record to settle whether the prior conviction can trigger a sentencing enhancement under federal law. If the factual record is insufficient to determine that a prior conviction falls within the definition of a “violent felony” or “serious drug offense,” the prior conviction won’t count. In Justice Alito’s view, the Court should discontinue its practice of concocting hypothetical crimes and fact patterns and shed the conceit that “[r]eal-world facts are irrelevant.”⁸⁰ Like Ms. Moreau, the Court has driven past numerous signs that it is “off course,” but it has rebuffed “opportunities to alter its course. . . , traveling even further away from the intended destination.”⁸¹

77. *Id.* at 539; see also *Taylor*, 142 S. Ct. at 2035 (Alito, J., dissenting) (“The whole point of the categorical approach that the Court dutifully follows is that the real world must be scrupulously disregarded.”).

78. *Id.* at 541.

79. *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Alito, J., dissenting) (“I would give ACCA a more practical reading. When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify.”).

80. *Mathis*, 579 U.S. at 543 (Alito, J., dissenting).

81. *Id.* at 543–44.

* * *

In the categorical-approach cases, Justice Alito has shown an abiding disdain for abstract inquiries that turn a blind eye to real-world consequences. In his more than fifteen years on the Court, several of his prognostications have been proven correct, and his consistent critique may have won over some of his colleagues.⁸² For example, in the *United States v. Taylor* case decided in 2022,⁸³ Justice Thomas expressed openness to abandoning the categorical approach and adopting a conduct-based approach akin to Justice Alito's proposal in *Mathis*. At oral argument, Thomas asked both the government and respondent to game out what would happen "if we could abandon the categorical approach."⁸⁴ Naturally, the government noted that it had not briefed the issue but would welcome such a change in light of "the judicial . . . chorus of complaints about the categorical approach that has been growing ever louder."⁸⁵ Although the case was decided 7-2 with Justices Alito and Thomas in dissent, Thomas took the opportunity to recommend overruling the Court's categorical-approach precedents, which have "led the Federal Judiciary on a 'journey Through the Looking Glass.'"⁸⁶ Like Justice Alito, Thomas would extinguish the categorical approach's reliance on hypothetical defendants committing hypothetical crimes and instead adopt a "conduct-based approach" into the defendant's actual conduct to determine

82. See, e.g., *Borden v. United States*, 141 S. Ct. 1817, 1856 (2021) (Kavanaugh, J., joined by Roberts, C.J., Alito & Barrett, JJ., dissenting) ("Because courts use the categorical approach when applying ACCA's violent felony definition, the Court's decision today will thus exclude many intentional and knowing felony assaults from those States."); see also *United States v. Davis*, 139 S. Ct. 2319, 2337 (2019) (Kavanaugh, J., joined in part by Roberts, C.J., Thomas & Alito, JJ., dissenting).

83. *United States v. Taylor*, 142 S. Ct. 2015, 2033 (2022) (Alito, J., dissenting).

84. Transcript of Oral Argument at 5, 77, *Taylor*, 142 S. Ct. 2015 (No. 20-1459).

85. *Id.* at 5.

86. *Taylor*, 142 S. Ct. at 2026 (Thomas, J., dissenting) (quoting LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 227 (Julian Messner ed., 1982)).

whether a prior offense constitutes a violent felony or crime of violence.⁸⁷

Justice Alito's pragmatic concerns with the categorical approach have indeed generated a judicial chorus of complaints outside One First Street. In a recent Second Circuit opinion, Judge Michael H. Park (a two-time law clerk of Justice Alito) noted the "absurdity of the exercise" of the categorical approach, which requires judges to "ignore the actual facts before them and instead to theorize about whether certain crimes could be committed without violent force."⁸⁸ The categorical approach "perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice."⁸⁹ Judge Park went on to cite sixteen federal-court opinions concurring with this sentiment, further measuring the reach of Justice Alito's concerns.⁹⁰

Judge Reena Raggi, also of the Second Circuit, had recent occasion to opine on the practical consequences of the categorical approach in a case vacating a conviction for Hobbs Act robbery, resembling the recent Term's *Taylor* decision concerning attempted Hobbs Act robbery.⁹¹ Judge Raggi noted the irony that in a case where there is "no question" that the crime of conviction "was violent, even murderous," the conviction must be vacated in part

87. *Id.* at 2028; *cf. supra* notes 33–35 and accompanying text (outlining Justice Alito's endorsement of the conduct-based approach). Justice Thomas also recommends overruling the Court's residual-clause decisions, particularly *United States v. Davis*, 139 S. Ct. 2319 (2019), and adopting a conduct-based approach to § 924(c)(3)(B)'s residual clause that mitigates vagueness worries associated with the categorical approach. *Taylor*, 142 S. Ct. at 2031–32 (Thomas, J., dissenting).

88. *United States v. Scott*, 990 F.3d 94, 125–26 (2d Cir. 2021) (Park, J., concurring).

89. *Id.* at 126.

90. *Id.* at 126–27 (citing cases).

91. This case was a follow-on to the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held the residual clause of 18 U.S.C. § 924(c) (2018) to be unconstitutionally vague. The defendant in this case had his conviction vacated because of its reliance on the unconstitutional residual clause.

because it cannot be deemed a crime of violence through the “commands [of] the categorical approach.”⁹²

Judge William Pryor of the Eleventh Circuit put his disdain for the categorical approach more simply: “It’s nuts.”⁹³ He asked, “How did we ever reach the point where” we “must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? . . . Congress needs to act to end this ongoing judicial charade.”⁹⁴ If Justice Alito could respond to Judge Pryor’s charge that the criminal-justice system must navigate out of the categorical-approach quagmire, he might warn Judge Pryor, “Don’t trust your GPS.”

II. MENS REA

In his opinions construing the mens rea requirement for a variety of federal crimes, Justice Alito has exhibited his characteristic pragmatism and decried the far-reaching ramifications of the Court’s decisions. Unlike the categorical-approach context, where criminal liability is not typically at issue,⁹⁵ mens rea is often a defendant’s best and last line of defense. Mens rea is derived from the classic maxim, *actus non facit reum, nisi mens sit rea*,⁹⁶ or as William Blackstone translated it, “an unwarrantable act without a vicious will is no crime at all.”⁹⁷ Mens rea is a foundational concept in our criminal

92. *United States v. Barrett*, 937 F.3d 126, 128 (2d Cir. 2019) (on remand from the Supreme Court). Although the categorical approach would apply in this case, the Second Circuit vacated the case primarily based on *Davis*’s holding that the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

93. *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (Pryor, J., concurring).

94. *Id.*

95. *But see Davis*, 139 S. Ct. at 2354–55 (Kavanaugh, J., concurring) (“[D]efendants who successfully challenge their § 924(c) convictions will not merely be resentenced. Rather, their § 924(c) convictions will be thrown out altogether.”). *Davis*, as well as its follow-on, *Taylor*, are discussed *supra* at notes 52–58 and accompanying text.

96. SANFORD H. KADISH, STEPHEN J. SCHULHOFFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 258 (2017).

97. 4 WILLIAM BLACKSTONE, *COMMENTARIES* at *20–21.

law and requires that an individual must have a culpable mental state corresponding to a particular element of a crime (whether it's an act, result, or the circumstances surrounding the crime).

Like most legal precepts, the necessity of mens rea is not without its exceptions,⁹⁸ but as a general matter, courts interpreting criminal statutes must identify the mens rea associated with the other various elements that together comprise a crime. In the contemporary era, the Model Penal Code provides the generally accepted standards of mens rea, which come in four increasingly culpable levels: negligence, recklessness, knowledge, and purpose.⁹⁹ In most situations, the higher the level of mens rea, the steeper the government's evidentiary burden in proving criminal liability. Where there is no direct evidence of the defendant's mental state, but the defendant clearly engaged in the charged conduct, the defendant's primary jury argument may be that the government has failed to prove the requisite mens rea by proof beyond a reasonable doubt. Defendants may also argue that the government has put forth insufficient evidence to demonstrate mental culpability or that a criminal prohibition requires a higher tier of mens rea than the government has proven or than has been charged to the jury.

In the categorical-approach context, Justice Alito voiced his concern with formalism obfuscating the facts of a defendant's case and generating adverse consequences at odds with congressional

98. Of course, various jurisdictions recognize strict-liability crimes, where criminal liability is assigned without the government needing to show that the defendant had a culpable mental state with respect to one or more elements. *See, e.g.*, MODEL PENAL CODE §§ 1.04(1), (5), 2.05(1) (AM. L. INST.1986); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (permitting strict liability for public-welfare offenses, "dispens[ing] with the conventional requirement for criminal conduct-awareness of some wrongdoing . . . [i]n the interest of the larger good [by] put[ting] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger"); *Staples v. United States*, 511 U.S. 600 (1994) (holding that either of two conditions may be sufficient to permit strict liability with respect to at least one element: either the legislature's clear intention to dispense with mens rea, or the non-felonious activity in which the defendant engaged was sufficiently dangerous to put the defendant on notice such that those engaging in that activity are not wholly innocent).

99. MODEL PENAL CODE § 2.02(1) (AM. L. INST. 1986).

purpose. These pragmatic concerns are also on display in the mens rea context, where Justice Alito has taken exception to the Court apparently hiding the ball or contorting statutory language. Throughout his service on the Court, Justice Alito has adopted a decidedly non-abstract approach to interpreting mens rea. Even where he is willing to be guided by a default “general presumption”—such as that a statutorily “specified *mens rea* applies to all the elements of an offense”—he pragmatically insists on leaving room for “instances in which context may well rebut that presumption.”¹⁰⁰ As the following cases reflect, “context” to Justice Alito typically entails the possibility of “odd results,” the risk of opening the floodgates of litigation, and the need for clear and stable precedent.¹⁰¹

A revealing example is Justice Alito’s dissent in *Elonis v. United States*, decided in 2015.¹⁰² In *Elonis*, the defendant was convicted of violating 18 U.S.C. § 875(c), which makes it a crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.”¹⁰³ After his wife left him, Elonis posted rap songs on Facebook containing violent imagery.¹⁰⁴ Although Elonis included disclaimers about his innocent intentions, his wife sought a state-court order of protection.¹⁰⁵ Elonis remained undeterred.¹⁰⁶ At issue was the proper mens rea corresponding to Elonis’s communication of the threat. The statute itself was silent on what mens rea (if any) was required regarding the threat itself, but the Third Circuit inferred that the appropriate level

100. *Flores-Figueroa v. United States*, 556 U.S. 646, 660 (2009) (Alito, J., concurring); see also *id.* at 659 (“I write separately because I am concerned that the Court’s opinion may be read by some as adopting an overly rigid rule of statutory construction.”).

101. *Id.* at 661.

102. 575 U.S. 723 (2015).

103. 18 U.S.C. § 875(c) (2018).

104. *Elonis*, 575 U.S. at 726–27.

105. *Id.* at 728–29.

106. *Id.* (noting that after the court’s grant of a “three-year protection-from-abuse order against Elonis,” Elonis subsequently posted, making threatening reference to the order of protection and how he had “enough explosives to take care of the State Police and the Sheriff’s Department”).

of mens rea was negligence—the lowest level of mens rea.¹⁰⁷ In other words, the government had to show that Elonis was negligent with respect to the threatening nature of his communications.

In an opinion by Chief Justice Roberts, the Supreme Court reversed, finding that a mental state higher than negligence should have been inferred. Invoking its strict-liability precedents,¹⁰⁸ the Court observed “the conventional requirement for criminal conduct [is] *awareness* of some wrongdoing.”¹⁰⁹ This conventional requirement instructs reluctance to infer a negligence standard.¹¹⁰ The silence on mens rea in the prohibition Elonis was convicted of violating did “not mean that none exists” and “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.”¹¹¹ After correctly noting that the negligence standard adopted by the Third Circuit did not require the government to prove that Elonis was in fact *aware* of the threatening nature of his behavior, merely that he was negligent toward its threatening nature, the majority opinion then concluded only that negligence is insufficient for liability under § 875(c).¹¹²

Quite deliberately, the Court did not answer whether recklessness, knowledge, or purpose would suffice for liability under § 875(c).¹¹³ In light of the brief lip service to this question during oral argument and there being “no circuit conflict over the

107. *Elonis*, 575 U.S. at 732 (summarizing the court of appeals’ holding that defendant can be found guilty if “a reasonable person would view [his words] as a threat”).

108. See *supra* note 98 and accompanying text.

109. *Elonis*, 575 U.S. at 738 (quoting *Staples v. United States*, 511 U.S. 600, 606–07 (1994)).

110. *Id.* (citing *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).

111. *Id.* at 734 (quoting *Morrisette v. United States*, 342 U.S. 246, 250 (1952)).

112. *Id.* at 740.

113. *Id.* at 741. (noting that § 875’s mental state requirement would be “satisfied if the defendant transmits a communication for the *purpose* of issuing a threat, or with *knowledge* that the communication will be viewed as a threat” and declining to decide whether “recklessness would [] be sufficient” because that issue had not been briefed (emphasis added)).

question” in the majority’s view, a merits decision on the precise mens rea required under § 875(c) was inappropriate.¹¹⁴

Without missing a beat, Justice Alito picked up on the Court’s omission. Noting that *Marbury v. Madison*’s had “famously proclaimed” that the judicial department must “say what the law is,” Justice Alito said the majority opinion had failed in that regard and instead had announced, “It is emphatically the prerogative of this Court to say only what the law is *not*.”¹¹⁵ The Court’s decision not to clarify the required mens rea under § 875(c) “is certain to cause confusion” and “regrettable consequences” among the lower courts.¹¹⁶ Unlike the Supreme Court, which “has the luxury of choosing its docket,” lower courts and juries “must actually decide cases,” which means “applying a standard.”¹¹⁷ *Elonis* and the government had in fact both briefed the issue of mens rea, and if the Court thought it lacked sufficient information to reach a merits decision, it could have ordered further briefing and argument.¹¹⁸

Concurring in the judgment, Justice Alito would have found that recklessness is enough. He largely agreed with the majority’s default presumption that § 875(c)’s silence as to mental state should require a mens rea more than mere negligence. Following the Model Penal Code, Justice Alito would infer recklessness “when Congress does not specify a *mens rea* in a criminal statute,” but go no further toward knowledge or purpose.¹¹⁹ In his view, “[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct.”¹²⁰ Justice Alito might have also cited the colloquy that he had at oral argument with Deputy Solicitor General Michael Dreeben concerning what Justice Alito referred to

114. *Id.* at 742. By avoiding a holding as to the mens rea required by § 875(c), the Court also avoided the question of whether the First Amendment implications of the statute require a high mens rea level.

115. *Id.* at 742 (Alito, J., concurring in part) (emphasis added).

116. *Id.*

117. *Id.*

118. *Id.* at 743.

119. *Id.* at 745 (citing MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1986)).

120. *Id.* at 745.

as the Model Penal Code's "razor-thin distinction[s]" between purpose and knowledge and the "considerable difference between" knowledge and recklessness.¹²¹ Depending on the proper level of mens rea, the government's burden could therefore vary significantly without further instruction from the Court.

Failure to reach an answer on the proper level of mens rea would also have plain adverse consequences, the Justice explained. If purpose or knowledge is required under § 875(c) and a district court instructs the jury that recklessness is sufficient, a defendant may be wrongfully convicted. Yet, if recklessness is enough under § 875(c) and a district court instructs the jury that proof of knowledge or purpose is required, a guilty defendant may be acquitted. With "[a]ttorneys and judges . . . left to guess,"¹²² all parties—defendants included—are left in the lurch because the majority decided that hiding the ball (or stopping it short of the goal) was more prudent than reaching the mens rea merits question.

Four years later, in *Rehaif v. United States*, Justice Alito expressed similar, though distinct, concerns that the Court's novel reading of the commonly charged firearm-in-possession prohibition¹²³ would both make it extremely difficult to prove mens rea in many cases, as well as "open[] the gates to a flood of litigation."¹²⁴ Hamid Rehaif had entered the United States on an immigrant student visa, but after receiving poor grades, he was kicked out of his university and forfeited his immigration status.¹²⁵ Thereafter, Rehaif visited a firing range, and he shot two firearms.¹²⁶ The government then charged Rehaif under 18 U.S.C. § 922(g), which provides "[i]t shall be unlawful for any person . . . who [inter alia], being an alien is

121. Transcript of Oral Argument at 43, *Elonis*, 575 U.S. 723 (2015) (No. 13-983).

122. *Elonis*, 575 U.S. at 742.

123. 18 U.S.C. § 922(g) (2018). This statute makes it a crime for people with a specified status to possess a firearm. Although the status categories are quite expansive, relevant here are the categories for persons convicted of any felony or being unlawfully present in the United States. See *id.* § 922(g)(1), (5)(A).

124. 139 S. Ct. 2191, 2213 (2019) (Alito, J., dissenting)

125. *Id.* at 2194 (majority opinion).

126. *Id.*

illegally or unlawfully in the United States[,] . . . [to] possess in or affecting commerce, any firearm or ammunition.”¹²⁷ Under the relevant sentencing provision, § 924(a)(2), “[w]hoever knowingly violates” § 922(g) “shall be fined . . . [or] imprisoned not more than 10 years, or both.”¹²⁸ The question presented to the Supreme Court was whether the government only had to prove that Rehaif “knowingly” possessed a firearm, or whether the government additionally had to prove Rehaif had a mens rea of knowledge as to his status as “an alien . . . illegally or unlawfully in the United States.”¹²⁹

The majority, in an opinion by Justice Breyer, answered in the affirmative: under § 922(g) the government had to prove *both* that Rehaif knew he was in possession of a firearm *and* of his status as an unlawful alien. The Court adopted this interpretation for several reasons, including its “ordinary presumption in favor of scienter”¹³⁰ and the grammatical construction of the statute.¹³¹ Because the government failed to show Rehaif knew of his immigration status, the Court reversed Rehaif’s conviction and remanded to the lower court.

One immediate consequence of the Court’s decision in *Rehaif* was the decision’s retroactive application. Because *Rehaif* placed knowing possession of a firearm without knowledge of one’s immigration status beyond the reaches of the extant federal criminal law, the decision would apply retroactively under the rule of *Teague v. Lane*, permitting individuals currently imprisoned under § 922(g) to challenge the validity of their convictions within one year on

127. 18 U.S.C. § 922(g) (2018).

128. *Id.* § 924(a)(2).

129. *Id.* § 922(g).

130. *Rehaif*, 139 S. Ct. at 2195 (noting that courts should presume that Congress intends to require mens rea regarding “each of the statutory elements that criminalize otherwise innocent conduct” absent contrary indication (citing *United States v. X-Citement Video, Inc.* 513 U.S. 64, 72 (1994))).

131. *Id.* at 2196.

federal collateral review.¹³² Defendants on direct review of § 922(g) convictions could also seek new trials on this basis.

Justice Alito dissented, joined by Justice Thomas. He began by critiquing the majority so “casually” overturning an interpretation of § 922(g) “adopted by every single Court of Appeals” and “used in thousands of cases for more than 30 years.”¹³³ The Court’s decision was “no minor matter” and disabled one of the nation’s chief tools “to combat gun violence.”¹³⁴ Moreover, the decision would create a “mountain of problems” and “swamp the lower courts” with thousands of prisoners seeking collateral relief on the claim that their § 922(g) convictions were defective for failure to charge or prove knowledge with respect to their status.¹³⁵ Justice Alito, of course, recognized that the Court must enforce the laws of Congress “even if we think that doing so will bring about unfortunate results,” but usually the Court requires “clear indication of congressional intent” before wreaking such havoc.¹³⁶ Yet, in *Rehaif*, the Court was intrigued by a “superficially appealing but ultimately fallacious argument” and diverged from its usual practice of resolving conflicts among the lower courts, and preserving a long-established interpretation absent evidence that it had “worked any serious injustice.”¹³⁷

Justice Alito tried to set the record straight after the majority presented a “bowdlerized version of the facts.”¹³⁸ The Court, in his

132. See 26 U.S.C. § 2255(f) (2018) (providing a “1-year period of limitation” that runs from “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”); *Teague v. Lane*, 489 U.S. 288, 307 (1989) (providing that a new rule “should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’” (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971))).

133. *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

view, sought to paint an “entirely imaginary case, a heartless prosecution,” that would evoke sympathy for the Court’s ultimately baseless statutory construction.¹³⁹ In yet another clear nod to legal realism, the Justice explained that in fact, Rehaif was not a down-on-his-luck immigrant student. Rather, after his expulsion and visa revocation, Rehaif moved into a hotel facing the airport, paid more than \$11,000 in cash for his lodging, and frequented a firing range over the course of fifty-three days.¹⁴⁰ Justice Alito appeared perturbed that the Court was pulling the wool over readers’ eyes, stretching and molding the story of a relatively unsympathetic defendant to produce a defendant-friendly decision at odds with thirty years of precedent and with untoward consequences. These sentiments undoubtedly remind us of his categorical-approach jurisprudence, which critiques the Court for proscribing review of the full factual record and only permitting “bowdlerized” *Shepard* documents to reveal the facts underlying a conviction.

Justice Alito’s penchant for pragmatism is perhaps matched by his knack for metaphor—in *Mathis* analogizing the categorical approach to a discombobulated GPS, and in *Rehaif*, analogizing the majority’s “purportedly textualist argument” to “a magic trick.”¹⁴¹ Because the firearm-in-possession statute’s “knowing” mens rea requirement is housed in § 924(a)(2)—an entirely separate provision from the firearm-possession prohibition itself, which is in § 922(g)—“any attempt to combine the relevant language” of the two statutory provisions “necessarily entails significant choices that are not dictated by the text of those provisions.”¹⁴² Rehaif naturally preferred applying the knowledge requirement broadly to include the status elements of § 922(g), because this would increase the government’s burden. The Court fell for the defendant’s move, which Justice Alito referred to as the trick “presto chango.”¹⁴³ But

139. *Id.*

140. *Id.* at 2202.

141. *Id.* at 2204.

142. *Id.*

143. *Id.*

Justice Alito asserted that “[t]he truth behind the illusion,” is that under ordinary usage, four different readings of the statute are possible.¹⁴⁴ The majority’s sleight of hand was to suggest that among the four plausible interpretations, Congress intended for the option with “a very high *mens rea* requirement,” requiring knowledge for the status element.¹⁴⁵

While this might not make much difference in many cases where the § 922(g) status at issue is unlawful presence in the country, it would enormously increase the government’s burden in prosecuting the most common firearm-possession crime, where the possessing defendant is a convicted felon. The government would now need to prove that the defendant *knew* he had been convicted not just of a crime, but of a crime within the category of “felony.”¹⁴⁶ Typically, to avoid the introduction of evidence concerning a prior offense, a defendant will stipulate to his felon status, but after *Rehaif*, the prosecution may need to offer evidence about the nature of the prior felony to allow the jury to infer knowledge—quite a defendant-unfriendly consequence of the majority’s holding.¹⁴⁷ Moreover, if the knowledge requirement of a gun-possessor’s status also applies to the prohibition on sale of firearms to persons falling within a § 922(g) category,¹⁴⁸ it seems highly unlikely that most sellers will know whether the purchaser falls into one of the § 922(g) status categories.¹⁴⁹ Finally, the Court’s decision contravenes the “practical unanimity” of the courts of appeals on these questions; instead the Court invented hypothetical, conflicting

144. *Id.*

145. *Id.* at 2206 (emphasis omitted).

146. *Id.* at 2209.

147. *Id.* As Justice Alito noted, the requirement that the government prove other § 922(g) statuses, such as felon status, threatens to undo longstanding precedent in the realm of evidence law, that defendants may offer to stipulate a prior conviction to prevent the prosecution from introducing more prejudicial evidence concerning the nature of their conviction. *See, e.g., Old Chief v. United States*, 519 U.S. 172 (1997).

148. *Id.*; *see also* 18 U.S.C. § 922(d)(5)(A) (2018).

149. *Id.*

interpretations on its way to approving an interpretation that no circuit had thought to adopt.¹⁵⁰

Echoing his concerns in the residual-clause context discussed previously,¹⁵¹ Justice Alito's most prominent concern with *Rehaif* was its inevitable opening of litigation floodgates. Because the Court's decision applied retroactively,¹⁵² the "[t]ens of thousands of prisoners . . . currently serving sentences for violating 18 U.S.C. § 922(g)" may be eligible for relief, such as a new trial if the case is still on direct review or even release through collateral review under 28 U.S.C. § 2255.¹⁵³ Those currently imprisoned for § 922(g) convictions may have their convictions vacated if they can demonstrate they are innocent of violating § 922(g), which, after *Rehaif*, only requires showing they did not know they fell into a § 922(g) status category. The requirement that district courts "hold a hearing . . . and make a credibility determination as to the prisoner's subjective mental state at the time of the crime" many years before "will create a substantial burden on lower courts, who are once again left to clean up the mess the Court leaves in its wake as it moves on to the next statute in need of 'fixing.'"¹⁵⁴ This too will not "necessarily be limited to § 922(g)" and may spread to other statutes, Justice Alito worried.¹⁵⁵

Lower courts, prosecutors, and defendants would all pay the price of the Court's purportedly textualist decision, and Justice Alito quantified the number of § 922(g) offenders that could raise *Rehaif* claims. According to the U.S. Sentencing Commission, in fiscal year 2020 alone, that number was 6,782 individuals.¹⁵⁶ Justice Alito's concern with the real-world consequences of *Rehaif* evince

150. *Id.* at 2210.

151. *See supra* notes 50–57 and accompanying text.

152. *See supra* note 132 and accompanying text.

153. *Rehaif*, 139 S. Ct. at 2212–13 (Alito, J., dissenting).

154. *Id.* at 2213 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2269–70 (2016) (Alito, J., dissenting)).

155. *Id.*

156. *Quick Facts: Felon in Possession of a Firearm*, U.S. SENT'G COMM'N, [<https://perma.cc/29F3-E6B3>].

his hesitance to destabilize or set unclear precedents, especially in a case like *Rehaif* where there was no lower-court conflict warranting the Court's review.

As Justice Alito prophesied in 2019, *Rehaif*'s effects have now reached well beyond the ambit of § 922(g) status offenses. This past Term, in *Ruan v. United States*, the Court applied *Rehaif*'s "mens rea canon," as Justice Alito dubbed it, whereby "the Court interprets criminal statutes to require a *mens rea* for each element of an offense 'even where the most grammatical reading of the statute does not support' that interpretation."¹⁵⁷ In *Ruan*, the relevant provision of the Controlled Substances Act (CSA) makes it a federal crime "[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance."¹⁵⁸ The majority held that the mens rea requirement ("knowingly or intentionally") applied to the "except as authorized" provision, requiring the government to prove beyond a reasonable doubt that a defendant "knew that he or she was acting in an unauthorized manner, or intended to do so."¹⁵⁹ The majority offered four justifications for this interpretation,¹⁶⁰ although as Justice Alito points out, "[i]t bases this conclusion not on anything in language of the CSA" but rather the mens rea canon established in *Rehaif*.¹⁶¹

To Justice Alito, the Court's effort to apply the mens rea canon to the CSA "rests on an obvious conceptual mistake."¹⁶² The "[e]xcept as authorized" clause represents an affirmative defense, not an

157. 142 S. Ct. 2370, 2384 (Alito, J., concurring) (quoting *Rehaif*, 139 S. Ct. at 2197).

158. 21 U.S.C. § 841(a) (2018).

159. *Ruan*, 142 S. Ct. at 2375.

160. The majority's four reasons included (1) the explicit inclusion of a mens rea term in § 841, (2) the importance of the "[e]xcept as authorized" element in "distinguishing morally blameworthy conduct from socially necessary conduct," (3) the "serious nature of the crime and its penalties," and (4) the "vague, highly general language of the regulation." *Id.* at 2386 (Alito, J., concurring).

161. *Id.* at 2383.

162. *Id.*

element, and the mens rea canon is inapt in this context.¹⁶³ Alito bases this interpretation on several factors. First, “[a]s a matter of elementary syntax,” the “knowingly and intentionally” clause modifies the verbs that follow and do not operate backwards to the “introductory phrase ‘except as authorized.’”¹⁶⁴ As Justice Alito quipped at oral argument, “[W]e are interpreting statutes and regulations, and maybe we ought to start with what they actually say.”¹⁶⁵ Second, the authorization clause “lacks the most basic features of an element of an offense,” such as mandatory inclusion in every § 841 indictment.¹⁶⁶ Yet, the CSA specifically provides that it is not “necessary for the United States to negative any exception or exception set forth in [the relevant subchapter],” implying the authorization clause lacks one of the key indicia of statutory elements.¹⁶⁷ Third, the authorization clause operates as a proviso giving “justification or excuse” for conduct that otherwise satisfies the elements of an offense.¹⁶⁸ Under the Court’s precedents, “an exception made by a proviso” designates an “affirmative defense that the Government has no duty to ‘negative.’”¹⁶⁹ Fourth, the majority, without reference, reverses the common-law rule that defendants bear the burden of production and persuasion of any affirmative defense by instead holding the government must prove unauthorized use beyond a reasonable doubt after a defendant has made a showing that their activity was authorized.¹⁷⁰

In this most recent example of Justice Alito’s mens rea jurisprudence we observe two of his trademarks. First, the Justice recoils at the Court’s expansion of the judicial role at the expense of Congress. By reading mens rea into every provision of a criminal statute

163. *Id.*

164. *Id.* at 2384.

165. Transcript of Oral Argument at 22, *Ruan*, 142 S. Ct 2370 (No. 20-1410).

166. *Ruan*, 142 S. Ct at 2385 (Alito, J., concurring).

167. *Id.* (citing 21 U.S.C. § 885(a)(1) (2018)).

168. *Id.*

169. *Dixon v. United States*, 548 U.S. 1, 13 (2006) (quoting *McKelvey v. United States*, 260 U.S. 353, 357 (1922)).

170. *Id.* at 9 (citing *Smith v. United States*, 568 U.S. 106, 112 (2013)).

to craft criminal offenses in a “sound” and “just” manner, the Court has effectively usurped Congress’s role in defining the elements of a criminal offense.¹⁷¹ Not to mention the majority’s trampling of ordinary usage and grammar. The *Ruan* Court also stumbled over the subtle distinction between the mens rea canon illuminating what Congress intended to include as an element and what the Justices want to include as an element as a matter of lenity. A Court capable of rewriting criminal statutes proves hard to square with the Constitution’s command of separation of powers.

Second, and relatedly, Justice Alito warns that when the Court reaches for a “sound” or “just” result in the criminal law, it ignores the cascading consequences. The *Ruan* Court’s elision of the element-affirmative defense distinction in the name of lenity makes it unclear “[h]ow many other affirmative defenses might warrant similar treatment.”¹⁷² Such a blasé attitude toward fundamental criminal-law concepts “leaves prosecutors, defense attorneys, and the lower courts in the dark.”¹⁷³

* * *

So, what are we to make of Justice Alito’s mens rea jurisprudence? A common thread (reminiscent of his categorical-approach jurisprudence) is an abiding concern with the Supreme Court engaging in theoretical expeditions at great cost to the administration of criminal law. Whether it is befuddling lower courts as in *Elonis*, inviting dubious collateral attacks as in *Rehaif*, or confusing the status of statutory affirmative defenses as in *Ruan*, Justice Alito is often one of the few voices on the Court calling out real-world consequences.

Moreover, the Justice is clearly concerned not just with the lower courts, but also the victims of crimes. As Justice Alito has asked advocates in oral argument, “[W]hat do you say to the amici who say that if your position is adopted, this is going to have a very grave

171. *Ruan*, 142 S. Ct. at 2384 n.* (Alito, J., concurring).

172. *Id.* at 2383.

173. *Id.*

effect . . . [Are] they[] just wrong, they don't understand the situation?"¹⁷⁴ Dashing any air of pretension, he directs advocates to quantify the concrete effects of their preferred position, asking in *Rehaif*, for example, "[h]ow many people are now serving time in federal prison under the felon-in-possession statute?"¹⁷⁵ Or in *Ruan*, asking whether the petitioner's interpretation of the CSA would require dismissal of "all the other indictments" in every case the Department of Justice brought under the relevant provision.¹⁷⁶ With such high practical stakes on the line, Justice Alito prefers to prioritize context over abstraction, and reality over theory.

CONCLUSION

In opening this chapter, I noted that Justice Alito is a natural judge. By this I meant that Justice Alito conceives of his job as getting a case right and not "winning." As a former Department of Justice employee, U.S. Attorney for the District of New Jersey, and Third Circuit Judge, Justice Alito is well-versed in how a Supreme Court opinion coming down from on high can wreak havoc on people working in or confronting the nation's criminal-justice system. In his categorical-approach and mens rea jurisprudence, Justice Alito has demonstrated a discerning sense of how a particular decision can unleash a chain reaction of negative consequences borne by the lower courts, prosecutors, defendants, and victims. He abjures pure textual formalism in statutory interpretation, if, for instance, giving shrift to a curious and perhaps errant comma would produce real-world results that are arbitrary, inconsistent, and contrary to Congress's evident purpose in enacting the statute.

It's hard to neatly define the Justice's pragmatism, but his criminal-law jurisprudence reveals an unyielding commitment to avoid prejudging a case without a full accounting of the facts, the

174. Transcript of Oral Argument at 60, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983).

175. Transcript of Oral Argument at 59, *Rehaif v. United States*, 139 S. Ct. 2191 (No. 17-9560).

176. Transcript of Oral Argument at 78, *Ruan*, 142 S. Ct. 2370 (No. 20-1410).

statutory landscape, and the practical consequences. Justice Alito's refusal to give in to the "cavalier treatment of . . . important question[s]"¹⁷⁷ has secured his position as the Justice who steadfastly acknowledges real-world consequences and Congress's purpose in the criminal law. Often through his concurrences and dissents, Alito has served as the Court's criminal-law oracle, time and again accurately predicting how the Court's decisions prioritizing abstraction over text and practical consequences will yield adverse consequences. But there is nothing supernatural about his prophecies. Justice Alito is simply a natural when it comes to judging, thinking two steps ahead of the curve.

177. *Ruan*, 142 S. Ct at 2383 (Alito, J., concurring).

JUSTICE ALITO ON CRIMINAL PROCEDURE

HON. ANDREW S. OLDHAM*

Justice Alito's criminal procedure jurisprudence reflects a commitment to administrable "rules" instead of fuzzy, hard-to-apply "standards."¹ Criminal procedure rules allow the relevant actors to understand the law and conform their actions to it. Rules are also easier for inferior-court judges to apply. Standards, in contrast, often obscure rather than answer the hardest questions. They can leave police, prosecutors, citizens, and judges with little idea of what the law really requires.² Justice Alito's criminal procedure decisions thus evoke his late colleague's mantra that "the rule of law is the law of rules."³

But only to a point. Taken to its extreme, a rules-focused approach can devolve into a heady exercise in hyperformalism, entirely disconnected from the real world. And Justice Alito often reminds us that law has no meaningful purpose when it stops

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1. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992) ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider. Thus, advance determination of the appropriate speed on expressways under normal conditions . . . [is] 'rule-like' when compared to asking an adjudicator to attach whatever legal consequence seems appropriate in light of whatever norms and facts seem relevant.").

