The Heritage Foundation

LECTURE
No. 1332 | DECEMBER 14, 2022
JOSEPH STORY DISTINGUISHED LECTURE | DELIVERED OCTOBER 25, 2022

A Conversation with Justice Samuel Alito

The Honorable Samuel Alito and John G. Malcolm

KEY TAKEAWAYS

The *Dobbs* leak made those of us who were thought to be in the majority in support of overruling *Roe* and *Casey* targets for assassination.

Someone crosses an important line when they say that the Supreme Court is acting in a way that is illegitimate.

Liberty has to live in the hearts of ordinary citizens. If it dies there, then it will die out.

John G. Malcolm: I want to welcome you to The Heritage Foundation and to the Joseph Story Distinguished Lecture. My name is John Malcolm. I'm the Vice President of the Institute for Constitutional Government and also the Director of the Edwin Meese III Center for Legal and Judicial Studies, and I'm delighted that Edwin Meese is here this evening.

This lecture has been named in honor of one of our country's most distinguished jurists and legal scholars, a man who, in fact, distinguished himself in many different ways. Joseph Story was involved in politics and civic activities in his native state of Massachusetts. After several years in private practice, he served in the Massachusetts state legislature, for part of that time as Speaker of the House, and then in the United States Congress. Pretty remarkable when you consider that he did all of that before he was confirmed as an associate justice on the U.S. Supreme Court at the ripe old age of 32, the youngest justice in our nation's history.

In addition to serving with distinction on the high court for 33 years, Story was instrumental in establishing the Harvard Law School and served as its Dane Professor of Law. Story was also an accomplished writer whose articles and books were praised on both sides of the Atlantic. His most famous work was, of course, his *Commentaries on the Constitution*, which demonstrated his commitment to faithfully interpreting the Constitution as it was understood by those who wrote it and ratified it. The influence of Story's *Commentaries* continues to be felt today among the judiciary and constitutional scholars, and thank heaven for that.

We are fortunate indeed to have Justice Samuel Alito as this year's Story Lecturer. Justice Alito has served as a federal judge for 32 years, half of them on the Supreme Court. Over the course of his judicial career, Justice Alito has demonstrated a keen intellect and an allegiance to the Constitution. He has also exhibited courage by never hesitating to state what the law is, not what he would like it to be, even when doing so places him in the center of the storm. He has also exhibited a quality that is exceedingly rare in this town: humility. Please join me in welcoming to the stage Justice Samuel Alito.

It's such a pleasure to have you here this evening, Justice Alito. Let's begin. What is it that first piqued your interest in the Constitution and in being a lawyer?

Justice Samuel Alito: Probably a couple of things. Boy, that's going way back. In high school I was really interested in American history, and, of course, you can't understand American history without understanding quite a bit about the Constitution. I was very interested in debating in high school, and I figured that was sort of what lawyers do.

One year, the national debate topic was on the exclusionary rule or something like that. That required us to assemble arguments on both sides of the question of whether it's required by the Constitution or whether it was appropriate for the Supreme Court to enforce it. I think I was also influenced by my father's work. He was not a lawyer, but he was in charge of research for the New Jersey legislature. That involved helping legislators, both Republicans and Democrats, to write legislation, so we talked about that.

John Malcolm: And he also got involved in redistricting matters, is that right?

Justice Alito: That was his major project during the 1960s, helping the state come into compliance with *Reynolds versus Sims*.[1] One of my memories from high school was lying in bed and listening to the clanking of the mechanical adding machine that he was using down in the kitchen to draw maps. The technology today is a lot different, but he said even back then that just with the tools that were available to him, he could draw maps with very little population deviation and respecting jurisdictional lines to achieve pretty much whatever end the member who asked him to prepare a map wanted.

John Malcolm: That's great—much like today.

After graduating from high school, you went to Princeton, which was very near your home in Trenton. You once stated that while you were at Princeton you saw some "very privileged people behaving irresponsibly. And I couldn't help making a contrast between some of the worst of what I saw on the campus and the good sense and decency of some of the people back in my own community."[2] Can you explain what you meant by that and how it formed your thinking?

Justice Alito: The specific things I was thinking about were aspects of the anti-war movement. I entered college in the fall of 1968, a long time ago, but that was at the height of the war in Vietnam. About two-thirds or more of the students in my high school class didn't go to college, so many of the boys were drafted, and they were sent off to fight in Vietnam or serve in the military someplace else. They had no choice, and they did what they thought was their patriotic duty.

The students at Princeton were triply privileged. We were privileged to be in college, we were privileged to attend a college with Princeton's resources, and we had draft deferments. So there was no risk that we were going to be sent off to the jungles of Vietnam as long as we were in college.

There were reasonable grounds to oppose what the U.S. did in Vietnam for strategic and policy reasons, and certainly in retrospect, that's even clearer than it was at the time. But I couldn't see any justification for vilifying ordinary soldiers like my high school classmates. I couldn't see any justification for some of the really wild claims that were being made about the reasons why the United States was in Vietnam.

And I was really put off by the message that I thought some of my classmates were sending and what the university finally sent by throwing ROTC units off campus. What was the meaning of that? Were they saying that the United States doesn't need a military? That would be absurd. Or were they saying, "Yeah, the United States needs a military, but we're really too good for that. Let the training of officers be done by the state universities and by other lesser places." I didn't like that kind of elitism.

