2023

Protecting a real or imagined past: Justice Samuel Alito and the First Amendment

Derigan Silver

Dan V. Kozlowski

SAINT LOUIS UNIVERSITY SCHOOL OF LAW
Legal Studies Research Paper Series

No. 2023-15

PROTECTING A REAL OR IMAGINED PAST: JUSTICE SAMUEL ALITO AND THE FIRST AMENDMENT

Derigan Silver, Ph.D.
University of Denver -Sturm College of Law

Dan V. Kozlowski, Ph.D.
Saint Louis University-Dept. of Communication & School of Law

FIRST AMENDMENT LAW REVIEW, vol. 22, 2023

PROTECTING A REAL OR IMAGINED PAST: JUSTICE SAMUEL ALITO AND THE FIRST AMENDMENT

Derigan Silver, Ph.D.[*] & Dan V. Kozlowski, Ph.D.[**]

ABSTRACT

This article examines the First Amendment jurisprudence of Justice Samuel Alito. In this article, we argue that the principles behind his decision-making are not always necessarily traditional methods of constitutional analysis, and litigants should understand the frames and lenses Alito uses to make decisions when making their arguments to him. The article concludes with a discussion of Alito's overall approach to the law and some thoughts on how he is attempting to reshape the First Amendment. We write that, above all, it is clear he is seeking to protect a real or imagined past that, in his mind, is under attack in modern America.

INTRODUCTION

In his U.S. Supreme Court First Amendment opinions, related to both the religion and expression clauses, Justice Samuel Alito has focused on what he views as the social center of American society and a need to protect this center from persecution. Alito views this center as being composed of those who have traditionally held power and who represent traditional conservative values. And many of Alito's opinions fret over a perceived attack on this center. As one commentor wrote, "Underlying Alito's free-speech jurisprudence is a pronounced anxiety about the impact of social change on those he deems worthy of protection."[1] In his dissenting opinion in *Obergefell v. Hodges*,[2] for example, the 2015 U.S. Supreme Court case that held that the Constitution guarantees the right for adult same-sex couples to marry, Alito wrote a telling passage that seemed to encapsulate concerns he has with the state of free speech in modern America. Although *Obergefell* was not a First

[*] Associate Professor, Department of Media, Film and Journalism Studies; Adjunct Faculty, Sturm College of Law, University of Denver.
[**] Associate Professor, Department of Communication; Secondary Appointment, School of Law, Saint Louis University.
[***] The authors would like to thank members of the Rocky Mountain First Amendment All Stars Workshop, including Alan Chen, Christina Koningisor, Margaret Kwoka, Helen Norton, and Blake Reid, for reading and providing helpful comments and insights on a draft of this article.
[1] Garrett Epps, *The Free Speech Jurisprudence of Justice Samuel Alito*, KNIGHT FIRST AMEND. INST. (May 1, 2018), https://knightcolumbia.org/content/free-speech-jurisprudence-justice-samuel-alito.
[2] 576 U.S. 644 (2015).

Amendment case, this excerpt from Alito's dissent offers an insight into those concerns:

> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. *I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.*[3]

That language from Alito echoes language in many of his First Amendment opinions and reflects his desire to protect "majorities-turned-minorities."[4] In cases involving religious statues and monuments on government property, employees of religious organizations, and offensive speech, Alito has expressed concern that traditional views and power structures are under attack in America. As Neil S. Siegel wrote, "Alito voices the concerns of Americans who hold traditionalist conservative beliefs about speech, religion, guns, crime, race, gender, sexuality, and the family. These Americans were previously majorities in the real or imagined past, but they increasingly find themselves in the minority."[5] The purpose of this article is to explore the First Amendment jurisprudence of Alito to better understand his overall judicial philosophy and approach to decision-making, as well as his general influence on First Amendment case law.

Alito's approach to the law generally, and the First Amendment specifically, are important for several reasons. Chief among these is that, in many ways, Alito is now the standard bearer for what has become a majority of justices on the Court who represent a minority of the American population:

---

[3] *Id.* at 741 (Alito, J., dissenting) (emphasis added).
[4] We borrow this phrase from Neil S. Siegel. *See* 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, 171 (2016) (writing that Alito uses his judicial voice to protect "[m]ajorities-turned-minorities, not 'discrete and insular minorities'").
[5] *Id.* at 165.

conservatives with strong religious convictions.[6] And there is evidence this majority of justices is intent on increasing the power of the Supreme Court[7] and is increasingly willing to

[6] In 2022, 37% of Americans described their political views as moderate, 36% as conservative, and 25% as liberal. Since the early 1990s, the percentage of individuals identifying as liberal has increased from 17% in 1992 to 25%, while the number of conservatives has remained steady, mostly between 38% and 36%. Lydia Saad, *U.S. Political Ideology Steady; Conservatives, Moderates Tie*, GALLUP NEWS (Jan. 17, 2022), https://news.gallup.com/poll/388988/political-ideology-steady-conservatives-moderates-tie.aspx. In 2020, the number of Americans who belong to a church, synagogue, or mosque fell below 50% to 47% for the first time ever. This is down from 50% in 2018 and 70% in 1999. Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP NEWS (Mar. 29, 2021), https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx. In addition, since the 1990s, large numbers of Americans have left Christianity and now describe themselves as "atheist, agnostic or 'nothing in particular.'" The Pew Research Center estimates that in 2020 about 64% of Americans identified as Christian, but that this number will drop to between 54% and 35% by 2070. *Modeling the Future of Religion in America*, PEW RSCH. CTR. (Sept. 13, 2022), https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/. Also, in 2022, 61% of Americans approved of same-sex marriage. Gabriel Borelli, *About Six-in-Ten Americans Say Legalization of Same-Sex Marriage is Good for Society*, PEW RSCH. CTR. (Nov. 15, 2022), https://www.pewresearch.org/fact-tank/2022/11/15/about-six-in-ten-americans-say-legalization-of-same-sex-marriage-is-good-for-society/. Finally, in 2022, 61% of Americans said abortion should be legal in all or most cases, while 37% said it should be illegal in all or most cases. *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/.

[7] According to recent accounts, the current U.S. Supreme Court is amassing power at the expense of the other branches of the federal government, lower federal courts, state governments, and state courts. *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) ("The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts. And it has done so using a variety of . . . interpretative methodologies. The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court."); Rebecca L. Brown & Lee Epstein, *Is the U.S. Supreme Court a Reliable Backstop for an Overreaching U.S. President? Maybe, but is an Overreaching (Partisan) Court Worse?,* 53 PRESIDENTIAL STUD. Q. 234 (2023); Adam Liptak, *An 'Imperial Supreme Court' Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html (writing that the Court is ready to elevate its role by giving themselves the right to review state courts' interpretations of state law); Lisa Tucker & Stefanie A. Lindquist, Opinion, *How the Supreme Court is Erasing Consequential Decisions in the Lower Courts*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/opinion/supreme-court-decisions-vacated.html#:~:text=The%20Supreme%20Court%20is%20increasingly,them%20in%20brief%20procedural%20orders ("The Supreme Court is increasingly setting aside legally significant decisions from the lower courts as if they had never happened, invalidating them in brief procedural orders.").

overrule established precedents.[8] In other ways, however, Alito stands out even on a consistently conservative Court. While many of his opinions focus on the need to protect religious activities and voices in public generally, others focus specifically on a subset of religious beliefs. That is, Alito is not just a conservative. He is a devout Christian conservative who is concerned about protecting traditional Christian conservative values.

Based on an analysis of his First Amendment opinions[9] while on the U.S. Supreme Court, we argue that Alito's jurisprudence is best understood via a variety of lenses. A superficial analysis of Alito's work might lead one to conclude he is unprincipled in his decision-making. We argue, however, that the principles behind his decision-making are not always necessarily traditional methods of constitutional analysis, and litigants should understand the frames and lenses Alito uses to make decisions when making their arguments to him. Above all, Alito is a practical judge, much more interested in outcomes and effects than abstract judicial philosophy.[10]

---

[8] Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 592 (2023) ("The Roberts court, more than any other court in history, uses its docket-setting discretion to select cases that allow it to revisit and overrule precedent.").

[9] Cases were identified by using the search terms in Nexis Uni "court (supreme) and first amendment and freedom of speech or freedom of the press." We cross-checked that list with the list of cases appearing in The First Amendment Encyclopedia. *The First Amendment Encyclopedia: Presented by the John Seigenthaler Chair of Excellence in First Amendment Studies*, MIDDLE TENN. STATE UNIV. https://www.mtsu.edu/encyclopedia/ (last visited Oct. 10, 2023). Some of the opinions we identified are clearly free speech or free press opinions. Others are Establishment Clause or Free Exercise Clause opinions. In total, we analyzed more than fifty opinions written by Alito since he joined the Court in January 2006. In addition, we discuss a decision from Alito's time on the U.S. Court of Appeals for the Third Circuit as it particularly illuminates some of our analysis and foreshadows some of the concerns he has expressed since taking a seat on the Supreme Court. Saxe v. State Coll Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

[10] We recognize that research suggests that all justices are driven by their policy preferences while crafting arguments based on legal principles. The "attitudinal model" of judicial decision-making from political science research, for instance, suggests "judicial outcomes are driven by judges' sincere policy preferences—judges bring their ideological inclinations to the decision-making process, and their case outcome choices largely reflect these policy preferences." Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making* 29 WASH. U. J.L. & POL'Y 263, 263 (2009). This article aims to explain the outcomes and preferences that drive Alito's First Amendment opinions. When making arguments to the Court, litigants must frame their arguments in ways that will sway the justices. We contend that making arguments based on abstract judicial philosophies like originalism are less likely to sway Alito than the principles we outline. However, we do contend Alito would be willing to use originalism should it support his desired outcome.

Part II of the article contains a discussion of scholarly commentary about Alito's judicial approach, including those scholars who have addressed his approach to the First Amendment. In Part III, we explain the principles behind Alito's decision making, giving specific examples from Alito's opinions in First Amendment cases. Our analysis leads to several conclusions in Part III.

In Part III Section A, we contend that Alito seems to follow no established model of constitutional interpretation. Although in the wake of his majority opinion in *Dobbs v. Jackson Women's Health Organization*[11] there was focus on Alito's use of originalism,[12] it is difficult to classify Alito as a committed originalist, especially when it comes to the First Amendment. Rather, Alito is methodologically flexible. Additionally—although this might seem redundant to note in the wake of *Dobbs*—Alito is willing and, indeed, eager to overturn precedent in cases he thinks a previous Court wrongly decided. He does not seem to see himself as bound by *any* previous decision of the Court. Applied to First Amendment cases, this becomes particularly apparent in cases dealing with the internet. Alito is not willing to assume that precedent in non-internet cases automatically applies to cases involving the internet or social media. His opinions suggest he is distrustful of the internet and other forms of new technology and believes the Court should take a measured approach to applying the First Amendment to it. For example, in *Brown v. Entertainment Merchants Ass'n,* he urged a cautionary approach with violent video games and made the point that we should not assume reading a violent book is the equivalent of playing a violent video game.[13] Alito could thus be labeled a techno-cautionary.

In Part III Section B, we examine Alito's desire to protect "majorities-turned-minorities." As noted above, in a variety of cases Alito has worried that traditional views and power structures—from a real or imagined past—are under attack in America. Alito particularly views religious conservatives as a

---

[11] 142 S. Ct. 2228 (2022) (overruling the precedent set by *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) and holding that the Constitution does not confer a right to abortion).

[12] *See, e.g.*, Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

[13] 564 U.S. 786, 820 (2011) (Alito, J., concurring) (comparing the experiences of reading the passage in *Crime and Punishment* in which Raskolnikov kills the old pawnbroker with an ax to a video-game player who creates an avatar that bears his own image killing a character with an ax).

persecuted minority and is especially protective of religious education. As noted below, he also has referenced concerns about protecting the unpopular speech of conservative students.[14] He is also an adamant protector of religion's role in public life and fears religious freedom is under attack. In November 2020, in a speech given to the conservative legal group the Federalist Society, Alito said, "It pains me to say this, but, in certain quarters, religious liberty is fast becoming a disfavored right . . . . For many today, religious liberty is not a cherished freedom."[15]

In Part III Section C, we argue that, in the government speech context, Alito's desire to protect religion's role in public life and his desire to protect those at the "center" of his perceived society can explain his decisions in government speech cases. In the cases we discuss, as he has in other areas of law, Alito voted to broaden religion's role in public life and to protect what might be considered controversial speech.

In Part III Section D, we examine Alito's opinions in cases involving low-value or harmful speech. Despite his willingness to protect what others might find to be harmful speech (for example, displays of the Confederate flag[16]), Alito is unwilling or reluctant to protect speech he *personally* sees as offensive, valueless and, especially, harmful (for example, violent video games in *Brown v. Entertainment Merchants Ass'n*;[17] speech that causes "grave injury" in *Snyder v. Phelps*,[18] so-called "crush videos" in *United States v. Stevens*,[19] and lies about military service in *United States v. Alvarez*[20]). While his opinions in these cases certainly categorize much of the speech in question as

---

[14] *See, e.g.*, *infra* notes 241–49 and accompanying text.

[15] The Federalist Society, *Address by Justice Samuel Alito [NLC 2020 Live]*, YOUTUBE (Nov. 12, 2020), https://www.youtube.com/watch?v=tYLZL4GZVbA.