2. Contrast Justice Alito's appreciation for simple, easy-to-understand rules with Justice Breyer's (putatively) pragmatic "enthusiasm for judicial minimalism, in the form of narrow decisions that leave the hardest questions *undecided*." Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 YALE L.J. 1719, 1729 (2006) (emphasis added) (in the administrative-law context).

3. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

comporting with the reality of everyday life.⁴ For Justice Alito, that's as true in criminal procedure as it is in other areas of law.⁵

This chapter considers two hallmarks of Justice Alito's criminal procedure jurisprudence. First, it explains Justice Alito's understanding of where the criminal procedure rubber hits the real-world road. Call it pragmatism; call it common sense; call it practicality. Whatever you call it, Justice Alito's criminal procedure decisions evince an unflagging concern for how any given precedent will affect ordinary people making everyday decisions. Second, it explains how Justice Alito's focus on real-world consequences affects his approach to reconsidering precedents and setting new ones.

I. CRIMINAL PROCEDURE PRAGMATISM

To unpack Justice Alito's understanding of criminal procedure rules and pragmatics, let's begin with the Fifth Amendment. The Court has long held that the Fifth Amendment's right against self-incrimination bars involuntary confessions.⁶ Until 1966, the Court's approach to that question turned on a fact-specific evaluation of the circumstances surrounding the defendant's confession.

That approach, however useful in individual cases, had a weakness: It was fundamentally a standard, and it did very little to establish a legal rule for *future* cases. And that meant courts (and everyone else) had a hard time drawing lines between voluntary and involuntary confessions. Was the suspect intelligent? Was he sick

4. See *Collins v. Virginia*, 138 S. Ct. 1663, 1681 (2018) (Alito, J., dissenting) ("An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, 'the law is a[n] ass—a idiot.'" (quoting CHARLES DICKENS, *OLIVER TWIST* 277 (1867))).

5. *Cf., e.g., Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (framing the textualist question as: "How would the terms of a statute have been understood by ordinary people at the time of enactment?").

6. *Bram v. United States*, 168 U.S. 532, 542 (1897); see also LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968) (discussing the origins of the right against self-incrimination).

at the time of the interview? Was he well-educated? Had he had prior police run-ins? etc.⁷

Partially because the voluntariness inquiry was so hard for everyone to apply, the Court fashioned a “prophylactic rule” in *Miranda v. Arizona*.⁸ A prophylactic rule is a way of protecting an underlying constitutional guarantee by imposing *extra*-constitutional requirements on the relevant set of actors.⁹ The underlying guarantee in *Miranda* was (mainly) the Fifth Amendment’s ban on involuntary confessions. The extra-constitutional requirements were *Miranda*’s judge-made procedural rules—for example, the requirement to inform a suspect of his right to remain silent before interrogating him. And the relevant actors were, of course, police interrogators. If the police break the *Miranda* rules—and they really are *rules*, not standards¹⁰—then the resulting confession is almost always inadmissible.

As with so many criminal procedure doctrines, however, *Miranda* shifted (rather than settled) the rules-versus-standards question. Specifically, after *Miranda*, the question became: *When* must police administer the prophylactic warnings? At one level, the answer is easy. *Miranda*’s safeguards apply to suspects who are in custody. But when is someone in custody? Well, if the police have formally arrested someone, that, too, is easy. But even without a formal

7. See *J.D.B. v. North Carolina*, 564 U.S. 261, 284–86 (2011) (Alito, J., dissenting) (documenting cases that analyzed a wide variety of factors indicating “voluntariness”).

8. 384 U.S. 436 (1966); see also *Michigan v. Tucker*, 417 U.S. 433, 445–46 (1974) (casting *Miranda* as prophylactic).

9. See Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 1 (2001) (discussing various definitions of the phrase “prophylactic rule” and concluding, “I prefer defining the term to refer to doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms.”). But see *id.* at 25–28 (arguing the concept is not helpful).

10. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that *Miranda* created a bright-line constitutional rule that Congress cannot statutorily abrogate and emphasizing that “experience suggests that the totality-of-the-circumstances test which [Congress] seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner”).

arrest, if police have created a “restraint on freedom of movement of the degree associated with” an arrest, then the suspect is likewise in custody.¹¹

At least initially, the Court’s custody cases turned on *objective* factors. The relevant question was, essentially, whether a “reasonable man” in the suspect’s shoes would consider himself free to end his interaction with the police and go on his way.¹² The officer’s and suspect’s *subjective* thoughts, beliefs, and feelings were simply irrelevant.

That brings us to *J.D.B. v. North Carolina*.¹³ In coordination with school administrators, a police officer had pulled a 13-year-old from class and talked with him in a school conference room.¹⁴ Without giving *Miranda* warnings, the officer asked the student about a couple of home break-ins.¹⁵ The student confessed to the break-ins, and he eventually admitted to the crimes in juvenile court.¹⁶ The key question was whether the student had been in custody when he confessed.

The Court didn’t actually answer that question, but it held the North Carolina Supreme Court had erred by applying the ordinary, objective “custody” test without accounting for the student’s age.¹⁷ The majority emphasized that disregarding a suspect’s age in the custody analysis would result in significant inaccuracies: As a matter of common sense, a child is likely more susceptible to implied coercion than an otherwise-similar adult would be.¹⁸ Therefore, the majority “h[e]ld that so long as the child’s age was known to the officer at the time of police questioning, or would have been

11. *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation omitted).

12. *Id.* at 324–25.

13. 564 U.S. 261 (2011).

14. *Id.* at 265–66.

15. *Id.* at 266.

16. *Id.* at 267.

17. *See id.* at 281.

18. *See id.* at 271–75.

objectively apparent to a reasonable officer,” it must be part of the custody analysis.¹⁹

Justice Alito’s dissent, joined by three other Justices, countered that the Court was ignoring *Miranda*’s prophylactic nature.²⁰ Remember that *Miranda* replaced a system that asked only whether a particular confession was, as a matter of actual fact, “voluntary.”²¹ And whatever its faults, *Miranda*’s chief virtue is that it’s a rule everyone, especially the police, can understand and apply.²²

The Court’s decision muddled the gateway custody question by taking into account the suspect’s age—not always an easy thing to quickly and reliably ascertain in the course of routine policing. And that was a step toward “undermin[ing] the very rationale for the *Miranda* regime.”²³ Further, Justice Alito explained, the majority’s rule will “generate time-consuming satellite litigation over a reasonable officer’s perceptions” of a suspect’s youthfulness. And it’s impossible to understand why a suspect’s youth could be relevant to the custody analysis while other characteristics—including intelligence, education, occupation, prior experience with law enforcement, mental health, etc.—unquestionably are not. And more fundamentally, the entire thrust of *Miranda*—and especially of the (formerly) purely objective “custody” test—is to lay down an administrable rule. If accuracy was the sole concern, after all, we’d be right back to the totality-of-the-circumstances voluntariness inquiry. In short, Justice Alito’s *J.D.B.* dissent was based on the principle that there aren’t any perfectly accurate rule-solutions to problems of criminal procedure. Insofar as the Court wants a rule, and a prophylactic one at that, good-enough answers sometimes must suffice.

19. *Id.* at 277.

20. *Id.* at 282 (Alito, J., dissenting).

21. *See id.* at 284–85 (Alito, J., dissenting).

22. *See id.* at 281–83; *see also* Caminker, *supra* note 10 (discussing *Dickerson*).

23. *J.D.B.*, 564 U.S. at 292.

Justice Alito's plurality opinion in *Salinas v. Texas*,²⁴ another Fifth Amendment case, was rooted in similar concerns. The suspect in that case (who was undisputedly *not* in custody at the time) had voluntarily talked with a police officer who was investigating a double murder.²⁵ He willingly answered the officer's questions—until the officer asked “whether his shotgun would match the shells recovered at the scene of the murder.”²⁶ Rather than answer, the suspect clammed up, “looked down at the floor, shuffled his feet,” and showed other signs of nervousness.²⁷

The question was whether the prosecution had violated the Fifth Amendment's guarantee against self-incrimination by arguing at trial that the defendant's reaction suggested guilt. The plurality opinion said no, and the reason was simple. The well-established rule says a suspect not in custody must affirmatively invoke his right against self-incrimination—merely remaining quiet isn't good enough.²⁸ There are a few exceptions to that rule.²⁹ But none applied here. Full stop.

Justice Breyer's dissent urged a more fact-sensitive approach—surely it would be wise to consider “the circumstances of the particular case” to determine whether a suspect *implicitly* invoked the right.³⁰ But Justice Alito disagreed. Why depart from existing precedents in a way that will leave police officers and suspects without concrete guidance in any given case? And even in court, Justice Breyer's standards-focused approach would create difficult “line-drawing problems” harmful to the rule of law.³¹ Far better to stick with the usual rule and apply it straightforwardly to the case at hand.

24. 570 U.S. 178 (2013).

25. *Id.* at 181.

26. *Id.* at 182 (plurality opinion) (quotation omitted).

27. *Id.* (quotation omitted).

28. *See id.* at 183 (citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)).

29. *See id.* at 184–185.

30. *Id.* at 201–02 (Breyer, J., dissenting).

31. *Id.* at 190–91 (plurality opinion) (also responding to the dissent's charge that the plurality's rule would itself be hard to administer).

These cases are only a sampling.³² Nevertheless, they illustrate Justice Alito's preference for rules over standards, and they reflect a deep appreciation of the workaday issues that face lower-court judges, prosecutors, and police. Those individuals face enough difficult, thorny problems as it is. The least judges can do is explain the rules of the game clearly and in plain English.

But as much as Justice Alito appreciates clear rules of the game, he also understands the playing field—both factual and legal—in any given case. And he often uses that knowledge in an effort to prevent the Court from making doctrinal messes.

A series of cases about the Federal Sentencing Guidelines illustrates this strand of Justice Alito's jurisprudence. The basic point of the Guidelines was to create "a system that diminishes sentencing disparit[ies]" among similarly situated offenders.³³ In *United States v. Booker*, just before Justice Alito joined the Court, the Court held that Congress had violated the Sixth Amendment's guarantee of trial by jury by making the Guidelines mandatory on sentencing courts.³⁴ The *Booker* Court "excise[d]" the offending statutory provisions in an attempt to fix the problem without totally undermining the Guidelines' goal of uniform sentencing.³⁵ The result: The Guidelines remain, but they're no longer mandatory on sentencing courts.

*Gall v. United States*³⁶ came two years later. The Court had to decide, in essence, how much flexibility a post-*Booker* district judge has to depart from the Guidelines when imposing a sentence.³⁷ The

32. See, e.g., *Byrd v. United States*, 138 S. Ct. 1518 (2018) (Alito, J., concurring) (short concurrence identifying the relevant questions informing whether a defendant can bring a Fourth Amendment claim in an evident attempt to keep the doctrine as clean as possible); *Birchfield v. North Dakota*, 579 U.S. 438 (2016) (majority opinion) (applying ordinary Fourth-Amendment rules in the drunk-driving context without distorting the doctrine); *Yeager v. United States*, 557 U.S. 110 (2009) (Alito, J., dissenting) (arguing, among other things, that the majority's rule would be too hard to apply).

33. *United States v. Booker*, 543 U.S. 220, 250 (2005).

34. See *id.* at 230–32.

35. See *id.* at 258–59.

36. 552 U.S. 38 (2007).

37. See *id.* at 40–41 (majority opinion).

Court held that sentences get reviewed only under the highly deferential abuse-of-discretion standard—and it imposed little-to-no obligation on district judges to give serious weight to the Guidelines.³⁸

Justice Alito's dissent contended that the majority was unduly sapping all the Guidelines' vitality. In his view, "a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision."³⁹

Justice Alito began by pointing out that *Booker* was ambiguous: It clearly held that the Guidelines were only "advisory," but it hedged about whether courts have much of an obligation to consider them on the way to sentencing decisions. And Justice Alito emphasized the fundamental principle of the Guidelines: Sentencing judges had been exercising too much discretion, and Congress attempted to remove that discretion entirely.⁴⁰

But this is where Justice Alito's vast understanding of criminal procedure came into play. He accounted for something six of the other Justices apparently did not: *Booker* was a decision *about the Sixth Amendment jury right*.⁴¹ That means *Booker* justifies undoing Congress's discretion-eliminating choice only to the extent Congress's choice conflicts with the Sixth Amendment. Thus, Justice Alito concluded, the only permissible approach is to read the ambiguous *Booker* opinion narrowly: *Booker* held the Guidelines aren't mandatory, but it didn't hold the Guidelines have no force whatsoever. And it *certainly* didn't hold that "sentencing judges need only give lipservice" to them, in Justice Alito's words.⁴²

38. *See id.* at 51.

39. *Id.* at 61 (Alito, J., dissenting).

40. *Id.* at 63–64.

41. *Compare id.* at 64 (Alito, J., dissenting) ("[I]n reading the *Booker* remedial opinion, we should not forget the decision's constitutional underpinnings. *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury."), *with id.* at 40–60 (majority opinion) (not even using the phrase "Sixth Amendment").

42. *See id.* at 63 (Alito, J., dissenting).

This is the kind of insight that appears obvious when you say it out loud. Yet Justice Alito was the only one to point it out at the time. And he noticed the issue because he understood how the Constitution, the statute, the Court's doctrine, and the trial-level sentencing system fit together.⁴³ In a series of related cases following *Gall*, Justice Alito continued making this point—often, but not always, as a lone voice crying out in the wilderness.⁴⁴

Or take the Sixth Amendment's Confrontation Clause, which guarantees a defendant's right "to be confronted with the witnesses against him."⁴⁵ Justice Alito wrote the plurality opinion in *Williams v. Illinois*,⁴⁶ which implicated the Confrontation Clause's application to expert testimony and DNA evidence. Justice Alito first concluded that the Clause doesn't "bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify."⁴⁷ And second, he explained that the Clause allows prosecutors to introduce expert-produced DNA evidence.⁴⁸

Because the decision was so badly splintered—with four opinions total—Justice Alito's reasoning for the plurality didn't become binding precedent.⁴⁹ But that doesn't make it unimportant. To the contrary, it fended off the dissenters from expanding the Clause's scope. *Williams* thus illustrates that a non-precedent is sometimes better than a bad one.⁵⁰

43. *See id.* at 66.

44. *Kimbrough v. United States*, 552 U.S. 85 (2007) (Alito, J., dissenting) (alone); *Cunningham v. California*, 549 U.S. 270 (2007) (Alito, J., dissenting) (joined by Justices Kennedy and Breyer); *Pepper v. United States*, 562 U.S. 476 (2011) (Alito, J., concurring in part and dissenting in part) (alone).

45. U.S. CONST. amend. VI.

46. 567 U.S. 50 (2012).

47. *See id.* at 56 (plurality opinion).

48. *See id.* at 58 (plurality opinion).

49. *See id.* at 120 (Kagan, J., dissenting) (discussing the Court's disagreement over the plurality's reasoning).

50. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., joined by the Chief Justice and Justices Breyer and Alito, dissenting) (lamenting the Court's formalistic extension of the Confrontation Clause to forensic analysts' testimony).

The dissent's approach sounded mainly in formalism and originalism. The dissenters advocated for a significant expansion of *Crawford v. Washington*,⁵¹ an opinion written by Justice Scalia which itself expanded the Court's existing Confrontation-Clause precedents on purportedly originalist grounds.⁵² In response, Justice Alito put on his own formalist and originalist tour de force, countering the dissent point-by-point.

But he also displayed a canny sense for the practical realities of expert testimony and DNA testing. Right up top, he noted that "[i]f DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable."⁵³ And when the dissent faulted the plurality for allowing abusive expert testimony, Justice Alito pointed to an interlocking web of existing "safeguards to prevent such abuses."⁵⁴ When Justice Thomas and the dissent each appealed to history, Justice Alito countered that they were overlooking the way DNA testing actually works: A team of technicians follows established procedures, with no incentive to reach "anything other than [] scientifically sound and reliable" results, and without any clue whether a given result will incriminate or exonerate any particular individual.⁵⁵ In sum, history matters, but so does context: "[T]he 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."⁵⁶

Justice Alito has employed a similar approach in other areas. In one Fourth Amendment case, he criticized the Court for giving an "arbitrary" answer to "a question not really presented by the facts

51. 541 U.S. 36 (2004).

52. *See id.* at 49–69.

53. *Williams*, 567 U.S. at 58 (plurality opinion).

54. *Id.* at 127–28 (Kagan, J., dissenting); *id.* at 79–80 (plurality opinion).

55. *Id.* at 113–18 (Thomas, J., concurring); *id.* at 134–35 (Kagan, J., dissenting); *id.* at 84–86 (plurality opinion).

56. *Id.* at 86 (plurality opinion) (quotation omitted).

in this case.”⁵⁷ In another, he pointed to the Court’s refusal to apply “nearly a century[’s]” worth of precedents and its decision to invent a new rule instead.⁵⁸ In the Fifth-Amendment context, he’s attempted to mitigate (what he sees as) majority-created doctrinal messes by urging lower courts to apply existing precedents as narrowly as possible in the future.⁵⁹ And in another Sixth Amendment case, he used his knowledge of trial procedure as a way to limit the scope of the Court’s holding.⁶⁰ The common refrain is that each case has its nuances, and it’s worthwhile to take the time to understand them. Why change the law when attending to the facts is enough?

II. CRIMINAL PROCEDURE MODESTY

A second hallmark of Justice Alito’s criminal procedure jurisprudence is its modesty. Thus, for example, he is often reluctant to overturn precedent. But Justice Alito’s modesty does not stop there. Judicial innovation—even when consistent with existing precedent—often raises more questions than it answers, rendering the law less clear. And each innovation complicates an already intricate mosaic of criminal procedure doctrine. In an area where proposals for groundbreaking shifts abound—among lawyers and jurists of all persuasions—Justice Alito’s opinions consistently argue for a cautious approach to legal change.

Let’s start with Justice Alito’s deference to precedent (or *stare decisis*⁶¹). Two of his dissenting opinions—one shortly after his elevation to the Supreme Court and one closer to the time of this writing—provide useful guideposts.

57. *Rodriguez v. United States*, 575 U.S. 348, 370 (2015) (Alito, J., dissenting).

58. *Collins v. Virginia*, 138 S. Ct. 1663, 1681–83 (2018) (Alito, J., dissenting).

59. *See Yeager v. United States*, 557 U.S. 110, 133–36 (2009) (Alito, J., dissenting).

60. *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 213–18 (2008) (Alito, J., concurring).

61. *Stare decisis* is Latin for “to stand by things decided,” and refers to the principle that courts should follow earlier judicial decisions when the same issue arises in subsequent litigation. *See Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

The first case is *Arizona v. Gant*,⁶² decided during Justice Alito's third full term on the Court. The case involved a recurring question: When police arrest an occupant or recent occupant of a vehicle, may they search the vehicle without a warrant?⁶³ In the 1981 decision of *New York v. Belton*, the Court had held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."⁶⁴

The *Belton* decision had been widely understood to permit police officers, pursuant to a lawful arrest, to secure arrestees (*e.g.*, in the back of a patrol car) and then search the passenger compartment of their vehicles.⁶⁵ But the *Gant* majority changed course and narrowed the circumstances where warrantless vehicle searches are permissible. The Court held that police may search an arrestee's vehicle only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.⁶⁶

Justice Alito vigorously dissented. He lamented that the majority's novel, bipartite test "is virtually certain to confuse law enforcement officers and judges for some time to come."⁶⁷ And he highlighted the perverse consequences that he believed would flow from the majority's new rule. For example, he argued that *Gant* would often "endanger arresting officers" by making them choose between searching the car *before* securing the arrestee and losing the right to search the car at all.⁶⁸

But the brunt of this dissent criticized the majority for departing from *Belton*'s rule without adequate justification. Here Justice Alito focused on the doctrine of *stare decisis*, which requires the Court to

62. 556 U.S. 332 (2009).

63. *See id.* at 335.

64. 453 U.S. 454, 460 (1981).

65. *Gant*, 556 U.S. at 341.

66. *Id.* at 343.

67. *Id.* at 356 (Alito, J., dissenting).

68. *Id.* at 355.

find “a special justification” to abandon a prior decision.⁶⁹ The Court is supposed to consider a number of factors in deciding whether a special justification exists, including reliance on the precedent, its workability, and whether it was badly reasoned.⁷⁰

Justice Alito’s dissent gave particular attention to reliance interests. This was an important jurisprudential move because, prior to *Gant*, most Justices considered reliance relevant in cases involving property and contract rights—but not in cases involving “procedural and evidentiary rules.”⁷¹ Justice Alito nonetheless identified substantial reliance reasons that, he argued, supported keeping the *Belton* rule. For example, he noted that police academies had been teaching the *Belton* rule to officers for more than a quarter century.⁷² And given the relative frequency of vehicle-occupant arrests, numerous searches—some of which would be the subject of pending litigation when *Gant* was decided—had been conducted in reliance on the Court’s guidance in *Belton*.⁷³ The Court’s decision thus threatened to “cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law.”⁷⁴ And it would force thousands of law enforcement officers to unlearn an established rule and replace it with the Court’s new (and more complex) guidance.

Justice Alito’s *stare decisis* analysis, including his concerns about reliance interests, obviously did not persuade a majority in *Gant*. But *Davis v. United States*⁷⁵—decided two years later—provides an interesting coda that arguably vindicates his view. *Davis* involved a vehicle search that took place in 2007, two years before *Gant* was decided. Because the officers searched the arrestee’s vehicle after securing him in a patrol car, the search would have been permissible under *Belton* but was unconstitutional under *Gant*. Justice Alito

69. *Id.* at 358 (quotation omitted).

70. *Id.*

71. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

72. *Gant*, 556 U.S. at 359 (Alito, J., dissenting).

73. *Id.*

74. *Id.* at 356.

75. 564 U.S. 229 (2011).

wrote for a six-Justice majority, holding that the exclusionary rule⁷⁶ did not apply to the fruits of the search. The Court also held, more broadly, that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”⁷⁷ The Court’s reasoning was based on the premise that “suppression would do nothing to deter police misconduct in these circumstances, and . . . it would come at a high cost to both the truth and the public safety.”⁷⁸ So, while Justice Alito’s emphasis on reliance interests in *Gant* didn’t win him that battle, they contributed to victory in a different war—the war over applying the exclusionary rule to reasonable, good-faith searches.

Next consider *Ramos v. Louisiana*,⁷⁹ a 2020 case involving the Sixth Amendment right to trial by jury. *Ramos* overturned the 1972 case of *Apodaca v. Oregon*⁸⁰ and held that the Sixth Amendment requires a *unanimous* jury verdict to convict a defendant of a felony.⁸¹ Justice Alito again dissented on *stare decisis* grounds. And he again emphasized reliance interests—though this time he focused on two States (Louisiana and Oregon), which were the only two that relied on *Apodaca* to allow non-unanimous jury verdicts.⁸²

As Justice Alito explained: “What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon.”⁸³ Perhaps most interestingly, he contrasted *Ramos* with other landmark Supreme Court decisions that overturned precedent, like *Janus v. AFSCME*,⁸⁴ arguing that the States’ reliance

76. The exclusionary rule is a judge-made doctrine that often renders evidence obtained in violation of a defendant’s Fourth Amendment rights inadmissible in subsequent criminal proceedings. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

77. *Davis*, 564 U.S. at 232.

78. *Id.*

79. 140 S. Ct. 1390 (2020).

80. 406 U.S. 404 (1972).

81. *Ramos*, 140 S. Ct. at 1397.

82. *Id.* at 1425–26 (Alito, J., dissenting).

83. *Id.* at 1436 (Alito, J., dissenting).

84. 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and holding that imposing union “agency fees” on nonconsenting public-sector employees violates the First Amendment).

interests in *Ramos* far exceeded the reliance interests in cases like *Janus*. In so doing, Justice Alito again flipped the conventional wisdom—that reliance interests for *stare decisis* purposes are at their apex in the realm of contract and property—on its head. He forecasted a “tsunami” of litigation arising from the *Ramos* decision, requiring countless retrials and requiring the evaluation of endless jury-unanimity claims on both direct and collateral review.⁸⁵ And he suggested that avoiding these kinds of structural shocks to our criminal justice system should be a central tenet of *stare decisis*—even more so than protecting contract and property interests. For Justice Alito, then, *stare decisis* is first and foremost a tool to promote systemic stability and the public good, rather than a protection for individual stakeholders and a thumb on the scale for vested interests.

Although only articulated in dissent, Justice Alito’s view of *stare decisis* and reliance interests in the criminal procedure context has proved influential. For example, partially in response to Justice Alito, the Court later held that the *Ramos* rule didn’t apply retroactively to cases on collateral review.⁸⁶ And Justice Alito’s defense of *stare decisis* carried the day in *Gamble v. United States*,⁸⁷ where his majority opinion rejected a request to overturn the “separate sovereigns” doctrine that permits both a State and the federal government to try a defendant for the same crime without offending the Double Jeopardy Clause.⁸⁸

Justice Alito’s modesty does not just counsel restraint in reconsidering precedent; it also counsels against broad judicial innovations in the absence of precedent. I should first explain what I mean by “judicial innovation.” Justice Scalia colorfully depicted the judicial penchant for innovation in his explanation of how the common law evolves. As he noted, common-law judicial doctrines tend to

85. *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

86. See *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021).

87. 139 S. Ct. 1960 (2019).

88. See *id.* at 1962.

develop in a peculiar fashion, “rather like a Scrabble board.”⁸⁹ This is because, under the rule of *stare decisis*, it’s very hard to *erase* a prior decision, but it’s easy to add *qualifications* to it. Justice Scalia captured the attractiveness and the technique of judicial innovation as follows:

[T]he great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.⁹⁰

By judicial innovation, then, I mean adding another word (*i.e.*, rule) to the Scrabble board of precedent instead of merely applying the words already on the board. In theory, ever since the landmark 1938 decision of *Erie Railroad Company v. Tompkins*,⁹¹ federal courts have abjured common-law rulemaking except in a few narrow enclaves.⁹² But the common-law mode of judging continues to have great appeal and influence in American jurisprudence, including in constitutional interpretation.⁹³ And the common-law methodology is particularly influential in the criminal procedure context, where the relevant constitutional commands—like no “unreasonable searches and seizures”⁹⁴—leave ample room for elaboration.

Against this backdrop, many of Justice Alito’s opinions provide powerful critiques of judicial innovation. Take, for example, *United States v. Jones*.⁹⁵ There, the Court considered whether it was an

89. ANTONIN SCALIA, A MATTER OF INTERPRETATION 8 (1997).

90. *Id.* at 9.

91. 304 U.S. 64 (1938).

92. See Andrew S. Oldham, *Sherman’s March (in)to the Sea*, 74 TENN. L. REV. 319, 374–77 (2007).

93. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

94. U.S. CONST. amend. IV.

95. 565 U.S. 400 (2012).

“unreasonable search” under the Fourth Amendment to surreptitiously attach a GPS tracking device to a suspect’s vehicle without a warrant and to monitor the vehicle’s movements on public streets.⁹⁶ All nine Justices agreed that the search was unreasonable. But they forcefully disagreed about why.

Perhaps ironically, it was Justice Scalia—often the critic of judicial innovation in other contexts—who proposed the more innovative approach in *Jones*. The historical standard, based on the landmark 1967 case of *Katz v. United States*,⁹⁷ was that a search was unconstitutional if it violated a suspect’s “reasonable expectation of privacy.”⁹⁸ But Justice Scalia’s majority opinion declined to apply the *Katz* test, instead formulating an additional and separate rule that a warrantless trespass to a person’s house or chattels constitutes an unreasonable search if done to obtain information.⁹⁹

Justice Alito concurred in the judgment. He argued the Court should have simply applied the *Katz* test, and he criticized the majority’s new approach as a “highly artificial” exercise “based on 18th-century tort law.”¹⁰⁰ Notably, he agreed that the *Katz* test has its flaws. For example, its reasoning is circular (a search is constitutionally “unreasonable” if it violates one’s “reasonable expectation of privacy”), it turns on judicial hindsight, and it is tainted by subjectivity.¹⁰¹ Justice Alito nonetheless argued that, for all its faults, *Katz* was superior to the majority’s new qualification. The latter, he worried, would create substantial confusion and disruption in Fourth Amendment law. For example, since the majority’s new test was tied to the notion of “trespass” under state property law, would the Fourth Amendment’s protections now vary from State to State?¹⁰² This and several other facets of the majority’s new

96. *See id.* at 402.

97. 389 U.S. 347 (1967).

98. *Jones*, 565 U.S. at 406.

99. *Id.* at 408, 408 n.5.

100. *Id.* at 418–19 (Alito, J., dissenting).

101. *Id.* at 427 (Alito, J., dissenting).

102. *See id.* at 425–26 (Alito, J., dissenting).

inquiry would confuse the law until their eventual clarification in further cases.

At bottom, *Jones* was about how to apply the 1791 constitutional prohibition on “unreasonable searches” to a 2012 case involving new and advanced surveillance technology. Justice Alito thought it unwise for the Court to manufacture a new test to adapt the Fourth Amendment’s “reasonableness” standard to these changed circumstances. Instead, he argued that if legal innovation was appropriate, it should come from a legislative body, which “is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”¹⁰³

Justice Alito has shown this same skepticism of judicial innovation in other criminal procedure cases. *Florida v. Jardines*,¹⁰⁴ for example, decided a year after *Jones*, asked whether it violated the Fourth Amendment to use a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home without a warrant.¹⁰⁵ The majority said yes, again expounding a trespass-based theory. Justice Alito again disagreed, urging that *Katz* (for all its faults) was better than judicial innovation.¹⁰⁶

The blockbuster 2018 case of *Carpenter v. United States*¹⁰⁷ brought the Court’s longstanding differences over judicial innovation in constitutional criminal procedure to a head. The issue was whether the Government conducts a “search” for Fourth Amendment purposes when it accesses historical cell phone records (called “cell site location information” or “CSLI”) that provide information about the user’s past locations.¹⁰⁸ CSLI surveillance can be particularly comprehensive and invasive: In *Carpenter* itself, for example, the Government scrutinized the suspect’s movement over 127 days through 12,898 location points.¹⁰⁹ But existing Fourth Amendment

103. *Id.* at 429–30 (Alito, J., dissenting).

104. 569 U.S. 1 (2013).

105. *Id.* at 3.

106. *See id.* at 17 (Alito, J., dissenting).

107. 138 S. Ct. 2206 (2018).

108. *Id.* at 2211.

109. *Id.* at 2212.

doctrine did not support holding that CSLI surveillance constitutes a search, for two reasons. First, this kind of investigation involves subpoenaing records rather than actual, physical searching—and subpoenas are generally subject to less Fourth Amendment scrutiny (a point Chief Justice Roberts contests in dissent). Second, the Government searched property belonging to a third party—the cell phone company—rather than searching the suspect’s own property. The majority sidestepped these doctrinal obstacles and held that accessing CSLI constitutes a search.¹¹⁰ It based its decision on “the unique nature of cell phone location information,” and noted that declining to extend Fourth Amendment protections to CSLI would permit “tireless and absolute surveillance” of anyone with a cell phone.¹¹¹

Justice Alito dissented. Despite “shar[ing] the Court’s concern about the effect of new technology on personal privacy,” he thought it unwise to depart from established Fourth Amendment principles in order to adapt the doctrine to the threats posed by new technology.¹¹² And he reiterated and expanded on his concerns about the dangers of judicial innovation. Specifically, he predicted that the principles underlying *Carpenter* would require “all sorts of qualification and limitations that have not yet been discovered” in order to prevent a wholesale revolution in Fourth Amendment law.¹¹³ These qualifications would “mak[e] a crazy quilt of the Fourth Amendment”—or, to return to our earlier metaphor, add needless complexity and word jumbles to the Scrabble board.¹¹⁴ For the Supreme Court to create this complexity, Justice Alito argued, was unnecessary and irresponsible. The proper course would have been to allow Congress and the States to choose how to adapt the law to the challenges of privacy in the digital age.

110. *Id.* at 2223.

111. *Id.* at 2218, 2220.

112. *Id.* at 2246 (Alito, J., dissenting).

113. *Id.* at 2261 (Alito, J., dissenting).

114. *Id.* (Alito, J., dissenting) (quotation omitted).

One final case warrants discussion because it demonstrates Justice Alito's firm commitment to judicial caution even in the face of particularly repugnant facts. In *Pena-Rodriguez v. Colorado*,¹¹⁵ the Court considered the scope of the evidentiary rule against admitting juror testimony to impeach jury verdicts. This rule predates the Founding. It provides that once a jury delivers its verdict, the losing party can't offer juror testimony to cast doubt on the regularity of the jury deliberations in an effort to set aside the verdict.¹¹⁶ This rule exists to shield jury deliberations from public scrutiny and to avoid post-verdict harassment of jurors. And the Court has applied it broadly: In one case, it held the rule excluded evidence even of the jury's rampant alcohol, marijuana, and cocaine use during a criminal trial.¹¹⁷ But in *Pena-Rodriguez*, the Court held that the Sixth Amendment requires the no-impeachment rule to give way where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a defendant.¹¹⁸

Justice Alito dissented. He began by characterizing the majority's intentions as "admirable" and stating that "even a tincture of racial bias can inflict great damage" on the criminal justice system.¹¹⁹ But after a lengthy survey of the history of and justifications for the no-impeachment rule, he concluded that the Court's creation of a constitutional exception to no-impeachment rules—for the first time—was improper. He went on to predict that the majority's doctrinal innovation would invite the practical harms that no-impeachment rules were designed to prevent. And he concluded by "question[ing] whether our system of trial by jury can endure this attempt to perfect it."¹²⁰

115. 137 S. Ct. 855 (2017).

116. See Fed. R. Evid. 606(b).

117. See *Tanner v. United States*, 483 U.S. 107, 115–16 (1987).

118. *Pena-Rodriguez*, 137 S. Ct. at 869.

119. *Id.* at 875 (Alito, J., dissenting).

120. *Id.* at 885 (Alito, J., dissenting).

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Perhaps Justice Alito's criminal procedure jurisprudence can best be summed up by his reflection in the Fourth Amendment case *Manuel v. City of Joliet*:¹²¹ "A well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well."¹²² This judicial philosophy has proved as influential as it is modest. Justice Alito's pragmatic and cautious approach to criminal procedure has crept into the Court's handling of all sorts of doctrines, from *Miranda* and the exclusionary rule to the Confrontation Clause and sentencing. His influence here, as in so many other areas, will be felt for decades to come.

121. 137 S. Ct. 911 (2017).

122. *Id.* at 929 (Alito, J., dissenting).

JUSTICE ALITO: A JUSTICE OF FOXES AND HEDGEHOGS

HON. AMUL THAPAR*

The great Oxford philosopher Isaiah Berlin once proposed that all great writers fall into one of two camps. Some are hedgehogs; some are foxes.¹ Hedgehogs “relate everything to a single central vision.”² Foxes, on the other hand, reject grand theories. They “pursue many ends, often unrelated and even contradictory.”³ While hedgehogs tend to see the world in black-and-white, foxes see it in shades of gray.