Yale Law School

John Malcolm: I guess this is going to feed into that, because after graduating Princeton, you then went to Yale Law School. I would hasten to add that Clarence Thomas and John Bolton were classmates of yours, but another classmate and a friend of yours was quoted as saying the following: "A lot of us were hippies, love children, political dissenters, and draft dodgers."[3] So why did you choose Yale Law School, and what was that experience like?

Justice Alito: Just as an aside, the Clarence Thomas of those days was different in appearance. I wish I had known him better at that time, but what I remember about him was Clarence standing in the courtyard wearing dungarees and no shirt. At that time, he did a lot of lifting. He was a powerful figure, just going like this with a football and the football would sail all the way across the courtyard. So he was a formidable presence. Of course, now he's a formidable presence in a different way.

Why did I go to Yale? Size was important to me. It was a lot smaller than Harvard. Reports from people I knew who went to the two places—people at Yale were a whole lot happier than friends I knew at Harvard, who seemed to vary from feeling down to bordering on clinical depression. My more respectable reason for going was that I was really hoping to take some constitutional law classes from Professor Alexander Bickel, whose work I had read, and I was very impressed with him.

John Malcolm: You weren't able to do that, though, were you?

Justice Alito: No, I wasn't. He got sick just after I got there, and I don't think he ever taught anymore.

John Malcolm: You have suggested that if one wants to learn constitutional law, that it would probably be a pretty good place to start by actually reading the document. I'm curious: Did you learn any constitutional law at Yale?

Justice Alito: Well, you know reading the document is actually a very radical idea. Why would anybody actually do that? Unfortunately, the answer to the question of whether I learned constitutional law at Yale is basically "no." As I mentioned, Professor Bickel got sick and didn't teach anymore.

And then there was my Con law class. All of the students in the first semester were required to take four subjects: contracts, torts, civil procedure, and constitutional law. Three of the classes for each student were taught in big groups, big sessions, but for each of us, one of those courses was taught in a small group with maybe 10, 12 students. The point of that was, we were supposed to learn legal writing as well as the subject of the class.

I looked at my course assignment, and I saw I had been assigned to a small group in constitutional law taught by Charles Reich. Now, the name probably doesn't mean anything to people now, but a short bio. In the '60s, he had really been a leading progressive constitutional scholar. He wrote an article called "The New Property,"[4] which was thought to have been influential in *Goldberg versus Kelly*.[5] But by the time I got to Yale, he had lost interest in law. He was swept up by the counterculture. He wrote a book called *The Greening of America*,[6] which was very popular. I think it was a best seller. It was serialized in *The New Yorker*. He appeared on *The Dick Cavett Show*, if I remember correctly, and he had no interest in teaching law.

So I went to the dean of students, and I asked to be transferred. "No, never in the history of Yale Law School has anybody been transferred." So there I was. I was stuck, and I went to the class. By the way, the big section of Con law was taught by somebody who was just switching over from antitrust to constitutional law, and that was Robert Bork, who was not very well known at the time, but he left too. He left to become Solicitor General. I couldn't take any courses from him, so I'm there with Charles Reich.

He began by going around the room and asking each student, "Why did you go to law school?" The student would give a reason. "No, that's a bad answer." This went on for weeks. He debated each of us about why we went to law school to try to convince us that we shouldn't be there. The moral was, there are no livable lives to be lived in the law. Then when he was finished with this, he got a volume of the history of the Cravath Law Firm where he had been a young associate, and he would open it up to a particular partner and tell us a story about the partner.

One partner was terribly irascible. He would call young associates into the office and would berate them. He would yell and get red in the face and would break pencils. What happened to him? He had a stroke and died at his desk.

Then there was another sad man who had been passed over for partner, but they kept him on to do sort of odd jobs. One of his duties was to take each young associate to lunch on the associate's birthday. The club where they went to lunch was in the same building as the firm, so he spent his time going up, having lunch, coming down. That was his work life. What happened to him? He committed suicide by jumping down the elevator shaft.

Professor Reich said that he could never tell when he would have to go to San Francisco, but he had a plane ticket in his desk, and the time might come when he had to go, and if he had to go, he would put a note on the bulletin board. I came back to school after Thanksgiving. There was a note on the bulletin board: "I have gone to San Francisco. Classes are canceled for the rest of the term." At the end of the term, I looked at my notes to see if there was anything in there about constitutional law, and I had written down the name of one case: *Hammer versus Dagenhart*.[7] I don't know why it came up, but that was it.

The Third Circuit and U.S. Attorney's Office

John Malcolm: After graduating, you clerked for Judge Leonard Garth on the Third Circuit, and then after that you were an Assistant U.S. Attorney, and later you came back to the office in New Jersey as the U.S. Attorney. What are your reflections on those experiences as an AUSA and as U.S. Attorney?

Justice Alito: They were both great experiences. Being an AUSA gave me the opportunity to go to court right away, handle some important matters. I argued dozens of cases in the Third Circuit, so that was wonderful. And it also had a collateral benefit because I spent quite a bit of time in the library doing research for my briefs, and that's where I met the librarian, Martha-Ann Bomgardner. Had I been a little bit younger, I would have done all my research at my desk on the computer, and I never would've met her. My life would be infinitely poorer.

Anyway, I came back as U.S. Attorney a number of years later, and that was a lot of fun and very satisfying. It was completely unlike anything I had done before, completely unlike anything I would do after that. It did not involve a lot of reading and deep thinking and writing. It was really a people job, managing the office, keeping all the attorneys moving in the right direction.

