

The Jurisprudence of Justice Samuel Alito

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ABSTRACT

Justice Samuel Alito has sat on the judicial bench for nearly 30 years and has authored more than 250 Supreme Court opinions, nearly 40% of those for a majority of the Court.¹ But his jurisprudence has yet to be systematically described. Although superficial accounts have been offered, they diverge widely. To some commentators, for example, Justice Alito is a methodological pluralist or “newer textualist,” though to others he is an originalist of the same or similar stripe as Justice Antonin Scalia. Yet Justice Alito’s jurisprudence cannot so neatly be identified with these or other competing descriptions.

This Article is the first systematic account in any legal publication of Justice Alito’s jurisprudence. It analyzes nearly three dozen of Justice Alito’s opinions to demonstrate that three themes characterize his jurisprudence: (1) a fact-oriented approach in which fact is distinct from doctrine; (2) an implementation of “inclusive originalism,” under which a judge may evaluate precedent, policy, or practice, but only if the original meaning of the constitutional text incorporates such modalities; and (3) a strong presumption in favor of precedent and historical practice.

Justice Alito’s jurisprudence is largely consistent with Burkean Conservatism. The three themes of Justice Alito’s jurisprudence follow the two features of Edmund Burke’s philosophical method of approaching political questions. First, Justice Alito’s distinction between fact and doctrine acknowledges both the Burkean rejection of abstract theory and the necessity of placing factual circumstances before principle and theory. Second, Justice Alito’s deference to precedent and historical practice squares with the Burkean tradition of relying on tradition and prescriptive wisdom.

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¹ See *The Supreme Court Database*, WASH. U. L., <http://scdb.wustl.edu/analysis.php> [<https://perma.cc/4RJG-KPGU>].

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INTRODUCTION

“This case requires us to apply the Fourth Amendment’s prohibition of unreasonable searches and seizures to a 21st-century surveillance technique Ironically, the Court has chosen to decide this case based on 18th-century tort law.”² So begins Justice Samuel Alito’s concurrence in *United States v. Jones*,³ distinct from the majority in three respects. First, although the majority framed the case as presenting an interpretive issue, Justice Alito approached the case from the factual premise that the government had used modern technology to track an individual’s vehicle.⁴ To the majority, interpretive theory preceded fact. Yet to Justice Alito, fact preceded interpretive theory. Second, although Justice Alito acknowledged the relevant constitutional text and its original meaning, that meaning had little, if

2 *United States v. Jones*, 565 U.S. 400, 418 (2012) (Alito, J., concurring).

3 565 U.S. 400 (2012).

4 *See id.* at 418.

any, application to the distinctly modern facts of the case. Third, because of the inapplicability of the constitutional text's original meaning, Justice Alito, unlike the majority, counseled deference to precedent. These three distinctions provide a crucial understanding of the jurisprudence of Justice Alito, and how it differs from the jurisprudence of both his conservative and liberal colleagues.

Despite Justice Alito's 28 years on the bench—15 on the Court of Appeals for the Third Circuit and 13 on the Supreme Court—his jurisprudence has yet to be systematically described. Although superficial accounts have been offered, they continue to widely diverge. Some argue that Justice Alito is a methodological pluralist⁵ or “newer textualist.”⁶ Others argue that he is an originalist of the same or similar stripe as Justice Antonin Scalia.⁷ Others argue that Justice Alito is a conservative legal realist.⁸ As will be seen, Justice Alito's jurisprudence cannot be so neatly identified with any of these competing methods.⁹

What existing accounts appear to agree on, however, is that Justice Alito is the most conservative Justice on the Supreme Court. To some onlookers, for example, there is “no [Justice] with a more level and solid swing than Justice Samuel Alito.”¹⁰ To others perhaps less charitable, one need only “look at the Republican Party platform” to “know his judicial philosophy.”¹¹ Similarly, some have described Jus-

5 Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 *YALE L.J.F.* 164, 166–67 (2016) (describing Justice Alito as a methodological pluralist because “he uses whatever modalities of interpretation—text, structure, precedent, original meaning, tradition, consequences, and ethos—seem to him most appropriate in the case under consideration”).

6 Elliott M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 *HARV. J.L. & PUB. POL'Y* 983, 984 (2007) (arguing that, to Justice Alito, “the text of the statute still reigns supreme, but legislative history can be used to establish the context in which the statute should be read”).

7 See, e.g., Bryan A. Garner, *Bryan Garner's Tribute to His Friend and Co-author Antonin Scalia*, A.B.A. J. (Apr. 2016), http://www.abajournal.com/magazine/article/bryan_garners_tribute_to_his_friend_and_co_author_antonin_scalia [<https://perma.cc/HH3J-W5ZC>] (describing Justice Alito as a “fellow originalist” of Justice Scalia).

8 See William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 *DUKE J. CONST. L. & PUB. POL'Y* 1, 6 (2011).

9 See *infra* Section I.B.

10 Michael Stokes Paulsen, *2014 Supreme Court Roundup: An Explanation of the Court's Affirmations of Our Right Not to Go Along*, *FIRST THINGS* (Nov. 2014), <http://www.firstthings.com/article/2014/11/2014-supreme-court-roundup> [<https://perma.cc/BHR9-ATQ9>].

11 Stephanie Mencimer, *Conservatives Say They Want Another Antonin Scalia. They Really Want Another Sam Alito.*, *MOTHER JONES* (May/June 2016), <http://www.motherjones.com/politics/2016/06/samuel-alito-profile-antonin-scalia-supreme-court-appointment> [<https://>

tice Alito's jurisprudence as a protection of "tradition-oriented minorities who used to be majorities in the real or imagined past"¹² or a reflection of populism.¹³ But as with the various accounts of Justice Alito's method of constitutional and statutory interpretation, descriptions of Alito's jurisprudence as a mere reflection of political conservatism—no more, no less—likewise miss the mark.

Justice Alito's jurisprudence is neither as obvious nor determinate as both his critics and supporters have suggested. Criticisms of Justice Alito as being nothing more than a conservative legal realist may result from the stale analysis of judicial behavior associated with Jeffrey Segal and Harold Spaeth, which explains the Justices' voting patterns as being nothing more than a product of their political policy preferences.¹⁴ But proceeding from a different perspective—Burkean Conservatism—we think Justice Alito's jurisprudence can be more readily identified.

We use the phrase Burkean Conservatism to capture the two salient themes of the philosophical method that Edmund Burke, the 18th-century English philosopher and politician, used to approach political questions. First, preserving a political system requires a realistic appraisal of the limited nature of human rationality and knowledge. The limits of human rationality and knowledge teach that practical and fact-specific, rather than sophisticated and *a priori*, reasoning should be employed.¹⁵ Because abstract theory must be rejected,¹⁶ fact must

perma.cc/9YPL-VXW4]; see also Brienne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 *YALE L.J.F.* 362 (2017) (describing Justice Alito's votes as "almost always in line with what one would predict based on the policy preferences of the party of the President that appointed him, i.e., Republican President George W. Bush").

¹² Siegel, *supra* note 5, at 169.

¹³ See William D. Araiza, *Samuel Alito: Populist*, 103 *CORNELL L. REV. ONLINE* 101, 111 (2017) (explaining that "[i]f one equates 'populism' with an unlearned but common-sense folk wisdom, then it becomes comprehensible to understand [Justice Alito's] arguments" as populist).

¹⁴ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) ("[T]he Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.").

¹⁵ See Letter from Edmund Burke, *Reflections on the Revolution in France*, and on the Proceedings in Certain Societies in London Relative to That Event (1791), as reprinted in 2 *THE WORKS OF THE RIGHT HON. EDMUND BURKE* 277, 333–34, 359 (Henry G. Bohn ed., 5th ed., 1855) [hereinafter *Burke, Reflections*] ("We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.").

¹⁶ Although "abstract ideas" are not "wholly out of any question," for example, "[a] statesman, never losing sight of principles, is to be guided by circumstances." 6 *EDMUND BURKE, Speech on a Motion for Leave to Bring in a Bill to Repeal and Alter Certain Acts Representing*

precede doctrine.¹⁷ In short, only after “actual circumstances and potential consequences” are considered should “principles and theories . . . be applied.”¹⁸

Second, social reform must come incrementally because “the past has an authority of its own” that “is inherent and direct rather than derivative.”¹⁹ Society ought to lean on the prescriptive wisdom that is both accumulated over generations and inherent in longstanding traditions and institutions.²⁰ It is “analogical precedent, authority, and example” that is to guide reform.²¹ In Burke’s words, because change is needed and indeed inevitable, “[p]recedents merely as such cannot make Law.”²² Though the past is presumptively valid, it must be “patch[ed] and polish[ed],” clothed “with new substance,” and fit “recent experience and need into the pattern of the wisdom of our ancestors.”²³ So it is that the Burkean may look to reliable founding principles to displace the authority of the past so long as the disruption of the past is insubstantial.²⁴

This Article proceeds in two parts. In Part I, we discuss more than 30 of Justice Alito’s opinions—majority, concurring, and dissenting—to argue that three themes characterize his jurisprudence. The first is a fact-oriented jurisprudence in which fact is distinct from doctrine. To Justice Alito, facts not only shape the issues before the Supreme Court in a given case, they also provide the doctrine necessary to resolve those issues. An important corollary is Justice Alito’s supplementation of traditional interpretive modalities—precedent, policy,

Religious Opinions (May 11, 1792), in *THE WORKS OF THE RIGHT HON. EDMUND BURKE* 113, 113–14 (Henry G. Bohn ed., 5th ed., 1855) [hereinafter *BURKE, Unitarian Speech*].

17 Rather than a political philosophy undergirded by universal principles, Burke believed that “political philosophy must begin with the reality of a particular society.” Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 646 (1994). The idea to Burke is to work from theories “drawn from the fact of our government.” 3 EDMUND BURKE, *An Appeal from the New to the Old Whigs, In Consequence of Some Late Discussions in Parliament Relative to the Reflections on the French Revolution* (1791), in *THE WORKS OF THE RIGHT HON. EDMUND BURKE* 1, 110 (Henry G. Bohn ed., 5th ed., 1855) [hereinafter *BURKE, Appeal*].

18 Brad Masters, *Reconciling Originalism with the Father of Conservatism: How Edmund Burke Answers the Disruption Dilemma in N.L.R.B. v. Noel Canning*, 2013 BYU L. REV. 1061, 1085.

19 Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990).

20 See Young, *supra* note 17, at 648.

21 Burke, *Reflections*, *supra* note 15, at 305.

22 FRANCIS CANAVAN, *THE POLITICAL REASON OF EDMUND BURKE* 122–23 (1960).

23 Russell Kirk, *Burke and the Philosophy of Prescription*, 14 J. HIST. IDEAS 365, 379 (1953).

24 See Masters, *supra* note 18, at 1087–88.

practice, and so on—with a large dose of practical, syllogistic reasoning, what we refer to as “plain English” reasoning.

The second theme of Justice Alito’s jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia. Under Justice Alito’s “inclusive originalism,” judges may evaluate precedent, policy, or practice, “but only to the extent that the original meaning incorporates or permits them.”²⁵ Under this aspect of Justice Alito’s jurisprudence, the constitutional text and its original meaning are dispositive when no conflict exists between them and other competing modalities. But when a conflict exists between the text and its original meaning on one side and other competing modalities on the other, a judge may consult those modalities if they are not inconsistent with the original meaning.

The third theme of Justice Alito’s jurisprudence is a presumption in favor of precedent and historical practice. Given this presumption, Justice Alito’s theory of *stare decisis* is robust, and he significantly relies on the doctrine as a method of reasoning. Although Justice Alito disfavors precedent-altering decisions, he is willing to depart from precedent if the precedent has not engendered reliance, circumstances have significantly changed, the precedent is unworkable, later decisions have undermined the precedent, or the error of the precedent is flagrant.

In Part II, we describe Justice Alito’s jurisprudence as Burkean. The three themes of Justice Alito’s jurisprudence largely follow the two features of Burke’s philosophical method of approaching political questions. First, Justice Alito’s distinction between fact and doctrine acknowledges both the Burkean rejection of abstract theory and the necessity of placing actual circumstances before principle and theory. Second, Justice Alito’s deference to precedent and historical practice squares with the Burkean reliance on tradition and prescriptive wisdom. As with Burke, so too does Justice Alito find inherent authority in longstanding traditions and institutions.

But importantly, Justice Alito’s inclusive originalism accounts for Burke’s recognition of the need for change, which is informed by the wisdom of the past and the experiences of the present. Though commentators have argued that originalism is inconsistent with Burkeanism such that an originalist like Justice Alito cannot be labeled a Burkean in the true sense,²⁶ we show in this Part how Burkeanism

²⁵ See Will Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015).

²⁶ See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 523 (1996) (“[F]rom a Burkean perspective, Burkean originalism does not seem very conservative at

provides room for one to look to reliable founding principles to alter precedent so long as that alteration is insubstantial. Furthermore, a good Burkean following tradition in the United States “must admit that the United States has a tradition of allowing the Court occasionally to upset the apple cart by appealing to the Constitution’s text or first principles.”²⁷

I. THE THREE THEMES OF JUSTICE ALITO’S JURISPRUDENCE

A. *Fact Before Doctrine*

“As the Court sees things, . . . [r]eal-world facts are irrelevant. For aficionados of pointless formalism, today’s decision is a wonder, the veritable *ne plus ultra* of the genre.”²⁸ So concludes Justice Alito’s dissent in *Mathis v. United States*,²⁹ a case about whether a sentencing court may determine whether a defendant’s conduct falls within a generic crime listed in the Armed Career Criminal Act when the underlying statute lists multiple ways of satisfying it.³⁰ The majority approached *Mathis* from a doctrinally rigid perspective, refusing to look at the facts in the record, yet Alito looked directly to them.³¹ It is Alito’s distinction between fact and doctrine—a distinction that eschews formalism and abstraction—that provides the first crucial understanding of his jurisprudence. This rejection of the theoretical in favor of the practical is at the center of Alito’s jurisprudence. In short, “[h]e is, in the strictest sense, a practical jurist.”³²

To Justice Alito, the Supreme Court’s work “is not abstract.”³³ Instead, that work “has an effect on the real world.”³⁴ Three of his opinions reflect a jurisprudence that prioritizes fact over doctrine and thereby disfavors “pure metaphysical abstraction.”³⁵

all.”); Young, *supra* note 17, at 664 (“If Edmund Burke were a judge in modern America, there is good reason to believe that he would not be an originalist.”).

²⁷ Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 686–87 (2006).

²⁸ *Mathis v. United States*, 136 S. Ct. 2243, 2271 (2016) (Alito, J., dissenting) (footnote omitted).

²⁹ 136 S. Ct. 2243 (2016).

³⁰ *Id.* at 2247–48 (majority opinion).

³¹ See *infra* notes 81–96 and accompanying text.

³² Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 4:00 PM), <https://spectator.org/sam-alito-a-civil-man/> [<https://perma.cc/D7SC-BKS7>].

³³ *Id.*

³⁴ *Id.*

³⁵ Cf. BURKE, *Appeal*, *supra* note 17, at 16 (explaining that “[p]ure metaphysical abstraction” must be separated from “moral [and] political subject[s]”).

United States v. Jones involved the constitutionality of the government's attachment and use of a global positioning ("GPS") device.³⁶ At issue was whether the attachment of a GPS device to a vehicle, and the use of the device to monitor the vehicle's location, violated the Fourth Amendment.³⁷ Because the government's attachment and use of the GPS device did not comply with the relevant warrant's time and place restrictions, the question was whether the attachment and use of the device constituted a search or seizure within the meaning of the Fourth Amendment.³⁸

Justice Scalia's majority opinion held that the government's attachment and use of the GPS device constituted a search.³⁹ Instead of resolving the case within the familiar *Katz v. United States*,⁴⁰ reasonable-expectation-of-privacy framework, Scalia approached the case from the perspective of the "meaning of the Fourth Amendment when it was adopted."⁴¹ Because that meaning was "close[ly] connect[ed] to property," the question was whether the government's physical occupation of private property constituted a trespass.⁴² And because the physical occupation constituted a trespass, a search within the Fourth Amendment's meaning had occurred.⁴³ The *Katz* framework, then, was not dispositive because the Fourth Amendment has been historically "understood to embody a particular concern for government trespass."⁴⁴

Writing separately, Justice Alito agreed that the Supreme Court has a responsibility to preserve the degree of privacy that individuals enjoyed when the Fourth Amendment was adopted.⁴⁵ By prioritizing doctrine over fact, however, Alito stressed that the majority's framing of the case resulted in needless abstraction. Alito stated that abstraction would be relevant if, similar to the facts of the case, one could imagine "a constable secret[ing] himself somewhere in a coach and remain[ing] there for a period of time in order to monitor the move-

³⁶ 565 U.S. 400, 402 (2012).

³⁷ *Id.*

³⁸ *See id.* at 402–03.

³⁹ *Id.* at 404.

⁴⁰ 389 U.S. 347 (1967); *see id.* at 361 (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

⁴¹ *Jones*, 565 U.S. at 404–05.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 406–07.

⁴⁵ *Id.* at 420 (Alito, J., concurring).

ments of the coach's owner[]."46 Indeed, "[t]he Court suggests that something like this might have occurred in 1791."⁴⁷ Yet, with perhaps uncharacteristic verve, Alito noted that "this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience."⁴⁸ Quite simply, the impossibility of "think[ing] of late-18th-century situations that are analogous to what took place in this case" rendered the majority's approach a merely abstract exercise.⁴⁹ The facts, rather than doctrine, were dispositive.

Consistent with his pragmatic jurisprudence, Justice Alito considered the practical impact of the majority's theoretical analysis, which he criticized as "highly artificial."⁵⁰ For one thing, the majority's analysis would result in several anomalies.⁵¹ The Fourth Amendment, for example, would prohibit the government from attaching a GPS device to a vehicle and using it to track that vehicle for mere minutes.⁵² Yet the government's tracking of that same vehicle with aerial assistance would escape Fourth Amendment scrutiny.⁵³ For another, the evolving law of trespass undermined the majority's theoretical approach.⁵⁴ Under that approach, it is unclear whether an individual's right to privacy turns on the law of trespass as it existed when the Fourth Amendment was adopted or as it now exists.⁵⁵ Finally, a trespass-based rule would in certain instances render an individual's lack of privacy rights an accident of geography.⁵⁶ For Alito, the correct analy-

46 *Id.*

47 *Id.* at 420 n.3.

48 *Id.*

49 *See id.* at 420.

50 *Id.* at 419.

51 *See id.* at 425.

52 *Id.*

53 *See id.* ("If the police attach a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the Fourth Amendment applies. But if the police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any Fourth Amendment constraints.").

54 *See id.* at 426–27.

55 *See id.* at 426 ("[S]uppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property." (citing RESTATEMENT (SECOND) OF TORTS § 217 cmt. e (AM. LAW. INST. 1963))).

56 *See id.* at 425–26 ("If the events at issue here had occurred in a community-property State or a State that has adopted the Uniform Marital Property Act, respondent would likely be an owner of the vehicle, and it would not matter whether the GPS was installed before or after his wife turned over the keys. [But] [i]n non-community-property States . . . the registration of

sis was to first consider the facts of “a particular case.”⁵⁷ Here, what was “really important” was not “18th-century tort law,” but the government’s use of a GPS device to track a vehicle.⁵⁸

More generally, Justice Alito criticized the majority’s approach as inconsistent with precedent and the text of the Fourth Amendment.⁵⁹ Rather than relying on an abstract property-based rule that the Supreme Court “repeatedly criticized,”⁶⁰ Alito favored a practical approach rooted in precedent: *Katz*’s reasonable-expectation-of-privacy test.⁶¹ To Alito, that test would avoid the problems identified above and properly train the Court’s analysis on the facts before it.⁶² Although Alito acknowledged some of the difficulties inherent in the *Katz* test,⁶³ he noted that the government’s conduct here impinged on society’s reasonable expectations of privacy.⁶⁴ With that conduct in mind, rather than the majority’s abstract approach, Alito agreed that the conduct constituted a search within the meaning of the Fourth Amendment.⁶⁵

Similar to *Jones*, Justice Alito’s concurrence in *Brown v. Entertainment Merchants Ass’n*⁶⁶ demonstrates a jurisprudence that elevates fact above doctrine. Alito’s concluding sentences in *Brown* are telling: “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy.”⁶⁷ These grisly scenes of the violent video games at issue in *Brown* provoked a sharp concurrence from Alito that cautioned the Supreme Court from “jump[ing] to the conclusion” that constitutional doctrine should remain frozen, like a dinosaur preserved in amber, in light of new technology.⁶⁸

the vehicle in the name of respondent’s wife would generally be regarded as presumptive evidence that she was the sole owner.” (footnotes omitted)).