Although Berlin later downplayed this essay, I suspect that his logic also applies to an age-old legal dispute: the split between rules and standards.⁴ Those who favor rules, like Justice Scalia, encourage judges to lay down clear rules that can be applied across cases. They are the ultimate hedgehogs. Those who prefer standards, by contrast, are foxes. They take an all-things-considered approach

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1. ISIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY* (1953).

2. JOHN LEWIS GADDIS, *ON GRAND STRATEGY* 4 (2018).

3. *Id.*

4. There is a longstanding debate about whether legal doctrines should cash out as rules or standards. There are merits to both approaches in particular settings. But I should put my biases on the table. I tend to stand with Justice Scalia—a pretty good place to stand—in favoring rules. As a lower-court judge, I know firsthand that rules are usually much easier to apply than standards. Rules can also ensure that law is applied in an evenhanded and predictable manner. At the same time, however, I know that every judge, no matter where their sympathies lie, will invariably be forced to employ both rules and standards. That is our lot in life. Even Justice Scalia—never one to shy from a fight—recognized that “[w]e will have totality of the circumstances tests and balancing modes of analysis with us forever.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989); see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

which balances an array of factors with close attention to the particular facts of each case. Justice Breyer is a great example. As a champion of pragmatism, Justice Breyer looks to balancing tests and multi-factor standards to resolve the case before him.

So, where does Justice Alito fall? Many would no doubt say that he's a fox, and there is some truth to that. In many contexts, Justice Alito openly acknowledges the limits of rules and the practical value of standards.⁵ Those insights reflect his reminder that "judging is not an academic pursuit" but rather a "practical activity" with often life-altering consequences for the parties before us.⁶

But I think that's only part of the story. When it comes to the separation of powers, I submit, Justice Alito typically resembles a hedgehog. In my view, separation-of-powers cases reveal his instinctive preference for rules over standards. Yet this preference is overlooked for a simple reason: Justice Alito rarely writes on a blank slate. Unlike, say, Justice Thomas, Justice Alito tends to take a thicker view of *stare decisis*. So, operating within the constraints of precedent, Justice Alito routinely refines the Supreme Court's caselaw in ways that make it both more coherent and more predictable—in other words, more hospitable for hedgehogs.

* * *

When it comes to our Constitution, structure is king. The Bill of Rights is, of course, a rich guarantee of our most basic rights. But without structural limits on governmental power, each of its cherished rights would be little more than words on a page. Our Founders understood this. They knew firsthand the abuse that flows from the unchecked consolidation of power in the hands of one actor. For that reason, they made structural limits the cornerstone of our

5. See Steven Menashi, *The Prudent Judge*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 16 (2023); Andrew Oldham, *Justice Alito on Criminal Procedure*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 19 (2023); Kate Stith, *Justice Alito on Criminal Law*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 18 (2023).

6. Samuel A. Alito, Jr., Assoc. Just., U.S. Sup. Ct., Manhattan Institute Walter B. Wriston Lecture: Let Judges Be Judges (Oct. 13, 2010).

constitutional charter.⁷ First, they divided powers between the federal government and the states. But they also divided powers *within* the federal government: the legislative power went to Congress, the executive to the President, and the judicial to the courts.

I can think of at least three reasons why rules are especially attractive for cases dealing with the separation of these powers. First, rules are more likely to restrain judicial overreach. The Founders understood that we should always expect government actors to expand their powers. And judges were no different. Indeed, for the Anti-Federalists—the leading critics of our constitutional order—the danger of *kritarchy* (rule by judges) loomed large. Brutus warned that “the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.”⁸ He reasoned that judicial review and lifetime tenure were a dangerous mix:

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.⁹

Although much has changed since the Founding, human nature has not. So, judges would do well to remember that, like other officials, we are not “angels.”¹⁰ We must always scrutinize our decisions to ensure that we do not succumb to the temptation to wrest power from the political branches. Rules reduce that risk.¹¹

7. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“Even a cursory examination of the Constitution reveals . . . that checks and balances were the foundation of a structure of government that would protect liberty.”).

8. Brutus, XV, in 2 THE COMPLETE ANTI-FEDERALIST 437–38 (Herbert J. Storing ed., 1981).

9. *Id.* at 438.

10. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

11. See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

Rules also enhance the public's perception of our judicial system as impartial and incorruptible—no small matter when our decisions are backed by neither the sword nor the purse.¹² Too many Americans today think that judges act as faithful agents of one political party or the other. This skepticism would hardly be assuaged if the Court handed down a decision on Tuesday that distinguished a case decided on Monday by reasoning, “Well, Monday’s case featured four factors while today’s involves four factors plus one.” By contrast, it’s hard to think of a better advertisement for the rule of law than the Court’s articulation of a clear rule in one case that it sticks to in subsequent cases—no matter the parties or issues before them.

And there’s another reason bright-line rules are valuable in the separation-of-powers context. Judicial decisions in this arena tend to have lasting consequences. Whether we are resolving disputes between dueling sovereigns or between coordinate branches of the federal government, we are deciding how our government operates. Too often, this truth is forgotten. Journalists and court-watchers scour Supreme Court opinions like box scores, trying to figure out who’s up and who’s down. But that’s not the role of a judge. And rules remind us to think not just about the case before us today, but the cases that’ll come down years from now, when the facts might be different and the shoe on the other foot.

Justice Alito put this point nicely in a recent case. In *Trump v. Vance*, an elected state prosecutor in New York launched a criminal investigation of the sitting President.¹³ As part of this investigation, the prosecutor sought to subpoena the President’s private records.¹⁴ This was unprecedented. As Justice Alito lamented at the outset of his powerful dissent, the Court’s decision was “almost certain to be portrayed as a case about the current President and the current political situation.”¹⁵ And true enough, that is how the

12. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

13. 140 S. Ct. 2412, 2420 (2020).

14. *Id.* at 2429.

15. *Id.* at 2439 (Alito, J., dissenting).

media characterized it. But most people didn't fully appreciate that the Court's decision was not a ticket good for one ride only. As Justice Alito noted, *Vance's* holding "will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation."¹⁶

Insights like these pervade Justice Alito's jurisprudence. And once we see things through this lens, we better understand his leading opinions on the separation of powers.

* * *

Justice Alito's separation-of-powers jurisprudence rests on a recognition that the judge's role is a limited one. His majority opinion in *Hernandez v. Mesa* embodies this judicial humility.¹⁷ *Hernandez* also demonstrates his skill in disciplining doctrines that previously relied on nebulous standards.

To illustrate this point, however, it's important to take a few steps back. Start with hornbook law. Federal courts "are not roving commissions"¹⁸ tasked with writing and updating our laws; that is Congress's job. With few exceptions, Congress must give plaintiffs the authority to come to court.¹⁹ In the language of law, that means a plaintiff must have a cause of action.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, however, the Supreme Court broke new ground.²⁰ There, the Burger Court found for the first time that the Fourth Amendment supplied a cause of action for money damages when federal agents allegedly violate the Amendment.²¹ The Burger Court then stretched *Bivens's* logic, expanding its reach to cover violations of the Fifth Amendment's Due Process Clause and the Eighth

16. *Id.*

17. 140 S. Ct. 735 (2020).

18. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

19. See, e.g., *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

20. 403 U.S. 388 (1971).

21. *Id.* at 389.

Amendment's bar on cruel and unusual punishment.²² At the time, it appeared the Court would continue expanding *Bivens* until *Bivens* "became the substantial equivalent of 42 U.S.C. § 1983."²³

But allowing courts to find implied causes of action shifts significant power to the federal judiciary—power that the Founders intended would rest in the elected branches.²⁴ Co-opting this power created problems. After all, any "decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide."²⁵ So any attempt at crafting the optimal liability regime must reckon with "a number of economic and governmental concerns" that are not easy to discern.²⁶ For instance, if an alleged constitutional violation flows from a complex law enforcement operation, which officers should bear the brunt of the liability? What mens rea standard should attach? And how will the projected costs and consequences of litigation be scored against their benefits? These are hard questions that can be answered only after balancing multiple factors against each other. And it is imperative that courts making these judgment calls get the balance exactly right. Unlike garden-variety state tort damages, the availability of a federal constitutional remedy can't be undone by legislation. Once the courts have extended *Bivens*, we all must live with it.

In *Hernandez*, the Court was invited to expand *Bivens* once more, and the facts of that case made the invitation all the more alluring.²⁷ Sergio Adrián Hernández Güereca, a fifteen-year-old boy in Mexico, was playing with his friends near the border.²⁸ While they were

22. See, e.g., *Davis*, 442 U.S. at 228 (holding that Fifth Amendment violations confer a cause of action and money damages); *Carlson v. Green*, 446 U.S. 14 (1980) (holding that *Bivens* does not foreclose actions for money damages under the Eighth Amendment).

23. Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1139 (2014).

24. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citations omitted).

25. *Id.* at 1858.

26. *Id.* at 1856.

27. See *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020).

28. *Id.* at 740.

playing, Jesus Mesa, Jr., a border patrol officer on American soil, shot and killed Hernández.²⁹ Citing *Bivens*, Hernández's parents brought a damages suit alleging that Mesa had violated their son's Fourth and Fifth Amendment rights.

Writing for the majority, Justice Alito declined the plaintiffs' invitations to extend *Bivens*. In reaching this conclusion, Justice Alito did not merely rely on the judiciary's institutional limitations—though those considerations are an important part of the opinion. Instead, he began with the basics. While the Court had previously recognized implied causes of action, Justice Alito declared that those decisions did not adequately consider “the tension between this practice and the Constitution's separation of legislative and judicial power.”³⁰ Put aside whether judges would be good at figuring out the appropriate liability regime. For Justice Alito, the Constitution answered this question. Our constitutional charter channels the legislative power to Congress while “this Court and the lower federal courts . . . have only ‘judicial Power.’”³¹ And the essence of lawmaking entails “balancing interests and often demands compromise.”³² We risk upsetting these delicate balances when we infer a cause of action from statutory silence. And worst of all, we'd be straying out of our lane. As Justice Alito notes, in the post-*Erie* world, “a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress[.]”³³ In other words, unless and until Congress creates a federal-officer analog for § 1983, we should handle *Bivens* claims with “caution.”³⁴

29. *Id.*

30. *Id.* at 741.

31. *Id.* (quoting U.S. CONST. art. III, § 1).

32. *Id.* at 742.

33. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

34. *Id.* One other option, of course, was to go all the way and overturn *Bivens*. And that's what Justice Thomas called for in a concurrence joined by Justice Gorsuch. *Id.* at 750 (Thomas, J., concurring). But in writing for the majority, Justice Alito limited *Bivens*'s reach while providing judicially manageable instructions for lower courts and litigants.

These first-order principles also explain the Court's exacting test for expanding *Bivens*. In *Hernandez*, Justice Alito signaled in no uncertain terms that lower courts should rarely, if ever, find the expansion of *Bivens* justified. Under *Bivens*, judges must ask two questions when deciding whether a cause of action exists. First, we ask whether the claim arises in a new context.³⁵ It's not enough that the plaintiff points to the same constitutional provisions as those that have already grounded prior *Bivens* claims. Instead, we must ask whether this case is "meaningfully different."³⁶ In finding that the facts of *Hernandez* arose in a new context, Justice Alito made it clear that the context is new if it differs in virtually any way from the Court's previous *Bivens* decisions.

Then, we move to the second step—where the bulk of the analytical work is done. There, we "ask whether there are factors that counsel hesitation" before we engage in the "'disfavored' judicial activity" of extending *Bivens*.³⁷ And the reasons are many. In *Hernandez*, Justice Alito offered three such factors. First, judges must be doubly cautious before creating a *Bivens* remedy that intrudes on the political branches' primacy in the realm of foreign affairs.³⁸ Second, Hernández's claims implicated national security issues because border patrol agents defend our Nation against illegal immigration and trafficking.³⁹ Last, Justice Alito pointed to multiple statutes where "Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders."⁴⁰ Congress's general pattern of limiting damages actions for injury inflicted abroad by government officials gave Justice Alito "further reason to hesitate about extending *Bivens*."⁴¹

While *Hernandez* featured an array of factors that cut against recognizing a *Bivens* action, they all derived from a recognition of the

35. *Id.* at 743.

36. *Id.* at 743–44.

37. *Id.* at 742–44 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

38. *Id.* at 744.

39. *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020).

40. *Id.* at 747.

41. *Id.* at 749.

judge's modest role. Indeed, perhaps the entire second step of the *Bivens* inquiry can be reduced to a single question: "[W]ho should decide' whether to provide for a damages remedy, Congress or the courts?"⁴² And by Justice Alito's lights, it's hard to ever see when the answer would not be Congress.

* * *

Justice Alito's opinion for the Court in *Murphy v. NCAA* also reveals his preference for bright-line rules.⁴³ This time, however, these principles cashed out in favor of the states rather than Congress. *Murphy* is also noteworthy because it shows how bright-line rules can be more administrable while also resolving doctrinal confusion.

In *Murphy*, the Court confronted the constitutionality of the Professional and Amateur Sports Protection Act (PASPA). PASPA made it unlawful for a state "to sponsor, operate, advertise, promote, license, or authorize by law" a sports-gambling scheme.⁴⁴

New Jersey took issue with this and passed a law authorizing sports gambling in the Garden State. Neither the NCAA nor various professional sports leagues were happy with this. So, they sued to enjoin New Jersey's law.⁴⁵

The dispute invoked two constitutional doctrines. The first was preemption. Under the Supremacy Clause, federal law is superior to state law. Preemption simply requires state and federal judges to apply federal law rather than state law when the two conflict. The second was the anticommandeering doctrine. Though it sounds in deep-rooted principles of federalism, the doctrine emerged with *New York v. United States* and *Printz v. United States*, a pair of

42. *Id.* at 750 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)).

43. 138 S. Ct. 1461 (2018).

44. *Id.* at 1470 (quoting 28 U.S.C. § 3702(1) (2012)).

45. *Id.* at 1471.

prominent Rehnquist Court decisions.⁴⁶ In *New York*, the Court struck down a federal law that required the states to either regulate the disposal of nuclear waste in line with federal standards or “take title” themselves.⁴⁷ Likewise, in *Printz*, the Court encountered a congressional statute requiring state and local law enforcement officials to perform background checks for prospective gun sales.⁴⁸ In striking down the law, the Court held that the federal government could not command the state’s officers to administer or enforce a federal regulatory program.⁴⁹ Taken together, these cases stand for the simple principle that states set state policy while the federal government sets federal policy.

Yet in the years leading up to *Murphy*, the two doctrines—preemption and anticommandeering—did not coexist easily.⁵⁰ Each threatened to swallow the other.⁵¹ Many prominent scholars, however, reconciled these doctrines by taking a dim view of the anticommandeering doctrine.⁵² On their view, the anticommandeering doctrine applies when Congress commands the states to affirmatively do something. By contrast, Congress’s preemption authority controls when it prohibits the states from doing something. As fans of federal supremacy, these scholars championed the affirmative-negative distinction on the ground that preemption would be a dead letter if the Constitution barred Congress from telling the states what they couldn’t do.

46. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

47. 505 U.S. at 153.

48. 521 U.S. at 902.

49. *Id.* at 925–26.

50. See generally Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351 (2020).

51. See *id.* at 356.

52. See Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71, 89–94 (1999); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 27–28 (2000); see also *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

The NCAA's two arguments in *Murphy* reflected this conventional wisdom. First, they defended PASPA as a preemption provision grounded in the Supremacy Clause. And second, they noted that PASPA did not require the states to lift a finger. In this regard, PASPA was unlike the statutes at issue in *Printz* and *New York*. Simply put, the case boiled down to a referendum on the affirmative/negative distinction for anticommandeering purposes. To be sure, this distinction promised simplicity at first glance. And it seemed like a bright-line rule. But writing for the Court, Justice Alito rejected this distinction.⁵³

Why? Because a positive command can easily be rewritten in negative form. For instance, the affirmative command, "Do not repeal," can be readily repackaged as a prohibition: "Repeal is prohibited."⁵⁴ It was a mere "happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition."⁵⁵ Any test that would allow Congress to sidestep the Constitution's prohibition against commandeering was no workable test at all. In two short lines describing PASPA, Justice Alito cut to the heart of why the affirmative-negative distinction cannot work: "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."⁵⁶

Justice Alito found a brighter, more workable rule. And just like in *Hernandez*, Justice Alito reasoned from constitutional text and history. Under our Constitution, Congress's legislative powers are limited. Thus, Congress can only exercise legislative power after it identifies the constitutional source of its authority. PASPA ran into the shoals for two related reasons. First, as Justice Alito noted, the Supremacy Clause is not an independent fount of legislative power

53. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

54. *Id.* at 1472.

55. *Id.* at 1478.

56. *Id.*

for Congress. It is instead only a “rule of decision” for courts to apply after encountering conflicting state and federal laws.⁵⁷ And second, the Constitution only “confers upon Congress the power to regulate individuals, not States.”⁵⁸ Putting these steps together, Justice Alito announced that the appropriate distinction is between federal laws that regulate the people directly and federal laws that regulate the state’s regulation of the people. The former can constitutionally preempt state law while the latter is unconstitutional.

Justice Alito’s new test squared preemption with anticommandeering. The opinion also displays a keen appreciation for how the law interacts with real-world incentives. More specifically, Justice Alito makes two points in favor of a robust anticommandeering doctrine. First, the doctrine furthers political accountability.⁵⁹ When Congress directly regulates an area, it bears total responsibility for the regulation’s benefits and burdens. That enables voters to know who to blame (or praise) for the regulation’s consequences. By contrast, if a State imposes a regulation only under Congress’s command, then “responsibility is blurred.”⁶⁰ A confused voter might understandably, yet unfairly, hold his state representatives accountable for policies that Congress concocted. And savvy politicians would surely exploit such ambiguities.⁶¹ Second, the anticommandeering doctrine prevents federal overreach. When Congress directly implements a policy, it must tally its benefits against the costs of enforcement and administration. And the prospect of these costs constrains Congress. But absent an anticommandeering doctrine, Congress could skip past this limit by enlisting the states to administer and enforce a law in place of the federal government.⁶² Indeed, Justice Alito found it “revealing that the Congressional

57. *Id.* at 1479 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

58. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

59. *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018).

60. *Id.*

61. *Id.*

62. *Id.*

Budget Office estimated that PASPA would impose ‘no cost’ on the Federal Government.”⁶³ In other words, without the separation of powers, Congress could run up the tab on today’s fashionable policy proposals while requiring the states to pay the bill tomorrow.

* * *

In most separation-of-powers cases, the Justices do not approach the issue in a vacuum. Instead, they inherit precedent. In that sense, *Ortiz v. United States* was a rare exception.⁶⁴ So I don’t think it’s a coincidence that *Ortiz* also offers one of the most vivid examples of Justice Alito’s preference for rules over standards in structural cases.

Like many defendants each year, Keanu Ortiz was convicted for possessing and distributing child pornography.⁶⁵ But here there was a twist: Ortiz’s trial didn’t take place in a federal civilian court. Instead, until he reached the Supreme Court, Ortiz’s case was tried by a court-martial. A panel of the Air Force Court of Criminal Appeals affirmed his conviction and so did the Court of Appeals for the Armed Forces (CAAF).⁶⁶ Across these proceedings, Ortiz brought several statutory and constitutional challenges to his conviction that are not relevant here.

Instead, when Ortiz’s appeal reached the Supreme Court, Justice Alito homed in on a more fundamental question. Did the Supreme Court even have *jurisdiction* to hear Ortiz’s appeal? And that question—first raised by Professor Aditya Bamzai in a brilliant amicus brief—was a “new one” for the Justices.⁶⁷ The Court had “previously reviewed nine CAAF decisions without anyone objecting that [it] lacked the power to do so.”⁶⁸

To understand the problem, let’s start with the basics. There are two paths to the Supreme Court. First, a small set of cases qualify

63. *Id.* at 1484.

64. 138 S. Ct. 2165 (2018).

65. *Id.* at 2167.

66. *Id.* at 2171–72.

67. *Id.* at 2173.

68. *Id.*

under the Court's original jurisdiction. Every other case must invoke the Court's appellate jurisdiction. And under Supreme Court precedent, Article III's grant of appellate jurisdiction only empowers the Court to hear appeals from a tribunal that exercises the "judicial power." All agreed on this point. But which entities exercise judicial power? Some examples readily come to mind. When the Sixth Circuit decides a case, for example, the Court has appellate jurisdiction to review our decision. That's true for state courts too.⁶⁹ In *Ortiz*, the Court had to decide whether the same holds true for the military-tribunal system.

The majority found jurisdiction after considering "the judicial character and constitutional pedigree of the court-martial system."⁷⁰ The Court took a functionalist path to reaching this conclusion. In particular, the Court noted the similarities between the federal courts and the military justice system. Governed by the same body of federal law, the military tribunals already afforded service members "virtually the same" procedural protections as those that defendants typically enjoy in federal and state courts.⁷¹ For those reasons, the Court has long held that the "valid, final judgments of military courts, like those of any court of competent jurisdiction[,] have res judicata effect and preclude further litigation of the merits."⁷² Indeed, "the jurisdiction of [military] tribunals overlaps significantly with the criminal jurisdiction of federal and state courts."⁷³ And the comparisons between the military courts and their civilian counterparts extend to sentence ranges and multiple layers of appellate review.

The Court's logic seems reasonable. After all, if you "see a bird that walks, swims, and quacks like a duck, you call that bird a

69. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

70. *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018).

71. *Id.* at 2174 (quoting 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* §§ 1–7, at 50 (LexisNexis, 9th ed. 2015)).

72. *Id.* (alteration in original) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975)).

73. *Id.* at 2174–75.

duck.”⁷⁴ Surely the same rationale can apply to determining what entities wield the judicial power. But Justice Alito didn’t agree. Instead, he relied on the Constitution’s text and structure. Since the Founding, military tribunals “have always been understood to be Executive Branch entities that help the President.”⁷⁵ But if the military courts are part of the Executive Branch—a point no one disputed—then how could they exercise the judicial power? After all, “Article III of the Constitution vests ‘[t]he judicial Power of the United States’—*every single drop of it*—in ‘one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.’”⁷⁶ And for Justice Alito, the federal judicial power can be exercised only by “tribunals whose judges have life tenure and salary protection.”⁷⁷

This categorical rule has obvious merits. For starters, it’s easily administrable. The majority’s test, by contrast, invites difficult line-drawing questions. For instance, could Congress provide for direct Supreme Court review of garden-variety administrative agency decisions from, say, the Social Security Agency? Would that depend on the panoply of procedural rights available to parties in the administrative hearing? And if that’s true, couldn’t Congress overwhelm the Supreme Court by requiring the Justices hear every single appeal that arises from the constellation of non-Article III tribunals that already exist?

Besides workability, Justice Alito’s argument also sounds in the internal logic of separation of powers. As judges, we do not, of course, have the purse or the sword at our disposal. But the Constitution does impose one requirement and two privileges on the judicial branch. We can only be appointed after both presidential nomination and Senate confirmation. In return, we are granted life tenure and salary protections. We should not underestimate the

74. Comment, *Ortiz v. United States*, 132 HARV. L. REV. 317, 317 (2018).

75. *Ortiz*, 138 S. Ct. at 2190 (Alito, J., dissenting).

76. *Ortiz v. United States*, 138 S. Ct. 2165, 2190 (2018) (quoting U.S. CONST. art. III, § 1).

77. *Id.*

importance of these designs. The Founders expected them to ensure judicial independence and impartiality. Thus, it would make sense if federal judges were the only federal officials tasked with exercising the judicial power to say what the law is. Or as Professor David Currie put it, “The tenure and salary provisions of Article III can accomplish their evident purpose only if they are read to forbid the vesting of the functions within its purview in persons not enjoying those protections.”⁷⁸

* * *

Consider another example. In recent years, few areas of law have seen as much renewed focus as the unitary executive theory of presidential power.⁷⁹ The idea is simple. As then-Judge Alito explained it, the unitary executive theory posits “that all federal executive power is vested by the Constitution in the President.”⁸⁰ And like other defenders of the theory, then-Judge Alito argued that the unitary executive model “best captures the meaning of the Constitution’s text and structure.”⁸¹

Indeed, the words of Article II alone seem all but dispositive. The Vesting Clause makes clear that “[t]he executive [p]ower shall be vested in a President of the United States.”⁸² Meanwhile, the Take Care Clause entrusts the President with the duty to “take [c]are that the [l]aws be faithfully executed.”⁸³ Taken together, this language tells us that the President is ultimately responsible for everything that takes place within the Executive Branch. To be sure, as Justice Alito explained in his confirmation hearings, the unitary executive theory does not scope the metes and bounds of executive power.

78. DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 121 (1985).

79. *See, e.g.,* *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

80. John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 *YALE L.J.F.* 374, 374 n.1 (2017).

81. *Id.*

82. U.S. CONST. art. II, § 1, cl. 1.

83. *Id.* § 3.

But it does tell us that any power which falls within the executive's prerogative must be under the Commander-in-Chief's control.

This has important implications in the officer-removal context in particular. Advocates of the unitary executive theory have long bristled at *Humphrey's Executor v. United States*.⁸⁴ In *Humphrey's Executor*, the Court blessed Congress's ability to impose statutory restrictions on the President's power to remove policymakers at the helm of so-called independent agencies. For many unitary executive theorists, this doctrine represents a "serious, ongoing threat" that "subverts political accountability and threatens individual liberty."⁸⁵

In a series of cases, the Court has pared back Congress's ability to insulate executive officers from presidential removal. In both *Free Enterprise* and *Seila Law*, Justice Alito joined the majority in refusing to extend *Humphrey's Executor* to new contexts.⁸⁶ In *Collins v. Yellen*, the latest in this series, Justice Alito wrote the majority.⁸⁷ And the shift from *Seila Law* to *Collins* illuminates Justice Alito's ability to discipline doctrine by minimizing ambiguities.

In *Seila Law*, the Court invalidated a law limiting the President's authority to remove the director of the Consumer Financial Protection Bureau (CFPB). The CFPB emerged from the Great Recession with the mandate to combat "unfair, deceptive, or abusive" acts and practices in consumer finance.⁸⁸ Congress intended the CFPB to operate as an independent agency like the agencies the Court blessed in *Humphrey's Executor*. But the CFPB differed from the agencies at issue in *Humphrey's Executor* in one important respect. While most independent agencies are led by multimember commissions or boards, the CFPB was headed by a single official. Appointed by the President and confirmed by the Senate, that official

84. 295 U.S. 602 (1935).

85. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., concurring in part and dissenting in part).

86. *See id.* at 2183; *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

87. *See* 141 S. Ct. 1761 (2021).

88. *Seila Law LLC*, 140 S. Ct. at 2193 (quoting 12 U.S.C. § 5536(a)(1)(B) (2018)).

serves a five-year term. Congress also ensured that the CFPB would be provided with an independent source of funding that circumvented the typical appropriations process.⁸⁹ In short, “Congress deviated from the structure of nearly every other independent administrative agency” in the nation’s history.⁹⁰

The *Seila Law* Court recognized “[t]he entire ‘executive Power’ belongs to the President alone.”⁹¹ And the President’s removal power flows from Article II’s text. If it is the President who ultimately bears responsibility to enforce the laws, then surely the President must have the power to remove executive officials that do not represent him. Anything else would allow executive officials to flout the President’s wishes. That could cripple the Presidency. “Without [removal] power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”⁹²

Though the Court embraced the unitary executive theory in *Seila Law*, the decision was narrow. Rather than strike down *Humphrey’s Executor*, the Court only declined to extend it to reach the “new situation” of “an independent agency led by a single Director and vested with significant executive power.”⁹³ In other words, there was a “standing athwart history, yelling [s]top” element to the decision. It also raised the question of when an agency wields “significant executive power.” In some instances, like the CFPB, the answer is self-evident. But one can imagine the difficulties lower courts would have in figuring out which agencies only exert “insignificant” executive power.

Fortunately, Justice Alito clarified the doctrine a year later. In *Collins*, the question was whether the Director of the Federal Housing Finance Agency (FHFA) could only be removed by the President

89. *See id.* at 2191–94.

90. *Id.* at 2191.

91. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1).

92. *Id.* at 2191 (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 514 (2010)).

93. *Id.* at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483).

for cause. The Court-appointed amicus sought to distinguish *Seila Law* by, among other things, contending that the FHFA's authority was more circumscribed than the CFPB's. More specifically, the amicus pointed out that the FHFA administers only one statute while the CFPB administered nineteen. Similarly, the CFPB directly regulates millions of individuals and businesses while the FHFA regulates a small number of government-sponsored enterprises.⁹⁴

But Justice Alito discarded the "significance" inquiry. Writing for the majority, he noted that the President's removal power is not a sliding scale that adjusts with the "the nature and breadth of an agency's authority."⁹⁵ Congress acts unconstitutionally when it insulates an agency head from the President's control irrespective of the agency's size or functions. The Constitution does not countenance structural violations simply because they could have been worse. Moreover, he highlighted the "severe practical problems" that would arise from requiring courts to discern which agencies are important and which agencies can fall by the constitutional wayside.⁹⁶ The FHFA's comparison with the CFPB is illustrative. While the amicus made credible arguments that the CFPB is more influential, Justice Alito identified several arguments that cut in the other direction.⁹⁷

Once again, Justice Alito justified his favored rule by recognizing its accountability benefits. Justice Alito emphasized that the President, unlike agency officials, is elected.⁹⁸ This point might seem obvious. But it has important implications. Without presidential control, the executive branch bureaucracy could run amok with minimal oversight from anyone accountable to the voters.

Put these cases together and we see that Justice Alito clarifies every area of the law that reaches his desk. We also see his penchant for rules over standards most clearly when he writes separately or

94. *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

95. *Id.*

96. *Id.*

97. *Id.* at 1784–85.

98. *Id.* at 1784.

in dissent. Of course, Justice Alito does not devise these rules in a vacuum. Nor do they flow from his policy views. Instead, he is a methodological pluralist. He begins with the Constitution's text, history, and structure. And he stops there too when the answer is definite. But he is also able to weave these first principles with the precedent he inherits.

* * *

Justice Alito's favor for rules is not absolute. Ever the humble Justice, he recognizes that sometimes the law forces courts to reject bright-line rules. That's particularly true when the proposed rule would transfer power from properly accountable bodies to the federal courts. For example, *Brnovich v. DNC*, featured a challenge to two neutral Arizona laws—(1) the out-of-precinct policy and (2) a prohibition on third-party ballot collection.⁹⁹ Along with a host of constitutional claims, the plaintiffs alleged that the laws' disparate impact on minority voters violated section 2 of the Voting Rights Act (VRA). *Brnovich* marked the first guidance that the Court had issued on how we should assess the incidental burdens of facially neutral time, place, or manner voting regulations under section 2 of the VRA.

Section 2(a) of the VRA, as amended in 1982, prohibits states from passing laws "in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color."¹⁰⁰ And its neighboring provision tells us what must be shown to prove a violation. It requires consideration of "the totality of circumstances" in each case and demands proof that the State's political processes are not equally open to participation by members of a protected class.¹⁰¹

This provision has been the source of endless confusion and litigation in voter-dilution cases. Indeed, in *Thornburg v. Gingles*, the

99. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

100. 52 U.S.C. § 10301(a) (2018).

101. *Id.* § 10301(b).

leading case, the Court threw out at least nine famously open-ended factors for judges and litigants to squabble over.¹⁰²

But Justice Alito did not blindly follow the approach set out in *Gingles*. Instead, he began at the ground floor by asking what the text meant at the time of the statute's enactment. *Brnovich* is an excellent example of what Professor John McGinnis calls "a statutory analogue to originalism."¹⁰³ Along with employing the traditional tools of textualism, Justice Alito keyed in on the VRA's statutory history, historical context, and expected applications to ascertain Section 2's meaning.

After tilling these fields, Justice Alito concluded that the statute aimed at ensuring that a state's political processes must be "equally open to minority and non-minority groups alike."¹⁰⁴ But Justice Alito did not create a bright-line rule for courts to use in determining when a facially neutral election regulation remains "equally open" for all Americans.¹⁰⁵ He made that clear at the outset after disclosing that the Court had received at least ten proposed tests for how to implement section 2's imprecise language from the parties and amici.¹⁰⁶

Instead, to inform future cases, Justice Alito announced a standard employing five guideposts—each of which "stem[med] from the statutory text"¹⁰⁷: (1) the size of the burden on voters beyond mere inconvenience; (2) the law's departure from "standard practice when the statute was amended in 1982"; (3) the size of the disparity; (4) the alternative means of voting other than the one burdened by the challenged policy; and (5) the State's interest in promulgating the challenged policy.¹⁰⁸

102. 478 U.S. 30, 36–37 (1986).

103. John McGinnis, *The Contextual Textualism of Justice Alito*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 14, *2 (2023).

104. *Brnovich*, 141 S. Ct. at 2337 (quoting § 10301(b)).

105. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021) (quoting § 10301(b)).

106. *Id.* at 2336.

107. *Id.* at 2342.

108. *Id.* at 2338–40.

Three insights from *Brnovich* are worth singling out. First, this is an example of how Justice Alito does not blindly pursue rules for their own sake. If the Court was looking for a bright-line rule to adopt in *Brnovich*, there were plenty to choose from. Indeed, as he noted, the various parties and amici had proposed no fewer than ten tests for resolving such cases. But Justice Alito declined to choose a winner among them as this case was the Court's "first foray into the area."¹⁰⁹ This prudence is understandable. The stakes for picking the right rule in this domain were extraordinarily high. One notable test, for example, would have required the State to run the gauntlet of strict scrutiny for every neutral voting regulation that imposes a disparate burden on certain voting populations. Its adoption would likely have led to the invalidation of hundreds of state laws that would have been considered noncontroversial the day the 1982 amendment to the VRA had been passed. What's more, the statute expressly calls on courts to consider the "totality of circumstances."¹¹⁰ That language directs courts to make holistic calls that turn on multiple considerations—that is, it calls for a standard rather than a rule. Justice Alito heeded that statutory instruction.

Second, Justice Alito looks to historical context and common sense as backstops to discipline his textual analysis. The portion of the VRA at issue in *Brnovich* is not a model of legislative clarity. And reasonable minds can read its provisions broadly. But when analyzing today's regulations, we would be wise to compare them to the standard practices in 1982 when Congress made the relevant amendments to the VRA. After all, it's unlikely that "Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States."¹¹¹ This logic is a bedrock principle of statutory interpretation and the separation of powers. We respect Congress when we assume that it does not intend to upend existing

109. *Id.* at 2336.

110. 52 U.S.C. § 10301(b) (2018).

111. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021).

regulatory schemes using only vague terms. In other words, we don't expect Congress to hide elephants in mouseholes.