I also had the opportunity to deal with the media for the first time, and that was quite an interesting experience. Before I arrived, pretty much every Sunday there was a big article in the local paper detailing inside information about investigations that the office was conducting. That was highly improper.

When I arrived, the reporter who wrote these articles came to see me, and he wasn't shy about making his point. He said, "Look, I can make you look really good, or I can make you look really bad. And if you leak information to me, I'll make you look really good." And I said, "No, we're not going to do that."

I was pestered in the first few weeks in the office. Every time something happened, an indictment, a guilty plea, a verdict, I got a whole stack of calls from reporters, and I didn't want to have to talk to all these reporters. So I hired the office's first public information officer to deal with them, and what we did was, we fed them all the information that they wanted about things that were on the public record, but I wanted no part of that other stuff.

John Malcolm: You had a good collegial relationship with the press right from the start.

Justice Alito: Right from the start.

The Solicitor General's Office and Office of Legal Counsel

John Malcolm: Now, in between those two jobs, you worked in the Justice Department in two different positions, first in the Solicitor General's office under Rex Lee and then Charles Fried. You argued 12 cases in front of the Supreme Court. Then you worked in the Office of Legal Counsel under Chuck Cooper providing legal advice to the President and executive branch agencies. What were those experiences like?

Justice Alito: They were both very valuable, and I cherish the memory of both of them. It was a real thrill to argue cases in the Supreme Court. As I said, I had argued quite few in the Court of Appeals, but the Supreme Court is different. Even though I had been in court a lot, I felt a little bit nervous during my first argument.

In those days, the office almost always gave an attorney a sure-win case for the attorney's first argument. Mine was a sure-win case. I started to talk, and then, fortunately, Justice [Sandra Day] O'Connor asked me the first question, and it was a really big softball question, so that was good. But it was a thrill and a privilege to handle those cases.

My first boss was Rex Lee. Rex was a gentleman, a scholar, and a very fine man. I'll give you one example of this. I had worked on a brief with Paul Bator in a case called *FCC versus League of Women Voters*[8] that had to do with the constitutionality of a federal statute that prohibited editorializing by a public broadcasting station. So it was a somewhat important case.

The statute was one that Attorney General [Benjamin] Civiletti had refused to defend because he thought it was pretty clearly unconstitutional. But when William French Smith took over as Attorney General, he thought that the government should defend the constitutionality of any statute unless it was utterly, utterly indefensible. So we took up that case, and Paul was determined. He thought we could actually win the case. He was set to argue it, but unfortunately he had a death in his family two days before the argument, and he couldn't argue the case.

So it fell to me to do that. I had previously in all my other arguments done a week of basically nothing but preparation. All of a sudden, I have to argue this at the last minute, but Rex was very supportive. He actually came to the argument and sat next to me like he was second chair in this argument, which shows the kind of person he was. We got four votes. I considered it a moral victory.

John Malcolm: And your time at OLC?

Justice Alito: OLC was a real joy. I should say that the Justice Department at that time was headed by a great man and an American statesman, General Meese. I'm glad that he's here with us here today. The head of OLC was my friend Chuck Cooper. I don't want to embarrass Chuck, but Chuck is clearly one of the best and most dogged and most principled attorneys I've ever known, so it was a pleasure to work with him.

I remember Chuck saying, "Come into my office. We've got to do some noodling on this hard issue." I had never really heard this term "noodling," but what he meant was, "We're going to think about it. We're going to use our noodles." The "noodling" I was familiar with had to do with these guys who stick their hands in the mud in a riverbed, and they wait for big catfish to bite their fingers. My clerk from Tennessee is shaking her head. She knows this. She knows this happens. Then they grab the big catfish, and if you see the hands of these guys, they're mangled. I tried to think of a connection like Chuck and I were sticking our hands into the muck of the law and coming up with a treasure. Anyway, it was a wonderful experience.

Among other things, Chuck assembled an all-star cast of young attorneys. It was a privilege to work with them. Many of them have gone on to distinguished academic careers. I'm going to forget somebody, and I'll be embarrassed that I did, but Nelson Lund, Brad Clark, John Manning, Michael Stokes Paulsen, Gary Lawson, John McGinnis. I'm probably forgetting somebody, but that was quite a crew.

John Malcolm: That's a good list.

Justice Alito: That was quite a crew.

John Malcolm: You were a judge on the Third Circuit for nearly 16 years before joining the Supreme Court. What was it like serving on panels with your former boss, Judge Garth, and what were some of the other things that stand out in your mind about your experience on the Third Circuit?

Justice Alito: It was a great experience. When I finished the clerkship with Judge Garth, I thought, "This is my dream job. If I could become a judge on the Third Circuit, that would be my dream job." Then, with the arrogance of youth, I said, "I'm really ready to do that right now." But the President didn't think it was appropriate to appoint me right then. Anyway, I thoroughly enjoyed the clerkship.

It was a little strange the first time I sat on a panel with Leonard Garth. I sort of had the feeling, "Do I need to write him a bench memo about the case?" But he treated me as an equal, and I had wonderful colleagues. I'm not going to name names because I'll omit somebody, but they powerfully impressed on me in different ways what it means to be a good judge.