⁵⁷ *See id.* at 430.

⁵⁸ *Cf. id.* at 418, 424.

⁵⁹ *Id.* at 419 (stating that the majority’s holding “strains the language of the Fourth Amendment” and “has little if any support in current Fourth Amendment case law”).

⁶⁰ *Id.* at 421.

⁶¹ *See id.* at 427.

⁶² *See id.*

⁶³ *Id.* (noting the *Katz* test’s “own difficulties” in that, for example, “[i]t involves a degree of circularity and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks” (citation omitted)).

⁶⁴ *Id.* at 430.

⁶⁵ *Id.*

⁶⁶ 564 U.S. 786 (2011).

⁶⁷ *Id.* at 818 (Alito, J., concurring).

⁶⁸ *See id.* at 806.

Brown concerned whether a state law prohibiting the rental or sale of violent video games to minors violated the First Amendment.⁶⁹ Justice Scalia, writing for the majority, concluded that it did.⁷⁰ To Scalia, the law at issue sought to “create a wholly new category of content-based regulation that is permissible only for speech directed at children.”⁷¹ Yet longstanding First Amendment doctrine prohibited that result.⁷² The majority conceded that the state’s argument would have greater constitutional traction if a longstanding tradition of restricting children’s exposure to violence existed in the United States.⁷³ Notwithstanding Justice Clarence Thomas’s claims to the contrary, the majority found no such tradition, instead pointing to well-known children’s fairy tales and adolescent reading lists that depicted violence, including *Grimm’s Fairy Tales* and Dante Alighieri’s *Inferno*.⁷⁴

Justice Alito’s concurring opinion sidestepped the First Amendment issue entirely.⁷⁵ His fact-forward opinion charged the majority with failing to “proceed with caution” given the “new and rapidly evolving technology” at issue. Said Alito:

I disagree . . . with the approach taken in the Court’s opinion. In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. . . . The opinion of the Court exhibits none of this caution.⁷⁶

To Justice Alito, the majority too hastily dived into the First Amendment before considering the facts on offer. Addressing the majority’s reference to children’s fairy tales, Alito stated that “the experi-

⁶⁹ *Id.* at 788–89.

⁷⁰ *Id.* at 805.

⁷¹ *Id.* at 794.

⁷² *See, e.g.,* *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” (citation omitted)).

⁷³ *Brown*, 564 U.S. at 795.

⁷⁴ *See id.* at 795–97.

⁷⁵ *Id.* at 806–07 (Alito, J., concurring) (“I see no need to reach the broader First Amendment issues addressed by the Court.”).

⁷⁶ *Id.* at 806.

ence of playing violent video games just might be very different.”⁷⁷ That very difference led Alito to disagree with the majority’s “squelch[ing] [of] legislative efforts to deal with what is perceived by some to be a significant and developing social problem.”⁷⁸ In light of “all of the characteristics of video games,”⁷⁹ the Supreme Court’s duty was to proceed with doctrinal caution. For Alito, a facts-doctrine dichotomy prevents headlong theoretical jumps that can arrest the legislative process.

Justice Alito’s dissent in *Mathis v. United States* likewise demonstrates a jurisprudence that places fact before doctrine, and in doing so rejects theoretical abstraction.⁸⁰ In *Mathis*, the Supreme Court addressed the Armed Career Criminal Act (“ACCA”), a statute that imposes enhanced sentences on a defendant with three prior “violent felony” convictions when the defendant is found guilty of possessing a firearm.⁸¹ In a series of formalistic decisions prior to *Mathis*, the Court ruled that a defendant’s three prior convictions qualify as an ACCA predicate only if the crimes’ elements are identical to or narrower than the elements of the generic version of the particular crime listed in the ACCA.⁸² So the Court forbade sentencing courts from determining whether the defendant’s *conduct*, rather than the defendant’s crime of conviction, fell within the generic crime listed in the ACCA.⁸³ At issue in *Mathis* was whether the ACCA makes an exception to that rule if a defendant was convicted under a statute listing multiple ways of satisfying at least one of its elements.⁸⁴ The majority held that no such exception applies and, as a result, that a sentencing court’s application of the ACCA involves only a comparison of elements.⁸⁵

As the foregoing discussion makes clear, the case law preceding *Mathis*, in Justice Alito’s words, “introduced . . . complications.”⁸⁶

⁷⁷ *Id.*

⁷⁸ *Id.* at 820.

⁷⁹ *Id.* (emphasis added).

⁸⁰ 136 S. Ct. 2243, 2266 (2016) (Alito, J., dissenting).

⁸¹ See 18 U.S.C. § 924(e)(1), (e)(2)(B) (2012).

⁸² See *Mathis*, 136 S. Ct. at 2247; see also, e.g., *Taylor v. United States*, 495 U.S. 575, 602 (1990) (“[A]n offense constitutes ‘burglary’ for purposes of [an ACCA] sentence enhancement if either its statutory definition substantially corresponds to ‘generic’ burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant.”).

⁸³ *Taylor*, 495 U.S. at 600, 602 (holding that sentencing courts applying the ACCA must “look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions”).

⁸⁴ See *Mathis*, 136 S. Ct. at 2247–48.

⁸⁵ See *id.* at 2257.

⁸⁶ *Id.* at 2267 (Alito, J., dissenting).

Those complications drove Alito's lone dissent. To Alito, resolution of the question presented—whether the ACCA permits a sentence enhancement when the convicting “statute’s specified means creates a match with the generic offense, even though the broader element would not”⁸⁷—was not a difficult task.⁸⁸ Alito noted the “mess”⁸⁹ of the majority’s “modified categorical approach,” which permits sentencing courts to look at certain documents when a convicting statute lists multiple means in order to determine what crime the defendant was convicted of.⁹⁰ Critiquing that approach, Alito not only chastised the majority’s rearrangement of fact before doctrine, but also offered an approach that itself placed fact before doctrine.⁹¹

To Justice Alito, a sentencing court should have the discretion to investigate the facts of the record of the previous case to determine whether to count a defendant’s prior conviction as an ACCA predicate.⁹² For example, in a burglary case like the one in *Mathis*, the sentencing court should be able to look to the record to determine whether the place the defendant burglarized matched the ACCA’s generic burglary offense.⁹³ If the record is unclear, the sentencing court should not count the conviction under the ACCA.⁹⁴ But if the record is clear, the conviction should count.⁹⁵ Against this “real-world approach” stood the majority, who, Alito said, “disdain[ed] such practicality.”⁹⁶

Justice Alito’s characteristically pragmatic dissent warned that the majority’s approach would lead to anomalous results and require sentencing courts to “delve into pointless abstract questions.”⁹⁷ As to anomalies, Alito noted that Congress intended for burglary convictions to count under the ACCA, but the majority’s approach meant that those convictions would not count in many states.⁹⁸ As to abstractions, Alito wished sentencing courts “good luck” in determining whether a state statute sets out one set of elements to define one

⁸⁷ *Id.* at 2250 (majority opinion).

⁸⁸ *See id.* at 2267 (Alito, J., dissenting).

⁸⁹ *Id.* at 2269.

⁹⁰ *Id.* at 2245–46 (majority opinion).

⁹¹ *See id.* at 2269–70 (Alito, J., dissenting).

⁹² *Id.*

⁹³ *Id.* at 2270.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2269–70.

⁹⁷ *Id.* at 2268.

⁹⁸ *Id.*

crime, or sets out multiple elements to define multiple crimes.⁹⁹ To avoid these anomalies and abstractions, the ACCA analysis, to Alito, should focus on a “more practical reading” of the statute that would not “frustrate fundamental ACCA objectives.”¹⁰⁰

Overall, Justice Alito’s opinions in *Jones*, *Brown*, and *Mathis* show not only a preoccupation with, but a prioritization of, facts. These three opinions demonstrate a fact-oriented jurisprudence in which facts not only shape the issues before the Supreme Court in a given case, but also provide the doctrine necessary to resolve those issues.¹⁰¹

The roots of Justice Alito’s fact-heavy jurisprudence may have been put down in his practitioner years before his Third Circuit and Supreme Court appointments. After graduating from Yale Law School and clerking for a year, he served as an Assistant U.S. Attorney for the District of New Jersey.¹⁰² Four years later, he became an Assistant to Solicitor General Rex Lee in the Justice Department before serving as Deputy Assistant Attorney General in the Office of Legal Counsel.¹⁰³ After his six-year tenure at the Justice Department, he became the U.S. Attorney for the District of New Jersey for three years until his appointment to the Third Circuit.¹⁰⁴ Justice Alito’s practical experiences trying cases lend support to the idea that his jurisprudence is largely predicated “on a pragmatic public servant’s preoccupation with real people and problems.”¹⁰⁵ Justice Alito’s background in this respect is completely different from the academic background of Justice Scalia and from the advocacy of Lockean natural law advanced by Justice Thomas prior to his appointment to the Court. Justice Alito was a trial lawyer, and Justices Scalia and Thomas were not. That difference takes us a long way in understanding their different approaches to cases. As Justice Alito has explained, “my ju-

⁹⁹ *Id.*

¹⁰⁰ *Descamps v. United States*, 133 S. Ct. 2276, 2295, 2302 (2013) (Alito, J., dissenting).

¹⁰¹ *Cf.* Allan Ides, *The Jurisprudence of Justice Byron White*, 103 *YALE L.J.* 419, 420, 456 (1993) (describing Justice Byron White’s jurisprudence as “transaction-oriented” in that, to White, “[f]acts were an essential component” because “they defined the scope of controversies before the Court as well as the basic foundation of the law to be applied to those controversies”).

¹⁰² Aaron M. Houck & Brian P. Smentkowski, *Samuel A. Alito, Jr.*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Samuel-A-Alito-Jr> [<https://perma.cc/FL5P-VNFQ>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Cf.* Young, *supra* note 17, at 645.

dicial approach is very heavily colored by my experience on the court of appeals, and the work of the court of appeals is all business.”¹⁰⁶

Indeed, Justice Alito has described today’s Court as “the most academic Supreme Court that has ever existed,”¹⁰⁷ and we strongly doubt that he means that as praise. This comment brings to mind Edmund Burke’s statement in 1792 that “[a] statesman differs from a professor in [a] university; the latter has only the general view of society; the former, the statesman, has a number of circumstances to combine with those general ideas, and to take into his consideration.”¹⁰⁸ It comes as little surprise, then, that the audience Justice Alito writes his opinions to is, in his own words, “those who will have to apply the opinion in future cases: trial judges and lawyers who need to work with the opinion.”¹⁰⁹ This practical, nonacademic orientation likely comes in part from his experience on the Third Circuit, where, in applying Supreme Court precedent, he “was looking for . . . some clear expression—some clear guidance—as to what I should do. I was always happy when I received that and not so happy when the guidance was not so clear.”¹¹⁰

Both Justice Alito’s pre-bench and Third Circuit experience provide a backdrop to a jurisprudence that, as discussed above, is fact-oriented. But it also provides a backdrop to another facet of his jurisprudence, one that supplements traditional interpretive modalities—precedent, policy, practice—with a large dose of pragmatic, syllogistic reasoning. Call it plain English reasoning, in which the premium is put on practicality, rather than on formal doctrinal rules.¹¹¹ Three of Justice Alito’s opinions reflect this component of his jurisprudence.

Take *Ohio v. Clark*.¹¹² That case involved the Sixth Amendment’s Confrontation Clause in the context of the introduction of out-of-court statements made by a juvenile to prove an adult defendant’s

¹⁰⁶ The Honorable Samuel A. Alito, Jr. et. al., *The Inaugural William French Smith Memorial Lecture: A Look at Supreme Court Advocacy with Justice Samuel Alito*, 35 PEPP. L. REV. 465, 469 (2008).

¹⁰⁷ See Walther, *supra* note 32.

¹⁰⁸ BURKE, *Unitarian Speech*, *supra* note 16, at 114.

¹⁰⁹ The Honorable Samuel A. Alito, Jr. et. al., *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 40 (2009).

¹¹⁰ *Id.* at 42.

¹¹¹ Cf. Araiza, *supra* note 13, at 106 (explaining that Justice Alito’s approach to adjudication involves “the meaning of constitutional and quasi-constitutional rights provisions as at least partially informed by ‘folk’ or ‘common sense’ understandings of what those provisions should mean or what conduct they value and thus protect” (citation omitted)).

¹¹² 135 S. Ct. 2173 (2015).

guilt.¹¹³ At issue was whether the Confrontation Clause prohibited the introduction of those statements made to a teacher when the juvenile was unavailable for cross-examination.¹¹⁴ Before *Clark*, the Supreme Court, in the originalist decision of *Crawford v. Washington*,¹¹⁵ held that the term “witnesses” in the Confrontation Clause means those “who bear testimony,” and thus that the clause bars the introduction of testimonial statements made by nontestifying witnesses unless those witnesses are unavailable to testify.¹¹⁶ Although the Court later held that certain statements made to police officers could be considered testimonial, it reserved the question of whether statements made to persons other than police officers also could be so held.¹¹⁷

Writing for the majority, Justice Alito resolved the question by focusing his analysis almost entirely on practical reasoning and the facts in the record. For example, “common sense” indicated that the “relationship between a student and his teacher is very different from that between a citizen and the police.”¹¹⁸ Acknowledging that the Supreme Court had expressly reserved the question presented, and thus that precedent did not squarely address the issue, the majority refused to “ignore [the] reality” of the facts.¹¹⁹ It was specifically “[i]n light of these circumstances,”¹²⁰ and not abstract Sixth Amendment theory, that the majority held that the statements at issue did not implicate the Confrontation Clause.¹²¹

Justice Alito’s practical reasoning in *Clark* is evident in both what he did and did not write. The concurrences of Justices Scalia and Thomas are instructive in this regard. Scalia concurred “to protest the Court’s shoveling of fresh dirt upon” the Supreme Court’s previous efforts to bring its “application of the Confrontation Clause back to its original meaning.”¹²² Thomas also concurred, noting the absence of “the original meaning of the Confrontation Clause” in the majority’s analysis.¹²³ Although the majority did support its holding in history,¹²⁴ if not originalism, it favored a straightforward and practical applica-

113 *Id.* at 2177.

114 *Id.*

115 541 U.S. 36 (2004).

116 *See id.* at 51, 53–54.

117 *See Clark*, 135 S. Ct. at 2179–80.

118 *Id.* at 2182.

119 *Id.* at 2181–82.

120 *Id.* at 2182.

121 *See id.*

122 *Id.* at 2184 (Scalia, J., concurring).

123 *Id.* at 2185 (Thomas, J., concurring).

124 *See id.* at 2182 (“As a historical matter . . . there is strong evidence that statements made

tion of law to fact that did “not ignore . . . reality.”¹²⁵ The distinction between Alito’s practical approach and Scalia and Thomas’s originalist approach underscores Alito’s judicial pragmatism.

Likewise, Justice Alito’s majority opinion in *Pleasant Grove City v. Summum*¹²⁶ demonstrates his plain English jurisprudence. In that case, a private religious organization brought a First Amendment challenge to a city’s rejection of the organization’s request to erect a monument in a park that contained several privately donated monuments, including one depicting the Ten Commandments.¹²⁷ The issue was whether the city allowing other privately donated monuments to be erected was either expressive conduct or the providing of a public forum for private speech.¹²⁸ If the former, the Free Speech Clause did not apply because that clause does not regulate government expression.¹²⁹ If the latter, however, the clause would require the city’s conduct to pass strict scrutiny.¹³⁰

As an initial matter, Justice Alito’s mere framing of the issue—which precedent should apply—was characteristically fact oriented. Before discussing relevant precedent, he found it necessary to first identify the facts to not only shape the issue, but also to identify the relevant precedent to resolve that issue. To Justice Alito, the “parties’ fundamental disagreement” centered not on First Amendment doctrine, but on the nature—the facts—of the city’s conduct.¹³¹

Justice Alito’s reasoning underlying the unanimous decision as to which precedent applied—that concerning government speech or that concerning private speech in a public forum¹³²—was pragmatic from start to finish. Indeed, this portion of the opinion contains no references to precedent and only brief references to historical practice.¹³³ With respect to history, Alito briefly noted that governments “since ancient times” have used monuments as a form of speech and that the government practice of selectively accepting donated monuments has

in circumstances similar to those facing [the juvenile] and his teachers were admissible at common law.”).

¹²⁵ *Id.*

¹²⁶ 555 U.S. 460 (2009).

¹²⁷ *See id.* at 464.

¹²⁸ *See id.* at 467.

¹²⁹ *See, e.g.,* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”).

¹³⁰ *See Summum*, 555 U.S. at 469–70.

¹³¹ *Id.* at 467.

¹³² *See id.*

¹³³ *See id.* at 470–72.

occurred “throughout our Nation’s history.”¹³⁴ But Alito resorted to practical argument. His analysis began, for example, with the first premise of a straightforward syllogism. First, “[a] monument, by definition, is a structure that is designed as a means of expression.”¹³⁵ That is true whether the monument is financed by the government or privately financed and displayed by the government on public land.¹³⁶ The reader is left to deduce the second premise and conclusion: because the monument was privately financed and displayed by the government on public land, the monument is designed as a means of expression and is therefore government speech to which the First Amendment has no application. That the remainder of Alito’s analysis contains similar reasoning¹³⁷ underscores his plain English jurisprudence.

Justice Alito’s dissent in *Walker v. Texas Division, Sons of Confederate Veterans*¹³⁸ concerned the applicability of *Summum* to a state’s specialty-license-plate program. Like his unanimous opinion in *Summum*, Justice Alito’s dissent in *Walker* illustrates the practical strain in his jurisprudence. In *Walker*, the majority held that the First Amendment did not prohibit a state’s rejection of a proposed specialty license plate displaying a Confederate flag.¹³⁹ That was the case, the majority reasoned, because the license plate was government, rather than private, speech.¹⁴⁰ Not so, said Justice Alito.

Before distinguishing *Summum*, and thus the practical reasoning he deployed in that case, Justice Alito opened his *Walker* concurrence with an acerbic hypothetical, drawing on the facts in the record:

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. . . . As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing”

¹³⁴ *Id.* at 470–71.

¹³⁵ *Id.* at 470.

¹³⁶ *See id.* at 470–71.

¹³⁷ *See, e.g., id.* at 472 (“Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account [certain] content-based factors The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.”).

¹³⁸ 135 S. Ct. 2239 (2015).

¹³⁹ *See id.* at 2242–43.

¹⁴⁰ *See id.* at 2248.

passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” . . . The Court says that [this] message[] [is] government speech.¹⁴¹

After asserting that the majority’s opinion portended the ominous,¹⁴² Justice Alito combed through the record to distinguish *Summum*. First, unlike *Summum*, the specialty-license-plate program at issue did not exhibit “selective receptivity.”¹⁴³ On this point, Alito chided the majority for relying on facts outside of the record,¹⁴⁴ perhaps another example of the centrality of facts in his jurisprudence.¹⁴⁵ Alito’s next point of distinction was perhaps the most pragmatic: unlike monuments like those at issue in *Summum*, license plates are small and mobile, and hence their number can only be limited by the number of registered vehicles.¹⁴⁶ Overall, though Alito relied on more precedents and other support in *Walker* than in *Summum*,¹⁴⁷ *Walker* is an opinion that is quintessentially pragmatic, and, as a result, quintessentially Alito.

B. Inclusive Originalism

Various features of Justice Alito’s jurisprudence—his penchant for placing fact before doctrine¹⁴⁸ and his general adherence to precedent,¹⁴⁹ among others—necessarily eschew theoretical abstraction. In that sense, his jurisprudence disfavors any interpretive methodology inconsistent with these features, which may, to some, include originalism. This may explain, first, why a systematic account explaining Alito’s interpretive philosophy has yet to emerge, and second, why existing surface-level accounts continue to widely diverge.¹⁵⁰ Our goal here is to provide that systematic account.