Third, *Brnovich* is a model of judicial humility in our federalist system. Election regulation is one of the State's core prerogatives.¹¹² Federal judges must be cautious before we wrest this power from state officials through hawkish oversight, especially where Congress has not clearly instructed that we do so. That does not mean we should grant the states knee-jerk deference, of course. But it does mean taking the State's interests seriously. Justice Alito did just that in *Brnovich*. In defending its laws, Arizona invoked its interest in preventing electoral fraud and preserving the perceived legitimacy of its elections. These are entirely legitimate interests. Indeed, given that elections are the lifeblood of a democracy, those interests may be among the State's most important. The Ninth Circuit thought otherwise "in large part because there was no evidence that fraud in connection with early ballots had occurred in Arizona."¹¹³ But election fraud has a storied history in American political life. So, as Justice Alito recognized, every State has a right to learn from history and take necessary prophylactic steps. And those State interests rightly fall within the "totality of circumstances" to be considered under section 2 of the VRA.

* * *

Yale historian John Lewis Gaddis, a keen student of grand strategy, suggests that great statesmen couple the hedgehog's sense of direction with the fox's sensitivity to surroundings.¹¹⁴ Justice Alito's greatness as a jurist could be described in similar terms. And this blend is often on show when Justice Alito writes in a separation-of-powers case. The Constitution's text, history, and structure are his touchstones. But Justice Alito's mastery of doctrine and keen sensitivity for how the law operates on the ground allows him to repair

112. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 *passim* (2021).

113. *Brnovich*, 141 S. Ct. at 2348.

114. GADDIS, *supra* note 2.

one area of neglected doctrine after another. Hedgehogs and foxes alike have much to learn from his opinions.

And for all this and much more, we are his beneficiaries.

AN ARCHITECT OF RELIGIOUS LIBERTY DOCTRINES FOR THE ROBERTS COURT

GABRIELLE GIRGIS*

INTRODUCTION: A “PRACTICAL ORIGINALIST” ON THE RELIGION CLAUSES

Justice Alito’s work on religion law is a hallmark of his jurisprudence. He has shaped this field more than any other sitting Justice, and perhaps even more than any other member of the Court in its history. On many issues—religious neutrality and religious exemptions, church autonomy, the Establishment Clause, and more—he has authored pioneering opinions that have refined existing doctrines. He has elaborated precedents to meet new challenges and then, when they have proven unworkable, replenished the caselaw by drawing on deeper sources—forgotten precedents, historical practice, and the text. In this way, Alito’s religion opinions highlight his distinctive approach as a doctrinalist and practical originalist, combining discipline with vision.

His contributions began, remarkably, with his time as a circuit judge. When the Supreme Court in *Employment Division v. Smith*¹ declared that under the Free Exercise Clause, a law would trigger strict scrutiny—and potentially an exemption—only if the law failed to be neutral and generally applicable, the meaning of “neutrality” was far from clear. The most important answer came from then-Judge Alito, who defined and applied the concept in ways that would guide the Supreme Court’s own cases for decades—

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1. 494 U.S. 872 (1990).

including in its free exercise review of COVID-19 regulations some 30 years later.

Besides refining free exercise doctrine, Justice Alito has at times urged deeper changes. His concurrence for *Fulton v. City of Philadelphia*² presses the Court to overturn *Smith* entirely, and to restore the pre-*Smith* rule that even facially neutral and generally applicable laws ought to be reviewed under strict scrutiny when they substantially burden a person's religion.³ At one level, of course, to overrule *Smith* would be a break with existing doctrine. But Alito's concurrence in *Fulton* took the position that overturning *Smith* would be a move toward greater coherence. His opinion painstakingly marched through history and caselaw to make the case that *Smith* rested on shaky foundations. *Smith* itself was poorly reasoned, its framework had proven unworkable, and later decisions had undermined its reach.⁴ Under these circumstances, he argued, the integrity of free exercise law would best be served by reaching past *Smith* for deeper sources—text, history (including the Founding-era state protections for religion that provided the backdrop for the First Amendment), and pre-*Smith* precedents that for decades had afforded religion more surefooted protection.⁵

Justice Alito's comprehensive analysis in *Fulton* can only be fully appreciated in its broader context. Many of his earlier decisions offer guidance for how religious-liberty claims will likely fare in a post-*Smith* world. These include several opinions applying federal laws that sought to restore the pre-*Smith* rule in statutory form: *Burwell v. Hobby Lobby Stores*,⁶ *Holt v. Hobbs*,⁷ and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.⁸ These decisions highlight the key questions that lower courts, litigants, and scholars will

2. 141 S. Ct. 1868 (2021).

3. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

4. See *Fulton*, 141 S. Ct. at 1892–99 (Alito, J., concurring in judgment).

5. *Id.* at 1898–1907.

6. 573 U.S. 682 (2014).

7. 574 U.S. 352 (2015).

8. 140 S. Ct. 2367 (2020).

have to grapple with in religious -liberty cases if, and when, the Court takes up Justice Alito's invitation in *Fulton*.

A similar theme of doctrinal sophistication and historical sensitivity animates Justice Alito's Establishment Clause opinions. When the Court began moving its caselaw, by fits and starts, away from the so-called *Lemon* test's multi-factor, theoretical analysis (turning on whether the law has a secular purpose, etc.),⁹ and toward a more purely historical approach (based on whether a practice of recognizing religion is part of a longstanding tradition),¹⁰ Alito's opinion for the Court in *American Legion v. American Humanist Association*¹¹ brought that development to near-completion. It did so to such an extent that by the next time the Court addressed the question in *Kennedy v. Bremerton*,¹² it could say that *American Legion* had effectively killed the *Lemon* test,¹³ so that now all that controlled Establishment Clause analysis were text and history.¹⁴

In spelling *Lemon*'s demise, Alito's *American Legion* opinion was—like his call to overturn *Smith*—about both change and deeper continuity. Rather than dismiss *Lemon* casually, Justice Alito's opinion thoroughly studied the doctrine's operation over decades, found it irretrievably unworkable and eroded by more recent cases, and declared that doubling down on *Lemon* now would only create further confusion in the caselaw.¹⁵ Thus, going beyond *Lemon* to first principles—to text and historical practice—was the best way to keep the law cogent.

Finally, when the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*¹⁶ embraced an important church -autonomy doctrine—the ministerial exception—Alito's doctrinal acumen again proved valuable. His concurrence in the case anticipated

9. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

10. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983).

11. 139 S. Ct. 2067 (2019).

12. 142 S. Ct. 2407 (2022).

13. See *id.* at 2427 (citing *Am. Legion*, 139 S. Ct. at 2079–81 (plurality opinion)).

14. See *id.* at 2428.

15. See *Am. Legion* 139 S. Ct. at 2080–82.

16. 565 U.S. 171 (2012).

questions that would soon arise (about how to define a “minister”) and provided a roadmap that would guide lower courts until it became controlling Supreme Court precedent, through a majority opinion by Alito himself, in *Our Lady of Guadalupe School v. Morrissey-Berru*.¹⁷

This recurring pattern—of working from within received doctrines but elaborating them and sometimes, in an effort to achieve more genuine coherence, moving beyond them—reflects his distinctive gifts and tendencies as a judge. He is faithful to caselaw but not in a wooden way; sensitive to its need for renewal and inclined to renew, as needed, based on text and history. In other words, here as elsewhere (as other Essays in this volume confirm), Alito balances attention to doctrine and original sources. And here even more than elsewhere, he has been the Court’s leader.

I. TOWARD A NEW ERA OF FREE EXERCISE INTERPRETATION

Justice Alito’s free exercise opinions have filled out the old and pointed toward the new. In a Third Circuit case called *Fraternal Order of Police v. City of Newark*¹⁸, then-Judge Alito helped the Supreme Court to answer to a key question under *Smith*’s interpretation of the First Amendment: what it meant for a law to fail to be “neutral” toward religion (and thus warrant strict scrutiny). But as Justice he would eventually call for *Smith*’s reversal, to bring free exercise law more in line with the original meaning of the First Amendment. If *Smith* is overturned, the Court would be able to draw on some of Alito’s opinions again, this time to articulate its new model for assessing exemption claims. It could draw, in particular, on his opinions applying the Religious Freedom Restoration Act¹⁹ (RFRA) and the Religious Land Use and Institutionalized Persons Act²⁰

17. 140 S. Ct. 2049 (2020).

18. 170 F.3d 359 (3d Cir. 1999).

19. 42 U.S.C. §§ 2000bb-1(a)–(b), 2000bb-2 (2018) (invalidated in part by *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

20. 42 U.S.C. §§ 2000cc–2000cc-2 (2018).

(RLUIPA)—two federal laws through which Congress sought to restore the religious exemptions test scrapped by *Smith*.

As noted above, under the Court's guiding interpretation of the Free Exercise Clause in *Smith*, there is no constitutional entitlement to religious exemptions from (or even heightened scrutiny of) laws that are neutral and generally applicable. In other words, strict scrutiny applies only if, say, the challenged law targets religion or involves "a context that len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct"²¹ (like the denial of unemployment insurance to those refusing work for religious reasons, as in *Sherbert*). The Supreme Court's first occasion to apply this standard was fairly straightforward. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,²² members of the Santeria religion in Florida argued that a local ordinance prohibiting animal slaughter violated their free exercise right to practice ritual animal killing. In a decision upholding that claim, the Court explained that the law, while facially neutral, was designed to target Santeria practice, because it banned animal-killing only when undertaken for religious reasons. Since exemptions to the no-slaughter rule were allowed if the killing was performed for secular reasons, the Court concluded, "religious practice [was] being singled out for discriminatory treatment."²³

But what are other, less glaring ways to violate *Smith*'s insistence on neutrality and general applicability? And *must* the policy involve a system of individualized exemptions (like the unemployment insurance context of *Sherbert*, and the animal-slaughter ordinance in *Lukumi*), or are there other warning signs of non-neutrality? The first prominent answers—decisive for future cases—came from then-Circuit Judge Alito in *Fraternal Order of Police*. Sunni Muslim police officers in Newark, New Jersey, had been dismissed for refusing to shave their beards, in violation of the police department's grooming policy. But the policy made an

21. See *Emp. Div. v. Smith*, 494 U.S. 872, at 884 (1990).

22. 508 U.S. 520 (1993).

23. *Id.* at 538.

exception for those who refused to shave for medical reasons. The Muslim officers argued that the policy triggered strict scrutiny under *Smith* and *Lukumi*. Alito agreed with their argument that “since the Department provides medical—but not religious—exemptions from its ‘no-beard’ policy, it has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons.”²⁴ In particular, Alito explained, it did not matter whether the secular exemption was “individualized,” as in *Sherbert* and *Lukumi*, because the Supreme Court’s fundamental “concern” in *Lukumi* was simply “the prospect of the government’s deciding that secular motivations are more important than religious motivations,” and “this concern is only *further* implicated when the government does not merely create a mechanism for individualized exemptions [as in *Lukumi*], but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection [as in *Fraternal Order of Police*].”²⁵ Whatever the precise mechanism, it was the state’s treatment of secular reasons for an exemption more favorably than religious reasons that was “suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.”²⁶

Alito’s opinion clarified a second and more important question. Does *just any* exemption for secular but not religiously motivated conduct trigger heightened scrutiny under *Smith*? Or must the exempted secular conduct be sufficiently analogous to the religious conduct? The very end of his opinion answered: Courts should apply strict scrutiny only when the exempted secular conduct would comparably undermine the state’s interest in the rule at issue.²⁷ For example, in *Fraternal Order of Police*, the fact that the police department exempted undercover police officers (but not religiously motivated officers) from its no-beard policy was not enough to trigger

24. *Fraternal Ord. of Police of Newark v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

25. *Id.* (emphasis added).

26. *Id.*

27. *See id.* at 366.

strict scrutiny—because letting undercover police officers grow a beard did not undermine the department’s asserted interest in “fostering a uniform appearance” (since “undercover officers ‘obviously are not held out to the public as law enforcement person[nel]’”).²⁸ But strict scrutiny *was* triggered by exemptions for publicly identifiable officers who refused to shave for medical reasons, because their refusals *did* undermine the department’s interest in uniformity just as much as religiously motivated refusals.

This account of when secular conduct is *comparable*—so that privileging it violates neutrality, and triggers strict scrutiny—has shaped the Supreme Court’s reasoning in other free exercise cases, as recently as those challenging COVID-19 regulations. A common thread in these Court decisions is that governments may not impose more stringent rules on religious activity than on secular activities that pose a *comparable risk to public health*. In *Tandon v. Newsum*,²⁹ for example, religious believers were granted an injunction from the state’s restrictions on private gatherings, which limited their ability to meet for worship in their own homes. In a *per curiam* opinion, the Court insisted that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”³⁰ And crucially, echoing then-Judge Alito, it reiterated that “whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue.”³¹ With COVID restrictions, “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather.”³² In *Tandon*, the problem was that “California treat[ed] some comparable secular activities more favorably than at-home religious exercise,” by allowing facilities like “hair salons, retail stores, personal

28. *Id.*

29. 141 S. Ct. 1294 (2021).

30. *Id.* at 1296.

31. *Id.*

32. *Id.*

care services, movie theaters,” and restaurants “to bring together more than three households at a time.”³³

This reading of the *Smith* test on neutrality reflects then-Judge Alito’s best effort to clarify a higher court’s precedent in light of the Free Exercise Clause. Yet as a Justice, Alito has explained why *Smith*’s standard is still insufficiently workable or protective of free exercise. His extended concurrence in *Fulton* arguing for *Smith* to be overruled on these grounds is worth considering closely. A chief problem with *Smith*, he argues, is its narrowness, which comes at the expense of religious freedom that should be protected under the First Amendment. As he points out early in the opinion, *Smith*’s reasoning has “startling consequences.”³⁴ Under *Smith*, laws could be constitutional—consistent with free exercise—even if they prohibited alcohol consumption, for example, or slaughter of a conscious animal, or circumcision, without making exceptions for the celebration of the Catholic Mass, kosher and halal slaughter, or ritual circumcision in Judaism and Islam.³⁵

The remainder of his concurrence argues that these consequences are not merely counterintuitive, but indeed unconstitutional, judging by the original meaning of the Free Exercise Clause, both on its face and in light of then-existing state constitutions (which provided a backdrop for the Clause’s adoption).³⁶ Referring to dictionary definitions from the ratification period, Justice Alito argues that the “normal and ordinary meaning” of the First Amendment’s bar on any law “prohibiting the free exercise of religion” would have encompassed laws “forbidding or hindering unrestrained religious practice or worship.”³⁷ This plain meaning, he observes, didn’t imply anything like *Smith*’s distinction “between laws that are generally applicable and laws that are targeted” against religion.³⁸ And

33. *Id.* at 1297.

34. *Fulton v. City of Philadelphia*, 141 S. Ct. at 1868, 1883 (Alito, J., concurring in the judgement) (2021).

35. *Id.* at 1884.

36. *Id.* at 1894–1907.

37. *Id.* at 1896.

38. *Id.*

in the colonial charters and state constitutions that normally inform our reading of the Bill of Rights, he continues, the “predominant model” was to protect religious liberty except where “the public peace” or “safety” was at risk.³⁹ As Alito pointed out, such a “carve-out” would have been unnecessary if religious liberty only barred laws that were openly hostile to religious practice.⁴⁰ Just so, colonies’ and states’ practices reflected widespread support for religious accommodation, even from otherwise neutral laws (e.g., regarding the swearing of oaths, military service, and the payment of taxes to state-established churches).⁴¹ Finally, Alito finds, historical scholarship defending *Smith*’s reading is “unconvincing” and “plainly insufficient to overcome the ordinary meaning of the text.”⁴² Early court cases are scant and conflicted, and the parts of the First Amendment’s drafting history relied on by *Smith*’s supporters (e.g., the Founders’ decision not to include a provision exempting conscientious objectors from military service) can be explained on grounds that do not lend support to *Smith*.⁴³

Justice Alito bolsters his interpretation of the Free Exercise Clause, and drives home the weaknesses of *Smith*, when he considers factors relevant to overturning any precedent: its reasoning, its consistency with other precedents, its workability, and developments in doctrine since it has been handed down.⁴⁴ On all four counts, he compellingly argues, *Smith* should no longer stand. In rejecting a constitutional claim to exemptions from neutral laws, *Smith* decided an issue that was never briefed or argued.⁴⁵ It gave no attention to the original meaning or history of the First Amendment, and offered spurious or half-hearted grounds for distinguishing several longstanding precedents.⁴⁶ Its evident and almost

39. *Id.* at 1901.

40. *Id.* at 1903.

41. *See id.* at 1905–06.

42. *Id.* at 1907.

43. *Id.* at 1907–12.

44. *Id.* at 1912–24.

45. *Id.* at 1912.

46. *Id.* at 1912–15.

exclusive motivation was a concern that judicially recognized exemptions would be judicially unadministrable, but its own standard (requiring courts to determine if a law is non-neutral or non-generally applicable) had proven unwieldy to apply.⁴⁷ And it was squarely at odds with more recent decisions by the Court, which recognized or implied support for free exercise exemptions that *Smith* would never countenance.⁴⁸ Alito points, for example, to *Hosanna-Tabor*, where “the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990”; to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which suggested that clergy members who cannot in good conscience officiate a same-sex wedding “would be entitled to a religious exemption from a state law” limiting “authority to perform a state-recognized marriage” to those “who are willing to officiate both opposite-sex and same-sex weddings”; and to *Boy Scouts of America v. Dale*, which “granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law.”⁴⁹

While only two other Justices (Thomas and Gorsuch) joined Alito’s *Fulton* opinion, another two (Barrett and Kavanaugh) expressed willingness to revisit *Smith* once it is clear what doctrines will replace it.⁵⁰ Alito therefore concludes his *Fulton* opinion by urging a return to the Court’s standard for exemptions under *Sherbert*, which required the Court to apply strict scrutiny to any law that substantially burdened religion. In *Fulton* he does not say much more about the contours of that new regime, but we get a more detailed picture from other opinions in which he discusses the application of RFRA and RLUIPA—which, as noted, sought to restore *Sherbert*’s doctrine, albeit in statutory form. Put together, in fact, these opinions may help forge the Justice’s legacy as an architect of the Court’s religious liberty doctrines in the twenty-first century,

47. *Id.* at 1917–23.

48. *Id.* at 1915–16.

49. *Id.*

50. *See id.* at 1882–83 (Barrett, J., concurring).

by guiding strict scrutiny analysis in free exercise cases post-*Smith* (and the application of important religious liberty statutes even now). I will focus on the two core questions under *Sherbert*-like analysis: (1) whether a law has imposed a *substantial burden* on religion; and (2) whether application of the law to the religious claimant serves a *compelling state interest*.

Start with Justice Alito's understanding of substantial burden analysis, expressed clearly in his concurrence for *Little Sisters of the Poor* and his majority opinion in *Hobby Lobby*. In both cases, Christian employers had religious objections to providing insurance coverage of contraceptives (or just abortifacient ones, in *Hobby Lobby*), which the Obama administration had required of most large-scale employers.⁵¹ The Little Sisters of the Poor, unlike the Green family, who owns Hobby Lobby, were not large-scale employers, but they objected to the accommodation for religious non-profits that the administration offered, believing that it would still make them complicit in the insurance coverage (just in a more roundabout way).⁵² In his concurrence for the Little Sisters' case, Alito argued that "substantial burdens" on religion should be determined by two factors: (1) whether there are "substantial adverse practical consequences" for the religious person who refuses to comply with the law; and (2) whether adherence to the law will "cause the objecting party to violate its religious beliefs, as it sincerely understands them."⁵³ What courts should not do is second-guess the truth or reasonableness of the claimants' beliefs on a "difficult and important question of religion and moral philosophy," as he put it in *Hobby Lobby*: namely, when "it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."⁵⁴ "Arrogating the authority to

51. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373–75 (2020).

52. *Id.* at 2376.

53. *Id.* at 2389 (Alito, J., concurring).

54. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 724 (2014).

provide a binding national answer to this religious or philosophical question” is simply off-limits to courts.⁵⁵

Under RFRA as under *Sherbert*, once the Court has established that a law substantially burdens religion, it must apply strict scrutiny, which asks whether application of the law to the religious person is the most narrowly tailored, or least restrictive, means of serving a compelling state interest. On how to determine whether a claimed interest is compelling, Justice Alito has suggested first that the interest must fall within a narrow range of exceptionally weighty public goods (and his historical analysis of free exercise in *Fulton* may shed more light on this point). Second, reluctant to have courts impose their own view of how important an interest is, he has urged basing the “compellingness” inquiry on whether the jurisdiction in question really treats the interest as compelling, and whether other jurisdictions do. Third, he has stressed that under RFRA (and the same point may also apply under any Free Exercise Clause cases that could arise post-*Smith*), there must be a compelling interest specifically in the law’s application to a *particular religious claimant* (over her objections to compliance).

A discussion of the first requirement comes in Justice Alito’s opinions for *Little Sisters of the Poor* and *Fulton*. In *Little Sisters*, he reminds us of *Sherbert*’s insistence that “[o]nly the gravest abuses, endangering paramount interest” could “give occasion for [a] permissible limitation” on free exercise.⁵⁶ *Fulton* could be read as clarifying what it takes to justify a burden on religious liberty in particular. As noted above, Alito suggests there that in the Founding era, under colonial and state-constitutional protections for religious liberty, the only interests deemed compelling enough to justify limits on free exercise were those of “public peace and safety.”⁵⁷ And this was understood narrowly, he continues: it was not thought, as

55. *Id.*

56. *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

57. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1902 (2021) (Alito, J., concurring in the judgment) (“[M]ore than half of the State Constitutions contained free-exercise provisions subject to a ‘peace and safety’ carveout or something similar.”).

defenders of *Smith* have argued, that every form of conduct regulated by generally applicable laws is “necessary” to secure those conditions.⁵⁸ Rather, he points out, dictionary usage from the time suggests that the terms “peace” and “safety” were closely tied to relief from violence and war or threat of physical harm. And Blackstone’s list of “offenses against the public peace,” in contrast to his “catalog[ing]” of many offenses that “do not threaten” violence or physical harm (such as “cursing,” refusing to pay taxes for infrastructural repairs, or acting as a “common scold”), centered on behaviors that were either violent or incendiary, such as rioting, “unlawful hunting,” carrying “dangerous or unusual weapons,” and so on.⁵⁹ In short, a sound interpretation of the original meaning of the Free Exercise Clause would suggest that only the most foundational interests of any government—those of securing basic conditions necessary for public order and freedom from violence—can justify laws that restrict religious exercise without offering an exemption.

Second, in *Little Sisters of the Poor*, Justice Alito suggests that rather than judge compellingness for themselves, courts could examine whether the state issuing the rule in question really treats the interest as compelling:

If we were required to exercise our own judgment on the question whether the Government has an obligation to provide free contraceptives to all women, we would have to take sides in the great national debate about whether the Government should provide free and comprehensive medical care for all. Entering that policy debate would be inconsistent with our proper role, and RFRA does not call on us to express a view on that issue. We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.⁶⁰

58. *Id.* at 1904.

59. *Id.* at 1903–04.

60. *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

Along these lines, the Court found in *Little Sisters* that the federal government had failed to treat women's interest in free contraception as compelling. This was clear from the numerous exemptions (for very small businesses, or companies with "grandfathered" insurance plans), as well as the government's "fail[ure] to ensure that millions of women have access to free contraceptives" (by leaving out coverage, for example, of women "who do not work outside the home").⁶¹

Alito has also suggested that courts look to the practices of *other* jurisdictions. In *Holt v. Hobbs*, which applied RLUIPA to vindicate a Muslim prisoner's right to grow a beard, Alito's opinion for the Court noted that "the vast majority of States and the Federal Government permit inmates to grow half-inch beards," while the state at issue there—Arkansas—did not.⁶² This, he suggested, increased Arkansas's burden to establish that the interest in barring a half-inch beard is compelling: "[W]hen so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course."⁶³

Third, Justice Alito has stressed that the compelling interest inquiry must focus on the right unit of analysis. Under RFRA and RLUIPA, courts should ask whether the compelling interest requires applying the regulation to *a particular claimant*. Alito emphasizes this point both in *Hobby Lobby* and *Holt*. As he writes in *Holt* (citing *Hobby Lobby*),

RLUIPA, like RFRA, contemplates a "more focused" inquiry and "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." . . . RLUIPA requires us to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants" and "to look to the marginal

61. *Id.* at 2392–93.

62. *Holt v. Hobbs*, 574 U.S. at 352, 368 (2015).

63. *Id.* at 369.

interest in enforcing” the challenged government action in that particular context.⁶⁴

In sum, Justice Alito’s opinions in cases involving RFRA and RLUIPA claims offer several bright line rules for strict scrutiny analysis of religious freedom claims under federal statutory law. If the Court decides to restore in constitutional law something like these policies’ religious liberty protections (modeled after *Sherbert*, and requiring strict scrutiny wherever religion has been substantially burdened), its new interpretation of the Free Exercise Clause could be guided by these criteria.

II. ADVANCING THE “HISTORY AND TRADITION” METHOD OF ESTABLISHMENT CLAUSE INTERPRETATION

In Establishment Clause jurisprudence, Justice Alito’s contributions run parallel to those discussed above. Just as he applied (and helped spell out the meaning of) *Smith* while treating *Smith*’s shortcomings as an impetus for proposing a better approach, so too he has worked with (and better specified) the Establishment Clause doctrine created in *Lemon v. Kurtzman* (and later cases using the “*Lemon* test”) while pushing the Court beyond *Lemon*’s pitfalls toward a more originalist approach.

In *Lemon*, the Court proposed that state action is an unlawful establishment of religion if it (a) lacks a secular purpose; (b) has the primary effect of advancing or inhibiting religion; or (c) fosters excessive entanglement between religion and government.⁶⁵ A later accretion was the “endorsement test,” which in Justice O’Connor’s telling asked whether a “reasonable observer” would think that the “challenged governmental practice conveys a message of endorsement of religion.”⁶⁶

64. *Id.* at 362–63 (internal citations omitted).

65. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

66. *Allegheny Cnty. v. ACLU*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and concurring in the judgment).

Echoing O'Connor, Justice Alito has emphasized that applications of this test should consider *all* relevant information available to the observer, including facts not immediately apparent, for example, to someone simply looking at a religious display. In his concurrence for *Salazar v. Buono*,⁶⁷ a case involving an Establishment Clause challenge to a World War I memorial cross on federal land in the Mojave Desert, Justice Alito urged that a reasonable observer would “be aware of the history and all other pertinent facts relating to a challenged display” —including, in that case, the fact that Congress had decided to transfer ownership of the land on which the cross stood to a private party, in exchange for another piece of land without the cross.⁶⁸ That transfer should be seen by the reasonable observer not as “an endorsement of Christianity” (as Justice Stevens argued in his dissent), but rather as a good “effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns” about the memorial.⁶⁹

In more recent establishment cases, the Court was asked to reverse *Lemon*. Justice Alito’s opinion for the majority in *American Legion*, a case that considered another World War I memorial cross, this time on public land in Maryland, is not unlike his concurrence in *Fulton* repudiating *Smith*’s interpretation of the Free Exercise Clause. For it highlights the shortcomings of the Court’s guiding precedent in *Lemon* and illustrates how an alternative approach reflected in more recent cases—here, a test focused on history and tradition—would resolve the issue at hand. Alito first points out the *Lemon* test’s inconsistency with longstanding (and long-accepted) practices in our nation’s history, including public references to God in various official contexts.⁷⁰ Next he cites many Justices, judges, and scholars who have lamented how unpredictable, indeterminate, and internally inconsistent the *Lemon* test’s outcomes have

67. 559 U.S. 700 (2010).

68. *Id.* at 728 (Alito, J., concurring).

69. *Id.*

70. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080–81 (2019).

been.⁷¹ Third, he focuses on problems peculiar to applying *Lemon* to public displays like the one at issue in *American Legion*—for example, the challenge of discerning the “purpose” of any longstanding display (under the first prong of the *Lemon* test), due to the age of the display and the evolution of its purpose over time to include new secular, historical, or cultural meanings.⁷²

For these reasons, Alito declines to adhere to *Lemon*’s “grand unified theory of the Establishment Clause,” opting instead for the “more modest approach” of the Court’s more recent cases, which is rooted in the “particular issue at hand and looks to history for guidance.” In this vein, surveying official expressions of religiosity—in particular, legislative prayers—that were upheld in recent Supreme Court cases and date all the way back to the First Congress, Alito notes that these practices reflected “respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.” In light of the long tradition of public religious expression that shares those features—and given the difficulty of applying *Lemon* (and in particular its “purpose” inquiry) to longstanding religious displays—Alito concludes that “[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition [of tolerance and inclusivity], they are likewise constitutional.”⁷³

Ultimately, *American Legion* stops short of expressly declaring *Lemon* dead for all purposes. Yet its aspersions on *Lemon*, its embrace of history and tradition as superior criteria, and its reasons for favoring that approach in religious-display cases were so forcefully stated that the Court’s next major case addressing Establishment Clause issues endorsed several lower court judges’ reading that *American Legion* had signaled the complete demise of *Lemon*.⁷⁴ Thus, in the Establishment Clause setting (with respect to *Lemon*),

71. *Id.* at 2081.

72. *Id.* at 2081–85.

73. *Id.* at 2089.

74. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 2427 (2022).

as in the free exercise setting (with respect to *Smith*), Alito has shown himself capable of developing doctrine, bringing to a head its internal tensions, and drawing on history and tradition to point the way to a sounder replacement doctrine.

One further analogy to Justice Alito's thought on free exercise is worth noting: an acute sensitivity to the privileging of secular over religious reasons for various actions. As noted above, Alito has recognized that a law cannot be "neutral" toward religion if it exempts conduct chosen for secular reasons, but not comparable conduct chosen for religious reasons. That is because, however well-meaning, this disparity of legal treatment reflects an arbitrary devaluing of religious reasons. Along similar lines, Alito has emphasized in establishment cases that just as the imposition of exclusionary religious displays can signal favoritism toward a religion, so the *removal* of longstanding religious displays can signal "aggressive[] *host[ility]* to religion."⁷⁵ This is true no matter how well-meaning the removal may be—in other words, even if the goal is to avoid excluding non-Christian observers, as Justices Ginsburg and Sotomayor suggested in their dissent in *American Legion*.⁷⁶

III. ROBUST PROTECTION FOR INSTITUTIONAL RELIGIOUS FREEDOM

During Justice Alito's tenure, the Court has heard several cases involving a First Amendment doctrine that protects the freedom of religious institutions to govern themselves. Under the so-called "ministerial exception," a religious entity's decisions regarding the hiring and firing of its ministers are exempt from the reach of employment-antidiscrimination laws. Justice Alito has clarified the scope of this exception in his concurrence in *Hosanna-Tabor* and his majority opinion in *Our Lady of Guadalupe School*, both of which tie the meaning of a "minister" to an employee's function or purpose within a religious institution. His clarifications have broadened the

75. *Am. Legion*, 139 S. Ct. at 2085.

76. *Id.* at 2107–08 (Ginsburg, J., dissenting).

principle's reach, to the benefit of more religious associations and especially those of less mainstream faiths.

Hosanna-Tabor involved a Lutheran school's firing of one of its teachers, Cheryl Perich, who then sued under the Americans with Disabilities Act, claiming that she had been unjustly terminated for a newly diagnosed disability.⁷⁷ The school maintained that it had dismissed Perich on religious grounds, for her refusal to settle their disagreement over her employment outside the courts (which runs counter to Lutherans' outlook on conflict resolution). A unanimous Court held that antidiscrimination laws could not be applied to regulate the school's choice of teachers, who were "ministers" in the relevant sense. But the majority opinion avoided deeper elaboration of what it takes to count as a minister under this doctrine, content to focus on a few key facts in the case at hand, including the teacher's formal title and formal commissioning as a minister.⁷⁸

Justice Alito's concurrence, joined by Justice Kagan, argues that the title of "minister" should be defined by an employee's function, rather than other characteristics that could be interpreted too narrowly, to the exclusion of religious minorities. "Because virtually every religion in the world is represented in the population of the United States," he writes, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies."⁷⁹ Several roles—such as leadership, worship, or teaching—could ground ministerial status: "The 'ministerial' exception should . . . apply to any 'employee' who leads a religious organization, conducts worship services or

77. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 178–79 (2012).

78. *Id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.").

79. *Id.* at 198 (Alito, J., concurring).

important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”⁸⁰

Writing for the Court, Justice Alito spells out this interpretation further in *Our Lady of Guadalupe School*, which upheld the dismissal of two Catholic school teachers under the same doctrine. In that opinion, he again cautions against using too rigidly the criteria that had defined Cheryl Perich as a minister in *Hosanna-Tabor* (her title, her training, her self-presentation as a minister, and her educational role in conveying Lutheran beliefs to students). None of these features, Alito emphasizes, should be deemed “essential” to a ministerial position eligible for the exemption (as the court below had erroneously held). The scope of the ministerial role is tied to “what an employee does,” and clearly includes jobs focused on “educating young people in their faith, inculcating its teachings, and training them to live their faith” — all tasks that, in Alito’s telling, “lie at the very core of the mission of a private religious school.”⁸¹ These distinctions have helped the Court articulate a broad vision of religious freedom that protects not only individuals but associations that are religiously affiliated or driven.

CONCLUSION: JUSTICE ALITO’S LEGACY IN RELIGION JURISPRUDENCE

The guiding principles of Justice Alito’s religion jurisprudence might best be summarized as flexibility in the law’s accommodation of religion (*Fulton*), respect for religious pluralism and tradition (*American Legion*), and deference to institutional autonomy (*Our Lady of Guadalupe School*). His jurisprudential approach in turn mirrors these principles, balancing fidelity to the past with resourcefulness and openness to change or renewal, for the sake of religion law’s integrity. Future justices would do well to imitate his example in meeting legal challenges to religious liberty.

80. *Id.* at 199.

81. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063–64 (2020).

SAMUEL ALITO'S CONSERVATISM—BURKEAN AND AMERICAN

ADAM J. WHITE*

"I am and always have been a conservative," Samuel Alito wrote in 1985, "and an adherent to the same philosophical views that I believe are central to this Administration." He was referring to the Reagan Administration, where he served in the Justice Department. But as he recognized, to call oneself a "conservative" is to start an explanation, not finish one. "It is obviously very difficult to summarize a set of political views in a sentence," he warned, before offering a few paragraphs.¹

A quarter-century later, Alito found himself reflecting once more on conservatism. In 2012, the Columbia Law School hosted a conference on "Burkean Constitutionalism," after the conservative *Weekly Standard* had surveyed Alito's writings and background and declared him "the Burkean Justice."² Alito keynoted the Columbia conference, and he took the "Burkean" label as a compliment—but as in 1985, he added a word of caution.

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1. Alito's statement was attached to his November 1985 application to be Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. It is available in the Reagan President Library's Digital Library Collection, in the "Office of Presidential Personnel: Records" collection, "Samuel A. Alito Jr." folder, box no. 18576: <https://www.reaganlibrary.gov/public/digitallibrary/smf/presidentialpersonnel/oa18576/40-443-12012045-oa18576-001-2017.pdf> [https://perma.cc/H8KT-RYY7] (hereinafter Alito OLC Application Statement).

2. Adam J. White, *The Burkean Justice*, WKLY. STANDARD (July 18, 2011), <https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice> [https://perma.cc/BFV5-EUWN].

