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The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent

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Justice Samuel Alito is regarded by both his champions and his critics as the most consistently conservative member of the current Supreme Court.[1] Both groups seem to agree that he has become the most important conservative voice on the Court. Chief Justice John Roberts has a Court to lead; Justice Antonin Scalia and his particular brand of originalism have passed on; Justice Clarence Thomas is a stricter originalist and so writes opinions that other Justices do not join; and Justice Anthony Kennedy can be ideologically unreliable. Justice Alito, by contrast, is unburdened by the perceived responsibilities of being Chief Justice, is relatively young by Supreme Court standards (66 years old), is methodologically conventional, and is uniquely reliable. As a conse-

1. *See, e.g.*, Stephanie Mencimer, *Conservatives Say They Want Another Antonin Scalia. They Really Want Another Sam Alito.*, MOTHER JONES (May/June 2016), http://www.motherjones.com/politics/2016/06/samuel-alito-profile-antonin-scalia-supreme-court-appointment [http://perma.cc/7F9A-5T6N] (quoting Erwin Chemerinsky as opining that, in terms of votes, conservatives would prefer another Justice like Alito to one like Scalia because Alito is "in every case, in every area, a conservative"); Michael Stokes Paulsen, *2014 Supreme Court Roundup: An Explanation of the Court's Affirmations of Our Right Not To Go Along*, FIRST THINGS (Nov. 2014), http://www.firstthings.com/article/2014/11/2014-supreme-court-roundup [http://perma.cc/4FQ4-JDW9] (describing Justice Alito as "the most consistent, solid, successful conservative justice on the Court").

quence, many conservatives love to celebrate him as the ideal Justice,[2] and many liberals love to condemn him as politically driven.[3]

However one feels about Justice Alito as a jurist, he is carving out a distinctive role for himself on the Court at a pivotal time. That role and this time should be of interest to people who care about the Court's work regardless of their ideology. Particularly in light of Justice Scalia's passing, Justice Alito has become the primary judicial voice of the many millions of Americans who appear to be losing the culture wars, including in battles over gay rights, women's access to reproductive healthcare, affirmative action, and religious exemptions.

Part I observes that Justice Alito relies upon a variety of "modalities" of constitutional interpretation; his conventional methodology distinguishes him only (albeit interestingly) from Justices Scalia and Thomas. Looking elsewhere for what distinguishes Justice Alito from the rest of his colleagues, Part II observes that his tenth year on the Court coincides with a potentially significant moment in American constitutional history. Connecting the moment to the man, Part III examines Justice Alito's distinctive role, which is most apparent in his majority opinion in *Burwell v. Hobby Lobby Stores, Inc.*[4] and his dissent in *Obergefell v. Hodges*.[5] There and elsewhere, Justice 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. Part IV considers two alternative characterizations of Justice Alito—one from conservatives (who may view Justice Alito as a Burkean conservative), and the other from liberals (who may view him as a movement conservative). The Conclusion suggests that Justice Alito's distinctive role will

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2. *See, e.g.*, Paulsen, *supra* note 1 ("There are louder talkers, flashier stylists, wittier wits, more-poisonous pens, but no one with a more level and solid swing than Justice Samuel Alito.").

3. *See, e.g.*, Mencimer, *supra* note 1 (quoting Erwin Chemerinsky as saying about Justice Alito that "[i]f you want to know his judicial philosophy, just look at the Republican Party platform"). Critics charge, for example, that he twice voted to destroy the Affordable Care Act on questionable and inconsistent grounds, *see* King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., joined by Thomas & Alito, JJ., dissenting); NFIB v. Sebelius, 132 S. Ct. 2566, 2642 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); he flipped on issues of executive power based on the identity of the president, *see, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2113, 2116 (2015) (joining two dissenting opinions); NLRB v. Noel Canning, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., concurring in the judgment); he invited a litigation campaign to defund public employee unions by constitutionalizing the partisan debate over "right to work" laws, *see, e.g.*, Harris v. Quinn, 134 S. Ct. 2618 (2014); and he frequently appears at meetings of conservative organizations, *see, e.g.*, Mencimer, *supra* note 1.

4. 134 S. Ct. 2751 (2014).