¹⁴¹ *Id.* at 2255 (Alito, J., dissenting).

¹⁴² *See id.* at 2255–56 (“[T]he precedent this case sets is dangerous. . . . If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? . . . What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve?”).

¹⁴³ *Id.* at 2260.

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* note 101 and accompanying text.

¹⁴⁶ *See Walker*, 135 S. Ct. at 2261.

¹⁴⁷ Justice Alito noted, for example, that unlike the public monuments at issue in *Summum*, history suggests that messages on license plates are not government speech. *See id.* at 2259.

¹⁴⁸ *See supra* Section I.A.

¹⁴⁹ *See infra* Section I.C.

¹⁵⁰ *See supra* notes 6–13 and accompanying text.

In this Section, we first provide an overview of the origins and tenets of originalism before providing an account of Justice Alito's inclusive originalism based on five of his Supreme Court opinions. We argue that Justice Alito's jurisprudence is indeed originalist, though not in the traditional sense. That is, Alito's flavor of originalism likely conforms to what Professor Will Baude describes as "inclusive originalism."¹⁵¹ Under that view, "judges can look to precedent, policy, or practice, but only *to the extent that the original meaning incorporates or permits them.*"¹⁵²

1. *Originalism's History*

The history of originalism is by now well worn, so we provide only a thumbnail sketch here to provide a basis for our later argument about Justice Alito's originalist jurisprudence.¹⁵³ Originalist theory¹⁵⁴ is understood to have begun in the 1970s with the writings of Judge Robert Bork, Justice William Rehnquist, and Professor Raoul Berger.¹⁵⁵ The views in these writings are now referred to as "Proto-Originalism," because although they discussed original intentions, they failed to define a "theory of original meaning or of the precise role it should play in constitutional practice."¹⁵⁶ Indeed, the term "originalism" was coined after these writings by Professor Paul Brest in a lecture he presented at Boston University School of Law in early 1979.¹⁵⁷ That lecture was published one year later as *The Misconceived*

¹⁵¹ See generally Baude, *supra* note 25.

¹⁵² *Id.* at 2355.

¹⁵³ See Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 198 (2017) ("We have gone from too few histories of originalism to too many . . .").

¹⁵⁴ The *theory* of originalism on the one hand, and the *method* of originalism on the other, bear distinction. Although the theory of originalism developed in the 1970s, see *infra* note 155 and accompanying text, originalism as an interpretive method has a lengthier pedigree. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448–49 (1934) (Sutherland, J., dissenting) ("A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.").

¹⁵⁵ See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 463 (2013). Professor Larry Solum identifies the following three works as marking the beginning of originalist theory: Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); and RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977). Solum, *supra*, at 462.

¹⁵⁶ Solum, *supra* note 155, at 463.

¹⁵⁷ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.† (1980).

Quest for the Original Understanding, a landmark critique of originalism that appeared in the *Boston University Law Review*.¹⁵⁸

In his article, Brest famously defined originalism as the “approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.”¹⁵⁹ Although Brest acknowledged that various forms of originalism “ha[ve] been a major theme in the American constitutional tradition” since *Marbury v. Madison*,¹⁶⁰ he found “strict intentionalism” originalism constitutionally troubling.¹⁶¹ This strict intentionalism required “the interpreter to determine how the adopters would have applied a provision to a given situation, and to apply it accordingly.”¹⁶² To Brest this task was impossible: the “historiographic difficulties” of such an interpretive approach meant that one could neither accurately identify nor reduce to one intention the many intentions of a multimember body.¹⁶³

Into this breach famously stepped then–Attorney General Edwin Meese III, who “burst into noisy and public view”¹⁶⁴ before the American Bar Association in July 1985 by calling for “a jurisprudence of original intention,”¹⁶⁵ Brest’s earlier objections notwithstanding. To Meese, the original intent of the Constitution’s drafters was binding because the document itself “is a limitation on judicial power as well as executive and legislative” powers.¹⁶⁶ If the document’s meaning is not limited by its drafters’ intent but is “viewed as only what the judges say it is,” it is no longer a “constitution in the true sense.”¹⁶⁷ By saying so, Meese has perhaps had a greater impact on constitutional theory than any other Attorney General of the United States.

Three months later, Justice William Brennan responded in an address at Georgetown University, criticizing Meese’s view as “little

¹⁵⁸ See generally *id.*

¹⁵⁹ *Id.* at 204.

¹⁶⁰ 5 U.S. (1 Cranch) 137 (1803).

¹⁶¹ Brest, *supra* note 157, at 204.

¹⁶² *Id.* at 222.

¹⁶³ See *id.* at 212–14, 229; see also Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 8–9 (2018) (describing Brest’s objection as “the problem of identifying, and then somehow adding up or ‘summing’ subjective intentions” of a diverse body or bodies of persons).

¹⁶⁴ Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 875 (2008).

¹⁶⁵ Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association (July 9, 1985), as reprinted in ORIGINALISM 47, 52 (Steven G. Calabresi ed., 2007) [hereinafter CALABRESI, ORIGINALISM].

¹⁶⁶ *Id.* at 54.

¹⁶⁷ *Id.* at 53.

more than arrogance cloaked as humility.”¹⁶⁸ Although the Supreme Court may “look to the history of the time of framing and to the intervening history of interpretation,” the “ultimate question” is, “[w]hat do the words of the text mean in our time?”¹⁶⁹

With additional attacks on “original intent” originalism in the mid-1980s,¹⁷⁰ few theorists defended it in the face of Brest’s and others’ objections.¹⁷¹ The development of originalist theory fell on Meese’s lawyers in the Department of Justice Office of Legal Counsel, which included future-Justice Samuel Alito and future law professors such as Steven G. Calabresi, John Harrison, Gary Lawson, John McGinnis, Michael Stokes Paulsen, and Michael Rappaport.¹⁷² An important shift away from original intent originalism finally came in 1986, when then-Circuit Court Judge Antonin Scalia advised originalists to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”¹⁷³ At Justice Scalia’s urging, Attorney General Meese’s advocacy of originalism as the correct approach to judging shifted from a focus on the original *intent* of the founders to a focus on the original *meaning* of the words of the Constitution, thereby sidestepping Brest’s and others’ objections.¹⁷⁴ As Professor Lawrence Solum notes,¹⁷⁵ the earliest version of this “New Originalism” appears to have been offered by Professor Gary Lawson,¹⁷⁶ fol-

¹⁶⁸ Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), as reprinted in CALABRESI, ORIGINALISM, *supra* note 165, at 58.

¹⁶⁹ *Id.* at 61.

¹⁷⁰ See, e.g., Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470–71 (1981); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

¹⁷¹ For one such defense, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 228–29 (1988).

¹⁷² For a list of other future judicial, academic, and professional luminaries that worked in Meese’s Office of Legal Counsel, see Barnett & Bernick, *supra* note 163, at 7 & n.38 (listing additional future law professors including Nelson Lund, future judges including Michael Luttig and Steven Markman, and future constitutional litigators including Michael Carvin and Theodore Olson).

¹⁷³ Antonin Scalia, Speech Before the Attorney General’s Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, ORIGINAL MEANING 106 (1987).

¹⁷⁴ See *supra* notes 158–63 and accompanying text.

¹⁷⁵ See Solum, *supra* note 155, at 463.

¹⁷⁶ See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

lowed by Professors Calabresi, Saikrishna Prakash,¹⁷⁷ and Randy Barnett.¹⁷⁸

2. *Originalism's Tenets*

Contemporary originalism, which is largely the creation of Attorney General Meese and of Justices Scalia and Thomas, maintains that “*the meaning of the Constitution remains the same until it is properly changed*, with an Article V amendment being the only proper method of revision.”¹⁷⁹ The basic premises to which all originalists subscribe are two-fold, the first descriptive (the Fixation Thesis) and the second normative (the Constraint Principle). First, “[t]he content, and thus the meaning, of the constitutional text is determined, or ‘fixed,’ at the time the portion of that text is framed and ratified.”¹⁸⁰ Second, “that fixed content must limit, or ‘constrain,’ subsequent interpretations of the constitutional text.”¹⁸¹

That originalists agree on these premises is not to say that originalists, both old and new, agree “all the way down.”¹⁸² At least four significant differences remain. First, although most originalists contend that the constitutional text is fixed by its publicly understood meaning at ratification, some continue to hold that the text is fixed by the intentions of its drafters.¹⁸³ Second, many, but not all, originalists identify a distinction between constitutional interpretation and constitutional construction.¹⁸⁴ Interpretation involves the discovery of the

¹⁷⁷ See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

¹⁷⁸ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611, 620 (1999).

¹⁷⁹ Barnett & Bernick, *supra* note 163, at 2.

¹⁸⁰ Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 Nw. U. L. REV. 487, 515–16 (2017); see also Solum, *supra* note 155, at 459.

¹⁸¹ Shaw, *supra* note 180, at 516; see also Solum, *supra* note 155, at 460.

¹⁸² Solum, *supra* note 155, at 464.

¹⁸³ Compare Lawson, *supra* note 176, at 875 (“[T]he federal constitution should be interpreted in accordance with originalist textualism, understood as a method which searches for the ordinary public meanings . . . at the time of those words’ origin.”), with Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL’Y 467, 467–68 (2008) (“[T]oday the more sophisticated forms of originalism seek the meaning of the text as it was likely understood by those who added the provision to the Constitution.”).

¹⁸⁴ Compare Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 611 (2004) (“Constitutional meaning must be ‘constructed’ in the absence of a determinate meaning that we can reasonably discover.”), with ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–14 (2012) (“From the germ of an idea . . . scholars have elaborated a supposed distinction between *interpretation* and *construction* Thus is born . . . a whole new field of legal inquiry.”).

constitutional text's meaning, while construction involves the determination of what legal effect to give to the text in the "absence of a determinate meaning."¹⁸⁵ Third, for those acknowledging this "interpretation-construction" distinction, some argue that construction of indeterminate constitutional provisions itself is originalist and anormative,¹⁸⁶ while others argue that construction necessarily involves normative judgments.¹⁸⁷ For those falling in the latter camp, differences remain over the basis upon which to make those normative judgments.¹⁸⁸ Fourth, some, but not all, originalists argue that the Constitution forbids the doctrine of *stare decisis*.¹⁸⁹

The point here is not to argue that these differences amount to "a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label."¹⁹⁰ It is instead to outline the premises that all originalists subscribe to and to demonstrate the range of views those premises permit. This second point is supported not only by how the above differences coalesce around the Fixation Thesis and Constraint Principle, but also by what Baude refers to as "inclusive originalism."¹⁹¹

Inclusive originalism is the theory that "the original meaning of the Constitution is the ultimate criterion for constitutional law."¹⁹² So far, so good, as far as potential differences with contemporary originalism. A difference appears, however, under the theory's view that originalism need be neither the "*exclusive* criterion for constitutional law, [n]or *just one among many* valid criteria."¹⁹³ Instead, the

¹⁸⁵ Whittington, *supra* note 184, at 611.

¹⁸⁶ For a recent argument that constitutional construction is originalist all the way down, see Barnett & Bernick, *supra* note 163, at 3–4, 13–14 (arguing "that the label 'originalist' can accurately be applied *both* to the activity of ascertaining the communicative content of the text *and* to the activity of giving legal effect to or implementing that meaning").

¹⁸⁷ See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 7 (2011) ("When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time.").

¹⁸⁸ Cf. Solum, *supra* note 155, at 473 ("One might apply a presumption of liberty or adopt a common law method of construction . . . [T]here are several possible approaches to the construction zone that are consistent with the core commitments of originalism to fixation and constraint.").

¹⁸⁹ See, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 *AVE MARIA L. REV.* 1, 6 (2007) ("[T]he Constitution itself establishes a *prima facie* case against the use of precedent . . ."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *CONST. COMMENT.* 289, 289 (2005) ("Stare decisis contradicts the premise of originalism . . .").

¹⁹⁰ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239, 239 (2009).

¹⁹¹ Baude, *supra* note 25, at 2355.

¹⁹² *Id.*

¹⁹³ *Id.* at 2354.

theory represents a “middle possibility”; it permits judges to use precedent, policy, and practice so long as “the original meaning incorporates or permits them.”¹⁹⁴ Judges, then, may implement different modalities unless “the original meaning would say not to.”¹⁹⁵ So inclusive originalism looks much like pluralism, but whereas pluralism is flat in that no “competing methods . . . dominate[] the others,” under inclusive originalism those methods “are hierarchically structured, with originalism at the top of the hierarchy.”¹⁹⁶

The two points emphasized above bear repeating. First, originalists subscribe to the same two premises: the Fixation Thesis and the Constraint Principle. Second, both those premises and the theory of inclusive originalism permit the varying disagreements among originalists. With these two points established, we turn to Justice Alito’s self-described “practical originalis[m]”¹⁹⁷ and argue that, notwithstanding what may appear to be a jurisprudence of pluralism, his jurisprudence reflects inclusive originalism.

3. Justice Alito’s Inclusive Originalism

Accounts of Justice Alito’s interpretive methodology widely diverge. Professor Lawrence Rosenthal argues, for example, that Alito has “evinced considerable sympathy with originalist interpretation.”¹⁹⁸ Bryan Garner recently described Alito as a “fellow originalist” of Justice Scalia.¹⁹⁹ Other commentators, however, take a different tack. Professor Eric Segall notes that Justice Alito is “not exactly [a] paragon[] of originalist decision making.”²⁰⁰ Pressing the point further, Professor Neil Siegel argues that Alito is a methodological pluralist in that “he uses whatever modalities of interpretation . . . seem to him most appropriate.”²⁰¹ To the extent that these latter accounts view nontextual sources as incompatible with originalism, they miss the mark. Although Alito does use multiple interpretive modalities, he, in his own words, “start[s] out with originalism.”²⁰² Alito’s brief description of a *hierarchical*, rather than *flat*, ordering of the text and its

194 *Id.* at 2354–55 (emphasis omitted).

195 *Id.* at 2358.

196 *Id.* at 2353.

197 Walther, *supra* note 32.

198 Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 3 (2007).

199 Garner, *supra* note 7.

200 Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 39 (2016).

201 Siegel, *supra* note 5, at 167.

202 Walther, *supra* note 32.

meaning above competing modalities is but one of several pieces of evidence suggesting his originalist jurisprudence.²⁰³ In this Section, we turn to additional evidence—five of Alito’s opinions—to argue that his jurisprudence also points toward inclusive originalism.

Justice Alito’s writings indicate a disposition toward inclusive originalism in three respects. First, the text and its original meaning are dispositive when no conflict arises between the constitutional text and original meaning on the one hand and other competing modalities on the other. Second, the text and its original meaning trump other competing modalities where these modalities conflict. Third, none of his opinions are anticanonical in the originalist sense. Some cite, for example, Justice Alito’s opinion in *McDonald v. City of Chicago*²⁰⁴ as an originalist anticanon. But Alito did not contradict originalism in that case. Although the reasoning or outcome in *McDonald* may appear “putatively nonoriginalist,” it is difficult to view it or any other Alito opinion as “a fixed star that repudiates originalism.”²⁰⁵

We first address the opinions of Justice Alito where the text and its meaning do not explicitly conflict with other competing modalities by starting with *Town of Greece v. Galloway*.²⁰⁶ In that case, the town of Greece, New York, opened its board meetings with prayers, some of which were distinctly Christian, others that were not.²⁰⁷ The respondents challenged the town’s prayers as a violation of the First Amendment’s Establishment Clause.²⁰⁸ Although Alito joined the majority’s holding that the town’s prayers did not violate the First Amendment, he wrote separately to demonstrate how those prayers comported with that amendment’s text and original meaning.²⁰⁹ His concurrence demonstrates his view of the position that originalism occupies in the hierarchy of competing modalities.

To Justice Alito, the text and meaning of the First Amendment sit at the top of the hierarchy because the text was fixed at its ratification, and that meaning constrains later interpretations of it. That is why, for example, he explained that “actions taken by the First Congress are presumptively consistent with the Bill of Rights,” which is particularly

²⁰³ *See id.*

²⁰⁴ 561 U.S. 742 (2010).

²⁰⁵ *Cf. Baude, supra* note 25, at 2386.

²⁰⁶ 134 S. Ct. 1811 (2014).

²⁰⁷ *Id.* at 1816.

²⁰⁸ *Id.* at 1817.

²⁰⁹ *See id.* at 1832–34.

true “when it comes to the interpretation of the Establishment Clause.”²¹⁰

In light of the “original understanding of the First Amendment,” Justice Alito explained how the dissent’s argument that the Establishment Clause requires nonsectarian legislative prayer was inconsistent with the clause’s text and original meaning.²¹¹ Important to Alito was “not so much what happened” prior to relevant precedent, “but what happened before congressional sessions during the period leading up to the adoption of the First Amendment.”²¹² This history demonstrated why it was “virtually inconceivable that the First Congress” would find that the prayers at issue violated the Establishment Clause.²¹³ Because “this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding.”²¹⁴ The original public understanding of the First Amendment, then, resolved the issue because the text was fixed at ratification, which constrained the Court’s interpretation of that text.²¹⁵

Justice Alito’s majority opinion in *Glossip v. Gross*²¹⁶ likewise demonstrates the role of text and its original meaning in his jurisprudence. *Glossip* concerned the constitutionality of Oklahoma’s method of execution, which employed a three-drug protocol.²¹⁷ The petitioners argued that the protocol violated the Eighth Amendment because the first drug failed to render persons insensate to pain, thereby creating an unacceptable risk of pain.²¹⁸ Alito, writing for the majority, disagreed, holding that the method of execution was consistent with the Eighth Amendment’s ban on cruel and unusual punishment.²¹⁹

Justice Alito telegraphed his conclusion with his opening sentence: “The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights.”²²⁰ To be sure, the holding was wrapped up first with the petitioners’ failure to establish likely success on the merits,²²¹ and second with the fact that the

210 *Id.* at 1834.

211 *Id.*

212 *Id.* at 1832.

213 *Id.* at 1834.

214 *Id.*

215 *See Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

216 135 S. Ct. 2726 (2015).

217 *Id.* at 2731.

218 *Id.*

219 *Id.*

220 *Id.*

221 *See id.* at 2736–38.

district court did not clearly err in denying the petitioners' motion for a preliminary injunction against Oklahoma's execution protocol.²²² But central to the case's disposition was the original meaning of "cruel and unusual," which Alito acknowledged was publicly understood at the time of the Eighth Amendment's ratification to permit hanging.²²³ Because Oklahoma's protocol was more humane than a practice that was "an accepted punishment at the time of" ratification, it passed constitutional muster.²²⁴ Alito's majority opinion in *Glossip*, like his concurrence in *Galloway*, shows how the text and its original meaning are dispositive when no conflict arises between those and other competing modalities.

We next discuss the manner in which Justice Alito treats conflicts between the text and its original meaning on the one hand and other competing modalities on the other by returning to *United States v. Jones*.²²⁵ As already observed, Alito's approach in resolving the question of whether the government's use of a GPS device constituted a search within the meaning of the Fourth Amendment starkly differed from Justice Scalia's.²²⁶ Alito, after all, not only chose to write separately, but also to criticize Scalia's property-based approach that, to Alito, relied on "18th-century tort law."²²⁷ It is tempting to read Alito's concurrence as a rejection of originalism. Alito, for example, noted that he would "analyze the question presented in this case by" applying the extratextual *Katz* test.²²⁸ But this temptation is only superficial.

A closer reading of Justice Alito's concurrence demonstrates a prioritization of the constitutional text and its meaning and, as a result, Alito's commitment to inclusive originalism.²²⁹ Justice Alito's analysis, for example, began with the text of the Fourth Amendment, rather than other competing modalities.²³⁰ And though Justice Scalia accused Alito of eroding the longstanding constitutional "protection for privacy expectations inherent in" property,²³¹ Alito expressly disclaimed any authority to do such a thing on originalist grounds. To

222 *Id.* at 2739.

223 *See id.* at 2731.

224 *See id.* at 2731–32.

225 565 U.S. 400 (2012).

226 *See supra* notes 39–68 and accompanying text.

227 *Jones*, 565 U.S. at 418 (Alito, J., concurring).

228 *Id.* at 419.

229 *See id.* at 419–21.

230 *See id.*

231 *Id.* at 414 (majority opinion).

