

## REASON AND FIAT IN THE JURISPRUDENCE OF JUSTICE ALITO

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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”<sup>1</sup> and his pragmatic justification of originalism as a means of constraining judicial discretion,<sup>2</sup> 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 best<sup>3</sup> organizing antinomy around which to structure a discussion of Justice Alito’s jurisprudence is one advanced by the legal theorist Lon Fuller<sup>4</sup> in a famous essay—or an essay that ought to be more famous than it is—titled “Reason and Fiat in Case Law.”<sup>5</sup> 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

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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.

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5. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

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.*;<sup>6</sup> his lone partial dissent in the census case, *Department of Commerce v. New York*,<sup>7</sup> 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*,<sup>8</sup> the funeral picketing case, and *United States v. Stevens*,<sup>9</sup> 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*<sup>10</sup> from 1949, and indeed his later masterwork of 1964, *The Morality of Law*,<sup>11</sup> which argued that law has an intrinsic integrity, an internal morality if you like, that must be respected in

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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.<sup>12</sup> "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.<sup>13</sup>

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:

[I]f the question were one of imprisonment, should the sentence be set at seven days, or eight days, or perhaps two weeks, or

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12. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377 (1946).

13. *Id.* at 378.

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.<sup>14</sup>

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.<sup>15</sup>

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

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14. *Id.* at 378–80.

15. *Id.* at 380.

action.”<sup>16</sup> 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.<sup>17</sup>

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

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16. *Id.*

17. *Id.* at 394–95.

measured.”<sup>18</sup> 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

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18. *Id.* a 379.

the Court in *Christopher v. SmithKline Beecham Corp.*<sup>19</sup> (for short, “*SmithKline*”). Although devoted to a seemingly dry issue of administrative procedure—whether courts should defer under the earlier *Auer v. Robbins*<sup>20</sup> 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*,<sup>21</sup> 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.<sup>22</sup> 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.”<sup>23</sup> As to the second, the agency’s interpretation lacked “the hallmarks of thorough consideration” because it had neither gone through the standard notice-and-comment process for binding

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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).



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*<sup>24</sup> decision, which announced—with no citation to positive law of any kind—that agencies are bound by their own legislative rules.<sup>25</sup> 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

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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,<sup>26</sup> 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.<sup>27</sup> 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,<sup>28</sup> 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.<sup>29</sup> As examples, he offered battlefield command; the negotiation of

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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;<sup>30</sup> 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 programs<sup>31</sup> and licensing of broadcast spectrum. Economic allocation, Fuller thought, is generally not susceptible of being conducted through adjudicative forms,<sup>32</sup> 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.<sup>33</sup>

Today, similar concerns animate reviewability doctrine, under the APA’s exception to judicial review for issues that are

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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.”<sup>34</sup> 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.”<sup>35</sup> As there is almost always *some* law to apply, however—both the APA’s prohibition on arbitrary and capricious agency action,<sup>36</sup> 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”<sup>37</sup>—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.”<sup>38</sup> 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*.<sup>39</sup> 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.<sup>40</sup>

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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.”<sup>41</sup> 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

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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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup>

It is easy to see Justice Alito’s lone dissent in *Snyder v. Phelps*<sup>45</sup> 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

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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 & IUSTITUM (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."<sup>46</sup> 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."<sup>47</sup> 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."<sup>48</sup>

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*,<sup>49</sup> the "animal crush videos" case. The Court invalidated the statute on overbreadth grounds, but for Justice

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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.”<sup>50</sup> Analogizing the videos to child pornography, whose prohibition the Court had previously upheld,<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup> 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.

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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.<sup>54</sup>

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

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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.