When a new federal judge is appointed—many of you may know this, some of you probably don't—the judge is sent to what's called "Baby Judge School" to learn a little bit about what it means to be a judge. The district court appointees go for, what is it? Two weeks? A week? There's a lot of stuff they need to learn. Court of Appeals judges go for a much shorter period, and Supreme Court justices don't go at all. Either we know it all or it doesn't matter.

Anyway, I learned a lot from my colleagues. So how do you learn to be a good judge? It's not an easy thing to convey. If you try to put it down in words, it sounds like a whole bunch of platitudes, but when you see it embodied in people who've been doing the job, it's impressive.

Nomination to the U.S. Supreme Court

John Malcolm: I won't follow up on the make-it-up part. So how did you learn you were going to be nominated to the Supreme Court?

Justice Alito: Oh, I remember it vividly. I'd been interviewed numerous times, but the President had nominated Harriet Miers, so I thought, "Well, my chance has passed."

I was sitting at the island in my kitchen early one morning drinking coffee and got a call on the phone. It was Deputy White House Counsel Bill Kelly, who said that Harriet wanted to withdraw, and the President had decided he wanted to nominate me. It was an incredible surprise. Then they told me that the President would call at a particular time, and I should wait for the call, so I waited for the call.

President Bush called, and he said, "I would like to nominate you for the Supreme Court." I said, "Mr. President, thank you very much. I am deeply, deeply honored." Then there was the pause, and he said, "Well, do you accept?" President Bush was not a lawyer, but he knew about offer and acceptance.

John Malcolm: You had obviously spoken to him before. I know one thing you share in common is you are both passionate baseball fans. So I'm curious: Did you spend more time talking about law or talking about baseball?

Justice Alito: It was a bit of both. It was a bit of both. To be honest, trying to think back on the exact questions and what we discussed, I can't quite remember. What I do vividly remember is the prelude to the interview, which was quite something. I was told to come to Washington, check into a hotel, and then be at a particular street corner downtown at a particular time on a Saturday morning, and a black Chrysler 300 would drive up, flash its lights three times. Then I was supposed to get in the back seat, which I did, and I was whisked into the White House because they didn't want the media to know who was being interviewed.

I had been in the White House Counsel's office before, but I had not been in the President's living quarters. They brought me up to the living quarters. This is on a Saturday morning. I'm brought into a room, and there's one person in the room. It's a young man who's tying his sneakers. I think he must have been a friend of one of the President's daughters. Then he left, and I was there by myself.

The next thing that happened was a black Scotty ran in the room and started sniffing my feet. That was the President's dog. Then the President came in with Harriet Miers, and he was very casually dressed, Saturday morning. Then we began to talk. We talked about law for a while, but then we did switch to baseball, and he showed me the TV in the room where he would watch games.

John Malcolm: He's obviously a Texas Rangers fan. You are a lifelong Philadelphia Phillies fan—and boy, is it a good year to be a Phillies fan! In fact, I understand that the Phillie Phanatic, which is the team mascot, made a special guest appearance at your Supreme Court welcome dinner.

Now, you grew up in Trenton, New Jersey, which is about equidistant between New York and Philadelphia, yet you chose to become a Phillies fan rather than, say, a Yankees fan. I'm curious why you did that and what that choice tells us about you.

Justice Alito: Well, as we sit here, wasn't it a good choice?

John Malcolm: This year, certainly.

Justice Alito: The Phillies are in the World Series; the Yankees have gone home for the winter. In 2009, I lost a bet with Justice [Sonia] Sotomayor when the Phillies played the Yankees. We both hoped that we could renew our bet and I could get even, but it's not going to happen.

I'll tell you a story about the Phillie Phanatic. We always have a welcome dinner for the justices, and we had a very nice dinner in our dining room, which is quite an elegant room. Then, after the dinner, Justice [Stephen] Breyer opened the door and the Phillie Phanatic came in. I have a picture in my office of the Phillie Phanatic hugging Clarence Thomas. It's a classic picture.

I shook hands with him or whatever you do with the Phillie Phanatic, but I noticed something different from the last time I had been in his presence.

I had previously met the Phanatic at a game in Philadelphia on a hot June day. The suit that he wears doesn't breathe at all, so it gets very, very hot. When he was in Philadelphia at the game, he was very fragrant, but when he came to visit us, he smelled like a rose.

So why did I choose the Phillies over the Yankees in the middle of the 1950s when the Yankees always won and the Phillies never did? The answer is, I don't know. But there have been psychological studies, and I'm sure these are right, that say that rooting for a losing team when you're growing up is good for your character.

John Malcolm: I'm sure that's right. In 1994 you even attended a Phillies Phantasy Baseball Camp, a gift from your wife Martha-Ann. That must have been a lot of fun. How was that experience, and did you get to bat against Steve Carlton?

Justice Alito: Not against Steve Carlton, but it was a great experience as it turned out. I never would've done this on my own, and if Martha-Ann had not already paid for it, I would've tried to persuade her that I really didn't want to go. But I don't like to waste money; she had bought it, so I went. It was a wonderful experience. You may think it's pathetic to think of guys in their 40s and 50s pretending to be major league baseball players for a week, but who cares? It was fun.

We were broken up into teams. We were in the clubhouse that the Phillies used for spring training, and we had lockers, and we had uniforms. We played on the field that they used. As a kid, I was a second baseman, and every place I played, the infield was bumpy. There were pebbles, so you could never count on getting a true hop. But this field was manicured. One day, the sprinkler system went off during the night when it shouldn't have, and when we arrived in the morning, the field was saturated. We couldn't play. So what did they do? They brought in a helicopter to hover over the field and dry the field so we could play.