Alito, “we must ‘assur[e] preservation of that degree of privacy against government that existed *when the Fourth Amendment was adopted.*”²³²

Before turning to other modalities, Justice Alito noted the limitations of the text’s meaning: “it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.”²³³ He further noted that limitation by addressing the majority’s trespass-based rule, concluding that the rule had no basis “within the meaning of the Fourth Amendment.”²³⁴ In short, Alito acknowledged that the text’s meaning no longer served a constraining function when it had no application to the question presented. In this way, he hierarchically ordered the text and its original meaning above other modalities, an ordering consistent with inclusive originalism.²³⁵

Justice Alito’s majority opinion in *Birchfield v. North Dakota*²³⁶ is similarly instructive. *Birchfield* involved the applicability of the Fourth Amendment to laws criminalizing the refusal of motorists to undergo blood and breath testing after being arrested for drunk driving.²³⁷ At issue was whether those laws constituted an unreasonable search in violation of the Fourth Amendment.²³⁸ The majority’s holding—that the government can administer breath tests but not blood tests “as a search incident to a lawful arrest for drunk driving”—rested on nonoriginalist grounds.²³⁹ The case may therefore read to some as another rejection of the Fixation Thesis and Constraint Principle.

As with his concurrence in *Jones*, however, Justice Alito began with the text of the Fourth Amendment and its original meaning. Alito noted the “ancient pedigree” of the search-incident-to-arrest doctrine, which existed “[w]ell before the Nation’s founding.”²⁴⁰ In support, he cited to an 18th-century manual for justices of the peace, a treatise entitled *The Fourth Amendment: Origins and Original Meaning*, and other historical research.²⁴¹ This led him to conclude that “the

²³² *Id.* at 420 (Alito, J., concurring) (alteration in original) (emphasis added) (citations omitted) (quoting *id.* at 406 (majority opinion) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001))).

²³³ *Id.*

²³⁴ *Id.* at 421.

²³⁵ See Baude, *supra* note 25, at 2355.

²³⁶ 136 S. Ct. 2160 (2016).

²³⁷ See *id.* at 2166–67.

²³⁸ *Id.* at 2167.

²³⁹ *Id.* at 2185; see *id.* at 2176 (deciding the question presented “by considering the impact of breath and blood tests on individual privacy interests”).

²⁴⁰ *Id.* at 2174.

²⁴¹ *Id.* at 2174–75.

legitimacy of body searches as an adjunct to the arrest process had been thoroughly established in colonial times, so much so that their constitutionality in 1789 can not be doubted.”²⁴²

The problem for Alito, though, was that “the founding era”—the relevant time period in which to identify the original meaning of the constitutional text— “does not provide any definitive guidance as to whether [blood and breath tests] should be allowed incident to arrest.”²⁴³ He acknowledged that “there may be evidence that an arrestee’s mouth could be searched in appropriate circumstances at the time of the founding,” but “searching a mouth for weapons or contraband is not the same as requiring an arrestee to give up breath or blood.”²⁴⁴ Only after considering available evidence of the text’s meaning did he consult other modalities, namely, precedent and practice.²⁴⁵ Like *Jones*, one again sees a hierarchical structuring of competing modalities, with originalism sitting at the top.

This brings us to *McDonald v. City of Chicago*,²⁴⁶ an opinion frequently cited as an example of anti-originalism, even though the outcome—as Justice Thomas’s originalist concurrence shows—is correct as an original matter.²⁴⁷ *McDonald* concerned the constitutionality of an ordinance of the city of Chicago that prohibited the registration, and thus possession, of most handguns in the city.²⁴⁸ Although the Supreme Court struck down a similar law two terms prior in *District of Columbia v. Heller*²⁴⁹ as a violation of the Second Amendment, Chicago argued that the amendment had no application to the states.²⁵⁰ The issue was thus whether the Second Amendment right to keep and bear arms applied to the states by way of the Fourteenth Amend-

²⁴² *Id.* at 2175 (citation omitted).

²⁴³ *Id.* at 2176.

²⁴⁴ *Id.* at 2176 n.3.

²⁴⁵ *See id.* at 2176–79.

²⁴⁶ 561 U.S. 742 (2010).

²⁴⁷ *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 425 (2013) (explaining that the plurality in *McDonald* “opted to follow precedent rather than original meaning”); John O. McGinnis, *Is the Court’s Originalist Jurisprudence Mostly Symbolic?*, *L. & LIBERTY* (July 7, 2017), <http://www.libertylawsite.org/2017/07/07/is-the-courts-originalist-jurisprudence-mostly-symbolic/> [<https://perma.cc/3TXG-KM3A>] (“*McDonald* itself is not originalist in reasoning although it extends an originalist result that could be extended on originalist grounds.”). *But see* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM* 31 (Grant Huscroft & Bradley W. Miller eds., 2011) (“*McDonald* could be read as compatible with an originalism that makes an exception for deeply entrenched precedent.”).

²⁴⁸ *McDonald*, 561 U.S. at 750.

²⁴⁹ 554 U.S. 570, 636 (2008).

²⁵⁰ *McDonald*, 561 U.S. at 751.

ment's Due Process Clause.²⁵¹ Alito, writing for a plurality, held that the right did, concluding that it was fundamental to the American scheme of ordered liberty.²⁵² Justice Thomas would have gone further and would have overturned the *Slaughter-House Cases*²⁵³ and protected an individual's right to own a gun for self-defense under state law.²⁵⁴

Two sections of *McDonald* read as if the original meaning of the Fourteenth Amendment was only an afterthought to the plurality. First, as Justice Thomas noted in concurrence, the plurality couched its holding in "a Clause that speaks only to 'process.'"²⁵⁵ Indeed, Justice Scalia's concurrence, unlike the plurality's opinion, acknowledged the problems with "substantive due process as an original matter."²⁵⁶ There is, of course, wide scholarly agreement on this point.²⁵⁷ Second, the plurality declined an open invitation to couch its holding in the Privileges or Immunities Clause of the Fourteenth Amendment,²⁵⁸ a clause whose meaning would undoubtedly more comfortably bear the holding as an original matter.²⁵⁹ Although the plurality acknowledged the flawed interpretation of that clause in the *Slaughter-House Cases*,

²⁵¹ See *id.* at 758.

²⁵² See *id.* at 767.

²⁵³ 83 U.S. (16 Wall.) 36 (1872).

²⁵⁴ *McDonald*, 561 U.S. at 858 (Thomas, J., concurring).

²⁵⁵ *Id.* at 806.

²⁵⁶ *Id.* at 791 (Scalia, J., concurring).

²⁵⁷ See, e.g., Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008) ("[A]s an originalist, the very notion of substantive due process is an oxymoron. The Due Process Clause of the Fourteenth Amendment does not protect 'life, liberty, or property' absolutely: it merely says that if the state deprives a person of any of those things it must do so with 'due process of law.'"); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1597 (2004) ("The *Griswold-Roe-Lawrence* line of cases has no apparent basis in the text or original meaning of the Due Process Clauses, and the Justices have never tried to show that there is one."); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009) ("Not only is [the idea of substantive due process] a made-up, atextual invention latched on to a clause that does not properly bear that meaning, it is a made-up, atextual invention latched on to a clause that affirmatively *contradicts* such a meaning."). But see, e.g., Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009) ("[O]ne widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights as a limit on congressional power.").

²⁵⁸ *McDonald*, 561 U.S. at 758 (plurality opinion).

²⁵⁹ See, e.g., *id.* at 850 (Thomas, J., concurring) ("Consistent with its command that '[n]o State shall . . . abridge' the rights of United States citizens, the [Privileges or Immunities] Clause establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them.").

it saw “no need to reconsider that interpretation.”²⁶⁰ These two features of Alito’s opinion cost him a majority, given that they prompted Thomas to concur in light of what he viewed as “a more straightforward path . . . more faithful to the Fourteenth Amendment’s text and history.”²⁶¹

Despite these features of *McDonald*, there are at least three reasons why Justice Alito’s plurality opinion is not wholly untethered from the text and its meaning so as to be considered “supratextualist lawmaking.”²⁶² As an initial matter, not only is the doctrine of *stare decisis* consistent with originalism,²⁶³ but, as we later argue, the doctrine itself may be rooted in the Constitution’s text, structure, and history.²⁶⁴ So though Justice Alito’s decision to forgo overturning the *Slaughter-House Cases* was arguably mistaken, it was not inherently anti-originalist, particularly because he reached the outcome an originalist would have reached.²⁶⁵ The route may have been wrong; the destination was correct.²⁶⁶

Second, Justice Alito’s determination of whether the right to keep and bear arms is consistent with contemporary originalist meth-

²⁶⁰ *Id.* at 758 (plurality opinion).

²⁶¹ *Id.* at 805–06 (Thomas, J., concurring).

²⁶² See Baude, *supra* note 25, at 2379.

²⁶³ See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 168 (2013) (“There are strong reasons for concluding that the Framers’ generation would have understood the judicial power to include a minimal concept of precedent, which requires that some weight be given to a series of decisions.”); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447 (2006) (asserting that “by 1787–1789, the concept of judicial power included significant respect for precedent” such that “judges would be bound by precedent such that they would have to follow analogous precedent or give significant reasons for not doing so”). *But see* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 525 (2000) (“It is highly unlikely that when the Constitution was adopted Americans believed that the principle of *stare decisis* was hard-wired into the concept of judicial power.”).

²⁶⁴ See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 792 (2018) (“[T]he legal validity of deference arises by implication from the Constitution’s structure, text, and historical context.”).

²⁶⁵ See Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in McDonald v. City of Chicago*, 63 FLA. L. REV. 487, 495–96 (2011) (“[E]ven if the [*McDonald*] Court’s approach has been questionable as a formal matter, the outcome is substantively correct under originalism, and that agreement is what is most important. Why engage in a disruptive spring cleaning of a century’s worth of case law, only to reach the same result under a different clause of the same constitutional provision?”).

²⁶⁶ *Cf.* Lund & McGinnis, *supra* note 257, at 1609 (arguing that although the Court’s use of “substantive due process is the [wrong] route” for “incorporat[ing] most of the Bill of Rights, . . . the Court need [not] engage in a disruptive spring cleaning of a century’s worth of case law only to reach the same result through a plausible interpretation of the Privileges or Immunities Clause”).

odology. Alito canvassed the history and public understanding of the right to keep and bear arms:

[T]his right is “deeply rooted in this Nation’s history and tradition. . . .” [B]y 1765, Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen.” Blackstone’s assessment was shared by the American colonists. . . .

. . . .

The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights. . . .

. . . .

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms.²⁶⁷

This originalist methodology leads us to our final point about *McDonald*. Although the plurality may have been wrong as an original matter that the Due Process Clause protects the right to keep and bear arms, it asked “precisely the kinds of question about the original meaning” that inclusive originalism ought to.²⁶⁸ The plurality was, as a result, working in the wheelhouse of inclusive originalism.

* * *

The foregoing discussion puts Justice Alito’s interpretive philosophy in the proper context. That context, we argue, is inclusive originalism. As Justice Alito previously put it, “I start out with originalism.”²⁶⁹ The constitutional text and its original meaning are dispositive when no conflict exists between them and other competing modalities. When a conflict exists between the text and its original meaning on one side and other competing modalities on the other, “all you have is the principle and you have to use your judgment to apply it.”²⁷⁰ Under that judgment, we have argued, the text and its original meaning

²⁶⁷ See *McDonald v. City of Chicago*, 561 U.S. 742, 768, 777 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)) (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 50 (2008)).

²⁶⁸ Cf. Baude, *supra* note 25, at 2378.

²⁶⁹ Walther, *supra* note 32.

²⁷⁰ See *id.*

trump other competing modalities, notwithstanding outcomes that may appear nonoriginalist. To Alito, “the Constitution means something and that . . . meaning does not change.”²⁷¹

C. *Stare Decisis and History*

As described above, Justice Alito’s jurisprudence is notable in its hierarchical structuring of competing interpretive modalities, with originalism at the top. But the modalities that sit beneath—precedent and history, for example—often do much of the work. As Professor Randy Kozel has put it, the constitutional “[t]ext is what starts the engine of constitutional law, but precedent is what really makes it hum.”²⁷²

Unlike those who may view deference to precedent and history only as a necessary element of judicial restraint,²⁷³ Justice Alito views deference as vital in identifying the existing wisdom within society, a value distinct from judicial restraint. This view is consistent with Alito’s rejection of abstract theory, which itself emphasizes tradition and incremental change. It appears that to Alito, the mechanisms most faithful to tradition and incremental change are *stare decisis* and history.

The doctrine of *stare decisis*, as Justice Alito has put it, “respects the judgment—the wisdom—of the past.”²⁷⁴ *Stare decisis*, then, is ultimately a “principle of respect for what has gone before.”²⁷⁵ Thus, although pragmatic reasoning is a notable feature of Alito’s jurisprudence,²⁷⁶ such reasoning must oftentimes yield to precedent, which “reflects a certain degree of humility about our ability to make sound decisions based on reason alone.”²⁷⁷

Justice Alito’s love of precedential argument, which is shared by Chief Justice Roberts,²⁷⁸ reflects Justice Alito’s time working in the Solicitor General’s Office. Chief Justice Roberts’s reliance on prece-

²⁷¹ *Id.*

²⁷² Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1844 (2013).

²⁷³ See Richard A. Cordray & James T. Vradelis, *The Emerging Jurisprudence of Justice O’Connor*, 52 U. CHI. L. REV. 389, 394–95 (1985) (“A significant illustration of Justice O’Connor’s views on judicial restraint is her approach to the principle of *stare decisis*.”).

²⁷⁴ 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).

²⁷⁵ *Id.*

²⁷⁶ See *supra* notes 111–47 and accompanying text.

²⁷⁷ Alito, *supra* note 274, at 5.

²⁷⁸ See Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1251 (2008) (“Chief Justice Roberts has an apparent commitment to *stare decisis*,

dential argument likewise reflects his long and distinguished career as a Supreme Court oral advocate.²⁷⁹ If one wants to persuade the Justices of something, it makes sense to argue from precedent. To get the true academic answer to a constitutional question like Justice Scalia, one must look at the original public meaning of the text.

Martin Luther condemned the Pope with a cry of “*sola scriptura*”—*only scripture*, and *not* the barnacles of interpretation, which the Church had encrusted on the text of the Bible.²⁸⁰ Ironically, Justice Scalia had the American-Protestant Hugo Black reading of the Constitution completely right. Only the words and their original meaning!²⁸¹ To hell with the corruptions the Court has encrusted upon the sacred text of our Shining City on a Hill.

As with his deference to precedent, Justice Alito often defers to historical practice. To Alito, although “[w]e here in the twenty-first century know much more than our ancestors did about many things,” we do “not necessarily [know] about the things that are most fundamental.”²⁸² Accordingly, “there should be a sort of presumption in favor of a venerable wisdom. We should not be rash about discarding this invaluable asset.”²⁸³ Because Alito rejects abstract theory and the rebuilding of the legal order upon theory,²⁸⁴ Alito prefers the long-standing wisdom that *stare decisis* and history reflect. In short, to Alito, the past is itself authoritative.

1. *Stare Decisis*

Justice Alito’s theory of *stare decisis* is robust. He does not favor a “narrow view of *stare decisis*,”²⁸⁵ instead urging “that a constitutional precedent should be followed unless there is a ‘special justifica-

not in the sense that he feels tightly bound by the directions of past cases, but in the sense that he is influenced by those cases and uses them to project his own influence on future decisions.”)

²⁷⁹ See Julie Hirschfeld Davis, *Bush Picks Roberts for Chief Justice*, BALT. SUN (Sept. 6, 2005), <http://www.baltimoresun.com/news/bal-te.roberts06sep06-story.html> [<https://perma.cc/VF6K-M3UG>] (noting Chief Justice Roberts’ “reputation—gained during an extraordinary 39 oral arguments—as a gifted advocate before the Supreme Court”).

²⁸⁰ Thomas Grey aptly noted that “[t]he scriptural analogue to constitutional textualism is the Protestant doctrine that the Bible is the sole vehicle of divine revelation (*sola scriptura*).” Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984). As Grey explained, “Luther said that ‘[n]o believing Christian can be coerced beyond holy writ,’ a point that William Chillingworth generalized into the more famous formula, ‘THE BIBLE, I say, the BIBLE only, is the religion of Protestants.’” *Id.*

²⁸¹ *Cf. id.*

²⁸² Alito, *supra* note 274, at 5.

²⁸³ *Id.*

²⁸⁴ See *supra* Section I.A.

²⁸⁵ See *Montejo v. Louisiana*, 556 U.S. 778, 799–800 (2009) (Alito, J., concurring).

tion' for its abandonment."²⁸⁶ Alito has seldom spoken of *stare decisis*, but three observations may be gleaned. First, Alito relies heavily on precedent as a method of reasoning. He "often approach[es] the doctrine of *stare decisis* like any other doctrine: as something that exists outside of [him] and that is [his] duty to consult."²⁸⁷ This may explain why Alito reliably bases a significant number of his opinions on controlling authority, moving methodically through the questions presented with repeated and express references to precedent. Second, he typically disfavors precedent-altering decisions. Third, Alito has expressed willingness to depart from precedent under certain circumstances. These three observations, which we address in turn, follow from eight of his opinions.

A prominent example of Justice Alito's routine examination of precedent is *Kentucky v. King*.²⁸⁸ In that case, police officers conducted a warrantless search of an apartment after hearing people inside the apartment hastily moving in response to the officers' announcing their presence.²⁸⁹ The officers testified that the sound of people moving led them to believe that evidence was being destroyed, which in turn led them to search the apartment without a warrant.²⁹⁰ At issue was whether the Fourth Amendment's exigent-circumstances rule applied when police officers cause persons to destroy evidence.²⁹¹ Although precedent did not squarely resolve the issue, Justice Alito characteristically moved through relevant precedent to hold that the exigent circumstances rule may apply.

Justice Alito began his majority opinion with the text of the Fourth Amendment, though quickly turned to precedent.²⁹² Citing numerous cases, Alito noted that a "well-recognized exception" to the rule that warrantless searches and seizures inside a home are unconstitutional is the exigent-circumstances rule, under which "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."²⁹³ Again pointing to precedent, Alito explained that one such exigent circumstance is the need to prevent the

²⁸⁶ *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (citation omitted).

²⁸⁷ See Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1189 (2015).

²⁸⁸ 563 U.S. 452 (2011).

²⁸⁹ *Id.* at 456.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 455.

²⁹² *Id.* at 459.

²⁹³ *Id.* at 460 (alteration in original) (citations omitted).

destruction of evidence.²⁹⁴ The issue, however, was whether this exigent circumstance gives way when police officers create such a circumstance.

Justice Alito resolved the issue by referencing the “principle that permits warrantless searches in the first place,” a principle enunciated in previous Supreme Court decisions.²⁹⁵ That principle led to the following rule: “[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.”²⁹⁶ Alito relied on precedent not only to create the rule, but also to explain why competing rules that some lower courts had crafted were erroneous.²⁹⁷

Cases unrelated in subject matter—*Davis v. FEC*,²⁹⁸ *Koontz v. St. John’s River Water Management District*,²⁹⁹ *Holt v. Hobbs*,³⁰⁰ and *Burwell v. Hobby Lobby Stores, Inc.*³⁰¹—also demonstrate the value of stare decisis to Justice Alito. Writing for the majority in each case, Alito addressed the issues by relying heavily on precedent as a method of reasoning. In *Davis*, the Supreme Court considered whether the provisions of the Bipartisan Campaign Reform Act (“BCRA”) that limited certain candidates’ expenditures of personal funds and required certain disclosures violated the First Amendment.³⁰² As he is wont to do, Alito began his analysis of BCRA’s personal-expenditure limit with a welter of precedents.³⁰³ Alito found those decisions largely inapposite, distinguishing them on the ground that they, unlike the case at hand, dealt with provisions limiting campaign contributions for all candidates.³⁰⁴ The provision at issue imposed different contribution limits on competing candidates, which, to Alito, implicated *Buckley v. Valeo*’s³⁰⁵ “emphasis on the fundamental nature of the right to spend personal funds for campaign speech.”³⁰⁶

²⁹⁴ *Id.*

²⁹⁵ *See id.* at 462.