[16] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 221 (2015) (Alito, J., dissenting).

[17] *Brown*, 564 U.S. at 805–06 (Alito, J., concurring) (agreeing that the law in question did not have the "precision" demanded by the Constitution but arguing the First Amendment should not be applied automatically to violent video games, a "new and rapidly evolving technology").

[18] 562 U.S. 443, 465–73 (2011) (Alito, J., dissenting) (arguing that comments about Matthew Snyder were personal attacks akin to "private conduct" rather than commentary on matters of public concern and therefore unprotected by the First Amendment).

[19] 559 U.S. 460, 482 (2010) (Alito, J., dissenting) (writing that "crush videos" were a form of "depraved entertainment that has no social value" and should not be protected by the First Amendment).

[20] 567 U.S. 709, 739 (2012) (Alito, J., dissenting) (arguing that a law that punished knowingly false statements about military decorations was constitutional because the "lies have no value in and of themselves, and proscribing them does not chill any valuable speech").

worthless or of little value, we find it significant that Alito seems particularly attuned to the harm caused by the speech in these cases, particularly harm to what might be described as traditional sensibilities, individuals, interests, and values.

In Part III Section E, we examine campaign finance cases and cases involving speech of public employee unions. Alito's opinions in these areas can be explained as supporting the Roberts Court's sustained efforts to increase the free speech rights of corporations and wealthy candidates, while simultaneously restricting the free speech rights of public employee unions. Read this way, these cases, like other Alito opinions we discuss, are attempts to restore power to the once powerful. In other words, the Court is giving power to corporations and wealthy individuals, while diminishing the power of organized labor unions.

In Part III Section F, we examine Alito's efforts to influence lower courts and future litigants. Like other justices, Alito at times seems to write directly to lower courts or future litigants, as if he is aiming to provide extra guidance beyond the majority opinion about how the majority opinion should be interpreted or, in some cases, to even weaken the majority opinion.[21] In these instances, Alito attempts to insert his interpretation of the majority opinion, even when he did not write it. And he has been successful in these endeavors. In the student speech case *Morse v. Frederick*,[22] for example, his concurring opinion is frequently seen as the "controlling" opinion.[23] He has also invited future litigants to challenge laws. For example, he advocated for the overruling of *Abood v. Detroit Board of Education*[24] before it happened.[25] While we do not suggest

---

[21] Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 157 (2011) (writing that Alito's concurrence in *Brown v. Entertainment Merchants Ass'n* was "clearly designed to weaken the strength of [the majority] by openly questioning its reasoning and analysis").

[22] 551 U.S. 393, 422 (2007) (Alito, J., concurring).

[23] *See, e.g.*, B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 309 (3d Cir. 2013) ("Justices Alito and Kennedy's . . . narrower rationale protecting political speech limits and controls the majority opinion in *Morse* . . . Justice Alito's concurrence, joined by Justice Kennedy, provided the crucial fourth and fifth votes in the five-to-four majority opinion.").

[24] 431 U.S. 209 (1977).

[25] As noted below, *Abood* was eventually overruled in a majority opinion written by Alito in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). *See infra* notes 121–29 and accompanying text. For years before that, however, Alito openly advocated for the

that Alito is the only justice to do this or even that there is something circumspect about justices wanting to influence other courts and future litigants when they are not writing for the majority of the Court, we do argue that Alito has been especially successful in this regard in some instances.

Finally, in Part IV, the article concludes with a discussion of Alito's overall approach to the law and some thoughts on how he is attempting to reshape the First Amendment. We argue that, above all, it is clear he is seeking to protect a real or imagined past that, in his mind, is under attack in modern America.

I. THE JURISPRUDENCE OF JUSTICE ALITO

As one author noted, Alito was "formed by the generation of conservatives" who shared a skepticism for "academics and theoreticians."[26] "[A]s a litigator, a prosecutor, and a judge [Alito] has tended toward a more practical view of legal craft," wrote Adam J. White.[27] Additionally, Alito is a traditional conservative and, perhaps more importantly, a product of 1980s Reagan Republicanism.[28] Several profiles of Alito have noted the profound effect the 1960s had on him. White, for example, noted that during Alito's formative years, conservatism changed significantly, "[b]eginning as a countermajoritarian and intellectual movement," but becoming a "majoritarian and populist one."[29] White noted that Alito was troubled by riots and crime in the 1960s[30] and was deeply

---

overturning of *Abood* and seemingly welcomed challenges to the precedent. *See* Harris v. Quinn, 573 U.S. 616, 671 (2014) (Kagan, J., dissenting) ("[The majority] does not pretend to have the requisite justification to overrule *Abood*. Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so."); Knox v. Serv. Emp. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012) (contending that provisions of a law supported by *Abood* were "an anomaly"). *See also* Brianne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 YALE L.J.F. 362, 366-67 (2016) ("In short, Justice Alito, perhaps recognizing that he did not yet have the votes to overrule *Abood* outright, was willing to bide his time, writing opinions that incrementally chipped away at the precedent while making the case to overrule it altogether . . ..").

[26] Adam J. White, *Samuel Alito's Conservatism – Burkean and American,* HARV. J.L. & PUB. POL'Y PER CURIAM 1, 14 (2023).

[27] *Id.*

[28] *See generally* Margaret Talbot, *Justice Alito's Crusade Against a Secular America Isn't Over*, NEW YORKER (Aug. 28, 2022), https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over.

[29] White, *supra* note 26, at 6.

[30] *Id.* at 6–7.

influenced by the legal theories of the Reagan Administration's legal department in the 1980s.[31]

In a profile in *The New Yorker* magazine, Margaret Talbot also observed that Alito's childhood and adolescence coincided with the social transformation advanced by the Warren Court.[32] She wrote,

> By the time Alito entered high school, he had developed a keen interest in the law, and was taking note of the Warren Court's reshaping of American life, which included landmark rulings desegregating schools and other public facilities; recognizing a right to contraception for married couples and to interracial marriage; barring state-sanctioned school prayer; and guaranteeing access to public defenders for indigent criminal defendants.[33]

Talbot went on to note the effect protest and counterculture had on Alito while he was an undergraduate student at Princeton, writing that Alito's "already deeply held political allegiances put him at odds with the left-wing youth culture."[34] Other authors have also noted that understanding Alito's jurisprudence requires understanding his relationship to conservative movements over the decades.[35] White wrote that "Alito's own conservatism resembles the formative conservative debates of decades earlier, rather than the increasingly theoretical originalist methodology prevalent today among conservative judges and legal scholars."[36] Against this backdrop, it is clear that Alito has become a staunch conservative justice determined to protect conservatism from perceived persecution.

A. Existing Scholarship on Justice Alito's Jurisprudence

Commentators have come to a variety of conclusions about Alito's jurisprudence since he joined the Court in 2006. He has been described as "the Court's most consistent

[31] Talbot, *supra* note 28.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See, e.g.*, White, *supra* note 26.
[36] White, *supra* note 26, at 13–14.

conservative"[37] and a "Burkean Conservative."[38] Alito has described himself as a "practical originalist."[39] During his confirmation hearings, he stated that the Constitution contained some "very specific provisions," and when interpreting these provisions, judges should seek to "understand what [the] provision means" and then apply the provision to "new factual situations."[40] In situations where the Constitution did not contain specific provisions, he said, it was the job of judges to understand the "broad principles" of the Constitution—such as unreasonable searches and seizures, due process, equal protection—and then apply them "to the new situations that come up."[41] William Marshall examined whether Alito's decisions could be explained through the lens of "judicial political realism."[42] Alito has also been called a "newer textual[ist]"[43] and an originalist.[44] J. Joel Alicea wrote that Alito's constitutional jurisprudence "has long confounded commentators because it defies simple definition."[45] Another body of literature, however, paints Alito as a reliable results-oriented conservative justice.[46]

---

[37] *See* Gorod, *supra* note 25.

[38] Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 507 (2019). "Burkean" refers to the 18th century philosopher Edmund Burke. "Burkean minimalists" believe that "constitutional principles must be built incrementally and by analogy, and with close reference to long-standing practices." CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 36 (2009). A Burkean judge believes that "courts should be closely attentive to long-standing practices and must respect the judgments of public officials and ordinary citizens over time." *Id*.

[39] Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man/.

[40] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 378 (2006) (containing the statement of Samuel Alito, Appointee for the Supreme Court of the United States).

[41] *Id.* at 378–79.

[42] 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, 18–19 (2011) (explaining how an opinion written by Justice Scalia and joined by Justice Alito is a prime example of judicial political realism).

[43] Elliott M. Davis, Note: *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983 (2007).

[44] Bryan A. Garner, *Bryan Garner's Tribute to His Friend and Co-author Antonin Scalia*, ABA J. (Apr. 1, 2016, 2:50 AM), http://www.abajournal.com/magazine/article/bryan_garners_tribute_to_his_friend_and_co_author_antonin_scalia.

[45] J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, HARV. J.L. & PUB. POL'Y PER CURIAM 1, 10 (2023).

[46] Calabresi & Shaw, *supra* note 38, at 509 ("What existing accounts appear to agree on, however, is that Justice Alito is the most conservative Justice on the Supreme Court.").

Even during his nomination hearings, there were concerns that Alito was an advocate of the far-right wing of American politics.[47] In 2016, one author wrote Alito was "regarded by both his champions and his critics as the most consistently conservative member of the current Supreme Court."[48] Before the addition of the three justices nominated by President Donald Trump (Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett), Brianne J. Gorod wrote, "[T]here is no one to his right on the current Court."[49] Gorod went on to argue, "Unlike [Chief Justice Roberts], who will occasionally vote in ways that are likely at odds with his ideological preferences, Justice Alito's voting record on the Court is almost always in line with his conservative ideological preferences, even in the face of adverse precedent."[50]

Neil S. Siegel noted that "[u]nlike Justices Scalia and Thomas, Justice Alito is not to any significant extent an originalist."[51] Siegel described Alito as a "methodological pluralist," writing, "[H]e uses whatever modalities of interpretation—text, structure, precedent, original meaning, tradition, consequences, and ethos—seem to him most appropriate in the case under consideration."[52] J. Joel Alicea, on

---

[47] *See, e.g.*, Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST (Nov. 1, 2005) (discussing liberal groups' arguments that Alito's nomination was a capitulation by President George W. Bush to the "far-right" of the Republican Party), https://www.washingtonpost.com/archive/politics/2005/11/01/alito-nomination-sets-stage-for-ideological-battle/fcda4ce4-7313-4d0c-ad8d-b0309200da87/.

[48] Siegel, *supra* note 4, at 164.

[49] Gorod, *supra* note 25, at 362. According to a political science measure known as the Martin-Quinn Score, which places judges on an ideological spectrum, Alito and Thomas are the two most conservative justices on the current Court. Preliminary data from the 2022 term shows that, statistically, Alito voted more conservatively than Thomas in the term that ended in June 2023. Oriana Gonzalez & Danielle Alberti, *The Political Leanings of the Supreme Court Justices,* AXIOS (July 3, 2023), https://www.axios.com/2019/06/01/supreme-court-justices-ideology.

[50] Gorod*, supra* note 25, at 363. Authors have speculated that the Chief Justice, while staunchly conservative, is also worried about the damage to the Court's credibility if it is seen as merely a political body and the justices as politicians in robes. *See e.g.*, Brianne Gorod, *The Roberts Court at 10: A Very Conservative Chief Justice Who Occasionally Surprises*, 2015 CONST. ACCOUNTABILITY CTR. 1, 8, https://www.theusconstitution.org/think_tank/capstone-a-very-conservative-chief-justice-who-occasionally-surprises/.

[51] Siegel, *supra* note 4, at 166.

[52] *Id.* at 167. (Alito, J., concurring) (citing Caetano v. Massachusetts, 577 U.S. 411, 412 (2016) (using the modalities of precedent and consequences); Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting) (using the modalities of tradition and consequences); McDonald v. City of Chicago, 561 U.S. 742 (2010) (using the modalities of tradition and precedent); District of Columbia v. Heller, 554

the other hand, wrote that Alito was a true originalist because he based his decisions on a "methodology drawn *from* the Founding era rather than imposed *on* it."[53] According to Alicea, modern originalism has become increasingly abstract and difficult to distinguish from living constitutionalism.[54] Because Alito does not follow this modern approach to originalism, Alicea wrote that Alito was originalism's best hope moving forward.[55] Alicea wrote there was little purpose in discussing Alito's originalism via the lens of the First Amendment because "current free-speech doctrine has long been unmoored from the original meaning of the Free Speech Clause."[56]

Authors Steven Calabresi and Todd Shaw described much of the literature surrounding Alito at the time they were writing as "superficial."[57] They labeled Alito's jurisprudence as complex and argued that his approach could not be neatly identified.[58] According to these authors, Alito's jurisprudence had three hallmarks. First, Alito is a "fact-oriented" justice.[59] They wrote, "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."[60] Second, they said Alito was an originalist, "though not in the traditional sense of the word that one might associate with Justice Scalia."[61] Instead, the authors labeled him an "inclusive originalist."[62] According to the authors, under this approach, "judges may evaluate precedent, policy, or practice, 'but only to the extent that the original meaning incorporates or permits them.'"[63] Finally, the authors contended that the final theme of Alito's jurisprudence was "a presumption in favor of precedent and historical practice" and that his theory of *stare decisis* was "robust."[64] Based on these

---

U.S. 570 (2008) (using the modalities of text, original meaning, tradition, consequences, and ethos).