5. 135 S. Ct. 2584 (2015).

likely be amplified in the years ahead, and identifies questions that follow for his supporters and critics.

One point of emphasis before proceeding: people are complicated, and judges are people. This Essay cannot capture the whole of Justice Alito, and so it does not try. Its more modest objective is to identify what makes Justice Alito's presence on the current Court distinctive. In pursuing that inquiry, the Essay situates him squarely at the "hinge" point in American constitutional history that may be imminent.

I. JUSTICE ALITO'S METHODOLOGY

Unlike Justices Scalia and Thomas, Justice Alito is not to any significant extent an originalist. Although he has described himself as a "practical originalist" on the ground that he believes "the Constitution means something and that that meaning doesn't change,"[6] his conduct on the Court suggests that the emphasis should be placed on the qualifier "practical." The higher the level of generality of the originalist inquiry, the less actual difference there is between originalism and living constitutionalism. And Justice Alito is fairly described as an originalist only at a high level of abstraction[7]—probably at the level at which Jack Balkin casts the originalist inquiry.[8] Unlike Justices Scalia and Thomas, Justice Alito does not tend to justify his conservative decisionmaking as simply a product of ideologically neutral methodological commitments, and he does not make occasional admissions against apparent ideological interest in the name of fidelity to a relatively thick understanding of originalism.

Like six of his seven current colleagues, Justice Alito is better described as a methodological pluralist. As suggested by the cases discussed throughout this

6. *See* Matthew Walther, *Sam Alito: A Civil Man*, THE AMERICAN SPECTATOR (Apr. 21, 2014), http://spectator.org/58731_sam-alito-civil-man/ [http://perma.cc/U4DD-ULFJ] (quoting from an interview with Justice Alito).

7. *See, e.g.*, *id.* (quoting Justice Alito as saying "Some of [the Constitution's] provisions are broadly worded. Take the Fourth Amendment. We have to decide whether something is a reasonable search or seizure. That's really all the text of the Constitution tells us. We can look at what was understood to be reasonable at the time of the adoption of the Fourth Amendment. But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it.").

8. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011). For an assessment that emphasizes the thin-ness of Balkin's orginalism, see Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931 (2013) (reviewing Balkin's *Living Originalism*). For another recent instance of the thinning of originalism, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). For an illuminating response to Baude, see Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016).

Essay, he uses whatever modalities of interpretation—text, structure, precedent, original meaning, tradition, consequences, and ethos—seem to him most appropriate in the case under consideration.[9] He implicitly agrees with Philip Bobbitt,[10] as opposed to Richard Fallon,[11] that there is no potentially constraining hierarchy among the legitimate modes of constitutional argument.

Because Justice Alito's pluralistic methodology is conventional, one must view him from a different angle to discover his distinctive role on the Court. It will help to focus on the time in constitutional history that may be fast arriving. The moment may reveal the man.

II. THE MOMENT

Over the past decade or so, cultural conservatives have, in significant ways, gone from playing offense to playing defense. During the second Bush Administration, for example, traditionalists pushed a federal constitutional amendment that would have prohibited same-sex marriage. Now they concede the general issue and seek religious exemptions.

Writing in 2006, the year that Justice Alito joined the Court, Robert Post and Reva Siegel identified tensions between the jurisprudence of originalism, which purports to transcend contemporary cultural disagreements by invoking the authority of the original meaning of the Constitution, and the political practice of originalism, which self-consciously intervenes in contemporary cultural disputes in order to infuse the authoritative meaning of the Constitution with conservative political values.[12] Post and Siegel described the political practice of originalism as being driven by a "politics of restoration, which encourages citizens to protect traditional forms of life they fear are threatened—threatened by modern mores and by a Court that has (mis)construed the Constitution to require social change."[13]

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9. *See, e.g.*, Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring in judgment) (precedent, consequences); Obergefell, 135 S. Ct. at 2642 (2015) (Alito, J., dissenting) (tradition, consequences); Shelby County v. Holder, 133 S. Ct. 2612 (2013) (structure, precedent); McDonald v. City of Chicago, 561 U.S. 742 (2010) (tradition, precedent); District of Columbia v. Heller, 554 U.S. 570 (2008) (text, original meaning, tradition, consequences, ethos).

10. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

11. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

12. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

13. *Id.* at 572.