²⁹⁶ *Id.*

²⁹⁷ *See id.* (“We have taken a similar approach in other cases involving warrantless searches.”); *id.* at 464 (explaining that the lower court’s rule “is fundamentally inconsistent with our Fourth Amendment jurisprudence”).

²⁹⁸ 554 U.S. 724 (2008).

²⁹⁹ 133 S. Ct. 2586 (2013).

³⁰⁰ 135 S. Ct. 853 (2015).

³⁰¹ 134 S. Ct. 2751 (2014).

³⁰² *See Davis*, 554 U.S. at 729–31, 736.

³⁰³ *See id.* at 737.

³⁰⁴ *See id.*

³⁰⁵ 424 U.S. 1 (1976) (per curiam).

³⁰⁶ *Davis*, 554 U.S. at 738.

Because the provision at issue imposed a substantial burden on that right, Alito next determined whether the provision was “justified by a compelling state interest.”³⁰⁷ Squarely addressing relevant precedent, he concluded that the provision was not.³⁰⁸

Justice Alito’s majority opinion in *Koontz* likewise relied heavily on precedent in holding that the limitations imposed on the government’s ability to impose certain conditions on land-use permit applications apply both when the government denies those applications and when the condition is a monetary extraction.³⁰⁹ Alito began his analysis by pointing to five cases that reflect the unconstitutional-conditions doctrine, which “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”³¹⁰ He then explained that the doctrine has equal application when the government approves *or* denies a permit after an applicant either decides or refuses to forfeit property, referencing 12 cases to support this holding.³¹¹ Finally, he pointed to seven decisions to further hold that the doctrine applies to both land and monetary extractions.³¹²

Holt is similarly instructive of how, as former Attorney General Alberto Gonzales has noted, Justice Alito prefers to “work through a given issue on the basis of a thorough examination of precedent and controlling authority.”³¹³ The issue in *Holt* was whether the Arkansas Department of Corrections’ prisoner grooming policy, which permitted prisoners to grow beards only for dermatological reasons, violated the Religious Land Use and Institutionalized Persons Act.³¹⁴ In *Holt*, a Muslim prisoner grew a half-inch beard for religious purposes.³¹⁵ He argued that the Department’s grooming policy violated the Act because it was counter to that statute’s prohibition on state and local governments substantially burdening an institutionalized person’s religious exercise unless the burden is “the least restrictive means of furthering a compelling governmental interest.”³¹⁶ Alito, writing for a

³⁰⁷ *Id.* at 740 (citation omitted).

³⁰⁸ *See id.* at 740–43.

³⁰⁹ 133 S. Ct. 2586, 2603 (2013).

³¹⁰ *Id.* at 2594–95.

³¹¹ *See id.* at 2595–97.

³¹² *See id.* at 2599–600.

³¹³ Alberto R. Gonzales, *In Search of Justice: An Examination of the Appointments of John G. Roberts and Samuel A. Alito to the U.S. Supreme Court and Their Impact on American Jurisprudence*, 22 WM. & MARY BILL RTS. J. 647, 700 (2014).

³¹⁴ *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

³¹⁵ *Id.*

³¹⁶ *Id.* at 859, 862–64.

unanimous Supreme Court, agreed.³¹⁷ Alito reserved the bulk of his analysis for the least-restrictive-means inquiry, given how the Department appeared to concede that its policy substantially burdened the prisoner's religious exercise.³¹⁸ Alito pointed to precedent establishing that the Act "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person.'"³¹⁹ Analogizing to several cases, Alito held that the Department's grooming policy was not the least restrictive means of furthering the state's interest in prison safety and security.³²⁰

We pause our discussion of how *Holt* further evidences Justice Alito's pervasive use of precedent to point out a more notable aspect of the opinion. That aspect is its demonstration of Alito's "consistent commitment to his principles of jurisprudence"—here, the doctrine of stare decisis—"despite his personal feelings."³²¹ Some commentators have noted that Alito "tends to be pro-law enforcement" and "generally joins in decisions based on principles of deference,"³²² but his opinion in *Holt* eschews both tendencies, supposed or legitimate. With respect to law enforcement, Alito noted that "it is hard to swallow the [Department's] argument that denying petitioner a 1/2-inch beard actually furthers the Department's interest in rooting out contraband."³²³ Alito also rejected any pretense of deference, explaining that although "courts should respect" the expertise of prison officials, "that respect does not justify the abdication of the responsibility, conferred by Congress, to apply [the Act's] rigorous standard."³²⁴

Finally, Justice Alito's majority opinion in *Burwell v. Hobby Lobby Stores* further evidences his penchant for precedent. To be sure, *Hobby Lobby* is a statutory interpretation case, given that the issue was whether the Religious Freedom Restoration Act's ("RFRA") protection of a "*person's* exercise of religion" applied to regulations governing for-profit corporations.³²⁵ In interpreting RFRA, Alito held that this protection did so apply.³²⁶ In addition to looking to the Dictionary Act to arrive at this interpretation, he also

³¹⁷ *Id.*

³¹⁸ *See id.* at 862–63.

³¹⁹ *Id.* at 863 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014)).

³²⁰ *See id.* at 865.

³²¹ *Gonzales*, *supra* note 313, at 700.

³²² *Id.* at 691, 704.

³²³ *Holt*, 135 S. Ct. at 864.

³²⁴ *Id.*

³²⁵ 134 S. Ct. 2751, 2767 (2014) (emphasis added).

³²⁶ *Id.* at 2768.

looked to precedent.³²⁷ Critically important, for example, were prior cases in which the Court “entertained RFRA and free-exercise claims brought by nonprofit corporations.”³²⁸ Because the Court had thus previously recognized that the word “person” applies to nonprofit corporations, Alito explained that the word “person” must also apply to for-profit corporations as well.³²⁹ Pointing to additional precedent, Alito noted that “no conceivable definition of the term ‘person’ includes natural persons and nonprofit corporations, but not for-profit corporations.”³³⁰ So *Hobby Lobby* is an example of not only Alito’s approach to statutory interpretation, but also his reliance on precedent as a method of reasoning.

The second observation about Justice Alito and stare decisis is that he typically disfavors precedent-altering decisions.³³¹ Alito noted that “stare decisis is not an ‘inexorable command,’” and any decision to alter precedent must “explain why its departure from the usual rule of stare decisis is justified.”³³² As he noted in *Arizona v. Gant*,³³³ “special justification” is required for such departures.³³⁴ In that opinion, he pointed to five factors that may justify departures from stare decisis: (1) reliance interests, (2) changed circumstances, (3) unworkability, (4) jurisprudential coherence, and (5) flagrancy of error.³³⁵ *Gant* itself involved police officers’ authority to conduct a warrantless search of a vehicle after lawfully arresting the vehicle’s occupant.³³⁶ The majority held that officers may not conduct that type of search “after the arrestee has been secured and cannot access the interior of the vehicle.”³³⁷

³²⁷ See *id.* at 2768–69.

³²⁸ *Id.* (citations omitted).

³²⁹ See *id.* at 2769.

³³⁰ *Id.* (citing *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.”)).

³³¹ See *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting).

³³² *Id.* (citation omitted).

³³³ 556 U.S. 332 (2009).

³³⁴ *Id.* at 358 (Alito, J., dissenting).

³³⁵ See *id.* In *Gant*, Justice Alito referred to these five factors as follows: (1) “whether the precedent has engendered reliance,” (2) “whether there has been an important change in circumstances in the outside world,” (3) “whether the precedent has proved to be unworkable,” (4) “whether the precedent has been undermined by later decisions,” and (5) “whether the decision was badly reasoned.” *Id.* (citations omitted). The phrases “jurisprudential coherence” and “flagrancy of error” are borrowed from Randy Kozel’s helpful discussion of the “doctrinal factors that the Court has, from time to time, described as relevant to the stare decisis analysis.” See Kozel, *supra* note 287, at 1161, 1168, 1170.

³³⁶ See *Gant*, 556 U.S. at 335, 338 (majority opinion).

³³⁷ See *id.*

In *Gant*, Justice Alito dissented on the ground that the majority's holding conflicted with, and "effectively overrule[d],"³³⁸ its decision 28 years prior in *New York v. Belton*.³³⁹ In *Belton*, the Supreme Court held that police officers may conduct a warrantless search of a vehicle incident to the arrest of one of the vehicle's occupants.³⁴⁰ Alito stated in his *Gant* dissent that the majority's arguable departure from *Belton* was unjustified, particularly because of the law enforcement reliance interests that the *Belton* rule established.³⁴¹ To Alito, "[t]he *Belton* rule has been taught to police officers for more than a quarter century," and "reliance by law enforcement officers is . . . entitled to weight."³⁴² Because none of the other four factors justified departure from *Belton*, Alito would have left "any reexamination of our prior precedents for another day."³⁴³ In perhaps his most quotable moment during his three decades on the bench, Justice Alito later said that the author of the *Gant* majority opinion, Justice Stevens, "thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old."³⁴⁴

Another example of Alito's preference for retaining settled decisions comes in an unlikely place: his dissent in *Whole Woman's Health v. Hellerstedt*.³⁴⁵ That case involved the constitutionality of a state's statutes requiring abortion providers to have admitting privileges at a hospital less than 30 miles from the site of the abortion and requiring abortion facilities to meet the same requirements as ambulatory surgical centers.³⁴⁶ The majority held that both requirements were unconstitutional because each constituted, under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁴⁷ an undue burden on access to abortion.³⁴⁸

³³⁸ See *id.* at 355 (Alito, J., dissenting).

³³⁹ 453 U.S. 454 (1981).

³⁴⁰ *Id.* at 460.

³⁴¹ *Gant*, 556 U.S. at 358–59 (Alito, J., dissenting).

³⁴² *Id.*

³⁴³ *Id.* at 365. In a later decision, Justice Alito explained that the *Gant* majority erred in departing from *Belton* because "that case had been on the books for 28 years, had not been undermined by subsequent decisions, had been recently reaffirmed and extended, had proved to be eminently workable . . . and had engendered substantial law enforcement reliance." *Montejo v. Louisiana*, 556 U.S. 778, 799 (2009) (Alito, J., concurring).

³⁴⁴ *Montejo*, 556 U.S. at 801 (Alito, J., concurring).

³⁴⁵ 136 S. Ct. 2292 (2016).

³⁴⁶ *Id.* at 2300.

³⁴⁷ 505 U.S. 833 (1992).

³⁴⁸ *Whole Woman's Health*, 136 S. Ct. at 2300.

Justice Alito dissented in *Whole Woman's Health* primarily on the ground that the majority ignored precedents dealing with the doctrine of res judicata, under which a losing litigant does not get a “rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.”³⁴⁹ Alito said that res judicata barred the plaintiffs’ constitutional challenge to the admitting-privileges requirement because they made “the exact same claim” but “lost on the merits” in an earlier suit before the Court of Appeals for the Fifth Circuit.³⁵⁰ Alito took the majority to task for it ignoring the “rules that apply in regular cases,” under which the plaintiffs “could not relitigate the exact same claim in a second suit.”³⁵¹ Alito explained that “what the Court has done here is to create an entirely new exception to” res judicata.³⁵² He then explained that, for similar reasons, res judicata barred the plaintiffs’ challenge to the surgical-center requirement.³⁵³ Although Alito did not address the five factors that may justify departures from stare decisis, he stated that the majority’s approach was “unprecedented,” given that it was “contrary to the bedrock rule” of res judicata.³⁵⁴

The third observation of Justice Alito’s views on stare decisis is a corollary of the second: Justice Alito’s presumption in favor of retaining settled decisions is just that—a presumption. “If the Court has gone down a wrong path” that “creat[es] bad consequences,” for example, Alito believes that “what the Court should do is say, ‘Well, we made a mistake. We turn [sic] took a wrong turn. We’re going to go back and correct the mistake.’”³⁵⁵ Perhaps the most prominent example of an attempt at course correction is his majority opinion in *Harris v. Quinn*.³⁵⁶

Harris concerned whether a state’s “fair-share” provision compelling personal care providers to pay fees to unions the providers did not support was consistent with the First Amendment.³⁵⁷ Justice Alito, writing for the majority, held that the provision was not.³⁵⁸ The critical issue in *Harris* was whether *Aboud v. Detroit Board of Education*,³⁵⁹ a

³⁴⁹ *Id.* at 2330 (Alito, J., dissenting).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 2337.

³⁵³ *See id.* at 2340–42.

³⁵⁴ *Id.* at 2337, 2339.

³⁵⁵ Alito, *supra* note 109, at 55.

³⁵⁶ 134 S. Ct. 2618 (2014).

³⁵⁷ *Id.* at 2623.

³⁵⁸ *Id.*

³⁵⁹ 431 U.S. 209 (1977).

case upholding fair-share provisions regulating state employees, extended to personal assistants.³⁶⁰ The most significant aspect of Alito's opinion was not his resolution of that issue—that *Abood* was not controlling³⁶¹—but his critique of *Abood* itself. Though the petitioners invited the Supreme Court to overturn *Abood*,³⁶² Alito's majority opinion turned down the invitation, perhaps sensing that accepting it would cost him a majority.³⁶³ Nevertheless, Alito engaged in an extended discussion that appears to read as an explanation of why *Abood* should be overruled.³⁶⁴

Justice Alito's criticism of *Abood* involved two of his five factors that may justify departure from precedent: unworkability and flagrancy of error. As to unworkability, Alito mentioned that "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems" that its holding would bring.³⁶⁵ For example, "the Court has struggled repeatedly" with the issue of whether public-sector union expenditures should be classified as "either 'chargeable' . . . or nonchargeable" since *Abood*.³⁶⁶ And "objecting nonmembers" such as employees face several "practical problems" under *Abood*, including the "bear[ing] [of] a heavy burden if they wish to challenge the union's actions."³⁶⁷ These problems appear to square with the definition of unworkability, which "refers to the 'mischievous consequences to litigants and courts alike' that can result from a vague or byzantine judicial rule."³⁶⁸

The primary problem with *Abood* for Justice Alito, however, was its flagrancy of error. As an initial matter, Alito noted in *Harris*, the *Abood* Court "seriously erred in treating" two prior cases "as having all but decided the constitutionality of compulsory payments to a pub-

³⁶⁰ *Harris*, 134 S. Ct. at 2627.

³⁶¹ *Id.* at 2638.

³⁶² *See id.* at 2645 (Kagan, J., dissenting) (explaining that "[t]he petitioners devoted the lion's share of their briefing and argument to urging us to overturn" *Abood*).

³⁶³ *See id.* at 2638 n. 19 (majority opinion) ("It is . . . unnecessary for us to reach petitioners' argument that *Abood* should be overruled . . .").

³⁶⁴ *See, e.g., id.* at 2632 ("The *Abood* Court's analysis is questionable on several grounds.").

³⁶⁵ *Id.* at 2633.

³⁶⁶ *Id.* (citations omitted).

³⁶⁷ *Id.*

³⁶⁸ Kozel, *supra* note 287, at 1162 (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)); *see also* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1173 (2008) ("[A] precedent or line of precedents . . . tends to be thought 'unworkable' where there exist no readily discoverable, judicially manageable standards to guide judicial discretion or where the purported 'rule' supplied by precedent seems to require judicial policy determinations of a kind not appropriate for courts to be making.").

lic-sector union.”³⁶⁹ What is more, *Abood* did not recognize the important distinction “between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector.”³⁷⁰ That case, to Alito, also “failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.”³⁷¹ Finally, the holding in *Abood* “rest[ed] on an unsupported empirical assumption.”³⁷² Both the unworkability of, and flagrancy of error in, *Abood* provided Alito with the special justification necessary to overturn it.

2. History

Justice Alito’s dissent in *Miller v. Alabama*³⁷³ is a prominent example of the value he places in history as a mechanism to identify existing wisdom within society. In that case, two teenagers were convicted of murder and sentenced to life in prison without the possibility of parole.³⁷⁴ At issue was whether such a sentence for individuals under the age of 18 violated the Eighth Amendment’s ban on “cruel and unusual punishments.”³⁷⁵ To the majority, resolution of the issue required a determination of whether those kinds of sentences were proportional, a concept it viewed “less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.”³⁷⁶ Because those sentences were categorically disproportionate, they violated the Eighth Amendment.³⁷⁷

Alito disagreed, beginning his dissent with an explanation of why the evolving-standards-of-decency standard of *Trop v. Dulles*³⁷⁸ is problematic.³⁷⁹ He disagreed, for example, that “our society is inexorably evolving in the direction of greater and greater decency.” This

³⁶⁹ *Harris*, 134 S. Ct. at 2632.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.* at 2634.

³⁷³ 567 U.S. 460 (2012).

³⁷⁴ *Id.* at 465.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 469 (citation omitted).

³⁷⁷ *Id.* at 479 (“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.”).

³⁷⁸ 356 U.S. 86 (1958).

³⁷⁹ *Miller*, 567 U.S. at 510 (Alito, J., dissenting) (“Both the provenance and philosophical basis for this standard were problematic from the start.”).

view—a “particular philosophy of history”—is troubling because it stacks the deck against the “venerable wisdom” of the past.³⁸⁰

Justice Alito discussed why historical practice rather than “evolving standards of decency” ought to be presumptive. For one, a presumption in favor of history prevents “entirely inward looking” case law.³⁸¹ This type of case law is dangerous because it allows for “extrapolat[ions]” that permit courts to bring “sentencing practices into line with whatever [they] view[] as truly evolved standards of decency.”³⁸² Such extrapolations, untethered to any indicia of society’s standards both past and present, represent only “the personal views of five Justices.”³⁸³ Without history, Alito warned that “we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed. The Constitution does not authorize us to take the country on this journey.”³⁸⁴

Likewise, Justice Alito’s dissent in *Obergefell v. Hodges*³⁸⁵ demonstrates the value he finds in historical practice. In *Obergefell*, the Supreme Court held that the Fourteenth Amendment’s Due Process and Equal Protection Clauses prohibit states from depriving same-sex couples the right to marry.³⁸⁶ From start to finish, Alito’s dissent sounded in the views of Alexander Bickel, whose restrained judicial philosophy includes the ideas of the “counter-majoritarian difficulty”³⁸⁷ and “the passive virtues.”³⁸⁸ Alito’s dissent explained why, to him, history and tradition are a sound—indeed, necessary—basis upon which to adjudicate constitutional issues involving the Due Process Clause: “To prevent five unelected Justices from imposing their personal vision of liberty upon the American people”³⁸⁹

Justice Alito began his dissent by referencing *Washington v. Glucksberg*,³⁹⁰ which says that rights are protected by the Due Process Clause only if they are “deeply rooted in this Nation’s history and tradition.”³⁹¹ Pointing to the history and tradition of the right to same-sex marriage in the United States, Alito, referencing his dissent in

380 Alito, *supra* note 274, at 5.

381 *Miller*, 567 U.S. at 514.

382 *Id.* at 515.

383 *Id.* at 510.

384 *Id.* at 515.

385 135 S. Ct. 2584 (2015).

386 *Id.* at 2604.

387 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

388 See *id.* at 111.

389 *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting).

390 521 U.S. 702 (1997).

391 *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting) (citation omitted).

United States v. Windsor,³⁹² noted that no state permitted the exercise of that right until 2003.³⁹³ The same was true of every country until 2000.³⁹⁴ Because “it is beyond dispute that the right to same-sex marriage is not among those” deeply rooted in history and tradition, the right is not, to Alito, protected by the Due Process Clause.³⁹⁵

In his *Obergefell* dissent, Justice Alito noted that history and tradition are valuable because they constrain the counter-majoritarian judiciary from arrogating to itself the constitutional authority to recognize new rights. That authority belongs not to “unelected judges,” but to “a legislative body elected by the people.”³⁹⁶ If a right lacks deep roots in history or tradition, judges may not “claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.”³⁹⁷ To do so would represent an unconstitutional “claim of power”³⁹⁸ and tread on the “caution and humility” that judges face when asked to constitutionalize “very new right[s].”³⁹⁹ Alito concluded with both of these ideas, which remind one of Bickel’s views on the counter-majoritarian difficulty and the passive virtues:

Today’s decision shows that decades of attempts to restrain this Court’s abuse of its authority have failed. A lesson that some will take from today’s decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means. . . . [Today’s decision] evidences . . . the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.⁴⁰⁰

Justice Alito’s dissents in *Miller* and *Obergefell* are only two of numerous of his opinions that rely on the “venerable wisdom”⁴⁰¹ that history supplies. Indeed, history as a method of resolving constitutional issues plays a significant role in most of the opinions we have discussed. In *McDonald v. City of Chicago*, for example, Alito dis-

³⁹² 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting).