“Burkean constitutionalism” means different things to different people, he explained. And its application to America’s particular constitutional institutions—including the work of American judges—is not so self-evident.³

Alito was rightly wary of defining either conservatism or Burkeanism with exaggerated specificity. Today, of course, “conservatism” might refer to any part of the broad collection of disparate and often conflicting political agendas on the post-Trump right. But American conservatism has never been monolithic; its history is a story of argument.⁴ In 1965, when conservatism was increasingly well defined by William F. Buckley Jr.’s *National Review*, Buckley himself quipped:

I confess that I know who is a conservative less surely than I know who is a Liberal. Blindfold me, spin me about like a top, and I will walk up to the single Liberal in the room without zig or zag, and find him even if he is hiding behind the flower pot. I am tempted to try to develop an equally sure nose for the conservative, but I am deterred by the knowledge that conservatives, under the stress of our times, have had to invite all kinds of people into their ranks, to help with the job at hand⁵

The next decades simplified matters considerably: political conservatism came to be defined by President Reagan’s agenda, and legal conservatism by Justice Scalia’s methodology.

But now, after an era of ideological and methodological consolidation, old questions about conservatism are new again. Yet as conservative lawyers and judges consider whether constitutional law

3. See 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/V4DF-9CB4>]. I happened to attend that conference; in this article, my general descriptions of his remarks are based on notes, while any direct quotes come from the Columbia Law School’s article.

4. MATTHEW CONTINETTI, *THE RIGHT: THE HUNDRED YEAR WAR FOR AMERICAN CONSERVATISM* (2022).

5. WILLIAM F. BUCKLEY, JR., *Notes Toward an Empirical Definition of Conservatism*, in *WHAT IS CONSERVATISM?* 212 (Frank S. Meyer ed., 1965).

should move in more libertarian or traditionalistic directions,⁶ Justice Alito does not fit easily into such categories. In an era of judicial and executive power, he is wary of concentrated power; in an era of jurisprudential theories, he is rooted in American experience. These are both well worth conserving.

I. SAMUEL ALITO AND THE MODERN CONSERVATIVE MOVEMENT(S)

A. The Education of Samuel Alito

“I am who I am in the first place because of my parents and because of the things that they taught me,” Justice Alito told the Senate Judiciary Committee in 2006, “and I know from my own experience as a parent that parents probably teach most powerfully not through their words but through their deeds.”⁷

He introduced himself to the sSenators, and to America, by describing his parents. His mother was a first-generation American, a teacher who, with her husband, “instilled” their children with “a deep love of learning.”⁸ Alito’s father came to America as an infant, grew up in poverty, suffered the loss of his own mother, yet attended college thanks to the generous intervention of “a kind person in the Trenton area.”⁹ After serving in World War II, Samuel Alito Sr. eventually “worked . . . for many years in a nonpartisan position for the New Jersey Legislature, which was an institution that he revered.”¹⁰

6. *See, e.g.*, RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022); GREG WEINER, *THE POLITICAL CONSTITUTION: THE CASE AGAINST JUDICIAL SUPREMACY* (2019); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

7. 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, S. Hearing 109-277, 109th Cong. 54 (Jan. 9–13, 2006) (hereinafter Confirmation Hearing).

8. *Id.* at 55.

9. *Id.* at 54.

10. *Id.* at 54–55.

"His story is a story that is typical of a lot of Americans, both back in his day and today," Alito recalled fondly, "and it is the story, as far as I can see it, about the opportunities that our country offers and also about the need for fairness and about hard work and perseverance and the power of a small good deed."¹¹

In his opening remarks to the Senators, Alito emphasized two more things. First, his community:

I got here in part because of the community in which I grew up. It was a warm but definitely an unpretentious, down-to-earth community. . . . I have happy memories and strong memories of those days and good memories of the good sense and the decency of my friends and my neighbors.¹²

And second, his profession—or at least his professional mentor, Judge Leonard Garth of the Third Circuit.

I had the good fortune to begin my legal career as a law clerk for a judge who really epitomized open-mindedness and fairness. He read the record in detail in every single case that came before me. He insisted on scrupulously following precedents He taught all of his law clerks that every case has to be decided on an individual basis, and he really didn't have much use for any grand theories.¹³

The formative moment in the young Alito's civic education may have been one that involved all three of those things: family, community, and the courts. After the Supreme Court broadly announced a constitutional rule of "one person, one vote" for legislative districts in *Reynolds v. Sims*,¹⁴ the New Jersey state legislature was left to actually implement the Court's theory. And the legislators, in turn, left the task to Samuel Alito Sr., who labored to draw new district lines that could comply in fact with the Court's doctrine.

11. *Id.* at 55.

12. *Id.*

13. *Id.*

14. 377 U.S. 533 (1964).

Justice Alito recalled this story to senators in the run-up to his confirmation hearing,¹⁵ and in a 2015 interview with Bill Kristol:

I remember lying in bed listening to this clanking of a mechanical—it's hard to believe—a mechanical adding machine. He was downstairs, and he was drawing maps to try to produce districts for the Senate and for the Assembly that were as close as possible to equal in population just using a mechanical adding machine.¹⁶

The sometimes vast gulf between sweeping generalities of Supreme Court opinions and the concrete difficulty of their implementation was apparent in the Alito home.

It was also apparent to Alexander Bickel. In *The Supreme Court and the Idea of Progress*, he recognized *Reynolds* as the Warren Court's "main statement" of a theory of constitutional democracy that the Court would impose on the states at the expense of society's counter-majoritarian institutions (except for the Court itself, of course).¹⁷ The Court was promoting majoritarianism, and "[m]ajoritarianism is heady stuff," Bickel noted.¹⁸ But whether the Court knew it or not, such doctrinal sloganeering tends to carry much further and much faster than the justices intended. "It is, in truth, a tide flowing with the swiftness of a slogan," he warned.¹⁹ "The tide is apt to sweep over all institutions, seeking its level everywhere. Now that the Warren Court has released it again, it bids fair, for example, to engulf the Electoral College The tide could well engulf the Court itself also."²⁰

15. David D. Kirkpatrick, *Court Nominee Presents Father as Role Model*, N.Y. TIMES, Dec. 5, 2005, <https://www.nytimes.com/2005/12/05/politics/politicsspecial1/court-nominee-presents-father-as-role-model.html> [<https://perma.cc/49AW-ZVAU>].

16. Bill Kristol, *Conversations* (July 10, 2015), <https://conversationswithbillkristol.org/transcript/samuel-alito-transcript/> [<https://perma.cc/KC93-ALCL>].

17. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 108–15 (1970).

18. *Id.* at 111.

19. *Id.*

20. *Id.* at 111–12.

Two centuries earlier, James Madison had seen the danger of “theoretic politicians” who would impose constitutional abstractions on the people, but the Warren Court was not heeding his warning.²¹ In his own time, Bickel longed for “a less confident reliance on the intuitive judicial capacity to identify the course of progress.” A few years later, Bickel would recharacterize his approach by explicit reference to Edmund Burke;²² but even before that, in *The Supreme Court and the Idea of Progress*, Bickel made his points in palpably Burkean terms:

More careful analysis of the realities on which it was imposing its law, and an appreciation of historical truth, with all its uncertainties, in lieu of a recital of selected historical slogans, would long since have rendered the Warren Court wary of its one-man, one vote simplicities The judicial process is too principle-prone and too principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality.²³

Bickel’s criticism of the later Warren Court, from *Reynolds v. Sims*’s one-man-one-vote to *Griswold v. Connecticut*’s sweeping right to privacy,²⁴ stirred young Sam Alito, who already was attracted to notions of judicial self-restraint. He recalled decades later, in his Supreme Court confirmation hearing, that:

[T]he first place in which I saw a theoretical explanation of that doctrine, which I found persuasive at the time, was Alexander Bickel’s book . . . which came out during the time when I was in

21. *Id.* at 166 (quoting THE FEDERALIST NO. 10 (James Madison)).

22. Alexander M. Bickel, *Notes on the Constitution*, COMMENTARY, Aug. 1975, at 53; ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975).

23. BICKEL, *supra* note 17, at 174–75.

24. See, e.g., *id.* at 41 (“On a linear plane we are not far from where we started. The distance is from *Lochner v. New York* . . . to the holding in *Griswold v. Connecticut*[.]”); *Griswold v. Connecticut*, 85 S.Ct. 1678 (1965).

college. I think it was the first book about constitutional theory, so to speak, that I had read.²⁵

From Bickel's writings, Alito learned the virtue of prudence. "Professor Bickel made the argument that the Court had taken the one person/one vote principle too far," he told the Senators, "and I know my father had said that although he thought it was a good idea, the idea of trying to get the districts to be exactly equal in population at the expense of looking at other factors, such as the shape of the district and respecting county lines or municipal lines, was a bad idea."²⁶ Through Bickel, Alito saw that the Court's work involved prudential, institutional questions:

[H]e was someone who I think most people would describe as a liberal, but he was a critic of the Warren Court for a number of reasons. And he was a great proponent of judicial self-restraint, and that was the main point that I took from my pre-law school study of the Warren Court.²⁷

Bickel's book inspired Alito to go to Yale Law School.²⁸ "[A]nd I was looking forward to taking some courses from him," Alito recalled years later in an interview, "but unfortunately he became ill . . . within the year when I started at Yale. So I never did take a course from him."²⁹ For Constitutional Law he was assigned to Charles Reich's small class, which Alito tried to escape with a transfer to Robert Bork's class, but the school denied his request. "So I'm self-taught."³⁰

25. *Confirmation Hearing*, *supra* note 7, at 519–20.

26. *Id.* at 382; *see also id.* at 381 ("I don't believe that I—in fact, I am quite sure I never was opposed to the one person/one vote concept. I do recall quite clearly that my father's work at the time working for the New Jersey Legislature and working on reapportionment had brought to my attention the question of just how far that principle of one person/one vote had to be taken in drawing legislative districts.").

27. *Id.* at 381.

28. Alito OLC Application Statement, *supra* note 1, at 1.

29. Kristol, *supra* note 16.

30. *Id.*

After graduating from law school in 1975, he clerked for Judge Garth and then served as an Assistant U.S. Attorney in New Jersey for several years. In 1981 he departed for Washington, to join the new Reagan Administration—the culmination of one conservative movement, and the beginning of another.

B. The Evolution of American Political Conservatism

Upon President Ronald Reagan's election, George F. Will wrote that "before there was Ronald Reagan, there was Barry Goldwater, and before there was Barry Goldwater there was *National Review*, and before there was *National Review* there was Bill Buckley with a spark in his mind, and the spark in 1980 has become a conflagration."³¹

But between Buckley's spark and Reagan's conflagration, conservatism changed significantly. Beginning as a countermajoritarian and intellectual movement, it eventually became a majoritarian and populist one. And this evolution occurred during Alito's formative years.

1. From Elitism to Populism

Shortly before Buckley founded *National Review*, Russell Kirk wrote *The Conservative Mind* (1955), a groundbreaking account of American conservatism that attempted to root conservatism in Edmund Burke. As Matthew Continetti recounts in his own newly published history of the American right, Kirk's magnum opus "gave conservatives an identity, an intellectual genealogy, and a point of view."³²

Yet Kirk's conservative genealogy and identity were largely disconnected from the American founding. As Continetti explains, "Kirk assimilated the American Right into a broader Anglo-American tradition," minimizing "the differences between Burkean, European-style conservatism, with its preference for monarchy,

31. JOHN B. JUDIS, WILLIAM F. BUCKLEY, JR.: PATRON SAINT OF THE CONSERVATIVES 14 (1988).

32. CONTINETTI, *supra* note 4, at 98 (2022).

aristocracy, and established churches, and American constitutionalism, with its belief in enumerated powers, individual natural rights, and religious pluralism." Kirk's account "defended the Constitution, but as a historical artifact rather than as the political structure designed by the Founders to instantiate the principles of the Declaration of Independence."³³

Buckley's own *National Review* began in a somewhat similarly elitist spirit, both in its message and in its personnel. But this soon changed. From Goldwater's presidential campaign, to Buckley's own mayoral campaign and surprisingly popular *Firing Line* television show, to Reagan's successful gubernatorial campaign and its ripple effects through the Republican Party in an era of broader social and political upheaval, conservatives suddenly had to grapple with the prospects—and risks—of populism.

Buckley "was an ambivalent populist," Continetti writes, but "the 'establishment' that *National Review* poked, prodded, and lamppooned was liberal in outlook,"³⁴ while populist conservatism ascended. He would denounce the populist right's worst impulses, such as the John Birch Society and George Wallace.³⁵ But he would also take aim at elite academic institutions and declare, "I am myself obliged to confess that I would prefer to live in a society governed by the first two thousand names in the Garden City telephone directory, than in a society governed by the two thousand faculty members of Harvard University."³⁶

Buckley's phonebook quip became legendary, but the punchline overshadowed his explanation of the fundamental challenge facing conservatives: how to embrace both populism and institutionalism,

33. *Id.* at 97–98.

34. *Id.* at 178.

35. See, e.g., JEFFREY HART, *THE MAKING OF THE AMERICAN CONSERVATIVE MIND: NATIONAL REVIEW AND ITS TIMES* 158–60 (2005) (John Birch Society); JUDIS, *supra* note 31, at 287 (Wallace).

36. William F. Buckley, Jr., *The Aimlessness of American Education*, *NEWSDAY*, Mar. 5, 1960, reprinted in WILLIAM F. BUCKLEY, JR., *RUMBLES LEFT AND RIGHT* 134 (1964) (When Buckley republished the essay in a 1964 collection, the Garden City phonebook became the more famous "Boston telephone directory.").

but in their proper proportions, and for the right reasons. He had particular reasons for populism in matters of higher education:

Not, heaven knows, because I hold lightly the brainpower or knowledge or even the affability of the Harvard faculty, but because I greatly fear intellectual arrogance, and that is a distinguishing characteristic of the university which refuses to accept any common premise. In the deliberations of two thousand citizens of Garden City I think one would discern a respect for the laws of God and for the wisdom of our ancestors which would not equally characterize the deliberations of Harvard professors—who, to the extent that they believe in God, tend to believe He made some terrible mistakes which they would undertake to rectify; and when they speak of the wisdom of our ancestors, it is with the kind of pride we exhibit in talking about the accomplishments of our children at school.³⁷

Conservatism's cautious embrace of populism—on education, on anticommunism, on crime, on the Supreme Court, and more—proved to be its political turning point.

And this era happened to coincide with Samuel Alito's own political and legal education. In his 1985 job application to OLC, he wrote that "I first became interested in government and politics during the 1960s," and "the greatest influences on my views were the writings of William F. Buckley, Jr., the *National Review*, and Barry Goldwater's 1964 campaign."³⁸

Similarly, as urban crime and political violence spurred conservatives to prioritize law and order in the late 1960s, those political and ideological arguments resonated with what Alito was seeing in his own hometown, Trenton. "The city never recovered" from 1968's riots, he told the *American Spectator* in 2014. "It's sad. The people living in the city were the ones who were plagued by crime[.]"³⁹

37. *Id.*

38. OLC Application Statement, *supra* note 1, at 1.

39. Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014), <https://spectator.org/sam-alito-a-civil-man/> [<https://perma.cc/AB4M-BNDW>].

2. From Congress to the Executive

In this formative period from the 1960s through the 1970s, American political conservatives changed in other important ways, too. One underappreciated but crucial change involved conservatives' view of executive power. Because the modern conservative political movement emerged in the aftermath of FDR's New Deal, it initially favored Congress over the presidency.

This was emphatically so in *National Review*, where editor James Burnham—whom Buckley later called, “the dominant intellectual influence in the development of this journal”⁴⁰—dedicated a book to Congress's central place in the constitutional order: *Congress and the American Tradition* (1959). Another of *National Review's* founding intellectuals, Willmoore Kendall, called for a restoration of legislative primacy against the imperial presidency, in seminal articles like “The Two Majorities.”⁴¹

The conservative instinct toward Congress endured through the Eisenhower Administration. Yet as Jack Goldsmith recounted in an insightful essay, President Nixon's election in 1968 spurred a reconsideration. Tracing *National Review* (and other key conservative journals, like *The Public Interest*) through the early 1970s, Goldsmith shows how conservative intellectuals came to recognize that executive power could be the key bulwark against the administrative bureaucracy's own excesses, and against the conventional wisdom of elite media institutions.⁴² And in the aftermath of Watergate, when the Democratic Congress enacted significant and wide-ranging limits on executive legal and political power—from foreign intelligence, to war powers, to emergency powers, the independent

40. WILLIAM F. BUCKLEY JR., *MILES GONE BY: A LITERARY AUTOBIOGRAPHY* 289 (2004). Buckley offered that tribute to Burnham at *National Review's* twenty-fifth anniversary dinner, in 1980. See HART, *supra* note 35, at 254.

41. WILLMOORE KENDALL, *The Two Majorities*, 4 MIDWEST J. POL. SCI., 317 (1960), reprinted in WILLMOORE KENDALL *CONTRA MUNDUM* (Nellie D. Kendall ed., 1971). See also WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 137–54 (1970).

42. Jack Goldsmith, *The Accountable Presidency*, THE NEW REPUBLIC, Feb. 1, 2010, at 33, 35–36.

prosecutors, to campaign finance—conservatives rallied around executive power even more energetically.⁴³

3. Rediscovering the Founders

Conservatism's shift on executive power became central to the conservative legal movement. So did one other pivotal period in modern conservative discourse.

Sixty years after Charles Beard downplayed the founding generation's intellectual and moral weight in *An Economic Interpretation of the Constitution of the United States* (1913), appeals to the founding fathers' constitutional vision were at low ebb. But this changed significantly in the run-up to 1976's bicentennial year, when an outpouring of patriotic celebration returned the founders to center stage.⁴⁴

To the public's instinctual affections, conservative scholars added intellectual substance. In 1967, Bernard Bailyn had published his Pulitzer-winning study of the founders, *The Ideological Origins of the American Revolution*.⁴⁵ Eight years later, in the run-up to the bicentennial, *The Public Interest* published a pointed essay by Prof. Martin Diamond, on the era's "disquieting account" of the American founding "which, quite apart from all other possible causes of political distress, has itself the logical tendency to make impossible the kind of constitutional contentment that so marked the nation's first centennials."⁴⁶ And, he warned, "it is upon the basis of this disquieting account that generations of American students have now received their instruction as to 'what really happened' at the

43. When Buckley published his first compendium of conservative thought, *DID YOU EVER SEE A DREAM WALKING?* (William F. Buckley, Jr., ed., 1970), he included Kendall's *Two Majorities*. But two decades later, when he published a revised version as *KEEPING THE TABLETS* (Harper & Row 1988), a different Kendall essay (*Equality and the American Political Tradition*) had taken its place. It was a subtle but telling editorial judgment.

44. And not just in 1776, the 1972 musical and movie.

45. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967)

46. Martin Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, 41 *PUB. INT.* 39, 40 (Fall 1975).

founding.” So he urged readers to return to a more genuine appreciation of the founders’ own understanding of the Declaration and Constitution.⁴⁷

Diamond was not alone. In 1973 and 1974, the American Enterprise Institute sponsored a series of keynote lectures at historical sites across America, to celebrate the imminent bicentennial: Irving Kristol at Washington’s St. John’s Church, on *The American Revolution as a Successful Revolution*, Martin Diamond at Philadelphia’s Congress Hall, on *The Revolution of Sober Expectations*, and other lectures by Gordon Wood, Seymour Martin Lipset, Dean Rusk, and others at sites across America.⁴⁸

One should not overstate the impact of think-tank lectures, of course. That said, the bicentennial’s combination of public affection and scholarly writings is important: it reasserted not just the Constitution’s text, but the wisdom and virtue of the founders who wrote it. It represented the American narrative, and it re-rooted our Constitution in the actual community that wrote and ratified it, laying a foundation for the legal thinkers who soon built the modern conservative legal movement.

C. *The Emergence of Legal Conservatism*

In 1976, Samuel Alito already had graduated from Yale Law School. In 1976 he began clerking for Judge Garth, and in 1977 he began a four-year stint as an Assistant U.S. Attorney in New Jersey. Which is to say, he attended law school right before the Federalist Society was founded, and Robert Bork “wasn’t that well known” yet.⁴⁹ And he was busy practicing law when conservative legal scholars began publishing foundational theoretical texts. In just those few years between his departure from New Haven and his arrival in Washington, the conservative legal world underwent profound changes.

47. *Id.* at 45.

48. See S.J. TONSOR, *AMERICA’S CONTINUING REVOLUTION: AN ACT OF CONSERVATION* (1975) (collecting the lectures).

49. Kristol, *supra* note 16.

Alito's original inspiration, Alexander Bickel, seemed to point the way forward for conservative critics of the Warren and Burger Courts. George Will memorialized him as "the keenest public philosopher of our time."⁵⁰ Robert Bork reviewed *The Morality of Consent*, Bickel's posthumous book on constitutional law and Burkean conservatism, and concluded that it "is hard to believe the work will not prove seminal, that the tradition will not be elaborated by others."⁵¹

But it wasn't. Instead, conservative judges, scholars, and lawyers focused on the Constitution's original intent, and the tools of legal textualism. They began in broad terms, with articles and books by Robert Bork,⁵² William Rehnquist,⁵³ and Raoul Berger,⁵⁴ before spurring a generational wave of increasingly precise deeply researched articles and books.

Soon law students at Yale, Chicago, and Harvard founded the institutions that became the Federalist Society. The Yale founders evidently considered calling their club "The Alexander Bickel Society," but the suggestion "generated little enthusiasm"⁵⁵—a telling indication of how far Bickel's star had fallen, so quickly.

The nascent Federalist Society's inaugural student conference, in April 1982 at Yale, was followed quickly by the establishment of a national organization of students, faculty, and lawyers, with special emphasis on building a network, particularly in Washington.⁵⁶ And this, in turn, quickly gave rise to deep integration of the new legal organization and the Reagan Administration, in both the White

50. George F. Will, *The Roots of Watergate*, WASH. POST, Dec. 27, 1974, at A17.

51. Robert H. Bork, *Alexander M. Bickel, Political Philosopher*, 1975 SUP. CT. REV. 419, 421 (1975).

52. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

53. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

54. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

55. George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL'Y 623, 648 (2006).

56. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 138–40 (2008).

House and the Justice Department, with the encouragement of Antonin Scalia, Boyden Gray, Ken Cribb, and other leading figures in the highest levels of government and legal academia.⁵⁷

The injection of intellectual energy into the Reagan Administration's legal departments became evident in mid-1985 when Attorney General Meese offered a speech to the American Bar Association. Criticizing the Supreme Court's recent decisions on federalism, criminal law, and the Establishment Clause, he called for a constitutional "jurisprudence of original intention," to "resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."⁵⁸ His speech drew a rejoinder from Justice William Brennan to which Meese replied in turn, inaugurating a generational debate over the Constitution, the founding fathers, and the courts.⁵⁹

But Meese's formulation quickly proved problematic. His invocation of the founders' "intent" was criticized for being too subjective, insufficiently restrictive of judicial discretion.⁶⁰ Accordingly, legal originalists came to focus more specifically on the original *meaning* of the Constitution's words, as understood by the generation that wrote and ratified them,⁶¹ and originalist legal scholars produced volumes of legal scholarship attempting to identify the original public meaning of various constitutional provisions.

These were years of extraordinary intellectual ferment and professional networking, especially in the Reagan Administration. Yet,

57. *Id.* at 139–47.

58. Edwin Meese, III, Att'y Gen., *Speech Before the American Bar Association*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47–54 (Steven G. Calabresi ed., 2007).

59. See Craig Crawford, *Legal Debate Pitts Meese vs. Brennan*, ORLANDO SENTINEL, Aug. 10, 1986.

60. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

61. Cf. Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'").

in hindsight, one can see that Samuel Alito remained somewhat detached from it.

Although he joined the Solicitor General's office in 1981, he remained something of an enigma among his Justice Department colleagues, who were largely unaware of his political leanings. "I was kind of a secret conservative," he told the *American Spectator's* Matthew Walther in 2014, until Solicitor General Charles Fried encountered him at a Federalist Society lunch meeting.⁶² When Alito applied to be Charles Cooper's deputy in the Office of Legal Counsel, the White House screener was so skeptical of Alito's *bona fides* that he urged Alito "to go write something really fast and explain why we ought to allow you to go into this political position even though we're kind of dubious about you," Alito recalled.⁶³

Alito's statement, declaring "I am and always have been a conservative," is interesting for its contrasts with what already was becoming conventional wisdom in the nascent conservative legal movement.⁶⁴ He cites Bickel as an inspiration, long after Bickel had been eclipsed by a new generation of conservative judges and scholars. He invokes the Warren Court's excesses and issues like affirmative action and abortion, but without explicit mention of constitutional originalism or textualism. His prominent mention of "limited government, federalism, free enterprise, the supremacy of the elected branches of government," and the Establishment Clause call to mind Meese's famous ABA speech just months earlier, while his endorsement of "the legitimacy of a government role in protecting traditional values" strikes both Reaganite and Bickelian notes.⁶⁵

Alito won the OLC post; two years later, he returned to New Jersey as the U.S. Attorney, and soon he would be appointed to the U.S. Court of Appeals for the Third Circuit. He had risen quickly through the ranks of the young conservative legal movement and continued to attract attention as a conservative judge.

62. Walther, *supra* note 39.

63. *Id.*

64. OLC Application Statement, *supra* note 1.

65. *Id.*

Yet he accomplished all of it while remaining somewhat detached from the conservative legal movement's increasingly theoretical and academic bent. The first generation of originalists quickly left Bickel behind, but Alito did not. The first generation of originalists no doubt meant to be populists, but they gravitated toward elite institutions in government and academia; Alito took another path.

II. "THE BURKEAN JUSTICE"

A. Alito as *"The Burkean Justice"*

When then-Judge Alito appeared before the Senate Judiciary Committee in 2005, the conservative legal movement was a quarter-century old, ripened with originalist judicial decisions and legal scholarship. The first generation of legal conservatives had largely marginalized, even delegitimized, reliance on legislative history as a supplementary tool for legal interpretation. Yet when Senator Grassley asked Justice Alito about legal interpretation, the nominee offered an unconventional answer.

"When I interpret a statute, I do begin with the text of the statute," he began; "I think that certainly is the clearest indication of what Congress as a whole had in mind in passing the statute." But "when there is an ambiguity in the statute," he continued:

I think it is entirely legitimate to look to legislative history, and as I said, I have often done that. . . . [I]t has to be done carefully and I think with a realistic evaluation of the legislative process, but I'm not one of the judges who thinks that you should never look to legislative history. I think it has its place.⁶⁶

And for the Constitution, he offered a similar approach. "I think the Constitution contains both some very specific provisions, and there the job of understanding what the provision means and applying it to new factual situations that come up is relatively easy." But, he continued, "it also contains some broad principles"—unreasonable searches and seizures, due process, equal protection—

66. Confirmation Hearing, *supra* note 7, at 504.

“[a]nd in those instances, it is the job of the judiciary to try to understand the principle and to apply it to the new situations that come before the judiciary.”⁶⁷ He emphasized, “I would never say that it is an easy process. There are some easy cases, but there are a lot of very difficult cases. And once you have identified the principle, the job of applying it to particular cases is often not easy at all.”⁶⁸

Justice Scalia had already offered caveats to the application of originalism and textualism, at least when application of the Constitution’s original meaning points to particularly untenable results.⁶⁹ But Alito was conceding a very different limit—not the limit of applying a constitutional provision’s principle, but the limit of *ascertaining* a constitutional principle with specificity.

This difference became clear in a series of opinions that Justice Alito wrote in 2010 and 2011, in cases involving the First Amendment’s freedom of speech. First, in *United States v. Stevens*, a case involving videos depicting the crushing of animals, he dissented from the Supreme Court’s decision striking down a federal statute criminalizing the production, sale, or possession of depictions of animal cruelty; where the Court saw the statute as unconstitutionally overbroad, Alito saw the constitutional issue as much more ambiguous.⁷⁰

“The First Amendment protects freedom of speech,” he wrote, “but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a

67. *Id.* at 378–79.

68. *Id.* at 379.

69. At the conclusion of his seminal defense of originalism, he offered one such caveat: “I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” But then again, he added, “I cannot imagine such a case’s arising either.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989). Twenty years later, he explicitly repudiated any faintheartedness. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 4, 2013, <https://nymag.com/news/features/antonin-scalia-2013-10/> [https://perma.cc/Y5LM-SX8D].

70. 559 U.S. 460 (2010).

highly unusual free speech issue because they are so closely linked with violent criminal conduct,” and Congress had legislated its prohibition based on “compelling evidence” of the need for the law. “Under these circumstances,” he concluded, “I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.”⁷¹

He reached a similar conclusion a year later, in *Brown v. Entertainment Merchants Association*, a constitutional challenge to California’s law against the sale of violent video games to children.⁷² Justice Scalia, again writing for the Court, held such video games to be constitutionally protected speech, akin to “Hansel and Gretel (children!) kill[ing] their captor by baking her in an oven” or “Homer’s Odysseus blind[ing] Polyphemus the Cyclops by grinding out his eye with a heated stake.”⁷³ Yet Alito merely concurred in the Court’s judgment, concluding that the First Amendment, rightly understood, might afford legislatures much more discretion to regulate modern video games, given their unprecedentedly vivid and immersive depictions of violence and the real-world effects that such games might have on children. “The Court acts prematurely in dismissing this possibility out of hand,” he warned, and “I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem.”⁷⁴

And in *Snyder v. Phelps*, he dissented from the Court’s holding that the First Amendment protected the Westboro Baptist Church’s aggressive and disturbing protest of a military funeral.⁷⁵ “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case,” he urged.⁷⁶ The First Amendment protects any number of expressive activities, but it “does not follow, however, that [protestors] may

71. *Id.* at 493 (Alito, J., dissenting).

72. 564 U.S. 786 (2011).

73. *Id.* at 796.

74. *Id.* at 820 (Alito, J., concurring in the judgment).

75. 562 U.S. 443 (2011).

76. *Id.* at 463 (Alito, J., dissenting).

intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.”⁷⁷ Preserving space for “family members to have a few hours of peace without harassment does not undermine public debate,”⁷⁸ he emphasized; “I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.”⁷⁹

Weeks after the last of these opinions was published, an article in the *Weekly Standard* surveyed the themes of Alito’s opinions, their contrasts with the Court’s majority opinions, and the intellectual biography of Alito himself, and called him “The Burkean Justice.”⁸⁰

B. Alito on “The Burkean Justice”

When Alito keynoted Columbia Law School’s aforementioned conference on “Burkean Constitutionalism,” he took the *Weekly Standard*’s “Burkean Justice” phrase as a compliment, given his own longtime admiration of Edmund Burke.⁸¹ But he also recognized that “Burkean constitutionalism” can mean very different things to different people. “Everyone wants to answer the question, ‘What would Edmund Burke do?’,” he observed.⁸² But that is a harder

77. *Id.* at 464.

78. *Id.* at 473.

79. *Id.*

80. Adam J. White, *The Burkean Justice*, WKLY. STANDARD, July 18, 2011, at 20. Nearly a decade later, two scholars similarly declared that “Justice Alito is, at bottom, the Supreme Court’s Burkean Justice.” See Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 578 (2019).

81. See 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/5L7L-YH9W]. As noted above, I happened to attend that conference; in this article, my general descriptions of his remarks are based on notes, while any direct quotes come from the Columbia Law School’s article.

82. *Id.*

question, and its application to the actual work of American judges is harder still.

Recognizing that Burke was not a systematic theorizer but a legislator, Alito began by quoting Burke's own warnings against abstraction: "Circumstances . . . give in reality to every political principle its distinguishing color and discriminating effect," Burke wrote in his *Reflections on the Revolution in France*; "[t]he circumstances are what render every civil and political scheme beneficial or noxious to mankind."⁸³ And, as Burke added in his *Letter to a Noble Lord* (1796), "[n]othing can be conceived more hard than the heart of a thoroughbred metaphysician."

Surveying modern invocations of Burke on both the right and the left, Alito suggested three possible categories of "Burkean" thought: *first*, the "substantive Burkeanism" of deciding matters narrowly, with no sharp breaks from precedent or settled doctrines; *second*, "methodological Burkeanism," respecting incremental improvements and reforms in governance, such as the prioritization of a written Constitution's original meaning over the common-law constitutionalism that preceded it; and *third*, "Burkeanism as prudent judging," counseling judges to respect human society's complexities, the human mind's limitations, and the (presumptively) accumulated wisdom of long-standing practices and institutions.

In presenting these three categories, Alito did not explicitly identify himself with any one category; in fact, he explicitly declined to endorse any of them. But for the first two—"substantive" and "methodological" Burkeanism—he offered not just arguments in their favor but also significant criticisms, especially in the tendency of some "Burkeans" to mistake judicial precedents for Burkean traditions. Judicial precedents, Alito emphasized, are discrete exercises of individual human judgment—or by decisions of a single Supreme Court—and like all such judgments they are prone to error and hubris.

83. *Id.* (quoting EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790)).

For the third category, Burkeanism as prudent judgment, Alito seemed relatively more favorable, because it seemed to encourage a Burkean disposition to recognize that rigid adherence to a particular methodology or substantive judgment would itself fail to take sufficient consideration of prudential considerations. Perhaps, he suggested, in some cases there are good reasons, even “Burkean” reasons, for judges to depart from minimalism, incrementalism, and conventionalism. And, he added, there are Burkean reasons to recognize the limits of originalism—he cited violent video games (per *Entertainment Merchants*) and GPS tracking devices (per *U.S. v. Jones*,⁸⁴ decided just months earlier) as examples.

In sum, Justice Alito’s keynote remarks revealed the breadth and depth of his understanding of both Burke and “Burkean” theories. But it also highlighted the extent to which Alito’s own conservatism resembles the formative conservative debates of decades earlier, rather than the increasingly theoretical originalist methodology prevalent today among conservative judges and legal scholars. And, finally, it offers useful context for some of the most significant constitutional and judicial debates of our time.

1. On Academics, Theory, and Metaphysics

When Justice Alito invoked Burke’s warning against “thoroughbred metaphysicians,” it echoed Madison’s warning about “theoretic politicians,”⁸⁵ but it also presaged comments that Alito would make elsewhere about the Court’s increasingly theoretical bent. “We’re now, I think, the most academic Supreme Court that has ever existed: four of my colleagues were full-time, very distinguished law professors,” he told the *American Spectator* in 2014. “I was not.”⁸⁶

The energetic pursuit of originalist theory in law schools was surely a good thing, but the centralization of originalist discourse in academia is at least a little ironic, given earlier conservatives’

84. 565 U.S. 400, 418 (2012) (Alito, J., concurring in judgment).

85. The Federalist No. 10 (James Madison).

86. Walther, *supra* note 39.

fondness for Bill Buckley's preference for the Boston phonebook over the Harvard faculty. And, to be sure, Buckley's Harvard faculty was not an originalist faculty workshop. But academic originalists are, in the end, academics and theoreticians, and thus will almost inevitably never share the earlier conservative skepticism of academic theorizing.