[53] Alicea, *supra* note 45, at 1 (emphasis in original).

[54] *Id.* at 2.

[55] *Id.*

[56] *Id.* at 3 (citing Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263 (2017)).

[57] Calabresi & Shaw, *supra* note 38, at 509.

[58] *Id.*

[59] *Id.* at 511.

[60] *Id.*

[61] *Id.* at 512.

[62] *Id.* at 570.

[63] *Id.* at 512 (quoting Will Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349, 2355 (2015)).

[64] *Id.*

themes, the authors labeled Alito's jurisprudence as "Burkean,"[65] a title first used to describe Alito by the conservative *Weekly Standard* in 2011.[66] Calabresi and Shaw concluded, "Alito's jurisprudence can be ascribed to neither conservative legal realism specifically nor political conservatism generally."[67]

White contended that Alito was Burkean for several reasons.[68] First, Alito himself seemed pleased with being called the "Burkean Justice" and was a long-time admirer of Burke.[69] White noted that in a keynote speech Alito gave at Columbia Law School, Alito discussed three categories of Burkean thought. First, Alito spoke of "substantive Burkeanism" or "deciding matters narrowly, with no sharp breaks from precedent or settled doctrines."[70] Next, he addressed "methodological Burkeanism" or "respecting incremental improvements and reforms in governance."[71] Finally, he discussed "'Burkeanism as prudent judging,' counseling judges to respect human society's complexities, the human mind's limitations and the (presumptively) accumulated wisdom of long-standing practices and institutions."[72] Of the three, White said that Alito seemed to find the third the most favorable, "Burkeanism as prudent judging."[73] White wrote this meant Alito recognized "that rigid adherence to a particular methodology or substantive judgement would itself fail to take sufficient consideration of prudential considerations."[74]

B. Scholarship on Justice Alito and the First Amendment

When it comes to the First Amendment, Alito embraces what one author called "a very subjective"[75] approach. Clay Calvert argued that Alito's dissents in *Stevens* and *Snyder* and his

---

[65] *Id.* We contend, however, that it is not correct to refer to Alito as Burkean when it comes to his approach to the law. See *infra* note 109 and accompanying text.
[66] Adam J. White, *The Burkean Justice*, WKLY. STANDARD (July 18, 2011), https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice.
[67] Calabresi & Shaw, *supra* note 38, at 577.
[68] White, *supra* note 26.
[69] *Id.* at 12 (discussing remarks made by Alito at a conference held at Columbia Law School). For a discussion of this conference, see Columbia Law School, *U.S. Supreme Court Justice Samuel Alito Says Pragmatism, Stability Should Guide Court* (Apr. 24, 2012), https://www.law.columbia.edu/news/archive/us-supreme-court-justice-samuel-alito-says-pragmatism-stability-should-guide-court.
[70] White, *supra* note 26, at 13.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Calvert, *supra* note 21, at 121.

concurrence in *Brown v. Entertainment Merchants Ass'n*,[76] "when considered along with his . . . opinions involving controversial forms of expression, demonstrate that he embraces a very subjective approach to First Amendment jurisprudence that privileges what he apparently considers to be decent speech of high value."[77] Calvert contended that Alito uses cultural-based judgments about "decency, distaste, disgust, offense and outrage" and intellectual judgments about "the perceived political value and contribution of speech toward democracy" to determine what to protect.[78]

Although Calvert focused on Alito's disdain for low-value or offensive speech, he also found Alito strongly advocated for the protection of speech in some cases, particularly when it came to political speech and striking down campaign finance laws.[79] Writing in 2011, Calvert highlighted Alito's majority opinion in *Davis v. Federal Election Commission*,[80] his dissenting opinion in *Christian Legal Society v. Martinez*,[81] and his concurring opinion in *Morse v. Fredrick*[82] as examples of his speech-protective opinions while on the Supreme Court.[83]

Siegel described Alito as the "least free-speech libertarian on the Roberts Court."[84] Like Calvert, Siegel found Alito's opinions in *Stevens*, *Snyder*, and *Brown* to be focused on "outrage" over expression that "has traditionally been regarded as despicable."[85] Siegel wrote that, given this seeming ambivalence for free speech, Alito's support for overturning campaign finance regulations is difficult to explain unless those cases are understood as "empowering traditionalists with resources to dissent from 'the new orthodoxy' by spending as much as they want."[86]

Writing about the free speech jurisprudence of Alito in 2018, Garrett Epps contended that Alito's main concern is the

---

[76] 564 U.S. 786, 805–06 (2011) (Alito, J., concurring) (agreeing that the law in question did not have the "precision" demanded by the Constitution but arguing the First Amendment should not be applied automatically to violent video games, a "new and rapidly evolving technology").
[77] Calvert, *supra* note 21, at 121.
[78] *Id.*
[79] *Id.* at 159.
[80] 554 U.S. 724 (2008).
[81] 561 U.S. 661, 706 (2009) (Alito, J., dissenting).
[82] 551 U.S. 393, 422 (2007) (Alito, J., concurring).
[83] Calvert, *supra* note 21, at 159.
[84] Siegel, *supra* note 4, at 172.
[85] *Id.*
[86] *Id.*

social consequences of the Court's decisions.[87] Epps argued Alito was a textualist and not an originalist, writing that the justice "takes careful notice of text but pays no special attention to 'original public meaning.'"[88] Epps also noted Alito's wariness of new technology, writing, "In an inversion of First Amendment jurisprudence, [Alito] argues that the Court should not presume that new forms of expression are protected."[89] Epps said this was particularly true when considering expression like violent video games in *Brown*.[90] According to Epps, the distinguishing feature in Alito's free speech opinions is that he "mistake[s] what the law calls expressive activity for actual conduct."[91] Finally, Epps wrote that "Alito often seems to decide cases with his heart."[92] He noted, however, that while Alito was "highly empathetic," it was a "selective empathy."[93] Epps wrote that Alito was overly concerned with tradition, deference to the state, and protecting speakers at an imagined "center" of American society.[94]

Keith E. Whittington wrote that Alito's approach to the First Amendment reflected a "generational transition in the conservative legal movement."[95] Whittington noted that Alito seemed particularly concerned with government regulation of conservative speech.[96] As we do below, Whittington noted that in some circumstances Alito is fond of quoting "free speech champions" from the past who have advocated for "protecting the speech that we hate."[97] Whittington, however, also noted that in other cases Alito is "reluctant to defend the hateful and offensive speech we hate."[98] Whittington also wrote that Alito's decisions were an interesting study in how to separate government speech from private speech.[99] According to Whittington, in cases where courts must disentangle government speech from private speech, Alito wants judges to "to focus far

---

[87] Epps, *supra* note 1.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Epps, *supra* note 1.
[94] *Id.* ("Alito envisions an American social center occupied by holders of power, wealth, and traditional values. The closer to this 'center' the speaker lies, in his analysis, the more robustly the speaker's speech should be protected.").
[95] Keith E. Whittington, *Justice Alito's Free Speech Jurisprudence*, HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2 (2023).
[96] *Id.* at 4.
[97] *Id.* at 5.
[98] *Id.* at 6.
[99] *Id*. at 11.

more on fact-specific, nuanced judgments and far less on doctrinal tests."[100]

II. JUSTICE ALITO AND THE FIRST AMENDMENT

This article builds on extant scholarship about Alito and provides a unique window into Alito's overall judicial philosophy while providing a more comprehensive and up-to-date analysis of his First Amendment jurisprudence in particular. Based on an analysis of more than fifty opinions in the areas of free speech and religion, we make several conclusions about Alito's general jurisprudence and his approach to the First Amendment.

A. Methodological Flexibility and Disregard for Precedent

Authors have noted that Alito's jurisprudence does not reflect any overarching methodological approach.[101] Alito has noted himself that he does not rigidly follow any specific methodology. He has specifically stated that in cases where originalism cannot resolve the issue, he applies his own judgment, describing himself as a "practical originalist."[102] At times, Alito has turned to originalism, although he rarely uses it to do heavy lifting in his First Amendment opinions. For example, in a concurring opinion in *Fulton v. City of Philadelphia*,[103] Alito used an originalist argument in writing about how the Free Exercise Clause should be interpreted.[104] He also invoked the "original understanding of the First Amendment" in his concurring opinion in *Town of Greece v. Galloway*, a 2014 case about prayer before public meetings. [105] In *Janus v. AFSCME*,[106] he inserted a quote from Thomas Jefferson to explain why compelled speech was so problematic.[107] Likewise, his majority opinion in *McBurney v. Young*, a case deciding if non-residents of Virginia had a right to records based on the state's access laws, contained a single sentence referencing

---

[100] *Id.*
[101] *See, e.g.*, Gorod, *supra* note 25, at 363.
[102] Walther, *supra* note 39.
[103] 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).
[104] *Id.* at 1899 (discussing what the free exercise right "was . . . understood to mean" when the Bill of Rights was ratified).
[105] 572 U.S. 565, 602 (2014) (Alito, J., concurring).
[106] 138 S. Ct. 2448 (2018).
[107] *Id.* at 2464 ("As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'") (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).

original meaning.[108] Some of his opinions, discussed below, do contain historical reviews of tradition or community practices. However, these rarely start with or reference the Framers' time period.

It would be more accurate to say that Alito is methodologically flexible and to classify him as a traditionalist or traditional conservative. Or, perhaps it would be more accurate to say he is a Burkean in his approach to society but not always the law.[109] Alito's opinions frequently focus on the more recent past and customs associated with what might be termed traditional American society. His opinions thus reference traditional values and the need to recognize tradition.[110] He laments changes that he perceives will make religious conservatives a persecuted minority and writes in favor of granting power to American institutions, such as organized religion, corporations, and, in some cases, the government.[111] Alito's opinions also at times appear highly personal and full of empathy for those he fears will soon be in the minority. In his free speech cases, he seems especially results-oriented, arguing to protect speech he finds valuable and lamenting what he sees as an assault on free speech in America, while also being willing to punish speech he finds to be offensive or harmful.[112] In that sense, aspects of his approach to the First Amendment embody what Nat Hentoff referred to as a "free speech for me—but not for thee" philosophy.[113]

In contrast to his reverence for a real or imagined past, Alito does not have the same reverence for precedents from Supreme Court cases he believes were wrongly decided. It is therefore as difficult to classify him as a legal Burkean as it is to

---

[108] 569 U.S. 221, 233 (2013) ("Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them.").

[109] According to Cass R. Sunstein, a Burkean judge follows and believes in "firmly rooted traditions" and "time-honored" practices. However, a Burkean judge would also stress the "slow evolution of judicial doctrine over time—and might reject sharp breaks from the judiciary's own past." Sunstein, *supra* note 38, at 48. Thus, while Alito's reverence for the past and for traditional values might be considered "Burkean," his willingness and desire to overturn decisions he does not agree with arguably cannot be considered "Burkean."

[110] As White wrote, "Justice Alito's instinct has been to begin with a presumption in favor of defending tradition." White, *supra* note 26, at 15.

[111] See *infra* Part III.B and Part III.C.

[112] See *infra* Part III.D.

[113] See generally NAT HENTOFF, FREE SPEECH FOR ME – BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (HarperCollins ed., 1st ed. 1992).

classify him as an originalist. Alito has been willing to overturn precedents he dislikes, and he at times has seemed to invite litigation challenging those precedents. For instance, in the First Amendment context, Alito's longing to overturn *Abood v. Detroit Board of Education*[114] was documented by scholars[115] and was apparent in several decisions[116] leading up to *Janus v. AFSCME*.[117] In *Abood*, decided in 1977, a unanimous Court upheld a law requiring public school teachers in Detroit to pay fees to subsidize some activities of public unions.[118] The Court ruled that public unions could be treated similarly to private unions.[119] The Court held that unions could collect fees from non-union members to recover the costs of collective bargaining, contract administration, and grievance adjustment processes.[120] This was true even if those fees could not be used by the union if there were objections by non-members to ideological or political goals of the union.[121] Although Alito had advocated for overturning *Abood* in multiple cases, it was not until 2018 that the precedent was finally overruled in a majority opinion he authored in *Janus v. AFSCME*.[122] In *Janus*, Alito railed against compelled speech, noting that it violated a "cardinal constitutional command."[123] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning," Alito wrote for the Court in *Janus*.[124] In fact, forcing individuals to betray their convictions or to command them into "involuntary affirmation of objected-to beliefs" was more damaging than any law involving censorship.[125] Therefore, compelling a person to "subsidize speech" could not be allowed.[126] Explaining why the Court was not following *stare decisis*, and was instead overruling

---

[114] 431 U.S. 209 (1977).
[115] *See, e.g.*, Gorod, *supra* note 25, at 366.
[116] *See* Harris v. Quinn, 573 U.S. 616, 671 (2014) (Kagan, J., dissenting) ("[T]he majority . . . does not pretend to have the requisite justifications to overrule *Abood*. Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so."); Knox v. Serv. Emp. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012) (contending that provisions of a law supported by *Abood* were "an anomaly").
[117] 138 S. Ct. 2448 (2018).
[118] *Abood*, 431 U.S. at 209.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 138 S. Ct. 2448 (2018).
[123] *Id.* at 2463.
[124] *Id.* at 2464.
[125] *Id.*
[126] *Id.*