Although the Roberts Court has become more conservative on most issues since Justice Alito succeeded Justice O'Connor, the perception that traditional mores are under attack has increased over the past decade, especially in the last few years. The Democratic Party has controlled the White House for eight of those ten years, and the signature legislative achievement of President Obama is a near-universal health care law that is viewed by many conservatives as deeply threatening to individual liberty, including religious liberty. What is more, same-sex marriage is now supported by more than 60% of the American public.[14] The public has likely been persuaded in part by the Court, which was itself influenced by dramatically changing public opinion as it moved—together with most other federal courts—toward declaring that the right to marry includes same-sex marriage.[15] And to add insult to injury, Justice Scalia's sudden death and Justice Kennedy's arguable movement to the left have meant, among other things, that affirmative action and abortion rights are substantially more secure than they appeared to be a year ago.[16]

In light of these and other developments, it now appears possible to imagine that the ideological left will win the culture wars.[17] The culture remains deeply divided and the future is by no means certain, but the idea that the left could prevail is thinkable now in a way that it was not a few years ago. If that is correct, and if the Democratic Party wins the presidency in 2016, a liberal majority may not only control the Court for the first time in nearly half a century, but also develop staying power. Under that scenario—fear of which may help

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14. In a Gallup poll conducted May 4-8, 2016, 37% of respondents expressed the view that same-sex marriage should not be recognized by the law as valid, 61% expressed the opposite view, and 2% had no opinion. *Marriage*, GALLUP (May 2016), http://www.gallup.com/poll/117328/Marriage.aspx [http://perma.cc/VX7L-LFU6].

15. *See generally* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System: Racial Segregation, Reapportionment, and* Obergefell *Appendix A*, 70 VAND. L. REV. (forthcoming 2017), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6318&context=faculty_scholarship [http://perma.cc/USL3-9DGQ] (analyzing the mutually supportive relationship between the Supreme Court and other federal courts on certain politically contentious issues).

16. *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). For analysis of the holding and implications of *Whole Woman's Health*, see Neil S. Siegel, *The Supreme Court's Reassuring—and Concerning—Abortion Ruling*, ACSBLOG (July 5, 2016), http://www.acslaw.org/acsblog/the-supreme-court%E2%80%99s-reassuring%E2%80%94and-concerning%E2%80%94abortion-ruling [http://perma.cc/43G7-8SAX].

17. *Cf.* Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [http://perma.cc/M2MT-ZWSC] (provocatively, and perhaps prematurely, declaring that the left has already won the culture wars). Actually winning will require much more than a liberal Court; it will require continued changes in popular understandings.

explain the historically extraordinary refusal of Senate Republicans to consider President Obama's nomination of Chief Judge Merrick Garland to replace Justice Scalia[18]—we will have reached a "hinge" point in American constitutional history.

Of course, the millions of Americans with traditional beliefs about a range of subjects have not gone away over the past decade, nor will they disappear if the Democratic Party dominates the presidency and the judiciary in the years ahead. But the idea that traditionalists will be able to "restor[e] the culture"[19] may become increasingly implausible even to them. Their politics of *restoration of* the culture will have evolved into a politics of *dissent from* the culture. As Douglas NeJaime and Reva Siegel recently observed in the context of religious accommodations, they will "shift from speaking as a majority seeking to enforce traditional morality to speaking as a minority seeking exemptions from laws that offend traditional morality."[20]

III. JUSTICE ALITO'S DISTINCTIVE ROLE

At this critical juncture, Justice Alito tries to protect tradition-oriented minorities who used to be majorities in the real or imagined past.[21] In his majority opinion in *Hobby Lobby*, Justice Alito observes that some religious owners of closely held, for-profit corporations cannot in good conscience provide their employees with insurance coverage for certain kinds of medical procedures. Then, with the *Casey* Court's concern for women potentially in mind,[22] he declares that the federal government "would effectively exclude these people from full participation in the economic life of the Nation."[23] He reads the Religious

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18. *See, e.g.*, Neil S. Siegel, *The Harm in the GOP's Pseudo-Principled Supreme Court Stance*, THE HILL: CONTRIBUTORS (Apr. 15, 2016, 12:00 PM), http://thehill.com/blogs/pundits%20-blog/the-judiciary/276462-the-harms-in-being-pseudo-principled-about-the-supreme-court [http://perma.cc/4XCS-GEMT].