Justice Alito, by contrast, was formed by the generation of conservatives who shared that skepticism, and his entire legal career—as a litigator, a prosecutor, and a judge—has tended toward a more practical view of legal craft. He begins with legal principle, and applies legal theories, but he is cognizant of the practical limits of theory, and he also understands that practical experience helps to bring the principles themselves into clearer view.

Indeed, perhaps the most apt quote from Buckley is not the famous phonebook quip, but Buckley's description of the Supreme Court in the late 1970s: "The Supreme Court of the United States discovers every year or so something in the Constitution not only that hasn't been discovered before, but something which the formulators of that particular article or amendment to the Constitution specifically rejected. But it becomes law. This is called casuistry . . ."⁸⁷

Buckley added that "[t]here is reason so many law students are uneasy about the profession they will soon be practicing; soon, we pray, may be reforming."⁸⁸ And, as we know, the Federalist Society soon undertook that generational project of reform. But the more that the new generation of conservative legal scholars and judges moves from a posture of judicial restraint to a posture of judicial creativity, the more that Buckley's criticism will apply to them, too.

Justice Alito seems likely to stick with Buckley and to find himself in disagreement with other originalist judges in cases reminiscent

87. WILLIAM F. BUCKLEY, JR., *A HYMNAL: THE CONTROVERSIAL ARTS* 215 (1978).

88. *Id.* at 216.

of his First Amendment opinions. “[O]ur legal system does not exalt reason above everything else,” he has warned elsewhere.⁸⁹

2. On Tradition and Community

Justice Alito’s emphasis of tradition—as distinct from mere judicial precedents—in his Columbia remarks echoed or foreshadowed judicial opinions in which he defended tradition and community from the encroachment of judges and litigators. In *Town of Greece v. Galloway* (2014), for example, his concurrence with the Court’s decision to uphold the constitutionality of a town council’s ceremonial prayer focused on the deep American tradition of civic prayer and the need for courts to allow that part of American civic life to remain intact.⁹⁰

But Alito’s Columbia remarks highlight the fact that his respect for precedents is not a matter of respecting tradition for tradition’s sake. Rather, it reflects a Burkean recognition that traditions and institutions can embody accumulated wisdom as to principles and their limits. This is not a denigration of the principles themselves—“If we don’t have fixed and clear principles then it is very easy for us to go astray,” he warned elsewhere⁹¹—but it is a call for humility in attempting to ascertain the nature and limits of those principles.

That insight undergirded Bickel’s own thought—not just in the most explicitly Burkean themes of his later books, but much earlier, in *The Least Dangerous Branch*. Quoting Harry Jaffa’s seminal study of Lincoln’s own constitutionalism, Bickel wrote that the principles embodied in the Constitution’s text are often understood best not just in the abstract, but with the help of experience of American democracy, practiced through its institutions—“from within the democratic ethos and perfections of that ethos.”⁹²

89. 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).

90. 572 U.S. 565 (2014) (Alito, J. concurring).

91. Alito, *supra* note 89, at 4.

92. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 67 (1962) (quoting HARRY JAFFA, *CRISIS OF THE HOUSE DIVIDED* 417 (1959)).

Thus, when government action—especially the swift and sweeping work of agencies, executives, and courts, rather than legislatures—threatens longstanding traditions or the institutions and communities that keep and transmit them, Justice Alito's instinct has been to begin with a presumption in favor of defending tradition. The most recent and emphatic example of this is his opinions in the Court's cases on religious liberty and administrative power.⁹³ It was evident in his address to the Federalist Society in late 2020, warning that religious liberty "is in danger of becoming a second-class right."⁹⁴

3. On Precedent and Precedents

At Columbia, Justice Alito emphasized the need to distinguish judicial precedents from Burkean traditions, recognizing that modern judicial precedents are the product of discrete decisions by individual judges, and thus they tend to lack the very benefits of wisdom embodied by genuine traditions and institutions.

This is not to denigrate precedent *per se*—far from it. At his confirmation hearing, he emphasized the importance of *stare decisis*:

It's a fundamental part of our legal system, and it's the principle that courts in general should follow their past precedents, and it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interest, and it's important because it reflect[s] the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It's not an inexorable command, but it is a general presumption that courts are going to follow prior precedents[.]⁹⁵

93. See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Alito, J., dissenting from denial of application for injunctive relief); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2387 (2020) (Alito, J., concurring).

94. Samuel A. Alito Jr., Assoc. Just., Sup. Ct., Keynote Address at the Federalist Society National Lawyers Convention (Nov. 12, 2020).

95. *Confirmation Hearing*, *supra* note 7, at 318–19.

This continued on the Court, when he criticized what he saw as his colleagues' too-eager overturning of precedent. For example, when the Court overturned its key precedent on non-unanimous criminal juries in *Ramos v. Louisiana* (2020), Alito dissented loudly: "The doctrine of *stare decisis* gets rough treatment in today's decision," he wrote. "Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered."⁹⁶

Yet as he emphasized in his Columbia remarks, he also sees clearly the limits of precedent. "[I]f the Court has gone down a wrong path and the wrong path is creating bad consequences," he explained in 2009, "then what the Court should do is say, 'Well, we made a mistake. We took a wrong turn. We're going to go back and correct the mistake.'"⁹⁷ Moreover, when parties or justices invoke a judicial precedent and attempt to rely on it, Justice Alito takes a very close look at the precedent itself—its original terms, its facts and context—before concluding that the precedent ought to again bind the Court.⁹⁸

In short, Alito understands that one should respect precedent *generally*, while also recognizing the fallibility of any *particular* precedent. His approach in *Dobbs*, surely the most significant judicial opinion of his entire career, reflects this approach.⁹⁹ When his critics condemned that judicial opinion as a sweeping rejection of

96. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting).

97. *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 55 (2009); cf. Jeremy Rozansky, *Precedent and the Conservative Court*, NAT'L AFFAIRS (Winter 2021), <https://nationalaffairs.com/publications/detail/precedent-and-the-conservative-test> [<https://perma.cc/7Y9E-EYVZ>]; Joel Alicea, *Stare Decisis in an Originalist Congress*, 35 HARV. J.L. & PUB. POL'Y 797 (2012).

98. See *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).

99. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261–78 (2022).

precedent,¹⁰⁰ their criticism revealed more about themselves than about their target. Alito himself, by contrast, approaches the doctrine of stare decisis with the mix of both the respect and the realistic skepticism that it requires—as he explained at Columbia and has exemplified on the bench.

4. On Concentrated Power More Generally

Alito's underlying recognition of the risk of error inherent in human action applies equally to executives and agencies, too, and thus Justice Alito has often been wary about deferring to the judgments of energetic administrators, especially when constitutional rights are at risk.¹⁰¹

Perhaps the best and most recent example of Alito's concerns about concentrated power and the risk of error is found in his recent comments on the “shadow docket,” involving cases in which the Supreme Court grants preliminary injunctive relief upon district court judges' review of administrative agencies' actions. Where critics have attacked the Court for granting preliminary injunctions against agencies, Alito has defended the Court's approach as a pragmatic accommodation of circumstances in which preliminary relief is needed to temporarily delay the swift and significant action of agencies or district courts.

Would Alito deny the risk that the Court itself might make a mistake in such moments? His comments, over the years, about judges' own propensity for error suggest otherwise. Rather, in debates about the “shadow docket,” his criticism is directed toward those who advocate for a one-size-fits-all approach that would defer enormously to district judges or administrative officers. If it is

100. See, e.g., David Litt, *A Court Without Precedent*, ATLANTIC (July 24, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576/> [<https://perma.cc/RWY5-66XT>] (“[T]he Court's right-wing majority has reneged on its end of the deal. With centuries of accumulated power at its disposal, the judiciary plans to use that power less cautiously than ever before. We are not just living in a moment without precedent. We are living in a moment without precedents.”).

101. See, e.g., *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Alito, J., dissenting from denial of cert.).

necessary to place presumptive weight in favor of institutional judgment, he sets his own presumption in favor of the settled practices, traditions, and institutions that he sees as society's least-unreliable stock of wisdom.

5. On the People and the Laws that They Enact

Justice Alito's Burkean instincts are evident in his textualism. As seen most recently in *Bostock v. Clayton County*,¹⁰² Justice Alito's textualism is not a theoretical inquiry into the abstract or objective definition of words in a statute, but rather a much more realistic assessment of the law's words as informed by the understandings and expectations of the people who enacted them. In that case, the Court held that the Civil Rights Act's Title VII applies to discrimination related to sexual orientation or gender identity, even while recognizing that the congressmen who enacted the law might not have expected the law to apply in such a way: "it is ultimately the provisions of those legislative commands rather than the principal concerns of our legislators by which we are governed."¹⁰³

But for Alito, the law's meaning could not be so easily separated from the actual Congress's reasonable expectations and intentions: "there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted," he wrote, and that made all the difference.¹⁰⁴

As noted above, the conservative legal movement's textualism has tended to become more abstract, theoretical, and "objective" over time. This change occurred for good reasons, but it also came at a cost: the new textualism disconnects the law from the actual, stated intentions and understandings of the actual, specific community that enacted the law. A move away from "original intent" toward a more objective "original understanding" inquiry reduces the risk that judges will read imagined intentions into the law, but it also increases the risk that judges will fail to recognize a

102. 140 S. Ct. 1731 (2020).

103. *Id.* at 1749 (quotation marks omitted).

104. *Id.* at 1757 (Alito, J., dissenting); see also *id.* at 1776–77.

community's actual intentions as limitations on the judge's own theoretical inquiry.

* * *

Justice Alito is a Burkean conservative. But he is also an *American* conservative, who would conserve American values and institutions not with theories but with a wariness of grand theories and of grandiose theorizers. He starts instead from appreciation—of Americans and America, and of the dangers of concentrating too much power the hands of elites or elite institutions.

In all of this, he reflects the era and ideas that formed him, more than the present day. Today's conservatives, choosing their own paths forward, can benefit from his example.

REASON AND FIAT IN THE JURISPRUDENCE OF JUSTICE ALITO

ADRIAN VERMEULE*

How to understand the jurisprudence of a judge or Justice as a coherent whole—coherent at least in aspiration if not execution? The difficulties are formidable because many of the institutional circumstances of judging conspire to promote the *ad hoc*, the pragmatic in a low sense, and the decision over the reasons for the decision. Judges do not choose their own dockets, and in the case of Justices, they do so only collectively. Thus, they are to a certain extent doomed to write for the occasion, with respect to particular problems not of their choosing, at least in their official capacities. Those problems will often be more or less concrete, and norms of good judicial craft will appropriately discourage expansive essays on legal principles or, even worse, legal theory. From the standpoint of a scholar looking in from the outside, one has to glimpse the Justice's enduring commitments through a cloud of concrete facts and issues. Often those commitments are most clearly revealed in separate concurrences and dissents—precisely the occasions on which the Justice at issue is not speaking for the Court and not saying what the law is, at least in any immediate sense.

In the face of these difficulties, the approach I will pursue is to try to discern a polarity or antinomy around which Justice Alito's jurisprudence can be organized and discussed. What gives character to the jurisprudence of a Justice, on this approach, is a tension or a

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recurring problem that spurs the Justice on to their most characteristic, memorable, and valuable opinions and contributions. A proper antinomy is a standing, unavoidable polarity in law and legal practice such that both poles have their attractions under certain circumstances—“good-bad” is not an antinomy—so that the Justice at issue, at his most characteristic, struggles to reconcile the tensions between the terms of the antinomy, to work out their mutual relationships, and to specify the domains in which each applies.

To illustrate, in the case of Justice Scalia one candidate for an organizing antinomy would be the standing tension in law and legal practice between rules and discretion. (Consider his essay “The Rule of Law as a Law of Rules”¹ and his pragmatic justification of originalism as a means of constraining judicial discretion,² in sharp contrast to the bewildering variety of jurisprudential justifications for originalism that academics have proliferated in recent years.) In the case of someone like Justice Gorsuch, the organizing antinomy would be liberty and coercion, which underlies his approach to subjects ranging from the nondelegation doctrine and judicial deference to agency legal interpretations, to separation of powers, free speech, and equal protection.

My thesis will be that the best³ organizing antinomy around which to structure a discussion of Justice Alito’s jurisprudence is one advanced by the legal theorist Lon Fuller⁴ in a famous essay—or an essay that ought to be more famous than it is—titled “Reason and Fiat in Case Law.”⁵ I will suggest that a number of Justice Alito’s most striking opinions can be profitably understood as grappling with the problem of reconciling reason and fiat in our

1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

2. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1988–1989).

3. “Best” here involves dimensions of both justification and fit; it requires placing Justice Alito’s jurisprudence in a coherent, attractive light, consistent with the data given to us by his opinions. I limit myself here to Justice Alito’s judicial output, bracketing his occasional speeches in extrajudicial fora.

4. 1902–1978; Professor of law at Harvard Law School from 1948 to 1972.

5. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946). As the essay is short, I will forego the usual point cites in the quotations that follow.

law, and that this explains at least in part his views about administrative procedure, reviewability, and free speech. When Justice Alito speaks in a more jurisprudential register, he is notably open to Fullerian themes. Justice Alito is, plausibly, our most Fullerian Justice.

The essay is organized as follows. Section I briefly explains Fuller's essay, links it to Fuller's book *The Morality of Law*, and clarifies the significance of the reason-fiat antinomy for legal theory. Section II addresses four of Alito's best-known and most powerful opinions: his influential opinion for the Court on *Auer* deference and administrative procedure in *Christopher v. SmithKline Beecham Corp.*,⁶ his lone partial dissent in the census case, *Department of Commerce v. New York*,⁷ arguing that the decision by the Secretary of Commerce to include a citizenship question on the census was unreviewable; and his lone dissents in *Snyder v. Phelps*,⁸ the funeral picketing case, and *United States v. Stevens*,⁹ the animal "crush videos" case—in both of which Justice Alito rejected free speech claims upheld by the majority. The brief conclusion suggests that Justice Alito's jurisprudence contains substantial traces of a Fullerian view of law that sees reason, not merely positive fiat, as constitutive of law's nature.

I. FULLER ON REASON AND FIAT

Fuller's essay of 1946, published in the *Harvard Law Review*, can be seen in retrospect to introduce and in some respects anticipate the themes of his famous literary-legal puzzle, *The Case of the Speluncean Explorers*¹⁰ from 1949, and indeed his later masterwork of 1964, *The Morality of Law*,¹¹ which argued that law has an intrinsic integrity, an internal morality if you like, that must be respected in

6. 567 U.S. 142 (2012).

7. 139 S. Ct. 2551 (2019).

8. 562 U.S. 443 (2011).

9. 559 U.S. 460 (2010).

10. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

11. LON L. FULLER, *THE MORALITY OF LAW* (Revised ed., Yale Univ. Press 1965).

order to have a genuine rule of law. The 1946 essay laid out the basic problematic that would structure Fuller's thinking for the rest of his career—and that, I claim, illuminates Justice Alito's jurisprudence.

For Fuller, the central antinomy of law was the attempt to reconcile reason and fiat. He imagined "a group of shipwrecked men isolated in some corner of the earth" and a judge appointed by the group to settle their legal disputes.¹² It would be apparent to him," wrote Fuller, "that the nature of his task imposed certain limitations on him":

He would realize that it was his responsibility to see that his decisions were right—right for the group, right in the light of the group's purposes and the things that its members sought to achieve through common effort. Such a judge would find himself driven into an attempt to discover the natural principles underlying group life, so that his decisions might conform to them. He would properly feel that he, no less than the engineers and carpenters and cooks of the company, was faced with the task of mastering a segment of reality and of discovering and utilizing its regularities for the benefit of the group.¹³

Fuller's imagined judge would go on to complicate his approach in two ways. First, he would recognize and reconcile the competing claims of reason and fiat by understanding that reason supplies general principles, which must inevitably be given further discretionary specification in concrete rules that could, as far as the principle itself is concerned, take different forms with reasonable bounds. Thus, the general principle that there should at some point be repose from the threat of suit or prosecution implies that the positive law should create statutes of limitations, but there is inevitably some range of choice about what exactly the limitations period should be, for which offenses. Or, in an example of Fuller's:

12. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377 (1946).

13. *Id.* at 378.

[I]f the question were one of imprisonment, should the sentence be set at seven days, or eight days, or perhaps two weeks, or even a month? Here obviously is an area, and a wide and important area, where law cannot be discovered, but must be made by the judge who applies it. In this area the judge functions not as one who seeks to conform his will to an external order, but as one whose will itself creates the order to which men must conform

. . . [This] combination of reason and fiat . . . would be, in other words, in part the discovery of an order and in part the imposition of an order.¹⁴

From the standpoint of the history of legal theory, it is amusing and instructive, although from another standpoint deeply regrettable, that Fuller here by dint of intellectual effort essentially rediscovered a central concept of classical law: *determinatio*, or determination, which brings general background principles of law (*ius*), discoverable by reason, into right relationship to positive law (*lex*) by seeing *lex* as a partially discretionary concretization of *ius*, ordered to and informed by reason. This seemingly accidental rediscovery, however, proved extraordinarily fruitful, as I hope to show shortly.

In a second complication, the Fullerian judge operating in a real, ongoing legal system, as opposed to a thought experiment, recognizes that:

the force of established institutions has now become one of the realities the judge must respect in making his decisions. . . .

. . . [T]he antinomy of reason and fiat . . . becomes aggravated and compounded, as it were, because established fiat is itself a reality that reason bids us take into account in our reckonings.¹⁵

Nonetheless, it is easy to forget that the basic problem of the judicial process remains that of discovering and applying those principles that will best promote the ends men seek to attain by collective

14. *Id.* at 378–80.

15. *Id.* at 380.

action.”¹⁶ Even when interpreting the positive law, in other words, the judge must—at least, or especially, in hard cases, where different sources of positive law are unclear, ambiguous or conflicting—interpret positive law in light of its ordering to the flourishing of the community as such, or put differently, in the light of legal reason.

In his peroration, Fuller argued that under the influence of Holmesian positivism, American law had recently overcommitted to the fiat side of the antinomy, thereby betraying its own classical traditions. He therefore called for a more rounded view of the law, one that embraced the standing tension between the two poles:

If there is any need, it is to get rid of the lingering traces of a philosophy that I like to think is essentially alien to the American spirit. This is the philosophy which by depriving law and ethics of the reason branch of the antinomy of reason and fiat leaves them with only the branch of fiat to stand on. . . .

. . . [A] return to what I have called the whole view of law will not only help in leading us toward a right solution of our problems, but will make for the spirit of compromise and tolerance without which democratic society is impossible.¹⁷

Fuller's essay introduced crucial themes that would appear in ever more elaborate forms in his later writings—and that, as we will see, suffuse Justice Alito's jurisprudence. For Fuller, the true spirit of American law, at least until the advent of Holmesianism, is that law is not merely sovereign command, nor rules posited by those authorized by social convention to posit rules, nor a prediction of what the courts will do in fact. Rather, law is in some crucial way oriented towards communal ends and social purposes; for Fuller, this ordering of law to the flourishing of the community is just legal reason. There are external criteria, found in the conditions required for successful group living, that furnish some standard against which the rightness of [the judge's] decisions should be

16. *Id.*

17. *Id.* at 394–95.

measured.”¹⁸ Reason in this sense is intrinsic to law’s nature, and the application of reason is constitutive of the craft of judging.

The point sweeps well beyond judges, however. For any official, such as a legislator or an administrative agency, or indeed for any citizen, to advance a *legal* claim is to advance a claim at least partially founded on reason, rather than subjective preference or private whim. A corollary, as we will see, is that (on Fuller’s view) in domains where the element of complex, ill-defined policy tradeoffs and hence willed choice between competing values becomes predominant, to that very extent we are no longer dealing with distinctively legal claims. Where this is so, the judge ought to recognize that the domain lies beyond or outside the limits of the legal rationality that it is the judge’s office to apply.

II. JUSTICE ALITO’S OPINIONS

Let me now turn to illustrating these themes in Justice Alito’s jurisprudence. What follows is inevitably selective. I will briskly examine four famous Alito opinions to illustrate the reason-fiat polarity, the internal morality of law and of law’s limits, and the obligation of legal rationality for all participants in the legal system. Of these four, only one is a majority opinion, while the other three are lone dissents. As I noted at the outset, the majority opinion and the separate opinion (whether concurrence or dissent) are essentially different genres, with dissents in particular allowing far more scope for the individual Justice’s thinking, style, and characteristic concerns to emerge. I begin with two opinions on administrative law, one on administrative procedure and one on reviewability, then turn to rights of free speech.

A. *Administrative Procedure and the Rational Morality of Law*

Let me begin with the most transparently Fullerian of Justice Alito’s best-known opinions: his highly influential 2012 opinion for

18. *Id.* at 379.

the Court in *Christopher v. SmithKline Beecham Corp.*¹⁹ (for short, *SmithKline*). Although devoted to a seemingly dry issue of administrative procedure—whether courts should defer under the earlier *Auer v. Robbins*²⁰ decision to the Department of Labor’s interpretation of its own regulation, an interpretation offered in *amicus* briefs—*SmithKline* had a double importance. In immediate terms, *SmithKline* led to the partial retrenchment of *Auer* deference in *Kisor v. Wilkie*,²¹ an opinion by Justice Kagan (in part for the Court, in part for a plurality) that limited *Auer* in order to save it, and did so by elaborating on the limits that Justice Alito had identified in *SmithKline*. More broadly, *SmithKline* inaugurated, in important respects, the current era of the rethinking of the administrative state, its proper domain and its limits, on the part of the Court’s more conservative Justices—“conservative” somehow defined.

Justice Alito’s opinion for the Court begins by clarifying and consolidating limits on *Auer* deference in a list that the *Kisor* plurality would later adopt more or less wholesale. Among these, the opinion identifies two as dispositive in the case at hand: agency consideration of the reliance interests of regulated parties, and the need for “thorough consideration” of agency interpretations.²² As to the first, *SmithKline* identifies the key issue as one of *de facto* retroactivity: to defer to the interpretation at hand under the circumstances of the case would “impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. . . . [This] would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires’” and threaten “unfair surprise.”²³ As to the second, the agency’s interpretation lacked “the hallmarks of thorough consideration” because it had neither gone

19. 567 U.S. 142 (2012).

20. 519 U.S. 452 (1997).

21. 139 S. Ct. 2400 (2019).

22. *SmithKline*, 567 U.S. at 159.

23. *Id.* at 155–56 (internal citation and quotation marks omitted).

through the standard notice-and-comment process for binding rules, nor been consistently defended by the Department over time. Accordingly, the Court proceeded to construe the relevant regulation and underlying statutes for itself, without deference to the agency interpretation, which it ultimately rejected.

Importantly, Justice Alito's opinion shows no anxiety about rooting its restrictions on *Auer* in any particular positive source of law. In this respect it follows on some of the foundational opinions of administrative law jurisprudence, such as the *Arizona Grocery*²⁴ decision, which announced—with no citation to positive law of any kind—that agencies are bound by their own legislative rules.²⁵ Justice Alito's opinion cites precedents, but largely treats its central requirements of considering reliance interests and reasoned agency deliberation as general background principles of law broadly understood. And the point of those background principles is to ensure that agencies, as the price of deference, have given full rational consideration to the interests of affected parties and generally to all aspects of their decision—to ensure, in other words, that an administrative *determinatio* of binding legal regulations partakes of reason as well as fiat.

All this is Fullerian both in concept and in detail. At the conceptual level, we have seen that a central point of Fuller's essay is to explain that the formulation of law by public bodies is always a concrete specification of general rational principles—an exercise that is partly reason, partly fiat. Moreover, Fuller's major work, *The Morality of Law*, argued that law's intrinsic procedural morality—referring here to “morality” not as a superimposed ethics, but as the internal logic of legality needed to make law work well, as law, in a well-ordered community—embodied a continual adjustment

24. *Ariz. Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932).

25. *See id.* at 389 (“Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting, in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.”). For this crucial proposition, the Court adduced no authority.

of reason and fiat. In this sense, the book represents a central application of the master antinomy laid out in Fuller's earlier essay.

At the level of legal detail, Fuller advanced eight procedural criteria of legal rationality,²⁶ principles that fit well with the restrictions on *Auer* deference laid out in *SmithKline*. Reliance interests imply that retroactivity is disfavored in the creation and elaboration of legal rules, Fuller argued, although not necessarily barred outright.²⁷ Reasoned consideration of the point of rules on the part of the rulemakers, and their rational intelligibility to law's subjects, is part and parcel of their status as law. As Cass Sunstein and I have argued elsewhere,²⁸ much of the Court's recent administrative law jurisprudence can be seen as an essentially Fullerian effort to establish a version of the rule of law governing, constraining, and constituting the administrative state, a rule of law grounded in general principles of legal rationality as well as in positive laws such as the Administrative Procedure Act (APA). Justice Alito's opinion in *SmithKline* is an exemplar and forerunner of this recent effort.

B. Reviewability and Law's Limits

Fuller's internal morality of law was by no means an imperialist account of law's dominion. Fuller argued that the morality of law generally, and in particular the requirements of rationality in adjudication, were certainly not unbounded or applicable to all subjects on which government might decide. On the contrary, Fuller argued clearly and vehemently in *The Morality of Law* that there was a large and important domain within which government might make decisions not subject to legal morality and adjudicative rationality.²⁹ As examples, he offered battlefield command; the negotiation of

26. FULLER, *supra* note 11, at 33 et seq.

27. *Id.* at 51 et seq.

28. CASS R. SUNSTEIN AND ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (Harvard Univ. Press 2020).

29. FULLER, *supra* note 11, at 168 et seq.

treaties by the President;³⁰ managerial decisions, such as the building of a hydroelectric plant; and essentially economic decisions allocating resources under conditions of scarcity, such as government spending on competing programs³¹ and licensing of broadcast spectrum. Economic allocation, Fuller thought, is generally not susceptible of being conducted through adjudicative forms,³² both because there are multiple, competing criteria of allocation (should a license go to the station that serves the largest audience? To the one that airs the highest-quality programming? To the one that is most financially viable?) and because the criteria themselves are ill-defined (what exactly counts as “high-quality programming” anyway?).

Current law maps imperfectly on to Fuller’s examples. Certain aspects of military command in the field have been legalized, for example, and allocative licensing is by no means generally exempt from judicial review. But there are at least two strands of doctrine that instantiate Fuller’s concerns with the domain-restriction of legal morality and adjudicative rationality.

In the older strand, the Court examined statutory obligations that Congress had thrust upon it to ensure that those obligations entrusted the federal courts with tasks that were inherently fit subjects for the exercise of the judicial power under Article III. A classic example does in fact involve radio licensing, a task which Congress tried initially to assign to the legislative courts of the District of Columbia under the Radio Act of 1927, with Supreme Court review, only to have the Supreme Court declare that the task was essentially “administrative” and thus lay beyond the scope of the Article III judicial power even by way of review.³³

Today, similar concerns animate reviewability doctrine, under the APA’s exception to judicial review for issues that are

30. *Cf. Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

31. *Cf. Lincoln v. Vigil*, 508 U.S. 182 (1993).

32. FULLER, *supra* note 11, at 171–73.

33. *Fed. Radio Comm’n v. Gen. Elec. Co.*, 281 U.S. 464 (1930).

committed to agency discretion by law.”³⁴ That doctrine itself has two major sub-headings. One is that agency action is committed to agency discretion where there is “no law to apply.”³⁵ As there is almost always *some* law to apply, however—both the APA’s prohibition on arbitrary and capricious agency action,³⁶ and, as Justice Scalia noted, “the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest”³⁷—the doctrine has often paid lip service to the “no law to apply” test but then taken a different tack. Instead it has developed (as Justice Scalia also put it) a “common law of judicial review of agency action—a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review.”³⁸ This body of jurisprudence is Fullerian in concept if not wholly in detail; it asks, in essence, whether the relevant issues and areas are fit subjects for the exercise of legal reasoning and distinctively adjudicative rationality, or instead require a type of political and administrative decisionmaking not subject to “judicially manageable standards”—the sort of distinctively legal principles and reasons that courts are duty-bound to apply.

A powerful example of this second strand of reviewability doctrine appears in Justice Alito’s lone dissent in the census case, *Department of Commerce v. New York*.³⁹ After carefully parsing the relevant statutes under the “no law to apply” test, Justice Alito turned to two key points. First, there was no relevant tradition of judicial review for the census and indeed an unbroken tradition to the contrary “that reaches back two centuries,” a historical gloss indicating the subject lay beyond the adjudicative authority of the courts.⁴⁰

34. 5 U.S.C. § 701(a)(2).

35. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

36. 5 U.S.C. § 706; Ron Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

37. *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting).

38. *Id.* at 608 (internal citation and quotation omitted).

39. 139 S. Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part).

40. *Id.* at 2604.

Second, courts reviewing decisions about the form and content of the census,” Justice Alito wrote, “would inevitably be drawn into second-guessing the Secretary’s assessment of complicated policy tradeoffs, [an] indicator of general unsuitability for judicial review.”⁴¹ On this view, the “law” that commits subjects to agency discretion is not only, and perhaps not primarily, positive statutory law, but also tradition and background principles that limit the domain of adjudicative rationality.

C. Free Speech in a Classical Register

I said above that insofar as reason is at least partly constitutive of law’s rationality, its obligations bind legislators and citizens as well as judges. Insofar as one advances a legal claim or seeks to exercise a legal right, that claim must participate in reason, not merely in the fiat of subjective desire, and must be expressed in rational ways for the ultimate benefit of the community. Fuller noted that this was the longstanding spirit of American law, and in this he was correct. The classical law of free speech in the United States reflects exactly this conception of law, and Justice Alito’s free speech jurisprudence shows real traces of this conception. This explains why Justice Alito has been, in important cases, out of step with a number of his colleagues’ opinions that are less deferential to legislative determinations, more libertarian, and more inclined to see valid speech as the expression of subjective, willful preferences.

Our current free speech law, with its familiar basic structure of content neutrality and viewpoint neutrality subject to a limited class of exceptions (defamation, fighting words, time place and manner restrictions, and so forth) is in critical respects a creation of the 1960s and afterwards. Recent scholarship has uncovered how radically different was the classical American approach to free speech—an approach that also captures the original

41. *Id.* at 2605 (internal quotation marks omitted).

understanding, as it was prevalent before, during, and well after the founding era and right through the mid-20th century.⁴²

For our purposes, the classical law of free speech had two major features. First, it recognized broad scope for content-based legislative determinations of the boundaries of reasonable speech, ordered to the common good.⁴³ Second, the responsibility to participate in the system of free speech in a rational way lay upon the speaker as well. Courts distinguished between, on the one hand, prudent, responsible speech on public issues, and on the other, irrational and irresponsible pseudo-speech. Thus, for example, “[o]pinions seriously, temperately, and argumentatively expressed” counted as protected religious speech, but “despiteful railings” and “malicious revil[ing]” did not.⁴⁴

It is easy to see Justice Alito’s lone dissent in *Snyder v. Phelps*⁴⁵ as animated by similar concerns. Notoriously, the case arose because members of the Westboro Baptist Church picketed the funeral of a fallen soldier, Marine Lance Corporal Matthew Snyder, holding signs that made model contributions to reasoned public discourse, such as “Thank God for Dead Soldiers.” Snyder’s father brought tort claims, principally intentional infliction of emotional distress

42. See, e.g., Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861 (2022) (“For most of American history, the governing paradigm of expressive freedom was one of limited toleration, focused on protecting speech within socially defined boundaries. The modern embrace of content and viewpoint neutrality, it turns out, occurred only in the 1960s In contrast to the modern focus on neutrality, the older approach did not preclude legislative or judicial assessments of communicative harms.”).

43. See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017) (“As a general matter, natural rights did not impose fixed limitations on governmental authority. Rather, Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good—generally defined as the good of the society as a whole. . . . And no evidence indicates that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare.”).

44. *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 400 (Pa. 1824). For the background history from the founding era through the mid-20th century, see Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 Harv. L. Rev. 689 (2021); T.A.D., *Originalist Blasphemy*, IUS & IUSTITIUM (Jan. 3, 2022), <https://iusetiustitium.com/originalist-blasphemy/> [<https://perma.cc/A59R-SSR4>].

45. 562 U.S. 443 (2011).

and intrusion upon seclusion, against the Westboro group, but the Court declared the suit barred by free speech because it was speech in a public place on matters of public concern.

Justice Alito's dissent was, by his restrained standards, incandescent. Our profound national commitment to free and open debate," he wrote, "is not a license for . . . vicious verbal assault [The Westboro Baptists] approached as closely as they could without trespassing, and launched a malevolent verbal attack."⁴⁶ That the wrongdoers were seeking public attention was, for Justice Alito, an aggravating rather than mitigating factor: Wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to slash a stranger as a means of attracting public attention."⁴⁷ Overall, [the Westboro Baptists'] outrageous conduct caused petitioner great injury In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims."⁴⁸

The classicism of these lines is striking and unmistakable. Not every sound that is emitted from the mouth, and not every phrase written on a placard, counts as "speech" in the constitutional sense, especially not speech on matters of public concern. Rather genuine speech on matters of public concern, as conceived in the *Snyder v. Phelps* dissent, has a rational character, rationally expressed, and is motivated in the right, public-spirited way. The "speech" of the Westboro Baptists was in fact pseudo-speech, a vile simulacrum of responsible participation in public discourse—the modern equivalent of "despiteful railing" and "malicious reviling."

Similar themes had appeared in another of Justice Alito's lone dissents the previous Term, in another now-notorious decision: *United States v. Stevens*,⁴⁹ the "animal crush videos" case. The Court invalidated the statute on overbreadth grounds, but for Justice

46. *Id.* at 463 (Alito, J., dissenting).

47. *Id.* at 472.

48. *Id.* at 475.

49. 559 U.S. 460 (2010).

Alito, the crush videos embodied no genuine “speech” worth protecting from chill through overbreadth doctrine. The First Amendment protects freedom of speech,” he wrote, “but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct.”⁵⁰ Analogizing the videos to child pornography, whose prohibition the Court had previously upheld,⁵¹ Justice Alito saw the films as a form of recorded brutality, rather than any sort of contribution to public discourse, arguing that “the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess.”⁵²

There is no doubt that in these twin opinions, at least, Justice Alito has been out of step with his colleagues. It is a great and standing irony of our current free speech law that while it is, in large part, a product of non-originalist Justices writing in the 1960s and after, it is taken to the most sweeping possible extremes by Justices who consider themselves originalists. The recent scholarship to which I have referred has shown that the current state of free speech law is far more libertarian, far less deferential to legislative judgments about the social value of speech, and far more hospitable to malicious, irrational, and morally perverse pseudo-speech than any conception held by the founding generation or for many generations afterwards, well past the ratification of the Fourteenth Amendment and into the 20th century.⁵³ As Fuller would put it, the animating spirit of the classical American approach to free speech, which was also indisputably the original conception of free speech, was entirely different than the post-1960s conception.

50. *Id.* at 493 (Alito, J., dissenting).

51. *See New York v. Ferber*, 458 U.S. 747 (1982).

52. *Stevens*, 559 U.S. at 495.