Abood's forty-year-old precedent, Alito wrote that *Abood* was "wrongly decided,"[127] "unworkable,"[128] and contained "poor reasoning."[129]

In addition, Alito has signaled his interest in overturning *Employment Division v. Smith*,[130] the 1990 decision in which the Court ruled that "neutral law[s] of general applicability"[131] do not violate the First Amendment's Free Exercise Clause, even if they burden religious activity. In a concurring opinion in *Fulton v. City of Philadelphia*,[132] for instance, Alito wrote that, in *Smith*, the Court "abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice."[133] Alito noted the precedent was "ripe for reexamination."[134] In his *Fulton* concurrence, Alito used many of the typical reasons put forth by the Court when it wants to overturn a precedent,[135] including poor reasoning,[136] inconsistency with previous precedent,[137] workability,[138] and subsequent developments.[139]

Alito was also no fan of the *Lemon* test[140] sometimes used in Establishment Clause cases, writing that it should be overturned. The *Lemon* test "called for an examination of a law's purposes, effects, and potential for entanglement with religion,"[141] and the Court later added to the analysis a consideration of whether a "'reasonable observer' would

---

[127] *Id.* at 2486.
[128] For Alito's discussion of why he found *Abood* unworkable, see *id.* at 2481–82.
[129] For a discussion of why Alito argued that *Abood* was "poorly reasoned," see *id.* at 2478–79.
[130] 494 U.S. 872 (1990).
[131] *Id.* at 879.
[132] 141 S. Ct. 1868, 1882-83 (2021) (Alito, J., concurring). In *Fulton*, the Court ruled that the City of Philadelphia's refusal to contract with an organization that would not certify same-sex couples as foster parents was a violation of the Free Exercise Clause of the First Amendment.
[133] *Id.* at 1883.
[134] *Id.*
[135] *See* Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence:* Citizens United v. FEC *and Stare Decisis*, 21 COMMC'N L. & POL'Y 39, 48–51 (2016) (discussing the various "acceptable" ways the Supreme Court justifies decisions to overturn precedent and not follow *stare decisis*).
[136] *Fulton*, 141 S. Ct. 1868 at 1912 (Alito, J, concurring).
[137] *Id.* at 1915–16.
[138] *Id.* at 1917.
[139] *Id.* at 1922.
[140] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (creating what became known as the *Lemon* test).
[141] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

conclude that the [challenged] action constituted an 'endorsement' of religion."[142] Writing in *American Legion v. American Humanist Ass'n*, for example, Alito's plurality opinion gave four reasons the *Lemon* test presented "particularly daunting problems in cases . . . involv[ing] ceremonial, celebratory, or commemorative purposes . . . ."[143] In those sorts of cases, Alito urged instead that religious monuments, symbols, and practices with a long history should be presumed constitutional in all situations.[144] Although Alito's opinion stopped short of formally overruling *Lemon*, the 2022 case *Kennedy v. Bremerton School District* showed that Alito, in effect, eliminated the *Lemon* test in *American Legion*.[145] In *Kennedy*, the Court, citing Alito's opinion from *American Legion*, held that the "shortcomings" associated with *Lemon*'s "ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[146]

Applying his approach toward *stare decisis* to the internet and new technology, Alito has made it clear he is unwilling to automatically grant protection and apply extant precedent to new technologies. For example, in 2022, in *NetChoice, LLC v. Paxton*,[147] Alito dissented when the majority declined to vacate a stay of a Texas law that prohibited social media platforms with fifty million users from removing content based on viewpoint, required these platforms to issue biannual "transparency report[s]," and established approved procedures by which users could appeal the platform's decision to remove content.[148] While

---

[142] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion).

[143] *Id.* at 2081–84 ("First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult…Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply…. Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, '[t]he 'message' conveyed . . . may change over time'…. Fourth, when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning.") (internal citations omitted).

[144] *Id.* at 2081–82.

[145] *Kennedy*, 142 S. Ct. at 2427–28.

[146] *Id.* (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion)). *See also* Gabrielle Girgis, *An Architect of Religious Liberty Doctrines for the Roberts Court,* HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2 (2023) (arguing that *Kennedy* showed that "*American Legion* had effectively killed the *Lemon* test, so that now all controlled Establishment Clause analysis were text and history").

[147] 142 S. Ct. 1715 (2022).

[148] *Id.* at 1716.

the law clearly violated established Supreme Court precedent, Alito, joined by Justices Gorsuch and Thomas, wrote in his opinion dissenting from a denial to vacate the stay that because social media companies were "novel," it was "not at all obvious how . . . existing precedents, which predate the age of the internet, should apply to large social media companies . . . ."[149]

Also, in *Packingham v. North Carolina*,[150] a case challenging a law that banned sex offenders from accessing social media sites, Alito's concurring opinion warned that the majority was using overly strong language in its broad pronouncements about the protection afforded to speech on the internet. Alito wrote that he could not join the majority's opinion because of its "undisciplined dicta."[151] He warned,

> The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers.[152]

And in 2011, in *Brown v. Entertainment Merchants Ass'n,*[153] Alito warned that the Court should proceed cautiously in cases involving new technologies such as video games.[154] In a concurrence that reads much like a dissent, Alito wrote that the Court should not assume the First Amendment applies to emerging technologies.[155] "In considering the application of unchanging constitutional principles to new and rapidly evolving

---

[149] *Id.* at 1716–17.
[150] 582 U.S. 98 (2017).
[151] *Id.* at 110 (Alito, J., concurring).
[152] *Id.*
[153] 564 U.S. 786 (2011).
[154] *Id.* at 806 (Alito, J., concurring) ("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. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.").
[155] *Id.*

technology, this Court should proceed with caution," Alito wrote.[156]

B. Protecting Majorities Turned Minorities from Perceived Persecution

As noted above, Alito seems particularly protective of conservatives, religion, religious education, and religion's role in public life, fearing conservative speech and religious freedom is under attack. For instance, Alito articulated his concern for protecting what might be considered unpopular speech in *National Review, Inc. v. Mann*,[157] an opinion dissenting from a denial of certiorari. In the case, a climate scientist sued critics for defamation, and those critics then filed a motion to dismiss under an anti-SLAPP statute.[158] In his opinion dissenting from the cert denial, Alito wrote that it was up to the Court to be "deadly serious about protecting freedom of speech"[159] when it came to protecting unpopular opinions, in this case conservative opinions about climate change.[160] He wrote:

> Climate change has staked a place at the very center of this Nation's public discourse. Politicians, journalists, academics, and ordinary Americans discuss and debate various aspects of climate change daily—its causes, extent, urgency, consequences, and the appropriate policies for addressing it. The core purpose of the constitutional protection of freedom of expression is to ensure that all opinions on such issues have a chance to be heard and considered.
>
> I do not suggest that speech that touches on an important and controversial issue is always immune from challenge under state defamation law. . . . But the standard to be applied in a case like this is immensely important. Political debate frequently involves claims and counterclaims

[156] *Id.*
[157] 140 S. Ct. 344, 345, 347 (2019) (Alito, J., dissenting).
[158] *Id.* at 344–45.
[159] *Id.* at 347.
[160] When Alito determines unpopular speech is worth protecting, he passionately argues in favor of protecting that speech. *See e.g.*, *infra* notes 241–49 and accompanying text. When Alito determines unpopular speech is not worthy of protecting, though, he is equally passionate in his arguments against protecting that speech. *See e.g., infra* Part III.D.

> about the validity of academic studies, and today it is something of an understatement to say that our public discourse is often 'uninhibited, robust, and wide-open.'[161]

In *McCullen v. Coakley*,[162] Alito showed that he was solicitous about the speech of anti-abortion protesters outside abortion clinics. In the case, Alito took umbrage with a Massachusetts law that created a fixed 35-foot buffer zone around facilities where abortions were being performed.[163] Finding the regulation was a content-neutral time, place, and manner restriction, Chief Justice Roberts' majority opinion applied intermediate scrutiny to the law, striking it down as overbroad.[164] Alito, however, wrote a separate opinion concurring in the judgment to argue the law discriminated on the basis of content and viewpoint because the purpose of the law was to suppress anti-abortion speech.[165] In his opinion, Alito imagined a scenario where a sidewalk counselor approached a woman inside a buffer zone to offer to answer questions about any doubt the woman might have about procuring an abortion.[166] That sidewalk counselor would be violating the statute, Alito said, while a clinic employee would be free to approach the woman and escort her inside.[167] "This is blatant viewpoint discrimination," Alito concluded.[168]

In his concurring opinion in *Doe v. Reed*,[169] Alito demonstrated sensitivity to the consequences those who oppose same-sex marriage might face.[170] In the case, the Court ruled that disclosure under the Washington Public Records Act of the names and addresses of people who sign referendum petitions did not violate the First Amendment.[171] Alito agreed with that general conclusion, but he wrote separately to emphasize the importance of as-applied exemptions from disclosure requirements for speakers who can show "a reasonable probability that the compelled disclosure of [personal

---

[161] *Id.* at 348 (citations omitted).
[162] 573 U.S. 464 (2014).
[163] *Id.*
[164] *Id.* at 479–96.
[165] *Id.* at 511–12 (Alito, J., concurring).
[166] *Id.*
[167] *Id.*
[168] *Id.* at 512.
[169] Doe v. Reed, 561 U.S. 186, 202 (2010) (Alito, J. concurring).
[170] *Id.* at 205.
[171] *Id.* at 202.

information] will subject them to threats, harassment, or reprisals from either Government officials or private parties."[172] Alito thought as-applied relief seemed warranted in this case, which dealt with a referendum that sought to overturn a state law expanding the rights and responsibilities of same-sex domestic partners.[173] In support of his position, Alito referenced the "widespread harassment and intimidation"[174] that supporters of a 2008 California proposition banning same-sex marriage had received.

Alito has also articulated concerns for employees and employers who might face consequences for their religious beliefs. For instance, in *Stormans, Inc. v. Wiesman*,[175] a 2016 dissent from a denial of certiorari in a case involving a pharmacy that did not want to carry contraception, Alito worried that the effect of the regulations in question—and the Court's refusal to overturn them—would be to make religious objectors unemployable.[176] In the case, regulations adopted by the Washington State Pharmacy Board specified that "a pharmacy may not 'refuse to deliver a drug or device to a patient because its owner objects to delivery on religious, moral, or other personal grounds.'"[177] A local pharmacy owned by devout Christians did not stock emergency contraceptives based on their "conviction that life begins at conception and that preventing the uterine implantation of a fertilized egg is tantamount to abortion."[178] Arguing that the case was an "ominous sign," Alito warned that that the regulations were "likely to make a pharmacist unemployable if he or she objects on religious grounds to dispending certain prescription medications."[179]Alito thus concluded, "If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern."[180]

But those who value religious freedom have instead found continued success in front of the Roberts Court, with Alito as a key justice in that success. Indeed, Alito has written several influential opinions about religion and public life. As one scholar

---

[172] *Id.* at 203 (citations omitted).
[173] *Id.* at 191.
[174] *Id.* at 205.
[175] 579 U.S. 942 (2016) (Alito, J., dissenting).
[176] *Id.* at 2433.
[177] *Id.* at 2434.
[178] *Id.* at 2433.
[179] *Id.* at 942.
[180] *Id.* at 943.

characterized it, "Justice Alito's work on religion law is a hallmark of his jurisprudence."[181] His opinions in this area emphasize his concern for ensuring a space for religion in public life and for protecting religious worship. In his view, religion should be able to play a meaningful, visible role in public life—and he believes the Constitution supports that view.

For instance, in *American Legion v. American Humanist Ass'n*,[182] a case discussed above,[183] Alito's opinion focused on the role of Christian symbols on public property and addressed perceived hostility toward religion. The case involved a cross displayed as part of a memorial park.[184] The Court ruled that having the cross on public property did not violate the Establishment Clause because the cross had been on the property for a long time and removing it now would show hostility toward religion.[185] Alito's opinion contained both a long history of the cross in question[186] and a long history of crosses in general, explaining how they were not merely symbols of religion.[187]

Alito wrote about public prayer in his concurring opinion in the 2014 case *Town of Greece v. Galloway*.[188] In the case, a 5-4 Court ruled that a town's practice of clergy delivering mostly Christian prayers before town meetings did not violate the Establishment Clause.[189] In his concurring opinion, Alito documented the long tradition of constitutionally permissible legislative prayer, and he emphasized that "any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice."[190] Alito noted that requiring clergy to say generic prayers, rather than

---

[181] Girgis, *supra* note 146, at 1.
[182] 139 S. Ct. 2067 (2019).
[183] *See supra* notes 142–43 and accompanying text.
[184] *Am. Legion*, 139 S. Ct. at 2068.
[185] *See id.*
[186] *Id.* at 2090. ("The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.").
[187] *Id.* at 2074-76. ("The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning.")
[188] 572 U.S. 565 (2014).
[189] *Id.* at 575.
[190] *Id.* at 595 (Alito, J., concurring).

sectarian ones, would violate the conscience of local clergy.[191] He also wrote that he was "troubled by the message some readers may take from the principal dissent's rhetoric."[192] He argued the dissent's hypothetical arguments about the impact of the majority's decision—such as the "image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer"[193]—would lead some to believe they would soon live in "a country in which religious minorities are denied the equal benefits of citizenship."[194] Alito said that "[n]othing could be further from the truth."[195]

Several of Alito's opinions have particularly focused on the role of religion in both private and public education. For instance, in *Espinoza v. Montana Department of Revenue*,[196] Alito wrote a lengthy concurring opinion that documented the history of how Catholics had been discriminated against in the United States. In the case, the Court struck down a Montana law barring the use of state funds for religious schools.[197] Alito's concurring opinion ended with a quote that again showed Alito's deep concern about those who are religious being treated in ways he thinks would be unfair.[198] Alito wrote that striking down the law was important because the ruling let "parents of modest means" send their children to private religious schools.[199] Alito said this was necessary because many parents found that public "local schools inculcate a worldview that is antithetical to what they teach at home."[200]

---

[191] *See id.* at 595–96 (contending that it is hard to compose a prayer that is acceptable to Christian, Jews, and "followers of Eastern religions" and that "[m]any local clergy may find the project daunting" or impossible and may feel "they cannot in good faith deliver such a vague prayer").
[192] *Id.* at 603.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] 140 S. Ct. 2246, 2274 (2020) (Alito, J. concurring).
[197] *Id.* at 2249.
[198] *Id.* at 2274.
[199] *Id.* (Alito, J., concurring).
[200] *Id.* ("[M]any parents of many different faiths . . . believe that their local schools inculcate a worldview that is antithetical to what they teach at home. Many have turned to religious schools, at considerable expense, or have undertaken the burden of homeschooling. The tax-credit program adopted by the Montana Legislature but overturned by the Montana Supreme Court provided necessary aid for parents who pay taxes to support the public schools but who disagree with the teaching there. The program helped parents of modest means do what more affluent parents can do: send their children to a school of their choice. The argument that the decision below treats everyone the same is reminiscent of Anatole France's sardonic remark that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'") (citations omitted).