19. *See* LIBERTY COUNSEL, http://www.lc.org/ [http://perma.cc/J8V7-TATK] ("Liberty Counsel is Restoring the Culture by Advancing Religious Freedom, the Sanctity of Human Life, and the Family.").

20. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553 (2015) (emphasis omitted).

21. *Cf.* Post & Siegel, *supra* note 12, at 561 (explaining that a politics of restoration "aims to restore an imagined past magically 'secure from the ravages of history and a turbulent time'" (quoting Edward W. Said, *Invention, Memory, and Place*, 26 CRITICAL INQUIRY 175, 177 (2000))).

22. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

23. 134 S. Ct. 2751, 2783 (2014).

Freedom Restoration Act[24] so as to prohibit the government from exercising such authority.

Justice Alito sounds similar themes in his dissent in *Obergefell v. Hodges*. In the initial parts of that dissent, he makes conventional pleas for judicial humility and restraint that, I argue below, he does not himself follow in many other areas of law. More revealing is the final part of his dissent, where he emphasizes "other important consequences" of the Court's conclusion that the right to marry includes same-sex marriage.[25] His foremost concern is that the decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[26] Although "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes," he fears that "if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[27] "By imposing its own views on the entire country," Justice Alito decries, "the majority facilitates the marginalization of the many Americans who have traditional ideas."[28] The consequentialist concern that traditionalists will be branded as bigots is sufficiently serious for Justice Alito that it counts as a reason for the Court to reject the constitutional claim.[29]

Justice Alito recently sought again to protect majorities-turned-minorities. He dissented from the denial of certiorari in *Stormans, Inc. v. Wiesman*,[30] a case involving a First Amendment challenge to Washington state regulations. In his view, those regulations "are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications."[31] Justice Alito objected that "this Court does not deem the case worthy of our time," even though "there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State."[32] Then, perhaps looking ahead to the 2016 elections, he wrote that

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24. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

25. 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting).

26. *Id.*

27. *Id.* at 2642-43.

28. *Id.* at 2643.

29. One wonders if there is an autobiographical element to Justice Alito's concern. He has described himself as "a kind of secret conservative" during his early years in Washington, D.C. *See* Walther, *supra* note 6.

30. 136 S. Ct. 2433 (2016).

31. *Id.* at 2433 (Alito, J., dissenting from the denial of certiorari).

32. *Id.*

"[i]f 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."[33]

Present in the foregoing passages is a revelation of Justice Alito's distinctive role on the Court. More than any other Justice, he uses his judicial voice to express the values of those with "traditional views" who were once real or imagined majorities and are now increasingly minorities with respect to a variety of "culture war" issues. Majorities-turned-minorities, not "discrete and insular minorities,"[34] seem to be the objects of Justice Alito's concern. He empathizes with their plight as the world changes profoundly around them. And he seeks to preserve their ability to dissent, to resist, to refuse to accept the new normal. Whether through the judicial assertiveness of his majority opinion in *Hobby Lobby*[35] or the judicial restraint of his *Obergefell* dissent, Justice Alito protects what used to be a politics of restoration, and what is increasingly becoming a politics of dissent.[36]

Viewing Justice Alito, in important part, as a traditionalist protecting majorities-turned-minorities in a period of cultural transition can account for his responses to a number of controversial cases. The most obvious are his votes in cases involving the Establishment Clause,[37] religious accommodations,[38] abortion,[39] and same-sex marriage.[40] Less obvious may be some of his federalism commitments,[41] which may reflect the reality that traditionalism is today more likely to prevail locally than nationally. Moreover, his votes in cases involving the Second Amendment,[42] criminal procedure,[43] capital punishment,[44] and

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33. *Id.*

34. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (developing a theory of judicial review inspired by footnote four of *Carolene Products*).

35. True, *Hobby Lobby* was a statutory interpretation case, not a free exercise case. But it was infused with values that both sides regard as being of constitutional moment, and Justice Alito read RFRA broadly.