53. As late as 1907, well past the ratification of the 14th Amendment, the Court held that the First Amendment prohibits prior restraints on speech but permits “the subsequent punishment of such [speech] as may be deemed contrary to the public welfare.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

Although it would take me too far afield to say more on this topic, I believe that the gap between the current state of free speech jurisprudence and doctrine, on the one hand, and the original understanding on the other, yawns so widely that the situation is intrinsically unstable. Free speech law is ripe for an originalist reevaluation. At a minimum, it is awkward to explain why exactly we have seen attempts at sweeping originalist reevaluations of the administrative state, of the Second Amendment, and of constitutional protection for private property, but not of free speech law, where the gap between current and original conceptions is at least as wide. If the situation is intrinsically unstable, it follows that it may not remain so forever. Although Justice Alito is sometimes out of step with his colleagues on free speech, the future will render the final judgment, and that judgment may just be so much the worse for his colleagues.

CONCLUSION: THE MOST FULLERIAN JUSTICE

If it seems surprising that a mid-20th century legal scholar like Fuller would provide the best lens through which to understand the jurisprudence of a Justice of the early 21st century, it shouldn't be. There is nothing new under the sun, in law and legal theory as elsewhere. Fuller is significant because his work revived, after the Second World War, the mainstream tradition of American law that had been partly lost to view during the triumph of Holmesian positivism. Behind that classical American tradition, and in continuity with it, stands the classical legal tradition of Europe generally, including the English common law tradition as a special case and local variant.⁵⁴

In this tradition, law is more than (although it is not less than) positive fiat. It also includes general background principles of both procedural and substantive legality, not necessarily or essentially

54. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (Polity Books 2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103 (2022).

embodied in any positive source of law; an account of the limits of distinctively legal rationality; respect for rights, when but only when ordered to the well-being of the community; an account not only of the rights but also of the duties of the citizen, as a public-spirited participant in a rationally ordered legal system; and, most generally, an account of law as both reason and fiat, with the latter supplying *determinatio* or specification to the majestic generalities of the former, but always informed by reason.

I have tried to suggest, however briefly and selectively, that Justice Alito's jurisprudence draws upon something like this conception. Nothing in this account requires that Justice Alito be immersed in Fuller's own writings or anything of that sort. Rather both are drawing water from the same well, the deep sources of American law and legal theory, what Fuller called the "spirit" of the American legal tradition. In this sense, the Fullerian strands of Justice Alito's jurisprudence represent the best and most characteristic parts of the Justice's work and the best of our law—"law" broadly understood.

JUSTICE ALITO'S FREE SPEECH JURISPRUDENCE

KEITH E. WHITTINGTON*

When President George W. Bush nominated Samuel Alito to fill a seat on the Supreme Court of the United States in the fall of 2005, the right was amid a libertarian turn on freedom of speech and the First Amendment. An earlier generation of postwar conservatives had a distinctly ambivalent view about the First Amendment. While the core idea that freedom of speech is an important value and should be protected was broadly shared in the mid-twentieth century, conservatives were often quite critical of the ways in which the Court expanded the scope of protections for free speech in those years, not to mention the ways in which free speech was often being exercised by activists and artists on the political left. Free speech controversies routinely revolved around conservatives calling for restrictions on expressive activity, and conservative politicians not infrequently made hay out of art and speech that offended popular sensibilities. Prominent conservative legal scholars like Robert Bork and Walter Berns argued for a more restrictive approach to the First Amendment than the Court had been taking.¹

By the turn of the twenty-first century, things had become more complicated. The Federalist Society now features a "Freedom of Thought Project" to foster greater consideration of the collapsing "social consensus on the importance of being able to say

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1. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); WALTER BERNs, *FREEDOM, VIRTUE, AND THE FIRST AMENDMENT* (1957).

controversial things.”² Its annotated bibliography of conservative and legal scholarship designed to introduce students and scholars to legal thought on the right pairs traditional conservative voices like Bork and Berns with more libertarian voices like Eugene Volokh and Michael Kent Curtis.³ Jurists and politicians on the right have become vocal, if not always consistent, proponents of a robust view of free speech values and associated legal protections,⁴ even while a new generation of conservative scholars and activists now complain about an excessive libertarian influence over the conservative legal mind.⁵ The most prominent current free speech advocacy group is now the Foundation for Individual Rights in Education (FIRE), as the American Civil Liberties Union (ACLU) has retreated from its traditional commitments on that front, and FIRE is routinely denounced from the left as a “right-wing” group.

Justice Alito reflects that generational transition in the conservative legal movement. At his confirmation hearings in January 2006, then-Judge Alito was pressed hardest on First Amendment questions by Ohio Republican Mike DeWine. DeWine was particularly concerned that the Court’s First Amendment jurisprudence had become too accommodating to pornography, which the senator thought was a form of “lesser value speech” entitled to little constitutional protection.⁶ Elsewhere in the hearing, however, DeWine

2. Freedom of Thought Project, THE FEDERALIST SOCIETY, <https://fedsoc.org/projects/freedom-of-thought> [<https://perma.cc/L97V-9ZW9>] (last visited Oct. 26, 2022).

3. Conservative & Libertarian Legal Scholarship: Constitutional Law, THE FEDERALIST SOCIETY, <https://fedsoc.org/commentary/publications/conservative-libertarian-legal-scholarship-constitutional-law> [<https://perma.cc/KDN9-NNRW>], (last updated Jun. 19, 2014).

4. See WAYNE BATCHIS, *THE RIGHT’S FIRST AMENDMENT* (2016); THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231 (2014).

5. See Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL’Y 917 (2021); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

6. 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. 393 (2006).

found himself on the other side of the First Amendment issue, declaring “there is perhaps no right in our Constitution that is really as important as freedom of speech” and expressing his concern over a “disturbing trend” of dissenting voices being excluded from public places.⁷ The nominee waxed enthusiastic about his own strong support for the freedom of speech.⁸ Democratic Senator Russell Feingold worried most about whether as a circuit court judge Alito had been too aggressive in protecting the speech rights of students and had won the Golden Gavel Award from the Family Research Council as a result. The question led Judge Alito to point out that he was just applying liberal icon Justice William Brennan’s standards for protecting student political expression.⁹ The ACLU filed a letter with the Senate expressing its deep concern over the Alito nomination, but notably admitted, “on the other hand, Alito has a generally positive record on issues involving free speech and the free exercise of religion.”¹⁰ There was a time when a conservative nominee to the Court could not expect the ACLU to endorse his record on free speech issues (though perhaps in the future the ACLU will complain that conservative nominees have too liberal of a record on free speech), but times had changed.

As a Supreme Court Justice, Alito has continued to develop “a generally positive record on issues involving free speech.”¹¹ So much so, in fact, that Justice Elena Kagan was inspired to charge Alito with “weaponizing the First Amendment,” of being too “aggressive” with it and failing to recognize that it was “meant for better things” than protecting dissenting workers from being

7. *Id.* at 527.

8. *Id.* at 527–28.

9. *Id.* at 621.

10. ACLU Letter to the Senate Judiciary Committee on the Nomination of Samuel A. Alito, Jr. to the United States Supreme Court, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/letter/aclu-letter-senate-judiciary-committee-nomination-samuel-alito-jr-united-states-supreme-court> [<https://perma.cc/3TQG-TAH2>].

11. *Id.*

compelled to pay for political speech with which they disagree.¹² Justice Alito has not always favored parties bringing free speech challenges before the Court. He has, on occasion, thought the majority was too solicitous of free speech claims. But his opinions are notable for emphasizing the importance of protecting unpopular speech from legal suppression or sanction. Even when disagreeing with how his colleagues have approached a free speech issue, Justice Alito has taken a cautious approach to identifying potential restrictions on speech that does not encourage a broad deference to governmental authority to limit personal expression in the name of communal values or societal interests. Across several opinions, he has been particularly concerned with the complexity of protecting individual speech in places of heavy governmental regulation.

I. PROTECTING UNPOPULAR SPEECH

In a recent speech, Justice Alito bemoaned the “growing hostility to the expression of unfashionable views.”¹³ He viewed it as “[o]ne of the great challenges for the Supreme Court going forward . . . to protect freedom of speech.”¹⁴ That freedom “is falling out of favor in some circles” and at risk of “becoming a second-tier constitutional right.”¹⁵ As important as the work of the Court might be in elaborating and defending that right, Justice Alito repeated Judge Learned Hand’s admonition that the courts will not be of much help if liberty is not understood and valued by ordinary Americans.

Surely it is premature to say that the freedom of speech is in danger of being expelled from the group of “fundamental freedoms” that the post-New Deal Court said was at the heart of the constitutional enterprise and deserving of special favor from the courts. The

12. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

13. Justice Samuel Alito, Address at 2020 Federalist Society National Lawyers Convention (Nov. 12, 2022), <https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society> [<https://perma.cc/9PP3-YDCK>].

14. *Id.*

15. *Id.*

Court in *Gitlow v. New York* elevated freedom of speech to a place of priority in the constitutional order, noting “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”¹⁶ Even after its 1937 retreat, the Court signaled that the freedom of speech was still of special judicial concern.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.¹⁷

Justice Jackson emphasized that freedom of speech “may not be infringed on such slender grounds” as might justify state interference with liberties that were, in his eyes at least, less precious.¹⁸

It would be a remarkable about-face for the Court to truly push freedom of speech into a second-tier category. The Brandeisian effort to elevate speech to a distinctive position that justified heightened judicial scrutiny even when almost no other liberty did has become foundational to how generations of jurists have understood their task. To allow freedom of speech to be trumped by relatively modest societal interests would be truly revolutionary, and Justices on both the left and the right still seem quite committed to the core of free speech principles.

But it is certainly possible to see the dangers on the horizon. In his speech, Justice Alito pointed to what might be taken to be an increasingly censorious civil society targeting conservative speech in particular. George Carlin’s once scandalous routine on words

16. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

17. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

18. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

you cannot say on television from the early 1970s now “seems like a quaint relic” given shifting societal norms around public profanity.¹⁹ But Justice Alito imagines a new list of “Things You Can’t Say If You’re a Student or Professor at a College or University or an Employee of Many Big Corporations.”²⁰ Those who express socially or religiously conservative views risk “being labeled as bigots and treated as such by governments, employers, and schools.”²¹ George Carlin might have represented the counterculture of the 1960s, but he was mainstream culture by the end of the 1970s. The evangelical right became politically active in the 1970s partly in response to that cultural transformation, but it is those who might once have identified themselves as part of the “moral majority” who now find themselves cultural outsiders. Like all dissident factions, they have a particular stake in hoping that the majority, or least the power-holders, embrace the virtue of tolerance. The libertarian right has something to offer the conservative right when it comes to carving out a place as a political and social minority in a majoritarian democracy.

Even if the freedom of speech does not get relegated to second-tier status *in toto*, the Court is quite familiar with how to characterize some forms of speech as less than fundamental. It is not hard to imagine a continuation of the long twilight war over where the boundaries are to be drawn between speech that is fundamental and speech that can be more easily subordinated to other values and concerns. Ken Kersch once wrote about how conceptual categories can get transmuted and “how conduct became speech and speech became conduct” as Progressives and New Dealers rethought what expressive activities were and were not worthy of

19. Justice Samuel Alito, Address at 2020 Federalist Society National Lawyers Convention (Nov. 12, 2022), <https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society> [<https://perma.cc/9PP3-YDCK>].

20. *Id.*

21. *Id.*

substantial constitutional protection.²² As he noted, there are ways “in which regime supporters publicly committed to and identified with a program of civil liberties work to constrict freedom which run counter to the substantive imperatives of the regime,” by “altering the definitions of what behaviors constitute free speech controversies in the first place.”²³ Justice Kagan’s warnings against using the First Amendment as a sword fall exactly into that category. What are the “better things” the First Amendment is supposed to protect, as we continue to celebrate the freedom of speech as a fundamental liberty, and what are the kinds of things that can be safely tossed aside in the name of progress? We are in the midst of a set of debates in which the putative defenders of free speech, who will still claim to be civil libertarians, will spend a great deal of time and energy explaining why the speech they want to restrict is not really the kind of speech that is of concern to the First Amendment or to any right-thinking person. Justice Alito pointed to the Second Amendment as an example of a right that got pushed into second-tier status in the past. Hopefully we will not see the day in which the Court explains to the people that the freedom of speech is really best understood as a right to be exercised collectively through government officials rather than by individual citizens, but the prospect that the First Amendment will continue to be treated better than the Second Amendment is a small consolation.

Justice Alito has been as vocal as free speech champions in the past about the importance of protecting the speech that we hate. Justices like Louis Brandeis, Hugo Black, William O. Douglas, and William Brennan were unafraid to be too aggressive about deploying the First Amendment as a sword, and they were insistent that freedom of speech meant nothing if we were unwilling to tolerate the expression of ideas that we detested. In a liberal democracy, we are to overcome wrong ideas by persuasion and mobilization, not

22. Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and Freedom of Speech*, 8 U. PA. J. CONST. L. 255 (2006).

23. *Id.* at 258–259.

by suppression and censorship. It is a hard lesson to learn and to remember, and Justice Alito has been eloquent in reminding us of it.

Justice Alito was most direct on this point in his opinion for the Court in *Matal v. Tam*.²⁴ The case involved the question of whether the government could refuse to issue a trademark for content that might disparage or bring into contempt any person living or dead. We live in a world in which we are constantly and confidently told that “hate speech is not free speech.” Having identified such a shiny new exception to the First Amendment, many are eager to identify the myriad examples of hate speech that they would like to suppress. The disparagement clause of the trademark statute was a compelling vehicle for (once again) making plain that even hate speech is protected by the First Amendment.

Justice Alito had already staked out his position on such matters when he was serving on the Third Circuit. One of the prominent opinions he wrote during that service came in the case of *Saxe v. State College Area School District*,²⁵ a case involving a harassment policy at a public school. This policy, which a few years earlier would have simply been described a speech code, prohibited any “verbal . . . conduct” that “offends” or “belittles” on the basis of a number of protected characteristics, including “hobbies and values” and “social skills.”²⁶ Such policies remain all-too-common at schools and universities today, sometimes with language that is barely better than that used by the school in this case. Judge Alito pointed out what should have been obvious,

By prohibiting disparaging speech directed at a person’s “values,” the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about “values” may offend is not cause for its prohibition, but rather the reason for its protection: “a principal function of

24. 137 S. Ct. 1744, 1751 (2017).

25. 240 F.3d 200 (3d Cir. 2001).

26. *Id.* at 203.

free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." . . . No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of anti-discrimination.²⁷

It is no accident that the opinion quotes from *Texas v. Johnson* and *Terminiello v. City of Chicago*.²⁸ Neither of those opinions, written by Justices Brennan and Douglas respectively, was likely to be beloved by conservatives at the time it was issued, but both were landmark statements in the battle against the "heckler's veto." The ability of the offended mob to enlist the assistance of the state to shut down speech that the mob finds intolerable through the threat of violence is an old problem and one to which the courts were slow to respond. The demand of the mob to silence speakers that offend remains a serious problem throughout civil society, even if the government is somewhat less quick than it once was to cater to the will of the mob. The fact that conservatives are now more likely to be the speaker that offends might make the courts more sensitive to the problem these days. It is surely the case that conservatives will often still find themselves part of the offended audience, and in some circumstances that has certainly encouraged conservatives to embark on their own cancellation campaigns. But one hopes for more principled consistency from the courts than from legislators or media personalities, and Judge Alito's opinion in *Saxe* was an appeal to principle that still needs to be heard.

In *Matal*, Alito returned to this theme. The disparagement clause, like the school's anti-bullying policy, "offends a bedrock First Amendment principle: Speech may not be banned on the grounds that it expresses ideas that offend."²⁹ No matter how much we

27. *Id.* at 210.

28. *Texas v. Johnson*, 491 U.S. 397 (1989); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

29. *Tam*, 137 S. Ct. at 1751.

might not like it, for constitutional purposes, “[g]iving offense is a viewpoint” and the Court has “said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”³⁰ The idea that the government “has an interest in preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment.”³¹ The “proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”³² “Hateful” speech is still free speech.

II. DISSENTING FROM SPEECH PROTECTIONS

Justice Alito is no William O. Douglas, however. Indeed, he was characterized by Neil Siegel as “the least free-speech libertarian on the Roberts Court.”³³ Siegel’s phrase is an interesting one because it would seem to recognize that the Roberts Court is, in general, a free-speech libertarian Court, and so to be the least free-speech libertarian on this Court is still to be quite libertarian. But Siegel quite persuasively points to cases in which Justice Alito seems more reluctant to defend the hateful and offensive speech we hate. Siegel has little to say about Justice Alito’s opinions in those cases, but they are worth unpacking. It is quite notable that Justice Alito has been willing to stand alone among his colleagues in voting to sustain government restrictions on speech, but it is also interesting how he sought to explain those votes.

The first of these is *United States v. Stevens*,³⁴ in which the Court struck down a federal statute seeking to prohibit commercial videos of acts of cruelty to animals, most notoriously “crush videos” of animals harmed for sexual titillation. Justice Alito alone tried to

30. *Id.* at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

31. *Id.* at 1764.

32. *Id.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 644 (1929) (Holmes, J., dissenting)).

33. Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164, 172 (2016).

34. 559 U.S. 460 (2010).

salvage what he characterized as a “valuable statute,” but his approach was a fairly limited one.³⁵ Rather than striking down the statute as a whole, Justice Alito would have preferred the more modest approach of asking whether the statute was unconstitutional as applied to particular the video at issue in the case, reflecting some skepticism about the overbreadth doctrine as a general approach to First Amendment cases. Rather than leaping to striking down the statute as a whole because it might touch on some constitutionally protected content, Justice Alito would have preferred to narrow the statute through interpretation so as to try to limit its scope to videos that are outside the bounds of constitutional protection. Congress in fact responded to the Court’s ruling by passing such a narrow statute, the Animal Crush Video Prohibition Act of 2010, with one circuit court rejecting a constitutional challenge to it.³⁶ Whether the Court should prefer to strike down overly broad laws in their entirety and leave it to Congress to modify the terms of the statute or to narrow the scope of the statute through interpretation is an interesting and important question, but one that reduces the distance between Justice Alito and his colleagues in the *Stevens* case.

Justice Alito’s suggested approach would have limited the scope of the original statute “to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law.”³⁷ In doing so, Justice Alito would have leaned on *New York v. Ferber*, which upheld a child pornography statute.³⁸ Chief Justice Roberts objected to the government seeking to use *Ferber* to create “a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment,” but he does little to grapple with Justice Alito’s point that *Ferber* rests on the view that the First Amendment “does not protect violent criminal conduct, even if

35. *Id.* at 482 (Alito, J., dissenting).

36. 18 U.S.C. § 48; *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014).

37. *Stevens*, 559 U.S. at 486 (Alito, J., dissenting).

38. *New York v. Ferber*, 458 U.S. 747 (1982).

engaged in for expressive purposes.”³⁹ A narrow set of applications to films of illegal animal torture that serve no educational or scientific purpose would seem to hew to the logic of *Ferber* regarding the intimate link between some illegal conduct and the monetization of that conduct through the commercial sale of videos of the criminal acts. Rather than adding new categories of unprotected speech, the Alito dissent in *Stevens* would seem limited to applying a framework already established by the Court. The application may or may not be a good one, but it is not a radical attack on the Court’s exiting free speech jurisprudence.

A second significant dissent came in *Snyder v. Phelps*, in which the Court rejected an intentional infliction of emotional distress claim based on the actions of the Westboro Baptist Church at a military funeral.⁴⁰ State legislatures have responded to the Court’s decision by creating time, place and manner statutes to keep protestors at a distance from funerals, which have had a more favorable reception in the courts.⁴¹ Of course, in this context the question was not one that could be resolved through a narrowing statutory interpretation. The buffer zone statutory scheme is surely the safer path to take from the perspective of preserving robust protections for protest activity. Allowing the intentional infliction of emotional distress tort in this context would leave open the door to vexatious suits against many other protestors, and the *Phelps* majority reinforced the broad principle highlighted by Justice Alito in *Saxe* and *Matal* that hateful and offensive speech is still constitutionally protected speech.

But again it is worth noting how Justice Alito tries to limit the implications of upholding the suit against the Westboro Baptist Church. He would seek to distinguish between “free and open debate” and a license for “vicious verbal assault.”⁴² To do so, Justice Alito reached back to *Chaplinsky v. New Hampshire* for the

39. *Stevens*, 559 U.S. at 493 (Alito, J., dissenting).

40. *Snyder v. Phelps*, 562 U.S. 443 (2011).

41. *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012).

42. *Snyder*, 562 U.S. at 463 (Alito, J., dissenting).

proposition that some words “by their very utterance inflict injury” and are not an “essential part of any exposition of ideas.”⁴³ Though never formally overruled, *Chaplinsky* is fairly moribund and sits uneasily with the Court’s more recent jurisprudence that recognizes that even hurtful speech can express ideas. More troubling, this argument drawn from *Chaplinsky* has potentially sweeping implications for a host of hate speech, harassment, and anti-bullying policies of the type that was at issue in *Saxe*. In *Saxe*, the school argued that the speech covered by the policy was likewise merely injurious and no essential part of the exposition of ideas, but Judge Alito disagreed. In *Snyder*, by contrast, Justice Alito characterizes the protestors’ conduct as “outrageous,” “vicious,” and the “brutalization of innocent victims.”⁴⁴ If Justice Alito had written for the majority in *Snyder*, it is not hard to see that many schools would seek shelter under that opinion to defend their harassment policies.

How to reconcile the two opinions? In *Snyder*, Justice Alito argues that the tort of intentional infliction of emotional distress is already ringed by doctrinal limitations that render it safe under the First Amendment. Perhaps the fact that this is “a very narrow tort”⁴⁵ that is difficult to satisfy in practice is sufficient to render it safe in the way that a school anti-bullying policy is not. Certainly the procedural safeguards surrounding the typical school harassment policy are less than robust. Perhaps the speech in question in *Snyder* is particularly brutalizing. If so, it invites further reflection on how speech that might be beyond the pale can be safely identified and put into policy. Perhaps some weight can be placed on “the fundamental point that funerals are unique events at which special protection against emotional assaults is in order.”⁴⁶ That would be a very narrow exception indeed, but it would certainly invite different judges and policymakers to reach different conclusions about what counts as a particularly emotionally sensitive context that

43. *Id.* at 465 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

44. *Id.* at 475.

45. *Id.* at 464.

46. *Id.* at 473.

should not be a “free-fire zone” for “verbal attacks.” In the few short years since *Snyder* was handed down, a culture of “safetyism” has taken off.⁴⁷ Justice Alito might think a funeral is uniquely a safe space but opening that door would invite many others to look for analogous spaces where they would like to exclude offensive speech. Less appealing is the prospect that Justice Alito simply finds the bereaved parents of a marine killed in the line of duty to be particularly sympathetic victims. Of course, other observers might find other targets of bullying to be quite sympathetic as well. If the boundaries of the First Amendment turn on how sympathetic an offended party might be, then the scope of protected speech is likely to be fairly unpredictable and much more restricted.

Alternatively, we might turn back to Judge Alito’s opinion in *Saxe*. That opinion gets quite a bit of rhetorical leverage from an unusual feature of the school’s harassment policy. School administrators in that case had cast an extremely wide net and happened to include the critical term “values” within the scope of protected categories. That inclusion made it particularly easy to highlight the ways in which offensive speech could also be speech that advanced or expressed a set of ideas. Perhaps a slightly more carefully crafted bullying policy would satisfy Justice Alito’s sense that some words merely injure and do not usefully convey ideas. If so, the “no hate speech” crowd might have an unlikely ally in Justice Alito if they play their cards right. I have to admit that this would seem to be an unlikely outcome and one that *Matal* was designed in part to reject, but the *Snyder* dissent seems to leave the door ajar in ways that I would not prefer.

Siegel might have pointed to the dissent in *United States v. Alvarez* as well.⁴⁸ He did not, and Justice Alito was joined in that dissent by Justice Thomas and Scalia, but here too Justice Alito would allow a statutory restriction on speech to stand. Once again, however, Justice Alito endeavors to argue that upholding the Stolen Valor Act

47. GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND* (2018); FRANK FUREDI, *WHAT’S HAPPENED TO THE UNIVERSITY?* (2017).

48. *United States v. Alvarez*, 567 U.S. 709 (2012).

of 2005 would have limited consequences for broader First Amendment protection.⁴⁹ Here too Justice Alito thought that statute was a natural extension of earlier doctrine and came with robust safeguards against expansion or abuse. Justice Alito begins with the notion that this case could fit within “a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”⁵⁰ That is not a very promising start. In the age of social media, we are now buffeted by claims that the public sphere is filled with misinformation. There are innumerable proposals to restrict false factual statements that inflict real harm and serve no legitimate interest on matters ranging from election interference and the pandemic to the health of politicians and the prevalence of child trafficking. If *Alvarez* had come out the other way, it might well have given additional life to legislative proposals to empower government regulators to root out what they regard as misinformation.

Justice Alito attempts to cut off that possibility by pointing to unique features of the “stolen valor” context that would distinguish it from the wider world of damaging false statements. Justice Alito points to five crucial limiting features: the statute applies only to “a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty”; the act “concerns facts that are squarely within the speaker’s personal knowledge”; knowledge of the falsity of the speech was an element of the offense; the act only applies to the communication of actual facts; and the facts at issue “are highly unlikely to be tied to any particular political or ideological message.”⁵¹ As a consequence, Justice Alito thinks that the suppression of false statements in this context can be readily distinguished from disputed factual claims in scientific, religious, philosophical, political or other social debates where state intervention is likely to cause real harm.⁵²

49. *Id.* at 739 (Alito, J., dissenting).

50. *Id.*

51. *Id.* at 740–41.

52. *Id.* at 751.

Justice Alito has departed from his colleagues in concurrences as well as dissents. The third case to which Siegel points is Justice Alito's concurrence in *Brown v. Entertainment Merchants Association*, in which the Court struck down California's effort to restrict the sale of violent video games to minors.⁵³ Here Justice Alito urged the Court to be more cautious about assuming "that new technology is fundamentally the same as some older thing with which we are familiar."⁵⁴ The immersive and interactive nature of video games—and perhaps future virtual reality environments—might make them qualitatively different, and more dangerous, than other media. The justices should at least accept that the jury might still be out on the empirical assumption that fictional violence is essentially harmless regardless of the form in which it is presented and consumed. In the meantime, Justice Alito was willing to join in striking down the law on due process grounds that addressed the chilling effect of a vague law while leaving the core First Amendment issue unresolved. It might not be practically possible to design a statute that could meet those requirements, but Justice Alito was at least open to a law that would reinforce "parental decisionmaking" over the media consumption of their children.⁵⁵ This solicitude for parental control over children and caution in the face of technological innovation reflect a conservative sensibility that would at least nibble around the edges of First Amendment jurisprudence.

III. SEPARATING OUT PRIVATE SPEECH

A final set of cases show Justice Alito grappling with how to identify and protect private speech when governmental and private action are entangled. These opinions all evince a civil libertarian commitment to securing a sphere for protected speech by private individuals, but they recognize the challenges of identifying such speech in many modern contexts of sprawling governmental

53. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).

54. *Id.* at 806 (Alito, J., concurring).

55. *Id.* at 815 (Alito, J., concurring).

activity and they reflect interesting efforts to think through the rationale for when speech restrictions might be appropriate.

Justice Alito wrote for the Court in *Pleasant Grove City v. Summum* but wrote for four dissenters in *Walker v. Texas Division, Sons of Confederate Veterans*.⁵⁶ Both required separating governmental speech from private speech. The Court recognized that when the government speaks with its own voice, First Amendment restrictions do not apply and the government can choose to convey some messages but not others. When it comes to messages conveyed on governmental property, however, it is not always evident when the government is speaking and when the government is allowing favored private actors to express themselves. If a city allows activists to paint "Black Lives Matters" on the street but does not allow other activists to similarly paint other messages, is that because the government is playing favorites among private speakers or is it because the government has adopted some street graffiti as its own? In *Summum*, the Court accepted that the government may "express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."⁵⁷ The majority thought permanent public monuments displayed in a public park necessarily became governmental speech. Dissenting in *Walker*, however, Justice Alito thought specialized license plates were distinguishable given the factors at play in *Summum*. By failing to adequately distinguish governmental from private speech, the dissenters in *Walker* thought the Court was establishing "a precedent that threatens private speech that government finds displeasing."⁵⁸ For the dissenters in *Walker*, *Summum* pointed to such factors as whether the government had long used these means for expressing exclusively governmental messages, whether this type of property had been and could reasonably be used by third parties to express their own messages, and whether a multitude of messages

56. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

57. *Summum*, 555 U.S. at 468.

58. *Walker*, 576 U.S. at 221 (Alito, J., dissenting).

could be reasonably accommodated by the physical space in question.⁵⁹ When it came to monuments, the public would necessarily view any message as governmental.⁶⁰ Customizable license plates, on the other hand, were tiny portable billboards and could only properly be read as expressing personal messages rather than governmental messages given how they had been used over time.⁶¹ Given the nature of license plates, the government could no more exclude messages it found offensive here than it could in the context of approving trademarks.

This past term, Justice Alito wrote separately in the Boston flag-raising case to emphasize that the Court should not rely on mechanical tests to separate government from non-governmental speech but should focus clearly on the important question of “whether the government is *speaking*.”⁶² Alito is particularly concerned about situations in which “a government claims that speech by one or more private speakers is actually government speech” and as a result using government-speech doctrine “as a cover for censorship.”⁶³ As he often does, Alito wants judges to focus far more on fact-specific, nuanced judgments and far less on doctrinal tests. Even so, he does provide some guidance of his own. The category of government speech should be restricted to a relatively small class of cases in which the government has specifically authorized an individual to speak on behalf of the government and that person is conveying a governmentally determined message and does so without abridging the speech of others acting in a private capacity.⁶⁴

Justice Alito wrote separately in other cases to express similar nuanced judgments about how best to characterize how the government was affecting the speech environment. In a concurring opinion, Justice Alito thought a buffer zone around an abortion clinic

59. *Id.* at 228–29.

60. *Id.* at 229.

61. *Id.* at 230–31.

62. *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1595 (2022) (Alito, J., concurring).

63. *Id.*

64. *Id.* at 1598.

put its thumb on the scale in ways that the majority did not fully appreciate.⁶⁵ In a concurring opinion in the “Bong Hits 4 Jesus” case, Justice Alito, while agreeing with the majority that the school could restrict speech that could be perceived as advocating illegal drug use, took pains to reject the government’s argument that public schools might restrict student speech in order to advance its “educational mission.”⁶⁶ The “educational mission,” he feared, might creep into “including the inculcation of whatever political and social views are held by the members” of the administration and faculty or public officials.⁶⁷ Such an expansive view of the mission of schools would inevitably lead school officials to “suppress speech on political and social issues based on disagreement with the viewpoint expressed.”⁶⁸ The “substantial disruption” test of *Tinker v. Des Moines Independent Community School District* should be narrowly construed to allow school official to head off “a threat of violence.”⁶⁹ In the more recent vulgar cheerleader case, Justice Alito seems to recognize a more elaborate set of circumstances in which speech can be restricted in schools.⁷⁰ There Justice Alito emphasized even more strongly that “public school students, like all other Americans, have the right to express ‘unpopular’ ideas on public issues, even when those ideas are expressed in language that some find ‘inappropriate’ or ‘hurtful.’”⁷¹ When trying to identify the circumstances in which schools can reasonably restrict student speech, Justice Alito goes beyond his earlier point about preventing violence. The functioning of a school necessitates that teachers be able to “regulate on-premises student speech, including by imposing content-based restrictions in the classroom.”⁷² Likewise, a concern with protecting students while out of their parents’ care

65. *McCullen v. Coakley*, 573 U.S. 464 (2014).

66. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

67. *Id.*

68. *Id.*

69. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

70. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

71. *Id.* at 2049 (Alito, J., concurring).

72. *Id.* at 2050.

includes a proper interest in prohibiting “threatening and harassing speech.”⁷³ But once again, speech “may not be suppressed simply because it expresses ideas that are ‘offensive or disagreeable.’”⁷⁴ School authorities bear the same duty as public official generally to prevent rather than facilitate a heckler’s veto.

The entanglement of government and private speakers raised its head again in the context of mandatory fees to support union activities.⁷⁵ In critiquing the Court’s earlier decision in *Abood v. Detroit Board of Education*, Justice Alito took pains to lay out how the Court had expressed concerns about the First Amendment implications of government requirements that worker contribute dues to labor unions.⁷⁶ Those concerns got brushed aside in *Abood*, but a Roberts Court majority was prepared to revisit the earlier concerns (once again Justice Douglas gets a sympathetic hearing in an Alito opinion).⁷⁷ The Court in the past had failed to fully appreciate “the bed-rock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support.”⁷⁸ But now the majority recognized that “[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.”⁷⁹ Hashing out the implications of this invigorated compelled speech doctrine will likely require some further work by the Court, but it is reflective of Justice Alito’s sensitivity to the ways in which majority pressures can impinge on individual conscience and how governmental interventions into society can gradually circumscribe the sphere of private speech unless the implications of those interventions are carefully thought through.

73. *Id.* at 2052.

74. *Id.* at 2055 (internal citations removed).

75. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

76. *Id.* at 2463–64 (discussing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

77. See *Lathrop v. Donohue*, 367 U.S. 820, 877 (1961) (Douglas, J., dissenting).

78. *Harris v. Quinn*, 573 U.S. 616 (2014).

79. *Janus*, 138 S. Ct. at 2463.

* * *

The ACLU is probably less happy with Justice Alito's record on free speech now than it was in 2005, but that may say more about the ACLU than Justice Alito. Unlike conservative jurists of old, Justice Alito is not inclined to adopt a broadly deferential posture to government officials who wish to suppress speech that they find threatening to public order. Although a traditional conservative concern with the proper care and socialization of children—and the parental authority to raise children—has affected his approach to some free speech disputes, there is no desire to carve out broad exceptions to First Amendment protections or subordinate individual views to social consensus. A driving force in his free speech opinions is a traditional civil libertarian one—how best to secure the expression of individual speech and belief no matter how unpopular or offensive those ideas might be to the broader community or to government officials and how best to avoid empowering government officials to suppress views with which they disagree. We seem to be entering a new period in which conservative activists and politicians are once again pushing policies targeting disagreeable speech. These initiatives will put new pressures on the conservative justices, including Justice Alito, who may find themselves sympathetic to the sentiments of the censorious policymakers, if not necessarily to their methods. Over the next few years, the Court's civil libertarian record on free speech will be put to the test.

THE ELEVATION OF REALITY OVER RESTRAINT IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

KEVIN C. WALSH*

In *Dobbs v. Jackson Women's Health Organization*,¹ the Supreme Court buried the constitutional right to abortion that it brought forth in *Roe v. Wade*² and breathed new life into in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³ Justice Alito's opinion for the Court completely overruling *Roe* and *Casey* is an outstanding jurisprudential achievement. Alito not only completely dismantled *Roe* and *Casey* before burying them, but also countered Chief Justice Roberts's imprudent reliance on judicial restraint and held together a majority divided over the continuing validity of other precedents.