³⁹³ *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting) (citing *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting)).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* (quoting *Windsor*, 133 S. Ct. at 2715).

³⁹⁷ *Id.* at 2641.

³⁹⁸ *Id.* at 2643.

³⁹⁹ *Id.* at 2640 (citation omitted).

⁴⁰⁰ *Id.* at 2643.

⁴⁰¹ Alito, *supra* note 274, at 5.

cussed the history of the right to bear arms by referencing the 1689 English Bill of Rights, Blackstone's *Commentaries*, the ideas of the drafters of the Bill of Rights, and 13 state constitutional provisions from the Founding Era.⁴⁰² In both *Pleasant Grove City v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, Alito canvassed the history of governments' uses of monuments since ancient times.⁴⁰³ In *Town of Greece v. Galloway*, he pointed to Congress's 19th-century practice of hearing Christian and Jewish prayers in the House and Senate.⁴⁰⁴ And in *Birchfield v. North Dakota*, he discussed the historical pedigree of the search-incident-to-arrest doctrine.⁴⁰⁵ These and other cases demonstrate, first, that Alito views the past as having an authority of its own and, second, that judges ought to give this authority deference.

II. THE BURKEAN JURISPRUDENCE OF JUSTICE ALITO

Having identified the three themes of Justice Alito's jurisprudence, we turn now to a discussion of how those themes are largely Burkean. And because, as we demonstrate below, Friedrich Hayek's thoughts about human reason and tradition closely resemble Burke's, we argue that just as Alito's jurisprudence is Burkean, so too is it Hayekian.

Specifically, we argue that the three themes of Justice Alito's jurisprudence largely follow the two features of Burke's and Hayek's philosophical methods of approaching political questions. First, Alito's fact-oriented jurisprudence reflects Burke and Hayek's rejection of abstract theory in favor of facts drawn from reality. Second, Alito's reliance on *stare decisis* and historical practice follows Burke's and Hayek's reliance on prescriptive wisdom inherent in longstanding traditions and institutions. Finally, Alito's commitment to inclusive originalism is, contrary to some commentators' positions,⁴⁰⁶ consistent with Burkeanism. Nevertheless, we argue that because there is a clear

⁴⁰² See 561 U.S. 742, 767–70 (2010).

⁴⁰³ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2259 (2015) (“In 1775 . . . a large gilded equestrian statue of King George III dominated Bowling Green, a small park in lower Manhattan . . .”); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (“Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power.”).

⁴⁰⁴ 134 S. Ct. 1811, 1830 (2014).

⁴⁰⁵ See 136 S. Ct. 2160, 2174 (2016) (“Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person.”).

⁴⁰⁶ See *infra* notes 521–24 and accompanying text.

American tradition of placing the constitutional text over precedent, a good Burkean should adhere to the text of the Constitution rather than precedent.

A. *The Limits of Human Reason and the Rejection of Abstract Theory*

1. *Edmund Burke and Friedrich Hayek on Human Reason and Abstract Theory*

Central to Burke's philosophy is the view that human rationality and knowledge is inherently limited. To Burke, the "private stock of reason . . . in each man is small," and so we should fear "put[ting] men to live and trade" in that stock.⁴⁰⁷ A rejection of abstract theory—the "coxcombs of philosophy,"⁴⁰⁸ as it were—necessarily follows from this view of the limited nature of human rationality and knowledge. As Burke put it, the "science of constructing a commonwealth, . . . or reforming it, is, like every other experimental science, not to be taught a priori."⁴⁰⁹

Burke's conception of human knowledge and its corresponding rejection of abstract theory is captured in his response to the French Revolutionaries, who favored a metaphysical approach to governance. Responding to that approach, Burke wrote:

Nothing universal can be rationally affirmed on any moral or any political subject. Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence. Prudence is not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.⁴¹⁰

Prudence, then, is an outgrowth of Burke's view that man's private stock of reason is inherently limited, or, as Professor Anthony Kronman explained, that "[n]o single person or even generation . . . can ever possess the self-sufficiency of understanding that the metaphysical ideal contemplates."⁴¹¹ To think otherwise, as the French who

⁴⁰⁷ Burke, *Reflections*, *supra* note 15, at 359.

⁴⁰⁸ *Id.* at 325.

⁴⁰⁹ *Id.* at 333.

⁴¹⁰ BURKE, *Appeal*, *supra* note 17, at 16.

⁴¹¹ Kronman, *supra* note 19, at 1056.

shouted “aux barricades” in the summer of 1789 did,⁴¹² is both arrogant and impious. Arrogant because it presumes a power of rationality that is equipped to answer every political question.⁴¹³ And impious because it compares “to a parricidal child who, contrary to all natural feeling, turns against his parents and announces his willingness to hack them into bits.”⁴¹⁴ Burke thus found, said Alexander Bickel, “a politics of theory and ideology, of abstract, absolute ideas . . . an abomination, whether the idea was the right of the British Parliament to tax the American colonies or the rights of man.”⁴¹⁵

Without metaphysical speculation, what is to guide the statesman? Replied Burke, “[a] statesman, never losing sight of principles, is to be guided by circumstances.”⁴¹⁶ This approach, said historian J.G.A. Pocock, “endows the community with an inner life of growth and adaptation, and it denies to individual reason the power to see this process as a whole or to establish by its own efforts the principles on which the process is based.”⁴¹⁷ Principles, to be sure, are necessary in Burke’s view.⁴¹⁸ An important distinction exists between principles that “draw[] from the *fact* of our government” on the one hand, and metaphysical speculation on the other.⁴¹⁹ One must start not from such speculation, but from “the reality of a particular society.”⁴²⁰ To Burke, facts precede doctrine.

Hayek’s conception of human knowledge follows the Burkean recognition of the limits of human reason and the rejection of abstract theory. Indeed, so close are the two thinkers’ views on these topics that one could reasonably agree with Professor Linda Raeder’s assertion that “Hayek’s thought[s] on” them are “merely an elaboration” of Burke’s.⁴²¹ Hayek greatly developed Burke’s rejection of abstract

⁴¹² See generally MARK TRAUGOTT, *THE INSURGENT BARRICADE* (2010).

⁴¹³ See Kronman, *supra* note 19, at 1056–57; see also Burke, *Reflections*, *supra* note 15, at 307 (describing the French Revolutionary “spirit of innovation” as “the result of a selfish temper[] and confined views[]”).

⁴¹⁴ Kronman, *supra* note 19, at 1057.

⁴¹⁵ Alexander M. Bickel, *Edmund Burke and Political Reason*, in *THE MORALITY OF CONSENT* 11, 19 (1975).

⁴¹⁶ BURKE, *Unitarian Speech*, *supra* note 16, at 114.

⁴¹⁷ J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in *POLITICS, LANGUAGE AND TIME* 202, 203 (1971).

⁴¹⁸ See BURKE, *Unitarian Speech*, *supra* note 16, at 113–14. Burke said he “do[es] not put abstract ideas wholly out of any question, because” an absence of “sound, well-understood principles” leads to “a confused jumble of particular facts and details.” *Id.*

⁴¹⁹ Young, *supra* note 17, at 646.

⁴²⁰ *Id.*

⁴²¹ Linda C. Raeder, *The Liberalism/Conservatism of Edmund Burke and F.A. Hayek: A Critical Comparison*, 10 *HUMANITAS* 70, 75–76 (1997).

theory in *Rules and Order*, the first of three volumes contained in his famous *Law, Legislation, and Liberty*.⁴²² In the first pages of *Rules and Order*, Hayek acknowledged “[t]he permanent limitations of our factual knowledge.”⁴²³ He would develop this idea over the next several hundred pages.

Hayek concluded in *Rules and Order* that governance “requires an insight into the limitations of the powers of conscious reason,”⁴²⁴ an insight that he and Burke thought vastly underappreciated. Burke viewed as dangerous the Enlightenment thinkers, Hayek the Cartesian constructivists.⁴²⁵ As Pocock noted, Burke viewed the Enlightenment as a “destructive movement of the human intellect, aimed at the utter subversion of . . . social behaviour” whose thinkers thought they could remodel society.⁴²⁶ Hayek, meanwhile, thought that Cartesian constructivists possessed “contempt for tradition, custom, and history in general.”⁴²⁷ The problem with the abstractions that such constructivism produced was the false belief that “[m]an’s reason alone should enable him to construct society anew.”⁴²⁸

In a term Burke himself could have coined, Hayek outlined the problems of what he called the “synoptic delusion,” a “fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order.”⁴²⁹ To Hayek, the “central problem” of this delusion is “our incapacity to assemble as a surveyable whole all the data which enter into the social order.”⁴³⁰ In Hayek’s Burkean words, “the possibility of justice rests on this necessary limitation of our factual knowledge, and that insight into the nature of justice is therefore denied to all

422 See generally 1 F.A. HAYEK, *Rules and Order*, in *LAW, LEGISLATION, AND LIBERTY* (1973) [hereinafter HAYEK, *Rules and Order*].

423 *Id.* at 11.

424 *Id.* at 29.

425 By “Cartesian constructivism,” Hayek was referring to “the basic idea[] of what” he labelled “constructivist rationalism” that followed from the thinking of René Descartes. *Id.* at 9–10. This idea was that “rational action . . . mean[t] only such action as was determined entirely by known and demonstrable truth.” From this idea came the “inevitable” conclusion that “everything to which man owes his achievements is a product of his reasoning thus conceived. Institutions and practices which have not been designed in this manner can be beneficial only by accident.” *Id.* at 10.

426 See *Introduction* to EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE*, at xxxiii (J.G.A. Pocock ed., Hackett Publ’g Co. 1987) (1790).

427 HAYEK, *Rules and Order*, *supra* note 422, at 10.

428 *Id.*

429 *Id.* at 14.

430 *Id.* at 14–15.

those constructivists who habitually argue on the assumption of omniscience.”⁴³¹

2. *Justice Alito on Human Reason and Abstract Theory*

Justice Alito’s fact-oriented jurisprudence largely reflects Burke and Hayek’s recognition of the limits of human reason and the rejection of abstract theory. At least three of Alito’s opinions conform to how one might view the Burkean judge, who disclaims the possession of a “special sort of [metaphysical] vision.”⁴³² We first return to *United States v. Jones*, where Alito in concurrence stressed the folly of prioritizing a property-based Fourth Amendment doctrine over fact.⁴³³ There, Alito counseled against what to him was an abstract construction of the Fourth Amendment because of the limitations inherent in such an exercise.⁴³⁴ As Burke likely would have, Alito stressed that the facts before the Court—the “circumstances” that ought to guide the statesman⁴³⁵—should guide its Fourth Amendment inquiry. In Hayekian terms, that inquiry required one to acknowledge the limitations of conscious reason.⁴³⁶ Thus, Alito disfavored the majority’s “highly artificial approach” that, to him, failed to consider the facts of the “particular case.”⁴³⁷ Alito reinforced his distaste for such an approach during oral argument in *Byrd v. United States*,⁴³⁸ where he reiterated “the problem with . . . this property route.”⁴³⁹ It is “that we go off in search of a type of case that almost never arose . . . at common law.”⁴⁴⁰ It would be foolish to engage in abstract hypotheticals that would “[n]ever have happened in 18th-century America.”⁴⁴¹ To Alito, the preferable approach—one we think a Burkean one—is to substitute a “discredited” academic theory for one that realistically engages with the facts before the Court.⁴⁴²

We would place no blame on readers who think it Burke or Hayek who said that “our legal system does not exalt reason above

⁴³¹ *Id.* at 13.

⁴³² Kronman, *supra* note 19, at 1056.

⁴³³ *See supra* notes 46–49 and accompanying text.

⁴³⁴ *See United States v. Jones*, 565 U.S. 400, 418–19 (2012) (Alito, J., concurring).

⁴³⁵ *See BURKE, Unitarian Speech, supra* note 16, at 114.

⁴³⁶ *See HAYEK, Rules and Order, supra* note 422, at 29.

⁴³⁷ *See Jones*, 565 U.S. at 419, 430 (Alito, J., concurring).

⁴³⁸ 138 S. Ct. 1518 (2018).

⁴³⁹ Transcript of Oral Argument at 26, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *See Jones*, 565 U.S. at 423 (Alito, J., concurring) (citation omitted); *see also id.* at 430.

everything else.”⁴⁴³ But that statement came from Justice Alito.⁴⁴⁴ Its sentiment is reflected in his concurring opinion in *Brown v. Entertainment Merchants Ass’n*, a concurrence driven by the majority’s apparent failure to proceed with doctrinal caution in the face of “all of the” circumstances before the Court.⁴⁴⁵ In *Brown*, Alito thought a doctrinally rigid approach in determining whether the First Amendment prohibited a state from making illegal the rental of violent video games to minors was inappropriate.⁴⁴⁶ Alito instead favored an approach that considered the actual “experience[s]” that the law at issue sought to protect minors from.⁴⁴⁷ In its doctrinal haste, Alito reasoned, the majority “act[ed] prematurely in dismissing” these experiences.⁴⁴⁸ Put in a Burkean way, the majority sought to police “[t]he lines of morality” with “the process of logic” rather than “the rules of prudence.”⁴⁴⁹ But to Alito, prudence counseled a recognition “that the experience of playing video games . . . may be very different from anything that we have seen before,” such that certain video games may not claim First Amendment protection.⁴⁵⁰

Justice Alito’s lone dissent in *Mathis v. United States* employs a Burkean model. There, Alito noted in a particularly quotable moment that the majority saw “[r]eal-world facts [as] irrelevant.”⁴⁵¹ In his dissent, Alito lambasted the majority’s modified categorical approach to sentencing as being out of touch with “practicality.”⁴⁵² One particularly troublesome aspect of the modified categorical approach is its “pointless formalism,” which requires sentencing courts to “delve into pointless abstract questions.”⁴⁵³ Alito preferred a “real-world approach” under which the facts of a particular crime were to play the central role at sentencing.⁴⁵⁴ This approach follows Burke and Hayek’s resistance to abstraction and the corresponding placement of fact over doctrine. As Burke put it, “I must see with my own eyes, I must, in a manner, touch with my own hands, not only the fixed, but the momen-

443 Alito, *supra* note 274, at 5.

444 *See id.*

445 *See* 564 U.S. 786, 806, 820 (2011) (Alito, J., concurring) (emphasis added).

446 *See id.* at 806.

447 *See id.* at 816–17.

448 *Id.* at 821.

449 BURKE, *Appeal*, *supra* note 17, at 16.

450 *See Brown*, 564 U.S. at 816 (Alito, J., concurring).

451 *Mathis v. United States*, 136 S. Ct. 2243, 2271 (2016) (Alito, J., dissenting) (footnote omitted).

452 *See id.* at 2268–70.

453 *Id.* at 2268, 2271.

454 *See id.* at 2269–70.

tary circumstances, before I could venture to suggest any political project whatsoever.”⁴⁵⁵

An additional three of Justice Alito’s opinions reveal a Burkean orientation of practical reasoning. Specifically, Alito’s plain English jurisprudence follows the pragmatic and syllogistic style that characterize Burke’s and Hayek’s philosophies. Perhaps the most prominent example of this pragmatic style is Alito’s majority opinion in *Ohio v. Clark*. In *Clark*, the majority held that the Confrontation Clause of the Sixth Amendment did not bar out-of-court statements made by a juvenile to prove an adult defendant’s guilt.⁴⁵⁶ In arriving at this conclusion, the majority could have—though most decidedly did not, as Justice Scalia aptly noted—applied the “original meaning” of the Confrontation Clause.⁴⁵⁷ Rather, the majority opted to use practical reasoning and the facts in the record—“common sense,” as the majority put it.⁴⁵⁸ The “reality” and “circumstances” of the facts guided the majority, rather than abstract Sixth Amendment theory.⁴⁵⁹

Justice Alito’s majority opinion in *Pleasant Grove City v. Summum* likewise follows the Burkean and Hayekian penchant for practicality. There, as previously noted, Justice Alito framed the issue of which First Amendment precedents the Court should apply around the facts in the record.⁴⁶⁰ Using these facts, he constructed a straightforward syllogism. First, “[a] monument, by definition, is a structure that is designed as a means of expression.”⁴⁶¹ Second, the monument at issue is the government’s means of expression because the government displayed it on public land.⁴⁶² Therefore, the First Amendment does not apply because government expression is not scrutinized under that amendment.⁴⁶³

Finally, Justice Alito’s dissent in *Walker v. Texas Division, Sons of Confederate Veterans* further shows a style of practical reasoning reminiscent of Burke and Hayek. In *Walker*, Alito argued that the majority erred in relying on *Summum* to hold that specialty license plates were government speech not subject to First Amendment pro-

⁴⁵⁵ EDMUND BURKE, A LETTER TO A MEMBER OF THE NATIONAL ASSEMBLY; IN ANSWER TO HIS BOOK ON FRENCH AFFAIRS 57 (2d ed. 1791).

⁴⁵⁶ 135 S. Ct. 2173, 2177 (2015); see also *supra* notes 112–21 and accompanying text.

⁴⁵⁷ *Id.* at 2184 (Scalia, J., concurring).

⁴⁵⁸ *Id.* at 2182 (majority opinion).

⁴⁵⁹ *Id.*

⁴⁶⁰ See *supra* notes 131–32 and accompanying text.

⁴⁶¹ 555 U.S. 460, 470 (2009).

⁴⁶² See *id.*

⁴⁶³ See *id.* at 464.

tection.⁴⁶⁴ He did so by making two practical arguments: first, that the government did not engage in “selective receptivity” with respect to specialty license plates, unlike the government’s receptivity of monuments in *Summum*, and second, that the number of license plates, unlike monuments, can only be limited by the number of registered vehicles.⁴⁶⁵

As with Burke and Hayek, Justice Alito recognizes the limits of human reason and reject abstract theory. It could have been Justice Alito, though it was Burke, who said that “I never govern myself, no rational man ever did govern himself, by abstractions and universals.”⁴⁶⁶ Justice Alito appears to recognize, as did Burke and Hayek, that because human rationality and knowledge are necessarily limited, practical and fact-specific reasoning ought to be favored. Justice Alito’s jurisprudence thus follows the first feature of Burke’s philosophical method of approaching political questions.⁴⁶⁷ As we discuss below, Justice Alito’s jurisprudence also follows the second feature of Burke’s philosophical method: reliance on the wisdom accumulated over generations and inherent in longstanding traditions and institutions.

B. *The Value of Tradition and History*

1. *Edmund Burke and Friedrich Hayek on Tradition and History*

The intrinsic limitations of metaphysical speculation require a different guide to human action. For Burke, that guide was prescriptive wisdom, which is derived from ancient traditions and institutions.⁴⁶⁸ Burke thus counseled adherence to our longstanding prejudices, though not in the pejorative sense. Rather, prejudice is, at bottom, collected experience, “the collected reason of ages.”⁴⁶⁹ This prejudice accumulates not in the individual but in the species: “The individual is foolish, . . . but the species is wise.”⁴⁷⁰ To exalt a priori reasoning over tradition is to plant, in Burke’s words, “a mine that will blow up, at one grand explosion, all examples of antiquity, all precedents, char-

464 See 135 S. Ct. 2239, 2255 (Alito, J., dissenting).

465 *Id.* at 2260–61.

466 BURKE, *Unitarian Speech*, *supra* note 16, at 113.

467 See *supra* notes 407–10 and accompanying text.

468 See Young, *supra* note 17, at 648.

469 Burke, *Reflections*, *supra* note 15, at 367.

470 Edmund Burke, Speech on a Motion Made in the House of Commons, the 7th of May 1782, for a Committee to Inquire into the State of the Representation of the Commons in Parliament, in 6 THE WORKS OF THE RIGHT HON. EDMUND BURKE, *supra* note 16, 144, 147 [hereinafter Burke, Reform Speech].

ters, and acts of parliament.”⁴⁷¹ To avoid this dangerous result, Burke strongly rejected attempts “to cast away the coat of prejudice, and to leave nothing but the naked reason.”⁴⁷²

Prescriptive wisdom resides not only in the prejudices of society, but in its longstanding institutions. In modern terms, Burke’s argument resembles crowdsourcing: “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people.”⁴⁷³ The wisdom of the crowd—in Burke’s case, centuries of institutional arrangements—is superior to any one man’s reason because it “has been tested by the experience of many years.”⁴⁷⁴

To Burke, prescriptive wisdom gains title to government authority in the same way that an adverse possessor gains title to property: the passage of time.