In the 2022 case *Kennedy v. Bremerton School District*,[201] in which the Court affirmed a public high school football coach's right to pray at midfield after games (which the Court described as a "brief, quiet, personal religious observance"[202]), Alito wrote a short concurring opinion explaining why the coach's actions were permissible:

> The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of public employees. Petitioner's expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities. When he engaged in this expression, he acted in a purely private capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed.[203]

Alito wrote the majority opinion for the Court in the 2020 case *Our Lady of Guadalupe School v. Morrissey-Berru*,[204] holding that the Free Exercise Clause dictates that the government may not get involved in employment decisions by a religious school, even if the reason for dismissal had nothing to do with religion.[205] The ruling, in other words, "protects the freedom of religious institutions to govern themselves"[206] and, in doing so, supports a broad vision of religious freedom. *Our Lady of Guadalupe School* involved employment discrimination claims brought by two elementary school teachers at Catholic schools.[207] Alito wrote for the Court:

> The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their

[201] 142 S. Ct. 2407 (2022).
[202] *Id.* at 2433.
[203] *Id.* at 2433–34 (Alito, J., concurring).
[204] 140 S. Ct. 2049 (2020).
[205] *Id.*
[206] Girgis, *supra* note 146, at 11.
[207] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.

> mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.[208]

Alito had previously made a similar argument in his concurring opinion in the 2012 case *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[209] In that case, the Court ruled in favor of a Lutheran school that had fired one of its teachers.[210] Writing for the Court, Chief Justice Roberts said the teacher was a minister for the purposes of the Civil Rights Act's "ministerial exception."[211] In the case, the Court was reluctant "to adopt a rigid formula for deciding when an employee qualifies as a minister,"[212] concluding only that the exception covered the teacher in question. Alito, however, wrote a concurring opinion in the case to explain the significance of broadly interpreting whether an employee fell within the ministerial exception.[213] Alito said that "courts should focus on the function performed by persons who work for religious bodies."[214] Instead of focusing on titles, Alito said "the 'ministerial' exception should . . . apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[215] Alito thus signaled in his concurring opinion the expansive definition of ministerial exception that would command a majority in *Our Lady of Guadalupe School* eight years later.[216]

Taken together with other cases, it is clear that Alito is in favor of broad exemptions to existing law for religious organizations or secular corporations that have religious ties and for these organizations to have wide latitude in how they conduct

---

[208] *Id.*
[209] 565 U.S. 171 (2012).
[210] *Id.* at 197.
[211] Girgis, *supra* note 146, at 11 ("Under the so-called 'ministerial exception,' a religious entity's decisions regarding the hiring and firing of its ministers are exempt from the reach of employment-antidiscrimination laws.").
[212] *Hosanna-Tabor*, 565 U.S. at 190.
[213] *See id.* at 198 (Alito, J., concurring).
[214] *Id.*
[215] *Id.* at 199.
[216] *Id.*; *see* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020).

themselves. For example, in *Burwell v. Hobby Lobby Stores*,[217] the case in which the Court ruled that privately held for-profit corporations could be exempt from the contraceptive mandate of the Affordable Care Act, Alito's majority opinion emphasized the substantial burden the law placed on corporations like Hobby Lobby.[218] The plaintiffs in the case believed "that providing the coverage demanded by the . . . regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage."[219] That belief, Alito wrote for the Court, "implicates a difficult and important question of religion and moral philosophy."[220] And, the Court reasoned, it was not the job of the government, including the courts, to tell the plaintiffs that their beliefs were flawed.[221] Such an approach, Alito said, would amount to "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question."[222]Alito's opinion was so powerfully worded, Justice Ruth Bader Ginsburg wondered in her dissent if the majority was holding that "any for-profit corporation could opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[223]

At the same time, Alito has also been central to the Court's efforts in ensuring that employers accommodate their employees' religious beliefs. Alito, for instance, wrote the majority opinion in the Court's June 2023 case *Groff v. DeJoy*.[224] In that case, an evangelical Christian, who believed for religious reasons that Sunday should be devoted to worship and rest, sued under Title VII of the Civil Rights Act after he was disciplined—and ultimately felt forced to resign—for failing to work on Sundays. Title VII "requires employers to accommodate the

---

[217] 573 U.S. 682 (2014).
[218] *Id.* at 690–92. In the case, a 5-4 Court held that the regulations related to the contraceptive mandate violated the Religious Freedom Restoration Act, "which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." *Id.* at 690-91.
[219] *Id.* at 724.
[220] *Id.* at 686.
[221] *See id.*
[222] *Id.* at 724. *See also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2396 (2020) (Alito, J., concurring). In *Little Sisters*, a case involving a government-created exemption to the contraceptive mandate for employers who have religious and conscientious objections, Alito argued in a concurring opinion, "I would hold not only that it was appropriate for the Departments to consider RFRA, but also that the Departments were required by RFRA to create the religious exemption (or something very close to it)."
[223] *Burwell*, 573 U.S. at 739–40 (Ginsburg, J., dissenting).
[224] 600 U.S. 447 (2023)

religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'"[225] Writing for the Court in *Groff*, Alito clarified an earlier Court precedent[226] and ruled that the "undue hardship" language from Title VII "is shown when a burden is substantial in the overall context of an employer's business."[227] In order to justifiably refuse to accommodate an employee's religious practice, then, an employer "must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[228] This clarified understanding of Title VII in *Groff* offers employees more protection than many lower courts had provided.

Alito has also demonstrated his concern for protecting and expanding religious freedom in cases that involve plaintiffs who are not Christian. For instance, in *Holt v. Hobbs,*[229] Alito's opinion for the Court held that Arkansas's Department of Corrections grooming policy violated the Religious Land Use and Institutionalized Persons Act by preventing a Muslim prisoner from growing a beard in accordance with his religious beliefs.[230] And in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*,[231] Alito concurred in the judgment in a case involving EEOC's lawsuit against Abercrombie for violating Title VII of the Civil Rights Act[232] when the company refused to hire a Muslim applicant because she wore a hijab.[233]

But Alito's most impassioned opinions have come in cases in which he worries Christians are being silenced, punished, or coerced into violating their beliefs. His dissent in the 2010 case *Christian Legal Society Chapter v. Martinez*[234] stands out as one chief example. In the case, a 5-4 majority upheld a public law school's policy of only offering official recognition to student groups who agreed to open eligibility for membership

---

[225] *Id.* at 453–54.
[226] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
[227] *Groff*, 600 U.S. at 468.
[228] *Id.* at 470.
[229] 574 U.S. 352 (2015).
[230] *Id.*
[231] 575 U.S. 768 (2015).
[232] Title VII of the Civil Rights Act of 1964 also "prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship." *Id.* at 770.
[233] *Id.* at 775, 782 (Alito, J., concurring).
[234] 561 U.S. 661 (2010).

and leadership to all students.[235] The Christian Legal Society at the Hastings College of Law had argued that the accept-all-comers policy infringed its First Amendment rights by forcing it to accept members who did not share its "core beliefs about religion and sexual orientation."[236] The Court majority held the policy was a reasonable, viewpoint-neutral condition on access to the college's student organization forum.[237] Alito vehemently disagreed, however.[238] Writing for himself and three other justices, Alito opened his dissenting opinion this way: "The proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[239] Alito said the majority ignored "strong evidence" that the college's policy "was announced as a pretext to justify viewpoint discrimination."[240] From Alito's perspective, "marginalization" was the consequence of the policy for religious groups who "cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith."[241] Alito thus concluded, "I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country."[242]

In the student speech context, it seems plausible to suggest that Alito's opinions are motivated by his desire to forestall punishment for students who express conservative-leaning or religious-oriented opinions. Alito is certainly not a student speech absolutist; he concurred in *Morse v. Fredrick*,[243] for instance, in upholding a school's decision to punish a student for displaying a banner with the message "Bong Hits 4 Jesus." But his concurrence in *Morse* aimed to narrow the majority opinion.[244] In his concurring opinion in the case, Alito tried to make it clear that the *Morse* logic should not extend to censor any

[235] *Id.* at 670–71.
[236] *Id.* at 668.
[237] *Id.* at 694–96.
[238] *Id.* at 706 (Alito, J., dissenting).
[239] *Id.*(quoting U.S. v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).
[240] *Id.* at 721 n.2.
[241] *Id.* at 741.
[242] *Id.*
[243] 551 U.S. 393 (2007).
[244] *Id.* at 422 (Alito, J., concurring).

speech "commenting on any political or social issue,"[245] as *Morse* was only about a pro-drug message and the "physical safety of students."[246] Alito also emphasized in his *Morse* concurrence that, in his view, the majority opinion did not allow school officials to justify punishing student speech that conflicted with a school's "educational mission."[247] Allowing those sorts of restrictions, Alito argued, could "easily be manipulated in dangerous ways," allowing public schools to inculcate "whatever political and social views are held" by officials, school administrators, and teachers.[248]

Moreover, in *Mahanoy Area School District v. B.L.*,[249] the 2021 case involving a school's punishment of a student for comments she posted on social media, Alito wrote in his concurring opinion that schools could not punish all off-campus speech.[250] Alito warned that a school could not punish off-campus speech that "is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like *politics*, *religion*, and *social relations*."[251] Perhaps thinking of conservative students who might be punished for speech that criticized or insulted students whose lives did not conform to conservative standards, Alito warned that it would be "difficult" for schools to punish "criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech."[252] Alito noted that "public school students, like all other Americans, have the right to express 'unpopular' ideas on public issues, even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful.'"[253]

Alito foreshadowed his approach to these issues while he was serving as a judge on the Third Circuit. In a well-known 2001 majority opinion he wrote for the Third Circuit in a case called *Saxe v. State College Area School District,*[254] Alito voted to strike down as unconstitutional a school district's anti-

[245] *Id.*
[246] *Id.* at 424.
[247] *Id.* at 423.
[248] *Id.*
[249] 141 S. Ct. 2038 (2021).
[250] *Id.* at 2049 (Alito, J., concurring).
[251] *Id.* at 2055 (emphasis added).
[252] *Id.* at 2057.
[253] *Id.* at 2049.
[254] 240 F.3d. 200 (3d Cir. 2001).

harassment policy. The district's policy defined harassment to "include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual"[255] on the basis of several characteristics, including, among other things, race, religion, sexual orientation, disability, intellect, social skills, and hobbies or values. The plaintiff in the case was the legal guardian of two children in the district. The children "sincerely identified themselves as Christians" and believed "they have a right to speak out about the sinful nature and harmful effects of homosexuality" and "to speak out on other topics, especially moral issues."[256] Fearing punishment for their speech under the policy, they sued to enjoin it.[257] In striking down the policy as overbroad, then-Judge Alito said that "by prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self-government (and democratic education) and the core concern of the First Amendment."[258] Alito argued that the Supreme Court had held "time and again, both within and outside the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[259]

Finally, in his Supreme Court opinion dissenting from a denial of certiorari in *Nurre v. Whitehead*,[260] Alito argued that the Court should have ruled in a case involving a school district that prevented a high school wind ensemble from playing a religious instrumental piece at the school's graduation ceremony. "When a public school purports to allow students to express themselves, it must respect the students free speech rights," Alito wrote. "School administrators may not behave like puppeteers who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings."[261] Alito argued that the Ninth Circuit's decision in favor of the school in the case "authorizes school administrators to ban any controversial student expression at any school event attended by parents and others who feel obligated to be present

[255] *Id.* at 202–03.
[256] *Id.* at 203.
[257] *Id.* at 202.
[258] *Id.* at 210.
[259] *Id.* at 215.
[260] 559 U.S. 1025 (2010) (Alito, J., dissenting).
[261] *Id.* at 1028.

because of the importance of the event for the participating students."[262]

C. Broadening Protection for Religion's Role in Public Life and Protecting Controversial Opinions via the Government Speech Doctrine

In his time on the Court, Alito has helped to shape the government speech doctrine. That doctrine holds that labeling speech "government speech" insulates it from challenges by plaintiffs "who claim that the government has impermissibly excluded their expression based on viewpoint."[263] As one scholar put it, under this doctrine, "Speech by government . . . to any audience on any subject is free of First Amendment constraint."[264] Alito's role in shaping the Court's government speech doctrine takes on added meaning when considered in conversation both with Alito's desire to protect religion's role in public life and his desire to protect those at the "center" of his perceived society. As one author noted, the government speech doctrine concerns the "most powerful" and "most central" speaker in society, the government.[265] Moreover, the outcome or result of Alito's opinions in the following three government speech cases mirror the jurisprudential themes just discussed in Section B. In these cases, Alito voted, in effect, to broaden religion's role in public life and to protect what might be considered controversial speech.