36. *Cf.* Paulsen, *supra* note 1 ("Those of us whose views are not in accord with the current trend of national politics and policies have little left if deprived of the rights to dispute, to dissent, to resist, to refrain, to refuse, to contest. These freedoms are the last line of defense.").

37. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1828 (2014) (Alito, J., concurring).

38. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

39. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Gonzales v. Carhart, 550 U.S. 124 (2007).

40. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013).

41. *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612 (2013).

42. *See* Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring); McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

race[45] may reflect, at least in part, a conception of gun owners,[46] crime victims, and white Americans as minorities who are disadvantaged by a liberal culture that rejects real or imagined traditional conservative values of self-defense, defense of others, law and order, and colorblindness.[47]

Justice Alito is also the least free-speech libertarian on the Roberts Court. His lone dissents in *United States v. Stevens*[48] and *Snyder v. Phelps*[49] give voice to the common sense and outrage of the community over expressive conduct that has traditionally been regarded as despicable. Moreover, his narrow concurrence in *Brown v. Entertainment Merchants Ass'n* strikes similar themes.[50] In those cases, Justice Alito responds as would a traditionalist conservative like Chief Justice William Rehnquist, who never really accepted the modern conservative movement's embrace (by the early 1990s) of free-speech libertarianism or libertarianism more generally.

Given Justice Alito's role as dissenter from the Court's free-speech libertarianism, his votes in campaign finance cases[51] seem difficult to explain in other than partisan terms. Perhaps, however, those votes may be understood, at least in part, as empowering traditionalists with resources to dissent from "the new orthodoxy" by spending as much as they want to influence the outcomes of as many election campaigns as they want.[52] A problem with this suggestion, how-

43. Of all the Justices, Justice Alito is the most hostile to claims brought by criminal defendants under the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 355 (2009) (Alito, J., dissenting) (Fourth Amendment); Salinas v. Texas, 133 S. Ct. 2174 (2013) (Fifth Amendment); Ohio v. Clark, 135 S. Ct. 2173 (2015) (Sixth Amendment).

44. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726 (2015); Kennedy v. Louisiana, 554 U.S. 407 (2008).

45. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016); Ricci v. DeStefano, 557 U.S. 557, 596 (2009) (Alito, J., concurring).

46. *See, e.g.*, Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549 (2004) (arguing that many gun owners conceptualize themselves as a beleaguered minority).

47. *See, e.g.*, *Ricci*, 557 U.S. at 607 (2009) (Alito, J., concurring) ("Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession."). Given fierce conservative opposition to *Brown v. Board of Education*, 347 U.S. 483 (1954), before 1964, viewing colorblindness as a traditional, as opposed to a contemporary, conservative value is imaginary, not real.

48. 559 U.S. 460, 482 (2010) (Alito, J., dissenting).

49. 562 U.S. 443, 463 (2011) (Alito, J., dissenting).

50. 564 U.S. 786, 805 (2011) (Alito, J., concurring).

51. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434 (2014); Citizens United v. FEC, 558 U.S. 310 (2010).

52. *See, e.g.*, Paulsen, *supra* note 1 (describing *McCutcheon* as "concern[ing] the freedom of citizens to resort to the public political process to resist, refute, and work to reverse policies with which they disagree," and declaring it "a victory . . . for rights of political dissent and resistance").

ever, is that traditionalist conservatives do not appear to have disproportionately benefited from, or taken advantage of, *Citizens United* and its progeny.

However many of Justice Alito's responses to controversial cases are captured by the account offered here, viewing him in part as the primary judicial voice of traditionalist conservatives identifies what is most distinctive about his role on the Roberts Court. When his conservative colleagues agree with him in culture war disputes, as is typically the case, more often than not they allow him to speak for them, even though he is the most junior among them.[53] When they do not allow him to lead, he often feels moved to speak for himself.[54] And when they are libertarians, as opposed to traditionalists, in certain speech cases, he dissents.[55]

An interesting question is whether it is just the values that majorities-turned-minorities possess, not their minority status per se, that moves Justice Alito, or whether he is also invested in them because they have lost political and cultural power (an endowment effect of sorts). Alternatively, perhaps he regards majorities-turned-minorities as the sort of Footnote 4 minorities that warrant special judicial solicitude; his emotional *Ricci* concurrence has something of that feel to it.[56] Regardless, the idea of "majorities-turned-minorities" is useful because it captures how American culture is changing—and how Justice Alito understands the culture to be changing. The idea also underscores that Justice Alito has rhetorically seized the mantle of protector of minorities—a potential example of what Jack Balkin has called "ideological drift."[57]