The hallmark of Justice Alito's opinion in *Dobbs* is legal-reality-based decisiveness. In legal reality, the Constitution supplies no right to abortion. The Court decisively determined that in *Dobbs*. The majority's unflinching prudence in confronting grave institutional error powerfully contrasts not only with the Chief Justice's institutionalist instinct for appeasement, but also with the three dissenting Justices' inability to learn from or even acknowledge the errors of the Court's abortion jurisprudence. The doctrinal

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1. 142 S.Ct. 2228 (2022).

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992).

reasoning in *Dobbs* traces directly back to the original dissents in *Roe*⁴ and the dissenting opinions of Chief Justice Rehnquist and Justice Scalia in *Casey*.⁵ The majority opinion's continuity with the law as recognized and declared by shifting numbers of Justices over time is entirely to its judicial author's credit, for *Dobbs* is a judicial opinion, not a chapter in a chain novel. Justice Alito's authorship of the opinion for the Court in *Dobbs* should contribute to his judicial legacy over time as significantly as Justice Blackmun's authorship of the opinion for the Court in *Roe* detracted from his. But whether *Dobbs* enhances or detracts from Justice Alito's judicial legacy over time will depend on the relative corruption or perfection of the culture of constitutional adjudication in which that legacy is received and assessed.

I. PARTIAL DOCTRINAL HARMONIZATION IN THE KEY OF
GLUCKSBERG

The sole question presented in *Dobbs* was whether the Constitution forbids all pre-viability prohibitions of abortion. At issue was the constitutionality of a state law that prohibited abortion after fifteen weeks' gestational age. As between the challengers and the state, the right ultimate outcome in *Dobbs* was not difficult to discern. Governing doctrine purporting to establish a right to abortion through viability was so unmoored from the law of the Constitution that there were multiple potential paths to decision, none uniquely correct.⁶ A first way to take the measure of *Dobbs* is by comparing the path taken in Justice Alito's opinion for the Court with the paths not taken as set forth in the concurring opinions.

4. 410 U.S. at 171 (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

5. 505 U.S. at 944 (Rehnquist, C.J., dissenting); *id.* at 979 (Scalia, J., dissenting).

6. One wishing to evaluate this assertion can review the briefs and opinions in *Dobbs*. For an explanation of "the law of the Constitution," in comparison and contrast with authorized developments, unauthorized developments, and unauthorized departures, see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142–49 (2016).

Alito's clear-eyed judiciousness in addressing the enormous errors of *Roe* and *Casey* contrasts sharply with Chief Justice Roberts's squinting solo concurrence. Roberts's proposal was *partial* overruling (which also would have amounted to partial upholding). Roberts would not have decided—at least in this case—that the Constitution confers no right to abortion. Instead, he would have described the previously announced right to abortion as something along the lines of “a reasonable opportunity to choose.”⁷ Because the Mississippi law was not unconstitutional as measured against a right defined as a “reasonable opportunity to choose [abortion],” Roberts would have upheld the challenged law but then decided nothing more. His guiding principle here, he said, was “judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.”⁸

The fundamental problem with this approach, Alito reminded Roberts, is that “we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”⁹ In contrast with the abortion right ensconced in *Roe* and extended in *Casey*, Roberts's “reasonable opportunity to choose [abortion]” rule would have been a new right with a new rationale. It also would have been as much a partial affirmation of *Roe* and *Casey* as a partial overruling. But Roberts did not “attempt to show that this rule represents a correct interpretation of the Constitution.”¹⁰ Whatever short-term benefits might result from leaving details of the new right's reach undecided would soon be dissipated by the need to address

7. Roberts wrote: “Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability.” 142 S.Ct. at 2310 (Roberts, C.J., concurring). Applying this newly described constitutional right to abortion, Chief Justice Roberts pointed out that “Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered ‘late’ to discover a pregnancy. I see no sound basis for questioning the adequacy of that opportunity.” *Id.* at 2310–11.

8. *Id.* at 2311.

9. *Id.* at 2283 (majority opinion) (quoting *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring)).

10. *Id.* at 2282.

abortion laws of other states.¹¹ The question of how much “the turmoil wrought by *Roe* and *Casey* [should] be prolonged” by the Court was a matter for prudential judgment.¹² Informed by the experience of almost fifty years under the *Roe* regime, Justice Alito and his four colleagues in the majority appropriately determined that “[i]t is far better—for this Court and the country—to face up to the real issue without further delay.”¹³

Alito was right. Earlier in the Term, the Court had already split over Texas’s Heartbeat Act with Roberts siding with the *Dobbs* dissenters.¹⁴ It seems unlikely he would later change his assessment about the unconstitutionality of Texas’s Heartbeat Act and other state laws like it. After all, Roberts in *Dobbs* touted as a comparative advantage of his approach that “under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent.”¹⁵ Roberts’s “reasonable opportunity to choose [abortion]” was probably where he would have ended up after *Dobbs* as before. Given how the Texas cases went, that is where he already was.

One also cannot appropriately appraise Roberts’s appeal to restraint without evaluating the legal justice of the constitutional right to abortion that Roberts would have left in place. The Court’s decisions in *Roe* and *Casey* resulted in judicial occupation of a domain in which the federal judiciary had no right to be. There is nothing judicious about advocating restraint in returning that domain to those with lawful authority. If an invader were to cross a border and occupy territory properly belonging to someone else, there would be something fundamentally misguided about

11. *See id.* at 2283 (“If we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The ‘measured course’ charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.”)

12. *Id.*

13. *Id.*

14. *See Whole Woman’s Health v. Jackson*, 142 S.Ct. 522 (2021).

15. 142 S.Ct. at 2316.

appealing to “occupier’s restraint” in justifying the unlawful occupier’s refusal to cede back all the ill-gotten territory. The requirement to return lawmaking authority to lawmakers relates back to the legal injustice of the earlier decisions taking it from them.¹⁶

Justice requires rendering to each his or her due. The final judgment part of this aspect of justice was easy in *Dobbs*, even according to Roberts. The Mississippi law’s challengers who brought the case were not entitled to any judicial relief. “I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis,” Roberts wrote. “That line never made any sense.”¹⁷ That takes care of what the abortionists bringing the case were due: nothing. The government’s due on the other side of the *v.* is where Roberts diverged from Alito. Under Roberts’s redefinition of the constitutional right to abortion, state governments would receive back lawmaking authority for the period from fifteen weeks’ gestational age until viability. Under Alito’s analysis for the Court, however, this was too grudging. The divide between Roberts and Alito was partially a question of justice, inasmuch as it was a question of what the State as party to the case was due. But it was more a question of prudence, inasmuch as prudence is the intellectual and moral virtue that “applies universal principles to the particular conclusions of practical matters.”¹⁸

16. The extent of the Court’s arrogation to itself of authority belonging to the people plays an important part in the majority’s *stare decisis* analysis. In explaining the way in which “*Roe* was on a collision course with the Constitution from the day it was decided” and that “*Casey* perpetuated its errors,” Justice Alito notes that “those errors do not concern some arcane corner of the law of little importance to the American people.” 142 S.Ct. at 2265. “[T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.” *Id.* This preferential option for the people is appropriate for authority rooted in popular sovereignty. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 27–29 (2022) (explaining the transmission of authority through the Constitution as justified by popular sovereignty).

17. *Dobbs*, 142 S.Ct. at 2310 (Roberts, C.J., concurring).

18. THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II, Q.47 art. 6 (Fr. Laurence Shapcote, O.P., trans., John Mortensen & Enrique Alarcon, eds., 2012).

Coming into *Dobbs*, the Supreme Court's "substantive due process" jurisprudence contained significant tensions. In the vintage years of substantive due process that began with *Casey* in 1992 and ended with *Dobbs* thirty years later, there were three principal lines of substantive due process doctrine. One was the line of substantive due process doctrine that emerged over the 1970s and 1980s and received its canonical formulation in the 1997 decision of *Washington v. Glucksberg*.¹⁹ A second line was the abortion-specific substantive due process doctrine that the Court set forth in *Casey*'s 1992 repackaging of *Roe* and applied in the Court's many abortion cases after. A third line ripened into maturity with *Lawrence v. Texas* in 2003,²⁰ from seeds sown in 1996 with *Romer v. Evans*.²¹ This line, which bore fruit most prominently in the 2015 decision of *Obergefell v. Hodges*,²² has principally been applied to extend rights related to sexual intimacy between persons of the same sex.

The most straightforward way to understand *Dobbs* doctrinally is that the decision eliminates the abortion-specific *Roe/Casey* line of substantive due process. The result is a partial harmonization of the doctrine that brings the outlier of abortion into the *Glucksberg* domain. The doctrinal harmonization is only partial, though, because *Dobbs* does not disturb *Lawrence* or *Obergefell*.²³ Significant tension therefore remains, for *Glucksberg* and *Lawrence* are plainly incompatible approaches to substantive due process.

Division over what to do with remaining substantive due process doctrine outside of *Glucksberg* was manifest in the separate concurring opinions of Justice Kavanaugh and Justice Thomas in *Dobbs*. Both Kavanaugh and Thomas have long recognized the incompatibility of *Glucksberg* and *Casey*. As then-Judge Kavanaugh noted in a lecture delivered a year before his nomination to the Supreme

19. 521 U.S. 702.

20. 539 U.S. 558.

21. 517 U.S. 620.

22. 576 U.S. 644.

23. See *Dobbs*, 142 S.Ct. at 2277–78 (majority opinion) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

Court, “even a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe v. Wade* in 1973—as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*.”²⁴ Justice Kavanaugh did not suggest that *Glucksberg* was wrong. According to Justice Thomas’s originalist outlook, however, *Glucksberg* itself is incompatible with the law of the Constitution.²⁵ That is why Thomas in his solo concurrence called for a complete reconsideration in the future of all the Court’s substantive due process precedents.²⁶

By contrast with Justice Thomas’s call for ending substantive due process entirely in the future, an explicit purpose of Justice Kavanaugh’s concurrence was to underscore this doctrine’s continuance: “I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of [*Griswold*, *Eisenstadt*, *Loving*, or *Obergefell*], and does *not* threaten or cast doubt on those precedents.”²⁷ This assertion by Kavanaugh underlined the statement made twice in Justice Alito’s opinion for the Court that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”²⁸

24. Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William H. Rehnquist*, American Enterprise Institute, 2017 Water Berns Constitution Day Lecture, available at <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf/>.

25. See *Dobbs*, 142 S.Ct. at 2300–01 (Thomas, J., concurring) (summarizing originalist analyses from earlier concurrences by Justice Thomas and concluding that “the Due Process Clause at most guarantees *process*. It does not, as the Court’s substantive due process cases suppose, forbid the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided.”).

26. See *id.* at 2301 (suggesting that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*”).

27. *Id.* at 2309 (Kavanaugh, J., concurring).

28. *Id.* at 2277–78 (majority opinion); *id.* at 2280.

II. PRUDENTIAL ORIGINALISM IN THE MAINTENANCE OF
GLUCKSBERG

If Justice Thomas is right that all substantive due process doctrine is incompatible with the original law of the Fourteenth Amendment, then does it follow that Alito's opinion for the Court in *Dobbs* is not originalist? *Dobbs* further entrenches *Glucksberg*, after all, and *Glucksberg* is a way of implementing substantive due process. The answer to this question depends on what one means by "originalist." In my view, the most perspicacious distinction pertinent here is the one drawn by Professor Stephen Sachs in *Originalism: Standard and Procedure*.²⁹ According to Sachs, originalism is best understood as a standard of correctness rather than a procedure for making decisions.³⁰ Sachs's deployment of this distinction is a helpful way of developing a distinction earlier drawn by Professor Christopher Green between "originalism [as] an ontological thesis about what makes constitutional claims true," and originalism as an epistemological approach toward ascertaining true constitutional claims.³¹

With this distinction in view, a decision like *Dobbs* is originalist if it is oriented toward bringing constitutional doctrine more closely in line with original law plus any lawful changes to original law. Justice Alito's opinion in *Dobbs* is clearly an originalist decision in its treatment of original law as a constitutional truthmaker.³² Justice Alito opens his analysis by invoking Chief Justice John Marshall's 1824 opinion for the Court in *Gibbons v. Ogden* and Justice Joseph Story's 1833 *Commentaries on the Constitution of the United States* for the propositions that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for

29. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

30. *Id.* at 778–81.

31. *See id.* at 789 & n.83 (discussing Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 511–12 (2018)).

32. Green, *supra* note 31, at 499, 506.

ascertaining what our founding document means.”³³ As noted by the joint dissent, moreover, Alito’s opinion for the Court also states that “the most important historical fact [is] how the States regulated abortion when the Fourteenth Amendment was adopted.”³⁴ This history did not change between *Roe* and *Dobbs*; the Justices’ appreciation for its significance did. Alito’s opinion underscores this shift in two lengthy appendices that document the history of state-law (and territorial-law) prohibitions of abortion.³⁵

Although the *Dobbs* dissenters are right about originalism’s importance to Alito’s opinion, they overstate its outcome-determining effect when they depict the decision as resting entirely on constitutional originalism. According to the *Dobbs* dissent, Alito’s opinion for the Court turns on a “single question: Did the reproductive right recognized in *Roe* and *Casey* exist in ‘1868, the year when the Fourteenth Amendment was ratified’?”³⁶ Contrary to the dissent’s single-minded anti-originalism, though, there is much more to Alito’s opinion in *Dobbs* than an inquiry into the state of the law in 1868. In keeping with the *Glucksberg* framework, the opinion for the Court also emphasizes the absence of any historical support for a

33. 142 S.Ct. at 2244–45.

34. *Id.* at 2324 (joint dissent) (quoting 142 S.Ct. at 2267). Notably, the *Dobbs* dissenters agreed with their colleagues in the majority about the absence of a constitutional right to abortion in 1868. *See id.* at 2323 (“The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.”). This datapoint from *Dobbs* suggests that critics of constitutional originalism like Harvard’s Adrian Vermeule have overstated originalism’s vulnerability to hijacking by “impishly subversive” theories of “living originalism” like that advanced by Yale’s Jack Balkin. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 98 (2022) (asserting that the “‘convergence’ of living constitutionalism and originalism, rightly identified as such by Balkin and others, is like the convergence of a predator and its prey”). Neither was Balkin’s originalist argument for abortion taken seriously enough by any of the Justices in dissent to merit a mention.

35. Appendix A contains “statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868.” 142 S.Ct. at 2285–96. Appendix B adds “statutes criminalizing abortion at all stages in each of the Territories that became States and in the District of Columbia.” *Id.* at 2296–300.

36. *Id.* at 2323 (joint dissent), quoting *id.* at 2252–53 (majority opinion).

constitutional right to abortion over the full first century of the Fourteenth Amendment's operation—right up until the year before *Roe* when Justice Brennan planted the seed in *Eisenstadt v. Baird*.³⁷

Glucksberg is certainly *more* consistent with the original law of the Fourteenth Amendment than *Roe* and *Casey*. But even on the reasonable assumption that constitutional originalism sometimes authorizes a Justice to rely on *stare decisis* in continuing to apply erroneous precedents, constitutional originalism lacks the resources on its own to dictate just how closely toward the original law to return the doctrine when reversing erroneous precedent. Understood as a criterion of correctness rather than a procedure for decisionmaking, originalism itself cannot generate a rule for deciding among various incorrect options. Rather, the Court's reversal of *Roe* and *Casey* in favor of the *Glucksberg* framework reflected prudential judgment in adjusting a variety of sources of constitutional law by reference

37. 142 S.Ct. at 2248 & n.23. Alito's summary of this history is worth considering in full for what it reveals both about the true state of the history and about the falsity of the dissent's characterization:

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

Id. at 2248–49.

to constitutional tradition.³⁸ The need for this kind of judgment is one way in which *Dobbs* exemplifies the “distinction between the activities of (i) ascertaining the best understanding of the Constitution as law, and (ii) rendering judgment in a case according to all applicable law.”³⁹

Unless original-law originalism requires maximal displacement of doctrine every time the Court confronts disharmony between existing doctrine and the best understanding of the law of the Constitution, judicial implementations of substantive constitutional law as understood by reference to original-law originalism will always be informed by prudential considerations of a similar sort as those seen in *Dobbs*. This raises the question of how to evaluate that kind of judicial selectivity. In my view, this kind of evaluation of judicial opinions issued by members of the Supreme Court of the United States can profitably be undertaken by reference to the virtues of justice and prudence. Having already considered certain aspects of justice, I now turn to consideration of the various opinions in *Dobbs* by reference to prudence.

38. See Marc O. DeGirolami, *Traditionalism Rising*, 23 J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (identifying Justice Alito’s opinion for the Court in *Dobbs* as evidence that “[c]onstitutional traditionalism is rising”). For additional examples of Alito’s constitutional traditionalism, see *Town of Greece v. Galloway*, 572 U.S. 565, 599–603 (2014) (Alito, J., concurring) (engaging in traditionalist interpretation); *United States v. Alvarez*, 567 U.S. 709, 741–42 (2012) (Alito, J., dissenting) (same); *Pleasant Grove City v. Summum*, 555 U.S. 460, 471–72 (2009) (same).

39. Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403, 455 (2022). Because *Dobbs* also involved the more particular question of whether to overrule erroneous precedents, the decision “provides a textbook illustration of the difference between (i) answering a question of what the Constitution, correctly understood, provides; and (ii) deciding how to rule in the face of an inconsistency between a correct understanding of the Constitution, on the one hand, and decades-old decisions interpreting the Constitution incorrectly, on the other.” The majority’s understanding of the answer to question (i) informed but did not itself determine its answer to question (ii).

III. THE PRUDENTIAL OPTION FOR REALITY OVER RESTRAINT IN
DOBBS

The perspective supplied by a focus on the virtue of prudence is helpful for assessing Supreme Court opinions like *Dobbs*. Questions presented to the Court are filtered in a way that tends to yield for Supreme Court resolution only those federal-law questions that are both significant and unsettled. Served up in petitions for certiorari, the parties and the Court isolate and extract specific questions out of the cases in which they are embedded—cases shaped by justiciability, procedural, and remedial doctrines.⁴⁰ This setting calls the particularity of prudential judgment into action. Prudence is about right reason in action. It is the intellectual and moral virtue that “applies universal principles to the particular conclusions of practical matters.”⁴¹ “[I]t belongs to the ruling of prudence to decide in what manner and by what means man shall obtain the mean of reason in his deeds.”⁴² The virtue of “prudence, or practical wisdom, [is] the bridge between the moral and intellectual virtues, which brings the power of moral reasoning to its full and proper development.”⁴³ Prudence is concerned with the concrete and contingent, particular decisions and actions, means rather than ends.⁴⁴ “It is exclusively the business of prudence ‘to form a right judgment concerning individual acts, exactly as they are done here and now.’”⁴⁵

40. See, e.g., Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 J. CONST. L. 1, 16–19 (2016) (describing agenda-setting mechanisms available to the Supreme Court).

41. AQUINAS, *supra* note 18, at II-II, Q. 47 art. 6.

42. *Id.* at Q. 47 art. 7.

43. J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S VIRTUE ETHICS 43 (2017).

44. See JOSEF PIEPER, FOUR CARDINAL VIRTUES 32–33 (1990) (“It is not the purpose or the business of the virtue of prudence to discover the goals, or rather the goal, of life, and to determine the fundamental inclinations of the human being. Rather, the purpose of prudence is to determine the proper roads to that goal and the suitable outlet in the here and now for those fundamental inclinations.”).

45. *Id.* at 28.

It is a common misunderstanding to equate prudence with caution or incrementalism.⁴⁶ Caution in relation to which dangers? Incrementalism with respect toward movements in which direction? As previously noted, whether one opinion is narrower or more restrained than another depends on what is being compared. Measured by the distance in which *Dobbs* moved substantive due process doctrine from the Court's substantive due process precedents going in, for instance, Alito's opinion for the Court is broader than Roberts's and the dissenters'. The same opinion, though, is narrower when measured against the original law of the Fourteenth Amendment as understood by Justice Thomas.

In contrast with Roberts's appeal to restraint, we can identify reality-based decisiveness as the defining feature of Alito's judicial prudence in *Dobbs*. For those who viewed *Roe* as a landmark, *Dobbs*'s demolition charge was a blockbuster.⁴⁷ Alito did not allow restraint to divert the razing of *Roe* and *Casey* in *Dobbs*. Responding to Roberts's reliance on restraint, Alito called on the Chief Justice "to face up to the real issue without further delay."⁴⁸ Roberts stood alone in trying to straddle the divide between the majority and dissenting positions by saving more definitive doctrinal determinations for another day. But the lawyers for the parties on both sides urged the Court "either to reaffirm or overrule *Roe* and *Casey*."⁴⁹

46. Cf. JEAN-PIERRE TORRELL, O.P., *AQUINAS'S SUMMA: BACKGROUND, STRUCTURE, & RECEPTION*, trans. Benedict M. Guevin, O.S.B., 44 (Catholic University of America Press 2005) ("Current usage considers prudence to be a timorous attitude and rather negative. But in the *Summa*, prudence is the virtue of choice and decision, of personal responsibility, of risks consciously taken. It belongs to prudence to bring to conclusion a course of action in a specific, unique, and unrepeatable situation. There is no room for hesitation here").

47. See Marc O. DeGirolami & Kevin C. Walsh, *A Less Corrupt Term: 2016-2017 Supreme Court Roundup*, FIRST THINGS 39 (October 2017), <https://www.firstthings.com/article/2017/10/a-less-corrupt-term> [<https://perma.cc/92CA-BN3U>] ("[A] blockbuster is not just a TV and film sensation. It is also—and originally—a bomb powerful enough to destroy a neighborhood block. Blockbusters wipe out the existing habitations of civilization so that new structures can replace them.").

48. 142 S.Ct. at 2283.

49. *Id.* at 2281; see also *id.* at 2242–43.

And the dissenting Justices agreed in insisting on a choice between these options, repeating some version of the word “reaffirm” several times in their joint opinion.⁵⁰

Although his call for restraint attracted none but himself, Roberts nevertheless persisted down that path, restrained neither by the perceptions of his colleagues nor the arguments of the parties. Alito, by contrast, maintained a majority for overruling. Addressing Roberts’s “reasonable opportunity to choose [abortion]” on the substance, Alito noted that the lawyers for the law’s challengers termed Roberts’s proposed approach “completely unworkable,” and “less principled and less workable than viability.”⁵¹ He added that Roberts’s concurrence had “not identified any of the more than 130 *amicus* briefs filed in this case that advocated its approach. Roberts’s concurrence, Alito concluded, would thus do exactly what it criticizes *Roe* for doing: pulling ‘out of thin air’ a test that ‘[n]o party or *amicus* asked the Court to adopt.’”⁵²

The law of a particular jurisdiction, such as the law of the United States, has a certain internal organization and unity of its own. Justice Alito understood in *Dobbs* that he could administer justice only through fidelity both to his role as a federal judge on a multimember appellate court, and also to his best understanding of the demands of federal law as shaped by his predecessors and shapeable by his past, present, and future judicial colleagues. This role fidelity beckoned him to submerge his outlook as an individual Justice into a shared understanding that allowed him and his colleagues to form a majority and to coalesce around an opinion for the Court. In answering to those aspects of his practical reasoning and grasp of governing law that would open the way to a working majority in *Dobbs*, Justice Alito also came more fully into his own as a prudent jurist.

In St. Thomas Aquinas’s account of the virtues, “[t]he integral parts of a principal thing really are its components—they are the

50. See, e.g., *id.* at 2317, 2321, 2322, 2327, 2333, and 2347 (joint dissent).

51. *Id.* at 2281 (majority opinion).

52. *Id.*, quoting 142 S.Ct. at 2311 (Roberts, C.J., concurring).

distinct elements that must concur for its perfection or completion. In this sense the wall, roof, and foundations are parts of a house.”⁵³ St. Thomas identifies eight integral parts of prudence: memory (*memoria*); understanding or intelligence (*intelligentia*); docility or teachableness (*docilitas*); shrewdness (*solertia*); reason (*ratio*); foresight (*providentia*); circumspection (*circumspectio*); and caution (*cautio*).⁵⁴ These integral parts of prudence provide criteria by which we can assess Justices’ use of the relevant legal materials.

All eight integral parts of prudence work together in deliberation about what is to be done, but a particular contribution that *memoria*, *docilitas*, and *solertia* all make is in their assessment of “what is ‘already’ real, upon things past and present, things and situations which are ‘just so and no different,’ and which in their actuality bear the seal of a certain necessariness.”⁵⁵ This is to say that these integral parts of prudence are both present-oriented and backward looking for a judge in just the right way; they inform judicial assessment not only of the present facts but also of the past precedents that must be considered in evaluating the situation.⁵⁶

53. BUDZISZEWSKI, *supra* note 43, at 6.

54. AQUINAS, *supra* note 18, at II-II Q. 49 arts.1–8.

55. PIEPER, *supra* note 44, at 17.

56. The remaining five integral parts, understanding (*intelligentia*), reason (*ratio*), foresight (*providentia*), circumspection (*circumspectio*), and caution (*cautio*) are more present-oriented while making use of insights from past impressions, present considerations, and probabilistic considerations about the future. Informed jurists can make their own comparative assessments of the Alito and Roberts opinions by reference to these parts of prudence. Given the posture of the case and our corrupted constitutional culture, it is understandable that the majority did not address the most important legal reality whose recognition is required for just laws regulating abortion: the Fourteenth Amendment personhood of the unborn. The Court’s overruling of *Roe* and *Casey* countered significant constitutional corruption. Yet the constitutional corpus juris is still distended. Across the board of Fourteenth Amendment case law more generally, one might reasonably believe that constitutional law is even more corrupt in 2022 (*Dobbs*) than in 1992 (*Casey*) or 1973 (*Roe*). In a less corrupt constitutional culture, the hallmark of a just and prudent Supreme Court opinion in a future case about abortion law should be reality-based deference rather than reality-based decisiveness. In legal reality, pre-natal human persons are persons under the Fourteenth Amendment. In an appropriate

For St. Thomas, “true-to-being memory” is “the first prerequisite for the perfection of prudence; and indeed this factor is the most imperiled of all.”⁵⁷ Imperiled memory can be a peculiar problem at the Supreme Court of the United States because judicial supremacy can operate to falsify the law of the Constitution. A specific danger for *memoria* is that “at the deepest root of the spiritual-ethical process, . . . the truth of real things will be falsified by the assent or negation of the will.”⁵⁸ Insofar as a precedential interpretation of the Constitution is the product of simple judicial will—what Justice White called in his *Roe* dissent an “exercise of raw judicial power”⁵⁹—then taking it as a representation of the reality of the law of the Constitution is a danger to *memoria* in the exercise of judicial prudence.

Chief Justice Roberts appears to have succumbed to this danger during the pendency of the *Dobbs* decision or some time before. The litigation over Texas’s Heartbeat Act, which prohibited abortion after approximately six weeks’ gestational age, may have been a turning point. While *Dobbs* was pending, the Supreme Court’s consideration of jurisdictional, procedural, and remedial questions related to this Act resulted in two argued cases, *United States v. Texas* (later dismissed as improvidently granted) and *Whole Woman’s Health v. Jackson* (a fractured decision that left Texas’s Heartbeat Act

future case calling for the evaluation of a state or federal law that protects prenatal persons as persons, the just and prudent stance of the Supreme Court (or any other court evaluating such a law under the Fourteenth Amendment) should be to defer to the enacting government’s recognition of the reality of Fourteenth Amendment personhood. For arguments and evidence relating to prenatal Fourteenth Amendment personhood, see, e.g., John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J. L. & PUB. POL’Y 927 (2022); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB. POL’Y 539 (2017); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 14 (2012).

57. PIEPER, *supra* note 44, at 15 (, citing AQUINAS, *supra* note 18, at II-II Q. 49 art. 1).

58. *Id.*

59. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

untouched).⁶⁰ In his solo opinion in *Whole Woman's Health*, Roberts asserted that "[t]he clear purpose and actual effect of S.B. 8 [i.e., Texas's Heartbeat Act] has been to nullify this Court's rulings."⁶¹ Issued on December 10, 2021, this opinion came down just nine days after the Court heard oral argument in *Dobbs*. Given that Roberts believed that "the role of the Supreme Court in our constitutional system is at stake" if a state like Texas could escape judicial censure of a law at odds with then-governing precedent,⁶² it is easy to understand why Roberts searched for some ground in *Dobbs* of keeping up appearances. For Alito and the other Justices in the later *Dobbs* majority, by contrast, the outward appearances of *Roe* and *Casey* were already on their way to being brought back closer to the reality of the Fourteenth Amendment's requirements.⁶³

The Chief Justice's perception that a state legislature's enactment of a law inconsistent with existing Supreme Court doctrine amounts to nullification of that doctrine presupposes a conventional form of judicial supremacy. This conventional judicial supremacy is "the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case."⁶⁴ Although conventional, judicial supremacy of this sort should be more controversial. I have previously contrasted this conventional understanding with judicial departmentalism, a form of bounded judicial supremacy in which "the Constitution means *in the judicial*

60. *United States v. Texas*, 142 S.Ct. 14 (Mem.) (2021); *Whole Woman's Health v. Jackson*, 142 S.Ct. 522 (2021).

61. *Whole Woman's Health*, 142 S.Ct. at 545 (Roberts, C.J., dissenting).

62. *Id.*

63. It is very likely that these Justices had already voted in conference to overrule *Roe* and *Casey* completely. Press accounts informed by leaks later reported this, but I will not cite those nor otherwise refer to the shamefully leaked draft opinion for the Court that accompanied these press reports. There is no reason to abet an already sad state of affairs in which *curiositas* can kill the Court.

64. See Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WILLIAM & MARY L. REV. 1713, 1715 (2017) (describing "judicial supremacy" as "the conventional designation for the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case").

department what the Supreme Court says it means in deciding a case.”⁶⁵ On this understanding, state and federal officials can act on different understandings of the Constitution than the Supreme Court’s without infidelity to the Constitution itself. These officials are subject to being brought into federal court, though, where the law of judgments, the law of remedies, and the law of precedent all operate to stabilize certain judicial resolutions.

From a judicial departmentalist point of view, entrenched opposition to *Roe v. Wade* extending over almost half a century need not be understood as attempted nullification. CLE by the *sensus fidelium* is more like it. In a system of constitutionalism based on popular sovereignty, the sustained efforts of citizens to provoke continued court confrontations can sometimes be best understood as representing the outlook of the constitutionally faithful that the Court can eventually be brought to see the error of its ways and change course.

Chief Justice Roberts’s judicial supremacy prevented him from seeing things this way. The *Dobbs* dissenters, too. The joint dissent asserted that “[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed.”⁶⁶ A better alternative, of course, would have been for one or more of the Justices to have changed his or her mind while on the Court.⁶⁷

The back-and-forth of judicial deliberation over cases within a Term, and the serial progression of cases over many Terms, can inform the habitual disposition of *docilitas* or teachableness. But *docilitas* does not run deep at One First Street, NE. For this kind of teachableness to be activated, there must be a kind of open-mindedness, an “ability to take advice, sprung not from any vague ‘modesty,’

65. *Id.*

66. 142 S.Ct. at 2320 (joint dissent).

67. Cf. e.g., *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985) (Justice Blackmun authoring an opinion for the Court overruling an opinion he had joined nine years prior). An example of multiple judges changing course while on the Court can be seen in the shift from *Minersville Sch. Dist. v. Gabis*, 310 U.S. 586 (1940), to *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

but simply from the desire for real understanding (which, however, necessarily includes genuine humility)."⁶⁸ When the members of the Supreme Court are epistemically closed off to the influence of the *sensus fidelium* by judicial supremacy, however, the only way that the Court can change its collective mind is through personnel change.

Even when there has been personnel change, individual Justices may for a variety of reasons balk at rapid doctrinal change. Chief Justice Roberts gestured in this direction when he contended that "[t]he Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases."⁶⁹ Considering how to respond to the invocation of bringing about a "serious jolt" is where *solertia* can come in. *Solertia*, or shrewdness, is the "virtue of 'objectivity in unexpected situations,'" a virtue that allows one confronted with a sudden event to "swiftly, but with open eyes and clear-sighted vision, decide for the good, avoiding the pitfalls of injustice, cowardice, and intemperance."⁷⁰

The temporal dimension of *solertia* is swifter than that of *docilitas*, but both are integral parts of prudence. The Court granted certiorari in *Dobbs* after an extended period of deliberation and limited the grant to a single question. The internal agenda-setting considerations that guided these actions, though, were upended by the emergence of Texas's Heartbeat Act and its insertion into the Court's agenda. By decision time in *Dobbs*, there was no prudent way to put off for another day direct confrontation with the full extent of the errors of the *Roe/Casey* regime. To their credit, the *Dobbs* majority and the *Dobbs* dissenters both recognized this and acted accordingly. The Chief Justice's overreliance on tactical shrewdness left him alone and outflanked on both sides.

68. PIEPER, *supra* note 44, at 16.

69. 142 S.Ct. at 2316 (Roberts, C.J., concurring).

70. PIEPER, *supra* note 44, at 16.

CONCLUSION

In overruling *Roe* and *Casey*, Justice Alito's opinion for the Court in *Dobbs* overcame the greatest error of his predecessor, Associate Justice Harry Blackmun. He did so by answering the arguments of Chief Justice John Roberts with doctrine declared by Roberts's predecessor, Chief Justice William Rehnquist. Like Blackmun, Alito operated for a time in the shadow of the Chief Justice. Blackmun was dubbed Chief Justice Burger's "Minnesota Twin" during his appointment process.⁷¹ Just as those Minnesota Twins began by voting more closely together and eventually grew more distant, Alito and Roberts also began by voting together more often before eventually growing more distant.⁷² Blackmun called himself "Old Number Three" because he was the President's third nominee for the seat he occupied on the Court.⁷³ Alito, too, was the President's third nominee for the seat he occupied.⁷⁴ But the parallels end there. Blackmun's opinion in *Roe* was the product of an Associate Justice new to the Court and still under the influence of a Chief Justice he had been closely linked with through his appointment and in his early years on the bench. The decision was imprudent and led to great evils. Alito's opinion in *Dobbs*, by contrast, is the product of an Associate Justice with a juridical outlook matured by years of experience in the role and standing apart from the influence of a Chief Justice with whom he had been linked earlier on. It is a prudent decision. Whether it leads to more good depends less now on

71. See Laura Kalman, "Becoming Justice Blackmun": Deconstructing Harry, N.Y. TIMES, May 8, 2005, <https://www.nytimes.com/2005/05/08/books/review/becoming-justice-blackmun-deconstructing-harry.html> [https://perma.cc/2DKP-7JQB].

72. See Adam Liptak, *Once Allies, Roberts and Alito Have Taken Divergent Paths*, N.Y. TIMES, May 4, 2022, <https://www.nytimes.com/2022/05/04/us/politics/roberts-alito-abortion-roe-v-wade.html> [https://perma.cc/STC2-UP5C].

73. Kalman, *supra* note 71.

74. The first two were John Roberts, who was initially nominated for the vacancy created by Justice O'Connor's resignation before being nominated for Chief Justice, and Harriet Miers.

the federal judiciary than on the use made of the lawmaking authority it returns to those who may rightfully exercise it.