Early in his time on the Supreme Court, Alito wrote the majority opinion in the 2009 case *Pleasant Grove City v. Summum*.[266] There, a Utah city had refused to accept a monument from a small religious group for display in a city park.[267] Previously, the city had accepted several privately donated monuments, including one of the Ten Commandments, but the city refused to accept a monument containing Summum's Seven Aphorisms.[268] Writing for the Court, Alito concluded that

---

[262] *Id.* at 1030.
[263] Helen Norton & Danielle Keats Citron, *Government Speech 2.0,* 87 DENV. U.L. REV. 899, 901 (2010).
[264] Epps, *supra* note 1.
[265] *Id.* As noted above, Epps argues that Alito seeks to protect the "center" of American social society and the "closer to this 'center' the speaker lies" the "more robustly" Alito seeks to protect the speaker. Epps also notes Alito's "reflexive deference to the state." *See supra* notes 94-101 and accompanying text.
[266] 555 U.S. 460 (2009).
[267] *Id.* at 464.
[268] "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'" *Id.* at 465 n.1.

"the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[269] Alito's opinion noted that the city had selected "monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park."[270] One of those monuments of which the city had "taken ownership"[271] was a monument of the Ten Commandments. One read of *Summum*, then, is that the opinion sanctioned a city permanently displaying a Ten Commandments monument as a desirable "image of the City that it wishes to project."[272]

In 2015, Alito wrote a dissenting opinion in *Walker v. Texas Division, Sons of Confederate Veterans*,[273] a government speech case. There, a fraternal lodge made up of Confederate descendants requested a personalized license plate that contained a Confederate battle flag. In a 5-4 decision, the majority held that the plates were government speech and thus the state had no obligation to provide a license plate containing the Confederate imagery.[274] In his dissenting opinion, Alito argued instead that license plates were not government speech but rather "little mobile billboards on which motorists can display their own messages."[275] Alito said what the state did in the case was "to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination."[276] The majority opinion, Alito argued, "establishes a precedent that threatens private speech that government finds displeasing."[277] Alito imagined what the precedent would mean extrapolated into other contexts, and, in making his point, he again showed concern about schools potentially silencing unpopular views: "What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with

---

[269] *Id.* at 464.
[270] *Id.* at 473.
[271] *Id.*
[272] *Id.*
[273] 576 U.S. 200 (2015).
[274] *Id.* at 219 ("We hold that Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring [the Confederate flag].").
[275] *Id.* at 223 (Alito, J., dissenting).
[276] *Id.*
[277] *Id.* at 221.

prevailing views on campus but banned those that disturbed some students or faculty?"[278] Thus, to Alito, the government speech doctrine insulated the government when it endorsed a message in favor of the Ten Commandments but did not insulate the government from a First Amendment challenge when the government wanted to distance itself from Confederate imagery.[279]

Finally, in the 2022 case *Shurtleff v. City of Boston*,[280] Alito wrote an opinion concurring in the judgment, joined by Justices Thomas and Gorsuch, to distance himself from the majority's opinion.[281] The case involved the city of Boston's refusal to fly what was characterized as a "Christian flag" submitted by an organization called Camp Constitution.[282] While Alito agreed with the majority that this was a violation of Camp Constitution's First Amendment rights, he wrote separately to disagree with the Court's application of a three-factor test, culled from *Summum* and *Walker*.[283] This test considered history, the public's perception of who is speaking, and the extent to which the government exercised control over the speech in deciding whether or not the speech in question amounted to government speech.[284] Instead, Alito wrote that to be considered government speech, the speech needed to satisfy two conditions.[285]

First, "[the government] must show the challenged activity constitutes government speech in the literal sense—purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government."[286] Second, "the government must establish it did not rely on a means that abridges the speech of persons

---

[278] *Id.* at 223.

[279] Alito attempted to distinguish *Summum* from *Walker*. First, he noted there was a lack of history regarding license plates being government speech. *Id.* at 230. Next, he argued that the "Texas specialty plate program also does not exhibit the 'selective receptivity' present in *Summum*." *Id.* at 231. Finally, Alito wrote that scarcity of space was an issue in *Summum* but not in *Walker*. *Id.* at 232-33.

[280] 142 S. Ct. 1583 (2022).

[281] *Id.* at 1595 (Alito, J., concurring).

[282] *Id.* at 1587.

[283] *Id.* at 1595 (Alito, J., concurring) ("I cannot go along with the Court's decision to analyze this case in terms of the triad of factors—history, the public's perception of who is speaking, and the extent to which the government has exercised control over speech.").

[284] *Id.*

[285] *Id.* at 1596. Alito wrote, "We did not set out a test to be used in all government-speech cases, and we did not purport to define an exhaustive list of relevant factors." Alito additionally laid out the weaknesses for the majority's test. He eventually, however, described what seemed to be his own test for government speech.

[286] *Id.* at 1599.

acting in a private capacity."[287] To Alito, this test explained why the government speech doctrine never applies to (1) private-party speech even if it is subsidized[288] or facilitated by the government or (2) private-party speech that occurs in "any type of forum recognized by our precedents."[289] Alito said the real question in government-speech cases is "whether the government is *speaking* instead of regulating private expression."[290] Applying that framework in *Shurtleff*, Alito said "the flag displays were plainly private speech within a forum created by the City, not government speech."[291] And denying Camp Constitution's request to fly its flag thus amounted to viewpoint discrimination in a public forum.[292] Alito concluded that "religion constitutes a viewpoint, and 'speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious point of view.'"[293]

D. Offensive and Harmful Speech

From the beginning of his time on the Court, Alito has held that speech he determines is offensive or harmful should not receive First Amendment protection. In these cases, Alito has seemed especially attuned to the cognizable harm caused by speech he seems to consider low value. While other authors have analyzed Alito's views regarding the value of this speech,[294] we find it notable to highlight that Alito seems to principally focus on the harm caused by the speech in these cases.

In the first of these opinions, coming in the 2010 case *United States v. Stevens*,[295] Alito wrote a dissenting opinion when an 8-1 Court struck down a federal law targeting so-called "crush videos."[296] In his dissent, Alito wrote that the law prevented the creation of a form of "depraved entertainment that has no social value."[297] Alito argued the appropriate path forward in the case should have been to determine whether the law was

[287] *Id.*
[288] *Id.* at 1599–600.
[289] *Id.* at 1601.
[290] *Id.* at 1595.
[291] *Id.* at 1601.
[292] *Id.* at 1601–02.
[293] *Id.* at 1602 (quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001)).
[294] *See, e.g.*, Calvert, *supra* note 21; Whittington, *supra* note 95.
[295] 559 U.S. 460 (2010).
[296] The law in question established "a criminal penalty of up to five years in prison for anyone who knowingly 'creates, sells, or possesses a depiction of animal cruelty,' if done 'for commercial gain' in interstate or foreign commerce." *Id.* at 464–65.
[297] *Id.* at 482 (Alito, J., dissenting).

unconstitutional as applied to the speech at issue in the case, which involved videos depicting dogfights.[298] But he also argued that the majority was wrong in striking down the law as overbroad.[299] Alito argued that crush videos, which typically show scantily dressed women stomping rats, mice, hamsters, or insects, "present a highly unusual free speech issue because they are so closely linked with violent criminal conduct."[300] He wrote, "The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes . . . . The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos."[301]

From Alito's perspective, the Court's 1982 decision in *New York v. Ferber*[302] provided an appropriate parallel.[303] In *Ferber,* the Court upheld a child pornography statute,[304] and Alito said in *Stevens* that "*Ferber's* reasoning dictates a similar conclusion here."[305] In *Ferber*, the Court did not rely solely on the low value of child pornography to justify its decision.[306] Instead, *Ferber* focused on the harm caused by the creation of the speech.[307] To the Court, the low value in the speech was not the idea expressed by minors engaged in sexual acts—but rather the use of actual minors to express those ideas.[308] Similarly, it was not the value of the speech at issue in *Stevens* that made it unprotected to Alito; it was the harm caused by the conduct behind the speech.[309] The majority, though, disagreed, concluding instead that "our decisions in *Ferber* and other cases cannot be taken as

---

[298] *Id.* at 482–83.
[299] *Id*. at 484–91.
[300] *Id.* at 493.
[301] *Id.*
[302] 458 U.S. 747 (1982).
[303] *Stevens*, 559 U.S. at 483.
[304] *Ferber*, 458 U.S. at 774.
[305] *Stevens*, 559 U.S. at 493 (Alito, J., dissenting). "In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment." *Id.* at 496.
[306] *Ferber*, 458 U.S. at 756.
[307] *Id.* at 756–63 (discussing the harm caused by the creation and distribution of child pornography).
[308] *Id.* at 763 (writing that there was no question of attempting to suppress any "particular literary theme or portrayal of sexual activity," rather the goal was only to stop portrayals that were more "realistic" because they employed actual children).
[309] *Stevens*, 559 U.S. at 492–93 (discussing how the harms caused by the creation and distribution of crush videos are the same as the harms caused by the creation and distribution of child pornography).

establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[310]

A year later, in *Snyder v. Phelps,*[311] Alito again was the lone dissenter in a free speech case when he argued that speech by the Westboro Baptist Church should have been unprotected by the First Amendment.[312] *Snyder* involved a lawsuit for intentional infliction of emotional distress resulting from anti-gay, anti-Catholic, and anti-military messages delivered by members of the Westboro Baptist Church (WBC) during an otherwise peaceful protest of a military funeral.[313] The Court, in an 8-1 opinion written by Chief Justice Roberts, ruled in favor of the WBC.[314] Roberts's majority opinion recognized that speech can "stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain."[315] But, the Court reasoned, "On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[316]

To Alito, though, the WBC's messages were "vicious assault[s]" and "malevolent verbal attack[s]" that did not merit First Amendment protection.[317] Alito said the petitioner in the case, Albert Snyder, whose son Matthew was killed in Iraq, "wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace."[318] Instead, as a result of the picketers' "vicious verbal assault,"[319] Alito noted that Snyder "suffered severe and lasting emotional injury."[320] Alito argued that the WBC members' speech made "no contribution to public debate."[321] It was "abundantly clear," Alito said, that, rather than commenting on matters of public concern, the WBC members instead "attacked Matthew Snyder

---

[310] *Id.* at 472.
[311] 562 U.S. 443 (2011).
[312] *Id.* at 463 (Alito, J., dissenting).
[313] *Id.* at 448–50. The Westboro Baptist Church members held signs displaying messages such as "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell." *Id.* at 454.
[314] *Id.* at 460–61.
[315] *Id.*
[316] *Id.* at 461.
[317] *Id.* at 463 (Alito, J., dissenting).
[318] *Id.* Alito argued elsewhere in the opinion that "funerals are unique events at which special protection against emotional assaults is in order." *Id.* at 473.
[319] *Id.* at 463
[320] *Id.*
[321] *Id.* at 464.

because (1) he was a Catholic[322] and (2) he was a member of the United States military."[323] To support his argument, in his opinion Alito quoted from *Chaplinsky v. New Hampshire*, the Court's discredited-but-never-overruled 1942 decision that birthed the "fighting words" doctrine, for the proposition that some "words may 'by their very utterance inflict injury.'"[324] He argued, "When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery."[325] Again, Alito is concerned with the harm caused by the speech, not just its value—and in this case the speech harmed the father of a dead Catholic soldier.