At the end, on the last day, we played against old major leaguers. By that time, every single one of the guys like me had pulled his hamstring. The clubhouse stank of liniment; nobody could run. So I came up to the plate, and the pitcher wasn't Steve Carlton, but it was a former Phillies closer, Al Holland. He threw very hard. Even though some years had gone by and he had put on a little bit of weight, I'm sure he still could throw hard, but on that occasion, I don't think he was really trying to throw hard.

I came up to the plate. First pitch, I couldn't even see it. I didn't know what happened. So I stepped out and said to myself, "You need a plan." I said, "My plan is this. He's going to throw the ball right over the center of the plate, waist high. So I am going to swing before he even releases the ball. When he's in his wind-up, I am going to swing and hope to hit the ball. I just don't want to strike out ignominiously." And it worked. I hit the ball. I grounded out to first base, and I was pleased.

America's Central Idea

John Malcolm: Let's move on to talk about law a little bit. Before we do that, though, Abraham Lincoln once said, "Every nation has a central idea from which all its minor thoughts radiate." I'm curious: In your judgment, what is America's central idea? What are your thoughts about that?

Justice Alito: Well, that's a hard question. It's a good question, but it's a hard question. Tonight or tomorrow I'm going to think of a better answer than I have right now. What I will say is that America has a number of different ideals. Individual liberty is certainly one of our ideals. Equality under the law, the rule of law, small "r" republican self-government, opportunity—I'm sure there are others. I'm thinking of a term or a concept that would unify these, because these different strands are often in tension with each other. At our best we have aimed at a kind of balance among all of those. So as I said, I'll wake up tonight or maybe tomorrow and think of a way of unifying them.

Originalism: Judging and Scholarship

John Malcolm: Originalists generally believe that the meaning of the Constitution is fixed at the time of its ratification and that judges lack the authority to change that meaning. Now, you have described yourself as a practical originalist. In cases of first impression, though, you've joined many originalist opinions; you've authored many yourself. When you describe yourself as a practical originalist, what do you mean by that?

Justice Alito: I'm not sure it's a very descriptive term. If I remember correctly, I used it in an answer to a question that was asked to me by Randy Barnett, and it popped into my head. Maybe I'm wrong, but I think that was when I used the term.

What I had in mind was basically this: that there is a difference between originalist judging, which has immediate practical consequences, and originalist scholarship, which can be very influential in the longer run but doesn't have consequences the moment the scholarship is published.

I'll give you two examples. One is stare decisis. Stare decisis was an important part of our legal system when the Constitution was adopted, and I think it's a fair inference that it's incorporated into the concept of the judicial power that's given to the federal courts in Article III. Certainly, if you read Federalist 78, it was very important in [Alexander] Hamilton's argument for judicial review. It was important at that time, and it remains quite important. It's not an inexorable command, but it remains important.

We follow precedent most of the time. What that can mean is that a court will apply a rule that is settled even though the court thinks the rule is probably wrong. The Court has said it is sometimes better that a rule be decided than that it be decided right. So that's stare decisis. It's an important part of judging, but it has no place in any form of scholarship in my opinion. Suppose there was stare decisis in the natural sciences. Suppose Einstein had said Newton's theory of gravity has been established for two centuries, so I'm going to follow it even though I think it's probably wrong.

No, we don't want that in any of the natural sciences. And it's no more true in other fields including legal scholarship. There's no precedent that is immune from questioning in legal scholarship. So that's one difference.

Another is compromise. If a justice is assigned to write an opinion for the Court, the justice has to try to get at least four colleagues to agree, and that can be a difficult process. What is ultimately produced may be quite different from what the author or any other member of the majority would actually prefer. But it's important to get an opinion of the Court.

That was driven home to me during my 15 years on the Court of Appeals. We lower court judges wanted to know what was the rule that the Supreme Court had decided and that we had to apply in our cases. When there wasn't a majority opinion, it became much more difficult, sometimes really almost impossible.

I don't think there's anything like that in scholarship. There's not the same kind of compromise, as most scholarship is written by one person. Even when there are co-authors, if they disagree about important things, they can decide they're going to go separately.

Protecting Religious Liberty

John Malcolm: In your opinions and in several speeches, you have described the importance of providing robust protection for religious liberty, both here and abroad. In fact, in a recent speech in Rome, you said that religious liberty is "dangerous to those who want to hold complete power."[9] You've also pointed out the importance of countering hostility to religion and the relationship between the right to free exercise and other constitutional rights such as the right to free speech and freedom of association and assembly. I was wondering if you could share your thoughts about the role of religion in our society and on the Court's jurisprudence in this area.

Justice Alito: It's a big question. It's an important question. It's a delicate question. So in answering it, I want to make sure I don't say anything that will be misunderstood.

I think that the religion clauses of the First Amendment envision a society, first of all, in which every person is free to practice any religion or no religion. They envision a society in which a religiously diverse population lives together harmoniously and productively. And they envision a society in which religious bodies have a good measure of autonomy. There are a lot of other things that could be said, but as a general statement, that's what I'll say right now.

We've said that history is very important in understanding the religion clauses. I think that's true, and I could cite three examples from early American history that I think illustrate some of what I was saying.

The first is the decision of the Continental Congress to grant exemptions from military service for Quakers. I wrote about this in my dissenting opinion in *Fulton*[10] a couple of terms ago. Granting those exemptions was really a big deal.