IV. TWO ALTERNATIVE CHARACTERIZATIONS

A conservative skeptic of the foregoing account might suggest that Justice Alito responds less as a traditionalist, and more as a Burkean, in some of the

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53. See, for example, the foregoing discussions of *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016), *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016), *Glossip v. Gross*, 135 S. Ct. 2726 (2015), *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

54. See, for example, the foregoing discussions of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Ricci v. DeStefano*, 557 U.S. 557 (2009).

55. See the foregoing discussions of *Snyder v. Phelps*, 562 U.S. 443 (2011), and *United States v. Stevens*, 559 U.S. 460 (2010).

56. *See Ricci*, 557 U.S. at 596 (Alito, J., concurring).

57. *See* Jack M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993) ("Styles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence. Their valence varies over time as they are applied and understood repeatedly in new contexts and situations. I call this phenomenon 'ideological drift.'").

cases discussed above.[58] For example, his opinions in *Obergefell* and *McDonald v. City of Chicago*[59] do express Burkean themes by emphasizing the virtues of continuity and slow change in American society. Consistent with a Burkean presumption in favor of sticking with established institutions and practices that have historically worked at least tolerably well, he writes in both cases that the critical question in a substantive due process analysis is whether an asserted right is objectively, deeply rooted in American history and tradition. As he notes, same-sex marriage is not.[60]

The majority opinion in *Obergefell* is, however, Burkean in its own way.[61] And Justice Alito dissented from the arguably Burkean majority opinions in *NLRB v. Noel Canning*[62] and *Zivotofsky v. Kerry*,[63] which emphasize in part the longstanding historical practice of the political branches.[64] More fundamentally, a Burkean conservative would care too much about stability to want the Court's doctrine to change substantially over the course of a decade, which, to reiterate, is what happened when and, for the most part, because Justice Alito replaced Justice O'Connor and voted to move the law.[65] In short, a Burkean conservative would be loath to uproot longstanding precedents, including lib-

58. *See, e.g.*, Adam J. White, *The Burkean Justice*, THE WEEKLY STANDARD (July 18, 2011), http://www.weeklystandard.com/the-burkean-justice/article/576470 [http://perma.cc/H3WX-JXN2] (arguing that Justice Alito's "understanding of community and tradition distinguishes him" from his colleagues).

59. 561 U.S. 742 (2010).

60. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting). Of course, as noted in Part I, level of generality is destiny. For the majority in *Obergefell*, the question was not whether same-sex marriage in particular is deeply rooted, but whether and why the institution of marriage—to which same-sex couples sought access—is deeply rooted. *See id.* at 2594-96, 2599 (majority opinion).

61. *See* 2016 SUPPLEMENT to PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 193 (6th ed. 2015) ("Kennedy emphasizes change through respect for tradition that results from discussion and lived experience—as opposed to change that occurs through violence and revolutionary upheaval.").

62. 134 S. Ct. 2550 (2014).

63. 135 S. Ct. 2076 (2015).

64. For analysis of the role of historical practice in *Noel Canning*, see Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015). For analysis of the role of historical practice in *Zivotofsky*, see Curtis A. Bradley, *Historical Practice, the Recognition Power, and Judicial Review*, 109 AM. J. INT'L L. UNBOUND 2, 2 (2015), http://www.asil.org/sites/default/files/print.bradley.pdf [http://perma.cc/2HMK-ZJUR].

65. See, for example, Justice Alito's votes in the campaign finance, Establishment Clause, Second Amendment, criminal procedure, race, abortion, and federalism cases discussed or cited in this Essay.

eral ones.[66] Justice Alito seems more of a traditionalist conservative than a Burkean.