That same year, in the 2011 case *Brown v. Entertainment Merchants Ass'n*,[326] Alito wrote an opinion concurring in the judgment in a case involving a California law that limited minors' access to purchase and rent violent video games and required the labeling of those games.[327] Alito's opinion, which read and functioned more like a dissent, declared the law void for vagueness, but he disagreed with the majority's broader approach (striking down the law as a content-based restriction that failed strict scrutiny review) and instead suggested that a properly drawn statute could be constitutional.[328] Alito said that there "are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show,"[329] and he thought the majority opinion too easily dismissed those differences. Alito expressed his revulsion at the level of violence in some video games, commenting that "[i]n some of these games, the violence is astounding. . . . It also appears that there is no antisocial theme too base for some in the video-game industry to exploit."[330] He also said he did not want the Court to "squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem."[331] Whittington summarized Alito's solicitude for parental control over children and caution in the face of video

[322] The WBC's picketing has, among other things, highlighted "scandals involving the Catholic clergy." *Id.* at 454.
[323] *Id.* at 470 (Alito, J., dissenting).
[324] *Id.* at 465 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
[325] *Id.* at 465–66.
[326] 564 U.S. 786 (2011).
[327] *Id.* at 789.
[328] *Id.* at 806–07 (Alito, J., concurring).
[329] *Id.* at 806.
[330] *Id.* at 818.
[331] *Id.* at 821.

games' possible effects in Brown to "reflect a conservative sensibility that would at least nibble around the edges of First Amendment jurisprudence."[332]

Then one year later, in 2012, Alito wrote a dissenting opinion in *United States v. Alvarez*.[333] The Court in that case struck down the Stolen Valor Act of 2005, which made it a crime to falsely claim receipt of military decorations or medals.[334] For Alito, though, the law was "enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and *inflicting real harm* on actual medal recipients and their families."[335] In his opinion, Alito discussed what he said was the "long tradition of efforts to protect our country's system of military honors."[336] He recognized that in areas such as "philosophy, religion, history, the social sciences, the arts, and other matters of public concern,"[337] society does not want the government to be the arbiter of truth. In those areas, he said, state efforts to penalize allegedly false speech would risk suppressing truthful speech.[338] Here, though, Alito concluded that Congress had passed a "narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech."[339]

Alito again revealed his willingness to suppress speech he considers valueless or harmful in his concurring opinion in the 2019 case *Iancu v. Brunetti*.[340] The Court in that case held that a section of the Lanham Act that barred the federal registration of "immoral" or "scandalous" marks infringed the First Amendment.[341] Alito agreed with that conclusion, but in his

---

[332] Whittington, *supra* note 95, at 10.
[333] 567 U.S. 709 (2012).
[334] *Id.* at 715–16.
[335] *Id.* at 739 (Alito, J., dissenting) (emphasis added).
[336] *Id.* at 741. To support this claim of a "long tradition," Alito cited orders from George Washington that "established a rigorous system" to ensure military awards were "received or worn by only the truly deserving" and a federal law from 1923 making it a federal offense to manufacture or sell military decorations without authorization. *Id.*
[337] *Id.* at 751.
[338] *Id.*
[339] *Id.* at 739.
[340] 139 S. Ct. 2294 (2019).
[341] *Id.* at 2297.

concurrence he highlighted that the Court's decision "does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."[342] Alito said the mark in question in the case, which involved the brand name FUCT, could be denied registration under such a narrowly crafted law.[343] Thus, once again, Alito was concerned with valueless speech that causes harm—in this case, speech whose effect is to "coarsen our popular culture."[344] Similarly, in 2019, in a dissent from a denial of certiorari in *Dahne v. Ritchie*,[345] Alito again expressed his willingness to censor speech he finds both offensive and harmful. In *Dahne,* Alito argued that the First Amendment should not protect speech of a prisoner that contained "offensive language" and personal insults that were the equivalent of "veiled threats."[346]

As mentioned above,[347] Calvert's 2011 article described Alito as embracing "a very subjective approach to First Amendment jurisprudence that privileges what he apparently considers to be decent speech of high value."[348] Calvert argued that Alito uses cultural-based judgments about "decency, distaste, disgust, offense and outrage" and intellectual judgments about "the perceived political value and contribution of speech toward democracy" to determine what to protect.[349] And Epps, again as previously mentioned, observed that "Alito often seems to decide cases with his heart."[350] Both of those observations seem apropos when analyzing Alito's opinions in these cases. As noted, though, we emphasize that Alito seems especially sensitive to the cognizable harm caused, or potentially caused,

---

[342] *Id.* at 2303 (Alito, J., concurring).

[343] *Id.* Alito wrote, "The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force." *Id.*

[344] *Id.*

[345] 139 S. Ct. 1531, 1532 (2019) (Alito, J., dissenting from denial of certiorari).

[346] *Id*. at 1532. *See also* Elonis v. U.S.*,* 575 U.S. 723 (2015) where, in his opinion concurring in part and dissenting in part, Alito emphasized the harms threats cause: "True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation." *Id.* at 746 (Alito, J., concurring in part and dissenting in part).

[347] See *supra* notes 77–78 and accompanying text.

[348] Calvert, *supra* note 21, at 121.

[349] *Id.*

[350] Epps, *supra* note 1.

by speech he considers low value. He sees the speech in these cases as damaging and, in some cases, assaultive.

Yet in other cases, Alito has been a robust defender of speech, decrying viewpoint discrimination and favoring protecting speech that others might find harmful or offensive but that he believes merits protection. In addition to cases discussed above—such as *National Review, Inc., McCullen, Christian Legal Society, Mahanoy Area School District, Saxe,* and *Walker—Matal v. Tam*[351] offers another example. That was a 2017 trademark case involving the music band The Slants and the trademark anti-disparagement clause.[352] Alito wrote the Court's majority opinion striking down the clause on First Amendment grounds.[353] In the opinion, Alito worried about efforts to label some speech as offensive, and he explained why what might be categorized as hate speech should be protected generally.[354] The government "has an interest in preventing speech expressing ideas that offend," Alito wrote.[355] "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[356] Alito thus critically labeled the anti-disparagement clause a "happy-talk clause."[357]

And in *Iancu*,[358] the trademark case discussed above[359] involving the brand name FUCT, Alito in his concurring opinion lamented that free speech was "under attack" in America.[360] He noted that Congress, if it wanted, could adopt "a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression

---

[351] 582 U.S. 218 (2017).
[352] *Id.* at 223.
[353] *Id.* at 244.
[354] *Id.* ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting Street v. New York, 394 U.S. 576, 592 (1969)).
[355] *Id.* at 246.
[356] *Id.* (quoting U.S. v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Alito also quoted that Justice Oliver Wendell Holmes line from *Schwimmer* in *Christian Legal Society Chapter v. Martinez*. *See supra* note 239 and accompanying text.
[357] *Matal*, 582 U.S. at 246.
[358] 139 S. Ct. 2294 (2019).
[359] *See supra* notes 340–44 and accompanying text.
[360] *Iancu*, 139 S. Ct. at 2302-03 (Alito, J. concurring).

of ideas."[361] But the provision of the Lanham Act at issue in the case discriminated on the basis of viewpoint.[362] Alito wrote:

> Viewpoint discrimination is poison to a free society. But . . . such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination."[363]

Alito thus seems to be selective in what speech he considers valueless and/or harmful. From his perspective, for instance, the First Amendment needs to protect displays of the Confederate flag on license plates,[364] and the First Amendment needs to provide space for Christians to criticize homosexuality.[365] That speech has value, it seems to Alito, and it does not cause harm to those who view or receive it in ways that would justify restrictions. On the other hand, violent video games,[366] speech that causes "grave injury,"[367] so-called "crush videos,"[368] and lies about military service,[369] for example, cause harm and are not worthy of First Amendment protection.

E. Supporting the Roberts Court in Striking Down Campaign Finance Regulations and Restricting the Speech Rights of Public Employee Unions

Alito has been a key justice in decisions of the Roberts Court that have struck down campaign finance regulations on First Amendment grounds and restricted the speech rights of public employee unions. For instance, in his first campaign finance majority opinion for the Court, 2008's *Davis v. Federal Election Commission*,[370] Alito ruled that the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act of 2022, which raised ordinary

---

[361] *Id.* at 2303 (Alito, J., concurring).
[362] *Id.* at 2302–03.
[363] *Id.*
[364] *See* Walker v. Texas Divisions, Sons of Confederate Veterans, 578 U.S. 200 (2015).
[365] *See* Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting).
[366] Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 805–06 (Alito, J., concurring).
[367] Snyder v. Phelps, 562 U.S. 443, 465-473 (2011) (Alito, J., dissenting).
[368] U.S. v. Stevens, 559 U.S. 460, 482 (2010) (Alito, J., dissenting).
[369] U.S. v. Alvarez, 567 U.S. 709, 739 (2012) (Alito, J., dissenting).
[370] 554 U.S. 724 (2008).

limits on the size of individual contributions to a campaign if a candidate's opponent spent more than $350,000 of their own money, was unconstitutional.[371] Alito's opinion focused on the "unjustified burden" the law placed on the wealthy candidate.[372] "The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office," Alito wrote for the Court.[373]

While he did not write opinions in the cases, Alito voted with the majority in *Citizens United v. Federal Election Commission*[374] (holding Congress cannot restrict independent expenditures by corporations), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[375] (striking down a public-finance law that granted additional funds to publicly funded candidates whose privately funded opponents exceeded spending limits), and *McCutcheon v. Federal Election Commission*[376] (striking down a law limiting the total amount of money an individual donor can give to federal candidates). As noted below, he wrote a short concurring opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.,*[377] a case that struck down federal restrictions on campaign finance laws.[378] He also wrote an opinion—his first in a First Amendment case—concurring in part and concurring in the judgment in *Randall v. Sorrell*,[379] a 2006 case that struck down state-level expenditure and contribution limits.

As noted above[380] in the discussion of Alito's opinion in *Janus v. AFSCME*[381] overruling *Abood v. Detroit Board of Education*,[382] Alito has ruled multiple times against the speech rights of public employee unions. For instance, six years before *Janus,* in *Knox v. SEIU, Local 1000*,[383] Alito wrote a majority opinion holding that the First Amendment prohibited public-sector unions from requiring objecting nonmembers to pay a special fee for

---

[371] *Id.* at 740.
[372] *Id.* at 740 ("The burden imposed . . . on the expenditure of personal funds is not justified by any governmental interest . . .").
[373] *Id.* at 742.
[374] *See generally* 558 U.S. 310 (2010).
[375] *See generally* 564 U.S. 721 (2011).
[376] *See generally* 572 U.S. 185 (2014).
[377] 551 U.S. 449, 482 (2007) (Alito, J. concurring).
[378] *Id.* at 481–82 (majority opinion).
[379] 548 U.S. 230, 263 (2006) (Alito, J., concurring).
[380] *See supra* Part III.A.
[381] 138 S. Ct. 2448 (2018).
[382] 431 U.S. 209 (1977).
[383] 567 U.S. 298 (2012).

the purpose of financing the union's political and ideological activities.[384] In strong language, Alito's opinion called the union's collection of fees from nonmembers "indefensible."[385] Alito's majority opinion likewise narrowed *Abood* in *Harris v. Quinn*,[386] ruling that the First Amendment barred the collection of an agency fee from home health care providers who did not want to join or support a union.[387] Alito thus chipped away at *Abood* before finally killing it in *Janus*.

In her dissent in *Janus*, Justice Kagan said the Court's opinion in the case "prevents the American people, acting through their state and local officials, from making important choices about workplace governance."[388] Kagan accused Alito's opinion of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[389] Commentators such as Catharine MacKinnon would argue that decisions protecting wealthy candidates and corporations in the campaign finance context and rulings denuding the resources and influence of labor unions have turned the First Amendment into "a weapon of the powerful."[390] Culminating in *Janus,* the Roberts Court, with Alito as a crucial contributor, has allowed "dominant groups to impose and exploit their hegemony."[391] Via this lens, these decisions can thus be read as efforts to restore power to the once powerful—elevating corporations over labor unions.

F. Seeking to Influence Lower Courts and Future Litigants

In many of his concurring and dissenting opinions in First Amendment cases, Alito seems to be writing directly to lower courts or future litigants, as if he is aiming to provide extra guidance about how the majority opinion should be interpreted or, in some cases, to even weaken the majority opinion. Alito is not the only justice to do

---

[384] *Id.* at 317–18.
[385] *Id.* at 314.
[386] 573 U.S. 616 (2014); *see also* Locke v. Karass, 555 U.S. 207 (2009), where Alito joined the majority opinion in a case upholding a local union's right to charge nonmembers for national litigation expenses but cautioned in his concurrence, "Because important First Amendment rights are at stake, the Government's argument regarding the burden of establishing true reciprocity has considerable force. Nonetheless, since petitioners in this case did not raise the question whether the Maine State Employees Association's pooling arrangement was bona fide, we need not reach that question today." *Id.* at 222 (Alito, J., concurring).
[387] *Id.* at 648–49.
[388] *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).
[389] *Id.*
[390] Catharine MacKinnon, *Weaponizing the First Amendment: An Equality Reading,* 106 VA. L. REV. 1223 (2020).
[391] *Id.* at 1224.

this, and we are not suggesting that there is something problematic about justices wanted to influence other courts when they are not writing for the Court majority. But Alito has been especially successful in this regard in some areas.

For instance, as Calvert wrote, Alito's concurrence in *Brown v. Entertainment Merchants Ass'n* "seems clearly designed to weaken the strength of that opinion by openly questioning its reasoning and analysis."[392] Additionally, in *Shurtleff v. City of Boston*,[393] the 2022 government speech case involving a Christian flag, Alito's concurrence warned that following the majority's opinion in the case might "lead a court astray,"[394] and he instead offered his own approach for how to determine what constitutes government speech.[395] And in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Alito wrote a concurring opinion in an attempt to explain the significance of "formal ordination and designation as a 'minister'"[396] in determining whether an employee fell within the ministerial exception. His concurring opinion in *Hosanna-Tabor* signaled the expansive definition of ministerial exception the Court would adopt when Alito wrote the majority opinion in *Our Lady of Guadalupe School*[397] eight years later.