The American Revolution was often on the verge of failing. The Continental Army had trouble keeping soldiers. So saying that a group—and the Quakers at that time were a big group—didn't have to serve in the military meant something. It particularly meant something if you think about the personal situation of the members of the Continental Congress. If the war had been lost, they would've been regarded as traitors and potentially treated as such by the British. Yet they thought it was important enough to grant those exemptions to the Quakers.

That's the first example. The second is what Washington did after he was elected President. He made a point of reaching out to all the religious groups in the country. He wrote a very famous letter that many of you have probably seen to the Hebrew congregation in Newport, Rhode Island. I wish I could quote it, but the thrust of it was that we are not just going to tolerate all religions. We are going to embrace them. All that we ask of all Americans is that they be good citizens.

The third is what happened when the Vatican was preparing to name the first Catholic bishop in the United States. The papal nuncio in Paris asked Benjamin Franklin for the recommendation of the Congress, and Franklin said, "The Congress of the United States has no power over churches or religious bodies." If you know European history, this was a big thing because throughout European history there had been constant battles between popes and emperors and kings about who was going to appoint the bishops in the territory in question. Franklin's answer was, "We're going to have none of that in the United States. Churches here are going to be autonomous."

Protecting Free Speech

John Malcolm: While we're talking about the First Amendment, you have spoken about the importance of free speech and civil discourse and have pointed out that the First Amendment was designed to protect unpopular speech because popular speech doesn't need any kind of protection. Some of your opinions reflect that: your majority opinion in *Matal versus Tam*;[11] your dissent in the *Walker* case,[12] which was a Texas license plate case; even on the Third Circuit, your majority opinion in the *Saxe* case.[13] What are your thoughts about the state of free speech on college and law school campuses?

Justice Alito: Well, based on what I have read and what has been told to me by students, it's pretty abysmal, and it's disgraceful, and it's really dangerous for our future as a united democratic country. We depend on freedom of speech. Freedom of speech is essential. Colleges and universities should be setting the example.

Law schools should be setting the example for the university because our adversary system is based on the principle that the best way to get at the truth is to have a strong presentation of opposing views. So law students should be free to speak their minds without worrying about the consequences, and they should have their ideas tested in rational debate. If law schools are not doing that—and according to these reports, some of them are not doing that—then they are really not carrying out their responsibility.

John Malcolm: When it comes to the First Amendment's Free Speech Clause, you have occasionally struck out on your own or virtually alone and indicated that you would've upheld certain laws that punished or regulated particular kinds of speech, cases like the *U.S. versus Stevens*[14] case, in which the Court struck down a federal law that criminalized the production of so-called animal crush videos; *Snyder versus Phelps*,[15] in which the Court said that the First Amendment protected the rights of members of the Westboro Baptist Church to protest and say some rather vile things at the funerals of soldiers who'd been killed in action; *United States versus Alvarez*,[16] in which the Court struck down a federal statute making it a crime to make a false statement about having received military honors; and *Brown versus Entertainment Merchant Association*,[17] which was a case involving parental consent laws for kids with violent video games. Those come to mind.

Can you explain the nature of your disagreement with your colleagues in the majority in those cases and where you would draw the line between protected and unprotected speech?

Justice Alito: I think we agree on what's most important, and that is that free speech is vitally important to our country and to our society. The real test, as Oliver Wendell Holmes wrote, is whether we're willing to protect the speech that we hate. It's easy to protect the speech that we love, but when it comes to the speech that we hate or the speech that we fear, that's where we're really tested. That's the most important thing.

So the general rule, with only exceptions for exceptional situations, is that any speech involving public issues, involving politics, government, history, economics, law, science, religion, philosophy, the arts, anything of that level of importance, the general rule has to be the government has to stay out. But it's also important to keep in mind what the First Amendment says, and it does not protect the right of everybody to say anything that they want at any time, at any place, and in any way. It protects "the freedom of speech." Like other provisions of the Bill of Rights, it refers to, picks up a preexisting right, a right that had some dimension before the Bill of Rights was adopted.

From the very beginning of our country, our legal system has recognized that there are categories of speech that are not protected by the freedom of speech: extortionate threats, fraud, defamation, shouting fire in a crowded theater. There are established exceptions. I won't go through all of the cases you mentioned, but I thought long and hard about every single one of them, and in all of those, I thought that the speech in question fell within an established exception. The Westboro Baptist case seemed to me a prime example of the tort of the intentional infliction of emotional distress.

The group went to funerals of soldiers who were tragically killed. They stood outside the church, and they chanted things like, "Your son, your brother, your husband, your friend is burning in hell because he served in the U.S. military." When they did that, the rest of the country was open to them. They could have gone anyplace else and delivered the same message. Or they could have waited until the funeral was over and then delivered the same message outside an empty church. But they didn't do that. They chose the exact circumstances that were calculated to injure bereaving, mourning relatives. I thought that was the classic example of that tort.

John Malcolm: These cases, it seemed to me, pose a very striking contrast to *Citizens United*,[18] which was a 5–4 decision. I'm not questioning the good faith of your colleagues. I know that you aren't either, but how is it that some of the justices seem more willing to provide greater protection to an animal crush video than to a video criticizing a candidate for political office?

Justice Alito: Well, I'll reiterate: I don't question the good faith of the dissenters in *Citizens United*. Justice [John Paul] Stevens wrote a lengthy opinion setting out their view. Everybody can read that. They can read Justice [Anthony] Kennedy's opinion for the Court, and they can decide which one they think is right.