A liberal skeptic might argue that Justice Alito responds less as a traditionalist conservative, and more as a movement conservative.[67] His opinions and votes in divisive cases do often reflect the ideological agenda for the courts of the Reagan Justice Department, of which he was a part as a young, aspiring lawyer. That agenda included, among other objectives, significant constitutional limits on the scope of federal power, a substantially greater role for religion in public life, a robust understanding of individual Second Amendment rights, a rollback of procedural protections for criminal defendants, a defense of the permissibility of capital punishment, a commitment to a colorblind, anticlassification principle in racial equality cases, and, above all else, the overruling of *Roe v. Wade* and a celebration of traditional family values.[68] For the most part, appointments by President Reagan and both Presidents Bush, including the appointment of Justice Alito, moved the Court in the direction of realizing that agenda.

Although characterizing Justice Alito as a movement conservative can help explain many of his votes, such a characterization does not get at the reasons for his affiliation with movement conservatism. Nor does it account for his solo dissents or separate opinions in certain speech cases, in which he deviates from movement conservatism. It also overlooks the fact that movement conservatives in the late 1980s and early 1990s, unlike Justice Alito today, were relatively opposed to religious exemptions.[69] In any event, this Essay seeks to identify what distinguishes Justice Alito from the rest of his colleagues, not what makes him like other Republican appointees. Relatedly, the Essay seeks to connect

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66. *See generally* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J. L. & PUB. POL'Y 509, 509-11 (1996) (arguing in favor of a "conventionalism" that "draws much of its inspiration from . . . Edmund Burke" and focuses on a legal text's "present-day conventional meaning," which "can be embodied in a variety of sources," the "most obvious" of which "is judicial precedent"); *see also* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1205 (2002) ("For the situational [i.e., Burkean] conservative, . . . the worst kind of judicial activism is disregard for precedent.").

67. *See, e.g.*, Mencimer, *supra* note 1 ("[T]hroughout his career, Alito has stayed true to his roots in the Reagan Justice Department, whose crusading lawyers laid the groundwork for the modern conservative legal movement that remade the nation's federal courts.").

68. *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988).

69. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause permits the government to ban sacramental peyote). A question for legal conservatives is why their view of religious exemptions has changed over time. It does not seem sufficient to say that the Free Exercise Clause raises different questions than does RFRA. As noted earlier, the Court in *Hobby Lobby* read RFRA broadly, and it did so with enthusiasm.

him to the current historical moment, not to the one that occurred when President Reagan was elected in 1980.

CONCLUSION

If a liberal majority with staying power soon emerges on the Court, Justice Alito's dissents on behalf of traditionalist dissenters may become more frequent and more strident in the years ahead. As suggested by his recent dissent from the denial of certiorari in *Stormans*, [70] Justice Alito appears to have already anticipated playing such a role. And as noted at the outset, no other Justice seems better situated to assume it in the wake of Justice Scalia's passing. The role also seems to suit Justice Alito temperamentally. In an interview with the *American Spectator* in April 2014, he explained that he prefers writing for himself and not the Court.[71] He also confessed that he takes "a certain pleasure" in rooting for a perpetually losing baseball team (the Philadelphia Phillies).[72] And he expressed his admiration for "stubbornness, stubbornness to stick with something," even if "it's not fun being on the losing side."[73]

If there is truth to this Essay's suggestion that Justice Alito is, and may increasingly become, the leading dissenter on behalf of dissenters from an increasingly liberal culture and Court, a question for him and his admirers is how to defend such substantive commitments, and not also those that would protect certain other historic and contemporary minorities. A question for liberals is how to respond to the apparently declining influence of the commitments that Justice Alito strives to protect. Many liberals will no doubt view those commitments as all the more reason to make a clean break from an oppressive past, much the way Radical Republicans in Congress took a hard line in the aftermath of the Civil War. Such liberals empathize with the people who were—and are—treated very badly when certain "traditional ideas" prevail.

Other liberals, however, may defend more accommodating approaches, much the way President Lincoln sought to proceed. They too empathize with those who suffered—and, depending on where they live, still suffer—under traditionalist conservatism. But they also empathize with those traditionalist Americans who feel increasingly alienated from cultural changes they find difficult to comprehend and cannot control.

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70. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (Alito, J., dissenting from the denial of certiorari).

71. Walther, *supra* note 6.

72. *Id.* Given that the Phillies won the World Series in 2008 and were in it again in 2009, Justice Alito probably has a lot of apologizing to do to fans of the Chicago Cubs—unless the Cubs win it all this year.

73. *Id.*

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