Prescription is the most solid of all titles, not only to property, but, . . . to government. . . . It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it. It is a better presumption even of the *choice* of a nation, far better than any sudden and temporary arrangement by actual election. Because a nation is not an idea only of local extent, and individual momentary aggregation; but it is an idea of continuity, which extends in time as well as in numbers and in space. And this is a choice not of one day, or one set of people, . . . it is a deliberate election of ages and of generations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time.⁴⁷⁵

The primary evil of ignoring prescriptive wisdom is, as Professor Ernest Young notes, the rebuilding of “society along ideal lines dictated by abstract theory.”⁴⁷⁶ In explaining this evil, Burke said:

An ignorant man, who is not fool enough to meddle with his clock, is however sufficiently confident to think he can safely take to pieces, and put together at his pleasure, a moral ma-

⁴⁷¹ Burke, *Reflections*, *supra* note 15, at 331.

⁴⁷² *Id.* at 359.

⁴⁷³ *Crowdsourcing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/crowdsourcing> [<https://perma.cc/N2K8-F6FU>].

⁴⁷⁴ Young, *supra* note 17, at 649.

⁴⁷⁵ Burke, *Reform Speech*, *supra* note 470, at 146–47.

⁴⁷⁶ Young, *supra* note 17, at 647.

chine of another guise, importance, and complexity, composed of far other wheels, and springs, and balances, and counteracting and co-operating powers. Men little think how immorally they act in rashly meddling with what they do not understand. Their delusive good intention is no sort of excuse for their presumption. They who truly mean well must be fearful of acting ill.⁴⁷⁷

One should thus address governance with “the existing materials of his country,” and “to derive all we possess as an inheritance from our forefathers.”⁴⁷⁸ To do otherwise would risk “pulling down an edifice which, has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.”⁴⁷⁹

Although Burke did not appear to develop a theory of judicial review based on his idea of prescriptive wisdom,⁴⁸⁰ constructing such a theory is not only possible, but straightforward. Central to a Burkean theory of judicial review is the presumptiveness of precedent. Under such a theory, as Professor Cass Sunstein has explained, “the central role of the courts is to protect long-standing practices against renovations based on theories, or passions, that show an insufficient appreciation for those practices.”⁴⁸¹ The goal of Burkean judicial review “would be to provide a safeguard against the revolutionary or even purely rationalistic spirit in democratic legislatures.”⁴⁸² And the means of achieving that goal is *stare decisis*. Thus, a Burkean theory of judicial review would rely, as Burke referenced, on “analogical precedent, authority, and example.”⁴⁸³

Hayek’s views on the nature of society sound in Burkeanism. Like Burke, Hayek thought that “the institutions of society which are indispensable conditions for the successful pursuit of our conscious aims are in fact the result of customs, habits or practices which have been neither invented nor are observed with any such purpose in view.”⁴⁸⁴ Channeling Burke, Hayek argued that “our morals endow us

477 Cf. BURKE, *Appeal*, *supra* note 17, at 111–12.

478 See Burke, *Reflections*, *supra* note 15, at 428, 305 (emphasis omitted).

479 *Id.* at 334.

480 See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 372 (2006) (explaining that Burke failed to “develop an account of judicial review” because “English courts lacked (and lack) the power to strike down legislation, and hence it could not possibly have occurred to Burke to explore the nature and limits of that power”).

481 *Id.* at 373.

482 *Id.*

483 Burke, *Reflections*, *supra* note 15, at 305.

484 HAYEK, *Rules and Order*, *supra* note 422, at 11.

with capacities greater than our reason could do.”⁴⁸⁵ As a result, “traditional morals may in some respects provide a surer guide to human action than rational knowledge.”⁴⁸⁶ In a similar vein, Hayek reasoned that

[i]t is the humble recognition of the limitations of human reason which forces us to concede superiority to a moral order to which we owe our existence and which has its source *neither* in our innate instincts, which are still those of the savage, nor in our intelligence, which is not great enough to build what is better than it knows, but to a tradition which we must revere and care for even if we continuously experiment with improving its parts—not designing but humbly tinkering on a system which we must accept as given.⁴⁸⁷

Hayek taught that society must come to grips with the delusions of constructivist rationalists or with, as Burke would put it, Enlightenment thinkers.⁴⁸⁸ This required acknowledging that “the success of action in society depends on more particular facts than anyone can possibly know.”⁴⁸⁹ Accordingly, “[i]n civilized society it is indeed not so much the greater knowledge that the individual can acquire, as the greater benefit he receives from the knowledge possessed by others, which is the cause of his ability to pursue an infinitely wider range of ends than merely the satisfaction of his most pressing physical needs.”⁴⁹⁰ From this comes Hayek’s Burkean conclusion: a “presumption in favour of traditional or established institutions and usages.”⁴⁹¹

2. *Justice Alito on Tradition and History*

Justice Alito’s jurisprudence also largely follows the second feature of Burke and Hayek’s philosophical method of approaching political questions: deference to society’s prescriptive wisdom. In particular, Alito consistently applies, as would a Burkean or Hayekian judge, the following rule of decision: “Policies that comport with the stream of precedent or tradition . . . are permissible, at least presumptively; policies that do not are not permissible, or at least are sus-

⁴⁸⁵ FRIEDRICH HAYEK, *The Origins and Effects of Our Morals: A Problem for Science*, in THE ESSENCE OF HAYEK 318, 318 (Chiaki Nishiyama & Kurt R. Leube eds., 1984).

⁴⁸⁶ *Id.* at 325.

⁴⁸⁷ *Id.* at 330.

⁴⁸⁸ *See id.* at 325.

⁴⁸⁹ HAYEK, *Rules and Order*, *supra* note 422, at 12.

⁴⁹⁰ *Id.* at 14.

⁴⁹¹ *Id.* at 11.

pect.”⁴⁹² In doing so, Alito, as would the Burkean or Hayekian judge, “suspends his . . . own first-order reason about the merits of individual policies” to apply this more straightforward rule of decision within the inclusive originalism framework.⁴⁹³ Alito’s application of this Burkean rule of decision is evidenced by our three earlier observations of his use of *stare decisis*: (1) significant reliance on precedent as a method of reasoning,⁴⁹⁴ (2) disfavoring precedent-altering decisions,⁴⁹⁵ and (3) willingness to deviate from precedent when at least one of five factors are met.⁴⁹⁶ It is also evidenced by our observation that Justice Alito significantly values history as a mechanism of identifying existing wisdom within society.⁴⁹⁷

Numerous opinions that Justice Alito has authored follow the approach taken by a Burkean judge, who would consciously refrain from “scribbl[ing] whatever he pleases” upon the statutory and constitutional order as if “his country [w]as nothing but *carte blanche*.”⁴⁹⁸ Consider, for example, our earlier discussion of the category of opinions where Justice Alito significantly relied on precedent as a method of reasoning.⁴⁹⁹ A cursory examination of a few of these cases—*Kentucky v. King*, *Davis v. FEC*, *Koontz v. St. John’s River Water Management District*, and *Holt v. Hobbs*—shows Alito’s Burkean understanding that “analogical precedent, authority, and example” should control.⁵⁰⁰ Likewise, a Burkean presumption in favor of tradition is evident in the category of cases where Alito disfavored precedent-altering decisions, like *Whole Woman’s Health v. Hellerstedt* and, most prominently, *Arizona v. Gant*. And the same is likely true, though some will doubtless disagree,⁵⁰¹ of the cases in which Alito has expressed a willingness to depart from precedent, such as *Harris v. Quinn*.

Justice Alito’s opinions about the Fifth and Fourteenth Amendment Due Process Clauses provide additional evidence of his Burkean

⁴⁹² Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1487 (2007).

⁴⁹³ *Id.*

⁴⁹⁴ See *supra* notes 287–330 and accompanying text.

⁴⁹⁵ See *supra* notes 331–54 and accompanying text.

⁴⁹⁶ See *supra* note 335 and accompanying text.

⁴⁹⁷ See *supra* notes 373–404 and accompanying text.

⁴⁹⁸ Burke, Reflections, *supra* note 15, at 428.

⁴⁹⁹ See *supra* notes 288–330 and accompanying text.

⁵⁰⁰ Burke, Reflections, *supra* note 15, at 305.

⁵⁰¹ See, e.g., Siegel, *supra* note 5, at 174–75 (“[A] Burkean conservative would be loath to uproot longstanding precedents, including liberal ones. Justice Alito seems more of a traditionalist conservative than a Burkean.”).

persuasion with respect to tradition and history. In these opinions, Justice Alito justified the Court's due process traditionalism largely on Burkean and Hayekian grounds, in particular by invoking what Cass Sunstein refers to as "many minds traditionalism."⁵⁰² The idea is that due process traditionalism—the idea that "rights qualify as such only if they can claim firm roots in long-standing traditions"—is valid because it aggregates "numerous views and the benefits of evolutionary pressures."⁵⁰³ In the Burkean sense, due process traditionalism is valid if only because traditions "have been accepted by numerous people."⁵⁰⁴ And in the Hayekian sense, due process traditionalism is valid because traditions endure "if and only if they are good."⁵⁰⁵ If a tradition does not serve a valuable function, it does not endure, which means that enduring traditions are valid.⁵⁰⁶ Justice Alito's opinions touching on due process follow both of these manifestations of many minds traditionalism.

Take Justice Alito's dissent in *Obergefell v. Hodges*, for example. There, Alito began by discussing *Washington v. Glucksberg*, the canonical due process traditionalism case.⁵⁰⁷ He argued that the right the petitioners sought—same-sex marriage—was not deeply rooted in history or tradition.⁵⁰⁸ End of case, said Alito.⁵⁰⁹ Most relevant here, Justice Alito deployed a Burkean and Hayekian "many minds" argument to explain why due process traditionalism is the proper due process lodestar. Such traditionalism is appropriate because it prevents "five unelected Justices from imposing their personal vision of liberty upon the American people."⁵¹⁰ Under this view, courts must treat circumspectly a right not deeply rooted in history or tradition because that right does not represent an aggregation of society's view, but instead the view of a limited number of individuals. Indeed, explained Alito, "the newness of [a] right" renders that right inherently "problem[atic]."⁵¹¹ But a right "that has long prevailed"—that represents an aggregation of the views of individuals "not just in this country . . . but also in a great variety of countries and cultures all around the

502 Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1548 (2008).

503 *Id.* at 1544; *id.* at 1548.

504 *Id.* at 1549.

505 *Id.* at 1557–58.

506 *See id.* at 1557.

507 *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

508 *Id.*

509 *See id.*

510 *See id.*

511 *Id.* at 2641.

globe”—stands on a different footing.⁵¹² To Alito, this footing removes from the Court the “authority to say that a State may not” continue to recognize that right.⁵¹³

Indeed, Justice Alito’s *Obergefell* dissent reads as a Burkean rejection of Justice Oliver Wendell Holmes’s famous statement twelve decades past that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”⁵¹⁴ By relying on due process traditionalism, Alito clearly rejected a Holmesian realism that embraces “rational policy” that “consider[s] and weigh[s] the ends of legislation, the means of attaining them, and the cost.”⁵¹⁵

Justice Alito’s Burkean statements about tradition and history off the bench confirm those made on it. Speaking at Catholic University in 2008, for example, Alito described the doctrine of *stare decisis* as one that “respects the judgment—the wisdom—of the past.”⁵¹⁶ This wisdom is an “invaluable asset” because although we may “know much more than our ancestors did about” certain things, we do not “necessarily [know more] about the things that are most fundamental.”⁵¹⁷ Accordingly, “there should be a sort of presumption in favor of a venerable wisdom. We should not be rash about discarding” it.⁵¹⁸

Was it Burke, Hayek, or Justice Alito who said “there are certain principles that we should not be so foolish to think that we can set aside without paying a fearsome price”? It was Justice Alito,⁵¹⁹ whose statement closely resembles Burke’s on the value of tradition and history: “The individual is foolish, . . . but the species is wise.”⁵²⁰

C. *Inclusive Originalism and Burkeanism*

We have thus far addressed two features of Justice Alito’s jurisprudence—the placement of fact before doctrine and a presumption in favor of precedent and history—and have argued that each follow the two features of Burke’s philosophical method of approaching political questions. But can the third feature of Justice Alito’s jurisprudence—inclusive originalism—be squared with Burkeanism? In what

⁵¹² See *id.* at 2642.

⁵¹³ *Id.*

⁵¹⁴ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵¹⁵ *Id.* at 472; *id.* at 474.

⁵¹⁶ Alito, *supra* note 274, at 5.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* at 4.

⁵²⁰ Burke, Reform Speech, *supra* note 470, at 147.

follows, we argue that it can. Even though inclusive originalism is consistent with Burkeanism as a descriptive matter, we nevertheless explain why a good Burkean following tradition in the United States should adhere to the text of the Constitution rather than precedent.

1. *Inclusive Originalism Is Consistent with Burkeanism*

A coterie of Burkean law professors, including Thomas Merrill, Ernest Young, and David Strauss, argue that originalism is inconsistent with Burkeanism. Merrill brought the debate in the open in his provocative and thoughtful 1998 article, *Bork v. Burke*, stating that “from a Burkean perspective . . . originalism does not seem very conservative at all.”⁵²¹ In a similar vein, Young has argued that “[i]f Edmund Burke were a judge in modern America, there is good reason to believe that he would not be an originalist.”⁵²² Similarly, Strauss has argued that originalism is “a destructive creed” because it “attack[s] the existing order, the existing tradition.”⁵²³ Each argue for a conventionalist approach, under which precedent reigns supreme, and hence believe that deviation from precedent is generally anti-Burkean.⁵²⁴ And so, the argument goes, a methodology of constitutional interpretation that permits such deviation is likewise anti-Burkean.

But the conclusion that an interpretive methodology that permits—indeed, sometimes favors or even requires—deviation from precedent is anti-Burkean is wrong for at least two reasons. First, under Burke’s own vision, precedent is not the end of the matter, but merely the starting point of identifying collected wisdom. As Burke put it, “*Precedents . . . merely as such cannot make Law—because then the very frequency of Crimes would become an argument of innocence.*”⁵²⁵ Thus, Burke’s philosophy is not, contrary to Strauss, simply a “theory of precedent.”⁵²⁶ To be sure, Burke’s theory of

⁵²¹ Merrill, *supra* note 26, at 523; see also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (explaining that a “common law approach . . . is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices”).

⁵²² Young, *supra* note 17, at 664.

⁵²³ David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 144 (2011); see also David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 969 (2008) (“The cause of legal conservatives would be much better served if conservatives would abandon their allegiance to originalism and instead adopt an approach to constitutional interpretation that is based in precedent . . .”) [hereinafter Strauss, *Why Conservatives Shouldn’t Be Originalists*].

⁵²⁴ See, e.g., Strauss, *supra* note 521, at 893, 934–35.

⁵²⁵ CANAVAN, *supra* note 22, at 122–23.

⁵²⁶ See Strauss, *Why Conservatives Shouldn’t Be Originalists*, *supra* note 523, at 973.

prescriptive wisdom presumes the validity of “settled scheme[s]” over “untried project[s].”⁵²⁷ This theory is not “a rigid commitment to the status quo.”⁵²⁸ Rather, it is a theory in which the status quo gradually and inevitably changes. Indeed, said Burke, “[a] state without the means of some change is without the means of its conversation.”⁵²⁹ That a methodology of constitutional interpretation would bring about change does not render that methodology antithetical to Burke’s philosophical vision.

Second, Burke advocated for a “profound reverence for the wisdom of our ancestors,” a wisdom we interpret as existing separate from precedent.⁵³⁰ A Burkean distinction exists, in other words, between precedent on the one hand and ancestral wisdom on the other. The question here is what sources capture that wisdom, and one plausible answer is the original understanding of the text of the Constitution. A methodology of constitutional interpretation that looks to this understanding serves the Burkean practice of “look[ing] backward to [our] ancestors.”⁵³¹ It “[lets] us,” as Burke said, “follow our ancestors,” who had “a rational, though without an exclusive, confidence in themselves” and “who, by respecting the reason of others” and “by looking backward as well as forward, by the modesty as well as by the energy of their minds, went on, insensibly drawing this constitution nearer and nearer to its perfection, by never departing from its fundamental principles.”⁵³²

The issue is therefore not whether deviation from precedent is inherently anti-Burkean. Burke’s own writings demonstrate that precedential deviation is okay. The issue is instead when, and by what degree, deviation is justifiable when “ancestral wisdom” in the form of the original understanding of the constitutional text conflicts with precedent.⁵³³

Resolving that issue is outside the scope of this Article. But we believe that Brad Masters’s recent attempt to do that is a good place

527 Burke, Reform Speech, *supra* note 470, at 146.

528 Masters, *supra* note 18, at 1061.

529 Burke, Reflections, *supra* note 15, at 277, 295.

530 See Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (1775), in 1 THE WORKS OF THE RIGHT HON. EDMUND BURKE 450, 483 (Henry G. Bohn ed., 5th ed., 1854).

531 Burke, Reflections, *supra* note 15, at 307.

532 BURKE, *Appeal*, *supra* note 17, at 114.

533 For an example of such a conflict, see, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010), in which the original understanding of the Privileges or Immunities Clause of the Fourteenth Amendment conflicted with the Court’s precedents interpreting that clause.

to start.⁵³⁴ As Masters argues, a Burkean judge may look to reliable founding principles to alter precedent so long as that alteration is insubstantial.⁵³⁵ More specifically, when a Burkean judge encounters a conflict between the original understanding of the constitutional text and precedent, she must “ask three questions: (1) What founding principles can we reliably discern? (2) How and why did we depart from those principles? and (3) What are the practical consequences of disrupting the tradition that has grown from the departure?”⁵³⁶ The first question serves a screening purpose. Founding principles should trump precedent only if they “are reliably established.”⁵³⁷ The answer to the second question, which “concern[s] the point of departure” from precedent, provides the judge with “perspective on the legitimacy of a precedent’s ‘title’ to authority.”⁵³⁸ Finally, the answer to the third question involves determining “the duration of a precedent’s existence” because “[t]he older the precedent, the more likely” that “any change could have far-reaching consequences.”⁵³⁹ This three-part exercise results from the sensible conclusion that, under a Burkean approach, “long-standing traditions should be preserved unless evidence of a countervailing founding principle is reliable and the consequences of disrupting the tradition are not substantial.”⁵⁴⁰

Putting aside the mechanism by which one should resolve conflicts between precedent and the original meaning of the constitutional text, inclusive originalism—and Justice Alito’s use of it—is consistent with Burkeanism. Interpreting the constitutional text in accordance with its original meaning follows Burke’s insistence on looking backward to, and in certain circumstances following, our “canonized forefathers.”⁵⁴¹ In short, Burke’s philosophy “leaves room for an approach that simultaneously respects precedent while drawing upon” the original meaning of the constitutional text.⁵⁴²

⁵³⁴ See Masters, *supra* note 18.

⁵³⁵ See *id.* at 1064 (developing a Burkean canon of constitutional interpretation, under which “long-standing traditions should be preserved unless evidence of a countervailing founding principle is reliable and the consequences of disrupting the tradition are not substantial”).

⁵³⁶ See *id.* at 1086 (emphasis omitted).

⁵³⁷ *Id.* at 1087.

⁵³⁸ *Id.* at 1088.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 1086.

⁵⁴¹ See *id.* at 1101.

⁵⁴² Cf. *id.* at 1061.

2. *The Burkean Tradition of Our Written Constitution*

Regardless of whether inclusive originalism is consistent with Burkeanism, we briefly lay out here why inclusive originalists like Justice Alito should adhere to the text of the Constitution rather than precedent. Although inclusive originalism is arguably Burkean, we think it is so only under a British constitutional vision, where, as one of us has put it before, “islands of text float in a sea of tradition, instead of the other way around.”⁵⁴³ The Burkean tradition under the American constitutional vision venerates the text of the Constitution and places it above contrary precedent and practice. So the Burkean justice or judge who adjudicates constitutional disputes should follow the constitutional text over precedent.