I will say this about *Citizens United*. It was really a narrow decision. It held that a little corporation, Citizens United, had the right to talk about the qualifications of a candidate for high public office in the period shortly before the election. That goes to the very core of what the First Amendment protects. The main popular criticism of the decision that you hear is that the freedom of speech applies to human beings; it doesn't apply to corporations. To this day, I think you can get bumper stickers that make the point.

And I think to ordinary people, it has immediate appeal. That's why it's used. But think about what it would mean if corporations did not have free speech rights. Where do we get our news? Where do we get all of our commentary on the news? The cable news networks are all owned by corporations: CNN, Fox, MSNBC. The broadcast networks are owned by corporations. Major newspapers, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, you can go down the list, are all owned by corporations. Popular entertainment is all provided by corporations.

If corporations did not have free speech rights and the government could regulate all of this as it wished—who wants that regime? *Citizens United* has become, I think, kind of a lightning rod for everything that a lot of people don't like about campaign finance and about the way campaigns are conducted. Certainly, there's a lot to dislike about the way campaigns are conducted, but all of that cannot be attributable to *Citizens United*.

John Malcolm: On a somewhat related topic, you've already made reference to the fact that the legal profession is adversarial in nature. In the best traditions of the bar, you're supposed to represent unpopular clients as long as you have a viable legal argument. Today, though, that appears to be changing and lawyers are often attacked for representing unpopular clients, especially if their clients are people of faith or they represent conservative causes. I'm curious to get your thoughts on this.

Justice Alito: It's very unfortunate. I think some law firms' dedication to that principle that you mentioned—that it is one of the best traditions of the bar to provide representation for unpopular people and unpopular causes—now gets only one-sided approval in a lot of quarters. I think that's to be deplored. On the other hand, there are still attorneys who are dedicated to that principle, and they will continue to represent those clients even though they have to pay a personal price. I think the bar should applaud those attorneys.

Administrative Agencies

John Malcolm: I want to talk a little bit about administrative agencies. They've often been referred to as a fourth branch of government. The Court has recently taken a less deferential view toward administrative agencies, curbing longstanding deference doctrines in *Kisor versus Wilkie*.[19] A majority of the justices, including yourself, have suggested that perhaps it's time to revive the so-called non-delegation doctrine, and the Court invoked the major questions doctrine in a number of cases last year.

In 2015, in *Department of Transportation versus Association of American Railroads,*[20] you wrote a concurring opinion in which you stated the following, "Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." And you continued:

> The principle that Congress cannot delegate away its vested power exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.

What do you mean by that, and how do you approach cases involving challenges to administrative agencies?

Justice Alito: A lot of very complicated and technical issues arise in administrative law, and I think we'd be here till midnight if I tried to get into those. But let me go back to something you said earlier about reading the Constitution. I do think that it's helpful in addressing these issues to keep in mind what the Constitution says.

I'm not questioning the existence of administrative agencies or denigrating their work, but it's important to keep in mind what the Constitution says. It explains how laws are supposed to be made. They are supposed to be passed by both houses of Congress and signed by the President unless the President's veto is overridden. And it says who's supposed to be interpreting the laws, and that's the judicial power in Article III.

I know that doesn't answer the hard questions, but I think what I was saying in that little concurrence is, "Let's keep this in mind. As we deal with these complicated issues, let's not get lost in the weeds and keep in mind the framework of the Constitution and ask ourselves whether on any particular point we've departed too far from it."

Textualism

John Malcolm: I'd like to now focus for a moment on textualism, which is sort of like a counterpart to originalism in statutory cases. In *Bostock versus Clayton County*,[21] the Court interpreted Title VII of the Civil Rights Act, which prohibits discrimination because of sex, to prohibit not only gender discrimination, but also discrimination based on sexual orientation and gender identity.

In your dissent, in which you criticized Justice [Neil] Gorsuch's majority opinion, you wrote the following:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice [Antonin] Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society.

Can you explain a little bit more about your disagreement with the majority and about how to properly think about textualism when it comes to discerning the meaning of statutes and whether you should incorporate things like legislative history, political history, social history, in determining that interpretation?

Justice Alito: I was sort of channeling Nino when I wrote that. I thought he'd like the pirate ship line. He could have done better, but it was my homage to him. But my theory of textualism is the one that he championed as I understand it. There are those who will disagree, but I've puzzled over this, and I think that my understanding is what he was getting at. I wish he were still with us. I wish he had been around for *Bostock*. I think he would've explained it all to us in ways that we could easily understand. But he wasn't, so we have to do our best without him.

It's a complicated subject. Let me say a couple of things.

The first is, I think it's important to keep in mind what he was battling when he took this on. By the late 1970s and the early 1980s, statutory interpretation had gotten way out of hand. Congressional intent, as illustrated by legislative history, had gone a long way toward supplanting consideration of the actual words of the statute. There was even a case from that era when the Supreme Court said this—and I'm not exaggerating: "The legislative history is ambiguous and therefore we will look to the text of the statute." The priority was reversed, and that's what Nino faced.

Legislative history was seen as enabling judges to reach whatever policy results they preferred. Judge [Harold] Leventhal of the D.C. Circuit famously said that looking at legislative history was like entering a cocktail party and looking over the room to find your friends. That was the idea. A judge who looked at the legislative history would look around to see friendly things in the legislative history. The judge would find them and would use them as support for the judge's interpretation.

