

SAMUEL ALITO'S CONSERVATISM—BURKEAN AND AMERICAN

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"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.

"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,

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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/oa18576/40-443-12012045-0a18576-001-2017.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>].

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).

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 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 Senators, 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

"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

⁵ William F. Buckley, Jr., *Notes Toward an Empirical Definition of Conservatism*, in *WHAT IS CONSERVATISM?* 212 (Frank S. Meyer Ed., 1965).

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.

¹¹ *Id.* at 55.

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.

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

¹² *Id.*

¹³ *Id.*

¹⁴ 377 U.S. 533 (1964).

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.

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

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 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:

¹⁹ *Id.*

²⁰ *Id.* at 111–12.

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).

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.”).

[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

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, 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

²⁷ *Id.* at 381.

²⁸ Alito OLC Application Statement, *supra* note 1, at 1.

²⁹ Kristol, *supra* note 16.

³⁰ *Id.*

³¹ JOHN B. JUDIS, WILLIAM F. BUCKLEY, JR.: PATRON SAINT OF THE CONSERVATIVES 14 (1988).

³² CONTINETTI, *supra* note 4, at 98 (2022).

³³ *Id.* at 97–98.

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 lampooned 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, 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

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.").

³⁷ *Id.*

³⁸ OLC Application Statement, *supra* note 1, at 1.

American Spectator in 2014. “It’s sad. The people living in the city were the ones who were plagued by crime[.]”³⁹

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 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-

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>].

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.

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.

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 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.

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

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).

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.

⁵⁰ George F. Will, *The Roots of Watergate*, WASH. POST, Dec. 27, 1974, at A17.

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 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

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).

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.’”).

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, 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.

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

⁶² Walther, *supra* note 39.

⁶³ *Id.*

⁶⁴ OLC Application Statement, *supra* note 1.

⁶⁵ *Id.*

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—“[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 highly unusual free speech issue because they are so closely linked with violent criminal

⁶⁶ Confirmation Hearing, *supra* note 7, at 504.

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, at <https://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/Y5LM-SX8D>].

⁷⁰ 559 U.S. 460 (2010).

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 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,

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 judgement).

⁷⁵ 562 U.S. 443 (2011).

⁷⁶ *Id.* at 463 (Alito, J., dissenting).

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).

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 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.

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

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.*

⁸³ *Id.* (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790)).

⁸⁴ 565 U.S. 400, 418 (2012) (Alito, J., concurring in judgment).

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' 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 of his First Amendment opinions. "[O]ur legal system does not exalt reason above everything else," he has warned elsewhere.⁸⁹

⁸⁵ The Federalist No. 10 (James Madison).

⁸⁶ Walther, *supra* note 39.

⁸⁷ WILLIAM F. BUCKLEY, JR., A HYMNAL: THE CONTROVERSIAL ARTS 215 (1978).

⁸⁸ *Id.* at 216.

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).

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

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*:

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)).

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).

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

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 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

⁹⁵ Confirmation Hearing, *supra* note 7, at 318–19.

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).

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.).

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 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 community's actual intentions as limitations on the judge's own theoretical inquiry.

* * *

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.

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.