The U.S. Reports are replete with evidence of a Burkean tradition in the United States in which the constitutional text and first principles trump precedent. Indeed, the Supreme Court has overruled itself in more than 235 cases, the majority of those having presented constitutional, rather than statutory, issues.⁵⁴⁴ As Judge Laurence Silberman has put it, the “Supreme Court is a ‘noncourt court’” that “rarely considers itself bound by the reasoning of its prior opinions.”⁵⁴⁵ Former Judge Richard Posner takes a more sardonic view: “The Supreme Court has never paid much heed to its own precedents—that’s nothing new.”⁵⁴⁶

Consider, for example, 10 famous occasions in which the Supreme Court has overruled itself by opting for constitutional text and first principles over precedent or doctrine.⁵⁴⁷ These cases, we argue, show a Burkean practice in the American constitutional culture of prioritizing text over precedent. Though many of these cases rely on other modalities of constitutional interpretation, they nevertheless demonstrate not only a preoccupation with, but also a prioritization of, the Constitution’s text. These cases, in sum, confirm “that text is more important than precedent as a matter of the actual Burkean common law practice of the Supreme Court.”⁵⁴⁸

⁵⁴³ Calabresi, *supra* note 27, at 637.

⁵⁴⁴ See U.S. GOV’T PUBL’G OFFICE, SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION 2623–35 (2017), <https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017-13.pdf> [<https://perma.cc/3QJ5-44CK>]. See generally BRANDON J. MURRILL, CONG. RESEARCH SERV., R45319, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT (2018).

⁵⁴⁵ *Lederman v. United States*, 291 F.3d 36, 48 (D.C. Cir. 2002) (Silberman, J., concurring).

⁵⁴⁶ Benjamin Wittes, *Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, at 39, 40.

⁵⁴⁷ See Calabresi, *supra* note 27, at 640–78.

⁵⁴⁸ *Id.* at 638.

The first modern instance in which the Supreme Court disavowed precedents because they were thought incompatible with the Constitution's text, structure, or first principles occurred during and immediately after the Constitutional Revolution of 1937. In *West Coast Hotel Co. v. Parrish*,⁵⁴⁹ the Court famously overruled its earlier decision in *Adkins v. Children's Hospital*⁵⁵⁰ and displaced four decades of economic substantive due process decisions represented by the infamous case of *Lochner v. New York*.⁵⁵¹ As is well known, this doctrinal sea change resulted largely from Justice Holmes's dissent in *Lochner*, which argued that the Constitution's text did not protect freedom of contract.⁵⁵² The majority in *West Coast Hotel* followed Holmes's textual argument, explaining that the text of "[t]he Constitution does not speak of freedom of contract," but only "of liberty."⁵⁵³ Similarly, the Court in the 1940s adopted a broad understanding of the Commerce Clause and Necessary and Proper Clause. These decisions—most notably *NLRB v. Jones & Laughlin Steel Corp.*⁵⁵⁴ and *Wickard v. Filburn*⁵⁵⁵—deviated sharply from precedent and relied on "first principles and a Marshallian originalist understanding of the scope of national power."⁵⁵⁶

Second, *Erie Railroad Co. v. Tompkins*⁵⁵⁷ overruled on originalist grounds the federal common law doctrine of *Swift v. Tyson*.⁵⁵⁸ Before ultimately rejecting that doctrine, the Court in *Erie* engaged in an originalist interpretation of the Rules of Decision Act⁵⁵⁹ based on the historical research of Charles Warren.⁵⁶⁰ Though the reliance interests

⁵⁴⁹ 300 U.S. 379, 400 (1937).

⁵⁵⁰ 261 U.S. 525 (1923).

⁵⁵¹ 198 U.S. 45 (1905).

⁵⁵² See *id.* at 75–76 (Holmes, J., dissenting) (“[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views . . .”).

⁵⁵³ *West Coast Hotel*, 300 U.S. at 391.

⁵⁵⁴ 301 U.S. 1 (1937).

⁵⁵⁵ 317 U.S. 111 (1942).

⁵⁵⁶ Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 952 (2008). We doubt on interpretive grounds that the Court correctly read the Commerce and Necessary and Proper Clauses so broadly. But the Court did “engage in textualist originalism, resort to first principles, decline to follow and indeed overrule key precedents, and sell its holdings to the public as being consistent with textualist originalism.” Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 643 (2006).

⁵⁵⁷ 304 U.S. 64 (1938).

⁵⁵⁸ 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. at 78–80.

⁵⁵⁹ 28 U.S.C. § 1652 (2012).

⁵⁶⁰ See *Erie*, 304 U.S. at 72–73 (“[I]t was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the

built on *Swift* were undoubtedly substantial, the Court ultimately found them irrelevant. As Justice Brandeis said, “the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’”⁵⁶¹ The Court’s clear placement of constitutional text over precedent was not an outlier, but another example of our constitutional tradition’s veneration of text.

The third overruling came in *West Virginia State Board of Education v. Barnette*,⁵⁶² where the Court found its earlier decision upholding a flag salute requirement unconstitutional on textual and historical grounds.⁵⁶³ In *Barnette*, Justice Jackson appealed to the original meaning of the Constitution’s text, stating that “[o]bjection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.”⁵⁶⁴ Jackson also cited the purpose of the Bill of Rights to demonstrate that it, along with the First Amendment, justified the Court’s departure from precedent.⁵⁶⁵ *Barnette* may not represent an originalist triumph. But it is one of numerous examples of the Court enforcing the constitutional text and its first principles over precedent.

Fourth, *Brown v. Board of Education*⁵⁶⁶ and its progeny overruled on textualist first principles *Plessy v. Ferguson*.⁵⁶⁷ We do not, nor need not, claim here that *Brown* is an originalist decision.⁵⁶⁸ Reasonable scholars disagree.⁵⁶⁹ But the conclusion that the Court in *Brown* struck down longstanding precedent by appealing to the Constitution’s text and first principles is agreeable. Significantly, the key sentence stating

[*Swift*] Court was erroneous” (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

⁵⁶¹ *Id.* at 79 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928)).

⁵⁶² 319 U.S. 624 (1943).

⁵⁶³ *See* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

⁵⁶⁴ *Barnette*, 319 U.S. at 633.

⁵⁶⁵ *See id.* at 634.

⁵⁶⁶ 347 U.S. 483 (1954).

⁵⁶⁷ 163 U.S. 537 (1896).

⁵⁶⁸ One of us has made that claim elsewhere. *See* Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 432.

⁵⁶⁹ *Compare* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995), *with* Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1866 (1997), *and* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995).

the holding of *Brown* relies not on the infamous sociological studies of Footnote 11,⁵⁷⁰ but on the text of the Equal Protection Clause.⁵⁷¹ Furthermore, the Court invoked what it thought were first principles of that clause to hold unconstitutional separate but equal accommodations.⁵⁷² The Court in *Brown* did not rest its holding on the original meaning of the Constitution's text, but it engaged in an extended discussion about that meaning and concluded that "[t]his discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."⁵⁷³ Although *Brown* may have been "just as afraid of originalism as originalism is afraid of *Brown*,"⁵⁷⁴ the decision is yet another example of constitutional text surpassing precedent.

Fifth is *Engel v. Vitale*,⁵⁷⁵ which rejected on strikingly originalist grounds the 171 years of government-led school prayer. In *Engel*, Justice Black opened with a lengthy discussion of the history behind the Establishment Clause that helped define its text.⁵⁷⁶ For example, Black noted that "[b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State."⁵⁷⁷ Black then discussed the purpose of the Establishment Clause to conclude that, nearly two centuries of practice notwithstanding, its text was dispositive.⁵⁷⁸ So it was that the Court again favored text over precedent.

Sixth, *Jones v. Alfred H. Mayer Co.*⁵⁷⁹ implicitly cast aside the *Civil Rights Cases*⁵⁸⁰ and explicitly overruled *Hodges v. United States*⁵⁸¹

⁵⁷⁰ See *Brown*, 347 U.S. at 494 n. 11.

⁵⁷¹ See *Brown*, 347 U.S. at 495 ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

⁵⁷² See *id.* ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

⁵⁷³ *Id.* at 489.

⁵⁷⁴ Baude, *supra* note 25, at 2381.

⁵⁷⁵ 370 U.S. 421 (1962).

⁵⁷⁶ See *id.* at 425.

⁵⁷⁷ See *id.* at 429; see also *id.* ("The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch.").

⁵⁷⁸ *Id.* at 431 (noting that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

⁵⁷⁹ 392 U.S. 409 (1968).

⁵⁸⁰ 109 U.S. 3 (1883).

⁵⁸¹ 203 U.S. 1 (1906), overruled by *Jones*, 392 U.S. 409.

by interpreting the Civil Rights Act of 1866 to prohibit racial discrimination in private real estate transactions. Writing for the majority, Justice Stewart stated that the Court's "starting point is the Thirteenth Amendment."⁵⁸² From that starting point, Stewart examined the meaning of the Act's text by referencing the intentions of those who framed the Thirteenth Amendment.⁵⁸³ Those intentions demonstrated that the meaning of the Amendment granted "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."⁵⁸⁴ So Congress had authority under the Act to regulate "the unofficial acts of private individuals, whether or not sanctioned by state law."⁵⁸⁵ This textualist reading of the Act and the 13th Amendment stands in tension with the *Civil Rights Cases*⁵⁸⁶ and plainly conflicts with *Hodges*. Stewart openly acknowledged this point by stating that *Hodges* was "incompatible with the history and purpose of the Amendment itself," which justified overruling the 62-year-old precedent.⁵⁸⁷

The seventh is *Gregg v. Georgia*,⁵⁸⁸ which drastically departed from the Court's previous decision in *Furman v. Georgia*⁵⁸⁹ that called the constitutionality of the death penalty into question. In *Gregg*, the Court relied on several modalities, though the original meaning of the Constitution's text was the most prominent.⁵⁹⁰ Writing for the majority, Justice Stewart began by noting "[t]he history of prohibition of 'cruel and unusual' punishment."⁵⁹¹ That history, wrote Stewart, demonstrated that its draftsmen "were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment."⁵⁹² Both this passage and its accompanying originalist footnote, which appear before references to precedent,⁵⁹³ are significant in that they presuppose the validity of the constitutional text and its original meaning. The question in *Gregg* was thus not whether the death pen-

582 *Jones*, 392 U.S. at 437.

583 *See id.* at 440–44.

584 *Id.* at 439 (emphasis omitted) (citation omitted).

585 *Id.* at 438.

586 *See Calabresi, supra* note 27, at 661 (noting that the *Jones* Court read "the original meaning of Section 2 [as] breath-takingly broad, contrary to the view expressed in the *Civil Rights Cases*").

587 *Jones*, 392 U.S. at 441 n.78.

588 428 U.S. 153 (1976).

589 408 U.S. 238 (1972).

590 *See, e.g., Gregg*, 428 U.S. at 169–72 (text and history); *id.* at 173 (precedent).

591 *Id.* at 169.

592 *Id.* at 170.

593 *See id.* at 170–72, 170 n.17.

ality violated the decency standard enunciated in *Trop v. Dulles*,⁵⁹⁴ but “whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.”⁵⁹⁵ Relying primarily on the Constitution’s text and history, the Court held that such a sentence did not, thereby deviating from recent precedent suggesting the contrary.⁵⁹⁶

Eighth is the three overrulings in the *Garcia v. San Antonio Metropolitan Transit Authority*⁵⁹⁷ line of cases touching on the scope of the 10th Amendment.⁵⁹⁸ The issue in each of these cases was whether the Constitution, and the Tenth Amendment in particular, set “affirmative limits on the congressional regulations of state governments, for example, with respect to prescribing wage and hour work conditions for state employees.”⁵⁹⁹ In *Maryland v. Wirtz*,⁶⁰⁰ the Court held that the Constitution did not impose such limits. But the Court’s decision eight years later in *National League of Cities v. Usery*⁶⁰¹ expressly overruled *Wirtz* by holding to the contrary. Justice Rehnquist, writing for the majority, repeatedly referenced the Constitution’s text and first principles.⁶⁰² Finally, the Court overruled *National League of Cities* nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*. Similar to Rehnquist’s opinion in *National League of Cities*, Justice Blackmun’s majority opinion in *Garcia* heavily relied on the Constitution’s text.⁶⁰³ Although the Court, said Blackmun, “do[es] not lightly overrule recent precedent,” it does “not hesitate[] . . . when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause.”⁶⁰⁴ That the Court in the final two cases couched its holdings in the Constitution’s text to swiftly overrule recent precedents only underscores an American constitutional tradition of venerating the text.

⁵⁹⁴ 356 U.S. 86 (1958).

⁵⁹⁵ *Gregg*, 428 U.S. at 158 (emphasis added).

⁵⁹⁶ *See id.* at 207.

⁵⁹⁷ 469 U.S. 528 (1985).

⁵⁹⁸ *See id.* at 536, 557.

⁵⁹⁹ Calabresi, *supra* note 27, at 668.

⁶⁰⁰ 392 U.S. 183 (1968), overruled by *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

⁶⁰¹ 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. 528.

⁶⁰² *See, e.g., id.* at 840 (“It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.”).

⁶⁰³ *See, e.g., Garcia*, 469 U.S. at 547 (“[T]he Commerce Clause by its specific language does not provide any special limitation on Congress’ actions with respect to the States.”).

⁶⁰⁴ *Id.* at 557 (footnote omitted).

Ninth is *United States v. Lopez*⁶⁰⁵ and its federalist progeny that upset a long line of cases upholding an expansive view of congressional authority. In *Lopez* itself, the Court “start[ed] with first principles” and the “language of the Commerce Clause” to hold that the clause does indeed set an outer boundary to Congress’s commerce power.⁶⁰⁶ This holding, of course, stands in great contrast with the many Commerce Clause cases granting Congress a nearly unlimited commerce power, including *NLRB v. Jones & Laughlin Steel Corp.*⁶⁰⁷ and *Wickard v. Filburn*.⁶⁰⁸ The *Lopez* majority refused to follow these and other “prior cases” that gave “great deference to congressional action.”⁶⁰⁹ *Lopez* would give rise to a federalism renaissance, as the Court two years later further limited congressional authority in *City of Boerne v. Flores*.⁶¹⁰ In *Flores*, Justice Kennedy authored a textualist majority opinion that explicitly limited the deferential holding of *Katzenbach v. Morgan*.⁶¹¹ The Court would continue this renaissance in *New York v. United States*⁶¹² and *Seminole Tribe v. Florida*,⁶¹³ which significantly limited or overruled *Garcia* and *Pennsylvania v. Union Gas Co.*,⁶¹⁴ respectively.⁶¹⁵ This line of cases challenges the conventional Burkean conception of American constitutional tradition that values precedent over constitutional text.

Finally, the Court in *Lawrence v. Texas*⁶¹⁶ explicitly overruled *Bowers v. Hardwick*⁶¹⁷ by squarely invoking the text of the Due Process Clause of the Fourteenth Amendment. Authoring the majority opinion in *Lawrence*, Justice Kennedy began his analysis by asking whether the petitioners could “engage in the private conduct in the exercise of their liberty under” that clause.⁶¹⁸ Although Kennedy’s

⁶⁰⁵ 514 U.S. 549 (1995).

⁶⁰⁶ *Id.* at 552–53.

⁶⁰⁷ See *NLRB*, 301 U.S. 1, 31 (1937).

⁶⁰⁸ See *Wickard*, 317 U.S. 111, 125 (1942).

⁶⁰⁹ *Lopez*, 514 U.S. at 567.

⁶¹⁰ 521 U.S. 507 (1997).

⁶¹¹ *Id.* at 527–28 (“There is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.” (citation omitted)).

⁶¹² 505 U.S. 144 (1992).

⁶¹³ 517 U.S. 44 (1996).

⁶¹⁴ 491 U.S. 1 (1989).

⁶¹⁵ See *New York*, 505 U.S. at 201 (White, J., dissenting); *Seminole Tribe*, 517 U.S. at 66.

⁶¹⁶ 539 U.S. 558 (2003).

⁶¹⁷ 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. at 560.

⁶¹⁸ *Lawrence*, 539 U.S. at 564.

reasoning may to some be wrong as an original matter,⁶¹⁹ he nevertheless engaged in an extended originalist analysis.⁶²⁰ This analysis led him to make the famous textual conclusion that *Bowers* was “not correct when it was decided, [and it] is not correct today.”⁶²¹ He supported this conclusion by invoking first principles, rather than precedent.⁶²² The Constitution’s text and first principles, then, were dispositive.

The long and short of it is that there is in the American constitutional culture a clear Burkean practice of placing constitutional text and first principles over precedent and doctrine. As Will Baude has similarly explained, “[t]he original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document’s past.”⁶²³ Good Burkean justices or judges adjudicating controversies under the Constitution should, therefore, follow its text and first principles instead of conflicting precedent.

CONCLUSION

A systematic account of Justice Alito’s jurisprudence is long overdue. Despite his near three decades on the bench, existing accounts are both brief and disjointed. Contrary to many of them, Justice Alito’s jurisprudence can be ascribed to neither conservative legal realism specifically nor political conservatism generally. What, then, can his jurisprudence be ascribed to? To answer that question we conclude where we began: “This case requires us to apply the Fourth Amendment’s prohibition of unreasonable searches and seizures to a 21st-century surveillance technique Ironically, the Court has chosen to decide this case based on 18th-century tort law.”⁶²⁴ As with many of Justice Alito’s opinions, this one—a concurrence in *United States v. Jones*—reflects three central themes of his jurisprudence.

First, facts are of central importance to Justice Alito and must be conceptually distinguished from doctrine. To Justice Alito, facts both

⁶¹⁹ See, e.g., Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 118 (2006) (“The fact that American law and its antecedents banned heterosexual as well as homosexual sodomy hardly supports a history-based right to engage in such conduct.”).

⁶²⁰ See *Lawrence*, 539 U.S. at 568–69.

⁶²¹ *Id.* at 560.

⁶²² See *id.* at 579 (“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

⁶²³ Baude, *supra* note 25, at 2408.

⁶²⁴ *United States v. Jones*, 565 U.S. 400, 418 (2012) (Alito, J., concurring).

shape the issues that a case presents and provide the necessary doctrine to resolve those issues. With this fact-oriented jurisprudence, Justice Alito supplements traditional interpretive modalities with what we refer to as “plain English” reasoning—a practical and syllogistic analytical style.

The second theme of Justice Alito’s jurisprudence is inclusive originalism. Although Justice Alito evaluates several modalities when he interprets constitutional text, he does only if the original meaning of the text permits such evaluations. When, for example, a conflict does not arise between the constitutional text and its original meaning on the one hand and other competing modalities on the other, Justice Alito finds dispositive the text and its original meaning. Yet when conflicts do arise, the text and its original meaning trump other competing modalities. In short, when interpreting constitutional text, Justice Alito orders the text and its meaning hierarchically, rather than flatly. Accordingly, Justice Alito is indeed an originalist, though of a different type than those who view the constitutional text’s original meaning as the exclusive criterion of constitutional interpretation, such as Justice Scalia.

The third theme of Justice Alito’s jurisprudence is a presumption in favor of precedent and historical practice. To Justice Alito, precedent is critical in identifying the existing wisdom within society. As such, his theory of *stare decisis* is robust, and he relies heavily on the doctrine as a method of reasoning. Justice Alito favors precedent-sustaining decisions, but he may depart from precedent if the precedent has not engendered reliance, circumstances have significantly changed, the precedent is unworkable, later decisions have undermined the precedent, or the error of the precedent is flagrant.

These three themes of Justice Alito’s jurisprudence largely follow Edmund Burke’s philosophical methods of approaching political questions. Justice Alito’s fact-oriented jurisprudence acknowledges the Burkean rejection of abstract theory and the necessity of prioritizing actual circumstances over principle and theory. Justice Alito’s deference to precedent and historical practice is rooted in the Burkean reliance on tradition and prescriptive wisdom. Like Burke, Justice Alito finds longstanding traditions and institutions inherently authoritative. Justice Alito is, at bottom, the Supreme Court’s Burkean Justice.