In another example, in *Mahanoy Area School District v. B.L.*,[398] the case involving a school's punishment of a student for comments she posted on social media,[399] Alito again appeared to set out to frame the majority opinion. Alito wrote in his concurrence that while he was joining the opinion of the Court, he was writing separately to explain his understanding of the Court's decision.[400] Alito noted this was the first case in which the Court had "considered the constitutionality of a public school's attempt to regulate true off-premises student speech, and therefore it [was] important that [the Court's] opinion not be misunderstood."[401] Alito wrote that courts should be skeptical of schools' attempts to punish off-campus speech.[402] His concurrence aimed to provide additional context and a

[392] Calvert, *supra* note 21, at 157.
[393] 142 S. Ct. 1583 (2022).
[394] *Id.* at 1596 (Alito, J., concurring).
[395] *Id.* at 1598–601.
[396] 565 U.S. 171, 198 (2012) (Alito, J., concurring).
[397] 140 S. Ct. 2049 (2020).
[398] 141 S. Ct. 2038, 2042-43 (2021).
[399] *Id.* at 2042–43.
[400] *Id.* at 2048 (Alito, J., concurring).
[401] *Id.* at 2048–49.
[402] *Id.* at 2049.

"framework within which efforts to regulate off-premises speech should be analyzed."[403]

His concurring opinion in *Morse v. Frederick*[404] offers another chief example of Alito's successful efforts at narrowing a majority's decision, as his concurring opinion is now frequently seen as the "controlling" opinion from the case.[405] In another example, in *City of Austin v. Reagan National Advertising of Texas Inc.,* a case about sign codes in the City of Austin, Texas, Alito wrote an opinion concurring in the judgment chiding the majority's opinion for being too broad.[406] And in *Americans for Prosperity Foundation v. Bonta*, Alito wrote an opinion concurring in part and concurring in the judgment arguing the majority's opinion used an incorrect standard in campaign finance cases.[407]

In his concurring opinion in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[408] however, Alito argued the majority did not go far enough. Although Alito understood "the Court's desire to decide no more than is strictly necessary," he wrote that he would also have decided that the Religious Freedom Restoration Act[409] compels an exemption for employers who did not wish to provide contraception to employees.[410] In *Reed v. Town of Gilbert*, Alito wrote a separate concurring opinion to "add a few words of further explanation" to the majority's opinion to explain what the opinion really meant if it was "properly understood."[411] Other times, Alito

---

[403] *Id.*

[404] 551 U.S. 393, 422 (2007) (Alito, J., concurring).

[405] *See, e.g.*, B.H. *ex rel* Hawk v. Easton Area School Dist., 725 F.3d 293, 309 (3rd Cir. 2013) ("Justices Alito and Kennedy's narrower rationale protecting political speech limits and controls the majority opinion in *Morse*…Justice Alito's concurrence, joined by Justice Kennedy, provided the crucial fourth and fifth votes in the five-to-four majority opinion.").

[406] 142 S. Ct. 1464, 1481 (2022) (Alito, J., concurring) ("For these reasons, I would simply hold that the provisions at issue are not facially unconstitutional, and I would refrain from making any broader pronouncements.").

[407] 141 S. Ct. 2373, 2391 (2021) (Alito, J., concurring) ("The Chief Justice would hold that the particular exacting scrutiny standard in our election-law jurisprudence applies categorically 'to First Amendment challenges to compelled disclosure.' Justice Thomas, by contrast, would hold that strict scrutiny applies in all such cases. I am not prepared at this time to hold that a single standard applies to all disclosure requirements. And I do not read our cases to have broadly resolved the question in favor of exacting scrutiny.") (internal citations omitted).

[408] 140 S. Ct. 2367, 2387 (2020) (Alito, J. concurring).

[409] 42 U.S.C. §§ 2000bb-2000bb-4.

[410] *Little Sisters*, 140 S. Ct. at 2387 (Alito, J., concurring).

[411] 576 U.S. 155, 174–75 (2015) (Alito, J., concurring) ("Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.").

seems to write concurring opinions that try to explain what the majority's opinion *does not* mean.[412]

Finally, in 2007, in a short concurring opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.,*[413] a case striking down federal restrictions on campaign finance laws, Alito seemed to telegraph that the Court was willing to overturn its 2003 decision in *McConnell v. Federal Election Commission*.[414] In 2010, of course, the Court overturned portions of *McConnell* in *Citizens United v. Federal Election Commission*,[415] with Alito voting with the majority.

III. CONCLUSION

During his 2006 confirmation hearings, Alito said that "it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any result."[416] But our analysis suggests that Alito indeed has changed First Amendment law during his time on the Court—and that he looks to change the law to achieve his desired result. Additionally, while his judicial philosophy seems practical and outcome driven, he is not without guiding principles that can be used to better understand his approach to the law.

As noted, Alito is methodologically flexible in reaching his decisions, willing to use the judicial approach that best leads him to his desired outcome. A *New York Times* guest essay from October 2022 written by Joseph Fishkin and William Forbath referred to the current Court this way: "It is Justice Samuel Alito's court now: methodologically flexible but ideologically rigid."[417] Indeed, Alito's outcomes in cases consistently align with his conservative ideological preferences.[418] In that sense, as

---

[412] *See, e.g.*, United States v. Apel, 571 U.S. 359, 376 (2014) (Alito, J. concurring) ("Our failure to address this question should not be interpreted to signify either agreement or disagreement with the arguments outlined in Justice Ginsburg's concurrence.").

[413] 551 U.S. 449, 482 (2007) (Alito, J. concurring) ("If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell v. Federal Election Comm'n.*") (internal citations omitted).

[414] 540 U.S. 93 (2003).

[415] *See* 558 U.S. 310, 365–66 (2010).

[416] Calvert, *supra* note 21, at 169.

[417] Joseph Fishkin and William E. Forbath, *How Liberals Should Confront a Right-Wing Supreme Court*, N.Y. TIMES (Oct. 17, 2022), https://www.nytimes.com/2022/10/17/opinion/liberals-supreme-court-constitution.html.

[418] *See generally* Siegel, *supra* note 4.

Emily Bazelon wrote, "Alito is defined not by his broad ideas but by his consistency."[419]

Importantly, Alito does not seem to see himself as bound by *any* previous decision of the Court. *Stare decisis* is not an issue when he believes a case was wrongly decided. In this way, Alito's jurisprudence reflects his own comments on a Burkean approach to the law. As noted above, White observed that Alito suggested he was most favorable to an approach he identified as "Burkeanism as prudent judging."[420] Alito clearly does not believe in rigid adherence to a particular methodology or substantive judgment if a decision fails to take sufficient consideration of Alito's own prudential considerations. As White noted, in a keynote speech Alito gave at Columbia Law School, Alito criticized the "tendency of some 'Burkeans' to mistake judicial precedents for Burkean traditions. Judicial precedents, Alito emphasized, are discrete exercises of individual human judgment."[421] Finally, it is important for lawyers making arguments before Alito to recognize that it seems he is almost inherently distrustful of the internet and other forms of new technology.

Alito does appear Burkean in his approach to society generally. He values, among other things, religion and its role in public life, the traditional family, traditional sources of authority, and stability.[422] Yet he is arguably anti-Burkean in his approach to Constitutional law. He pushes it to change, swiftly and dramatically when possible.[423] Geoffrey Stone once said that Alito "seems almost off the charts in his seeming inability to follow settled law when it counters his gut sense of right and wrong."[424] In his keynote speech at Columbia Law School, Alito himself even advocated there were good and Burkean reasons for departing from "minimalism, incrementalism, and conventionalism."[425] In the First Amendment context, it was thus Alito, for example, who wrote the opinion in *Janus*

---

[419] Emily Bazelon, *Mysterious Justice*, N.Y. TIMES (Mar. 18, 2011), https://www.nytimes.com/2011/03/20/magazine/mag-20Lede-t.html.
[420] White, *supra* note 26, at 13.
[421] *Id.*
[422] Burkean minimalists "emphasize the need for judges to pay careful heed to established traditions and to avoid independent moral and political arguments of any kind." Sunstein, *supra* note 38, at 36.
[423] Burkean minimalists "insist on small steps rather than earthquakes." *Id.*
[424] Ben Conery, *Roberts, Alito Leave Imprint on Rulings*, WASH. TIMES (Mar. 29, 2011), https://www.washingtontimes.com/news/2011/mar/29/roberts-alito-leave-imprint-on-rulings/.
[425] White, *supra* note 26, at 13.

overturning *Abood*.[426] And Alito also has pushed for the Court to revisit *Employment Division v. Smith*,[427] the 1990 case that held generally applicable laws not targeting specific religious practices do not violate the First Amendment's Free Exercise Clause.[428]

Alito believes the Court's ruling in *Smith* inhibits religious freedom—and broadening religious liberty has been a primary project for him in his time on the Court.[429] In July 2022, while delivering the keynote address at the University of Notre Dame's "Religious Liberty Summit" in Rome, Alito said, "The challenge for those who want to protect religious liberty in the United States, Europe and similar places is to convince people who are not religious that religious liberty is worth special protection."[430] Writing in the *New York Times*, columnist Linda Greenhouse characterized that Alito speech as "a call to arms on behalf of religion."[431]

Alito has shown throughout his time on the Court, and in different First Amendment contexts, that he is fearful that conservative and religious thoughts and speech are under attack. We argue, for instance, that Alito's desire to protect religion's role in public life and his desire to protect those at the "center" of his perceived society can explain his decisions in the government speech context as well. Additionally, in campaign finance cases and cases involving the speech rights of public employee unions, Alito's opinions can be seen as attempts to restore power to corporations and wealthy individuals and diminish the power of organized labor unions.

Interestingly, despite his willingness to protect speech others might find harmful, Alito is unwilling or reluctant to protect speech he *personally* sees as offensive, valueless, and, especially, harmful. Alito, for instance, signaled a willingness to uphold narrowly tailored restrictions in the service of protecting children from violent video games[432] as well as a law attempting to honor "[o]nly the bravest of the brave."[433] He has also argued

---

[426] Janus v. AFSCME, 138 S. Ct. 2448, 2459–60 (2018).
[427] 494 U.S. 872 (1990).
[428] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).
[429] See, e.g., Linda Greenhouse, *Alito's Call to Arms to Secure Religious Liberty*, N.Y. TIMES (Aug. 11, 2022), https://www.nytimes.com/2022/08/11/opinion/religion-supreme-court-alito.html.
[430] *Id.*
[431] *Id.*
[432] *See* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 820–21 (2011) (Alito, J. concurring).
[433] U.S. v. Alvarez, 567 U.S. 709, 739 (2012) (Alito, J., dissenting).

the First Amendment should not protect speech that harmed the memory of a dead Catholic solider[434] or "depraved" videos of animal torture.[435] But in other opinions he has expressed concerns that conservatives will suffer from censorship motivated by viewpoint discrimination.[436] Alito, for instance, does not seem to see how or why the speech of religious groups could be considered harmful, worrying that these individuals will unfairly be labeled "bigots" for merely espousing deeply held religious views.[437] Alito thus seemingly is selective about what speech can cause harm. Thus, while authors have struggled to explain why in some cases he is willing to protect "speech we hate" and in others he is not, we suggest it is because he sees some "speech we hate" as harmful, while he does not see how other categories of "speech we hate" could cause harm as well.

Finally, we point out that Alito has been successful in attempts to invite challenges from future litigants and to offer his frame on opinions when he is not in the majority. While we do not suggest that Alito is the only justice to attempt to influence lower courts' interpretations of the Court's rulings, we do note his success in this area. Alito is also not the only justice to signal precedents he thinks are ripe for reexamination. Individuals would be prudent, however, to pay attention to Alito's invitations, as they have predicted the outcome of future cases.

Overall, what is arguably most striking about Alito's First Amendment opinions is his desire to protect those he sees as coming under attack—those who were the majority in a real or imagined past but who he seems to worry are increasingly becoming minorities. Nadine Strossen, the former president of the American Civil Liberties Union, asked in a 2022 essay, "Who really benefits from the First Amendment?"[438] Alito hopes the answer to that question is the previously powerful or those who view themselves as losing power. In particular, he views religious conservatives as a persecuted minority, and he worries they are being suppressed—engulfed by "prevailing standards of political correctness"[439]—and that the First Amendment should

---

[434] Snyder v. Phelps, 562 U.S. 443, 463 (2011) (Alito, J., dissenting).
[435] U.S. v. Stevens, 559 U.S. 460, 482 (2010) (Alito, J., dissenting).
[436] *See* Obergefell v. Hodges, 576 U.S. 644, 741 (Alito, J., dissenting).
[437] *Id.*
[438] Nadine Strossen, *Who Really Benefits From the First Amendment?*, TABLET (July 13, 2022), https://www.tabletmag.com/sections/news/articles/who-really-benefits-from-the-first-amendment.
[439] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 706 (2010) (Alito, J., dissenting).

do more to protect them.[440] He is especially protective of religious education. As his dissenting opinions in cases such as *Stevens, Snyder*, and *Alvarez* attest, Alito is not a free-speech libertarian. But, as this article has shown, he is fearful that those who share his beliefs feel threatened and are at risk of being silenced.

[440] Alito thus unsurprisingly voted with the majority in the June 2023 case *303 Creative LLC v. Elenis*, where the Court held that, under the First Amendment, Colorado's Anti-Discrimination Act could not compel a graphic designer to create websites celebrating same-sex marriages, which the business owner "does not endorse." *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2309, 2313 (2023).