Legislative history was also being manipulated by Congress. Congress was paying attention to what the Court was doing, and since the Court was putting a lot of weight on legislative history, Members of Congress, spurred on, I'm sure, by interest groups, were trying to manufacture legislative history to support propositions that they couldn't actually get into the bill.

So that's what Nino was fighting. He was, I think, quite successful in changing the direction.

That's the first point. The second is that I think Nino recognized that the theory of the judicial role in interpreting statutes that he adopted, that he accepted, demanded some concept of congressional intent. The traditional theory has been that the judge in the statutory case is the faithful agent of the legislative body, and an agent has to be mindful of, has to heed the intent of, the principal.

If you accept that theory, you can't get away from some concept of intent. Nino's way of dealing with that was to say that he accepted a sort of an objectified intent. That was how he described it. This was the intent that you could discern from the text of the statute and the broader context. I think that includes, in a case like *Bostock*, what Congress had shown that it thought about this issue in all sorts of other legislation that it had passed that remained in force at that time.

The third point is that Nino excluded from consideration legislative history, and I think he did this heavily for prophylactic reasons. I think that in his view—he had seen all these abuses, and in his view, legislative history was to a judge like an alcoholic beverage is to an alcoholic: The judge couldn't just take one sip of legislative history because then the judge would get drunk on legislative history. He had seen that.

Substantive Due Process

John Malcolm: The Due Process Clause of the Fourteenth Amendment has been a source of considerable controversy on the Court for a long time. It was cited as the source for recognizing a constitutional right to abortion in *Roe versus Wade*[22] and to same-sex marriage in *Obergefell versus Hodges*.[23]

In your dissent in *Obergefell*, you stated the following:

> I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

Can you explain the controversy surrounding substantive due process and what role you think the Court should play in terms of analyzing and recognizing liberty interests?

Justice Alito: In one of my opinions last term, I wrote that Lincoln once said that all Americans believe in liberty, but they don't agree on what liberty means.[24] Liberty means very different things to different people. It means one thing to, let's say, a libertarian; it means something very different to a socialist.

The Due Process Clause of the Fourteenth Amendment protects liberty from deprivation without due process of law. There's the issue about whether the work that the Court's due process jurisprudence has done in protecting substantive rights really belongs in the Privileges or Immunities Clause, but that's another subject.

As to the interpretation of liberty, because the term means different things to different people, it's important to have some structure. It's important to have some discipline. It's important to have a standard that doesn't just turn judges loose to say that the Constitution protects any aspect of liberty that they personally feel is really, really important. What the Court had said is that the liberty protected by the Due Process Clause consists of those rights that have deep roots in our history and our tradition, and that provides a standard that keeps this jurisprudence from getting out of control.

Legitimacy and Court-Packing

John Malcolm: A couple of your colleagues stated recently that the Court has strayed too far from public sentiment on several current issues and that this threatens the Court's legitimacy as an apolitical institution.[25] You recently stated that "saying or implying that the Court is becoming an illegitimate institution or questioning our integrity crosses an important line."[26] How do you respond to those who say that the Court has become a nakedly partisan institution, and what is the danger of crossing that line?

Justice Alito: Everybody in this country is free to disagree with our decisions. There's no question about that. Everybody is free to criticize our reasoning and to do it in strong terms. That certainly is done in the media and in the writings of law professors and on social media and in other fora. There's no question about all of that. But to say that the Court is exhibiting a lack of integrity is something quite different. That goes to character. It goes not to a disagreement with the result or the reasoning of a decision; it goes to character.

Someone also crosses an important line when they say that the Court is acting in a way that is illegitimate. I don't think anybody in a position of authority should make that claim lightly. That's not just ordinary criticism. That is something very different.

John Malcolm: Along those same lines, in a speech you gave a couple of years ago, you criticized a group of U.S. Senators for filing a brief that you labeled "an affront to the Constitution and to the rule of law,"[27] in which they said that the Supreme Court was not well and if the Court didn't mend its ways, it might have to be "restructured."[28] There have been recent calls, as you know, to increase the number of justices on the Supreme Court, euphemistically referred to as Court-packing. I was wondering if you had any thoughts on these reform efforts that you'd be willing to share with us?

Justice Alito: The size of the Court is not specified by the Constitution. It has varied from time to time. It's been nine now for a long time, but the size is something for Congress to decide, and therefore it's an issue for all citizens, not for Supreme Court justices any more than anybody else. Let me say two other things.

First, I'll ask a rhetorical question. We were talking about the perception of legitimacy, so this goes in that direction. If Congress were to change the size of the Court and the public perceived that the reason for changing the size of the Court was to influence decisions in future cases that Congress anticipated the Court might be deciding at some point in the foreseeable future, what would that do to the public perception of our independence and our legitimacy? It's a question for citizens, so I leave it there.

The second is more interesting, actually, to me: What would all of us do if we were the delegates to a new constitutional convention and we were going to decide how big the Supreme Court should be? I think we ought to start by saying it's got to be an odd number. We don't want ties. I've been on the Court at a time when we had eight, and I don't think there's anything good about it.

Beyond that, the Court shouldn't be too big because if it were too big, it would be hard for the justices to work together. I saw this starting to happen on the Third Circuit when we had an en banc, and I think we were up to 13 judges. It became somewhat unwieldy. It also shouldn't be too small because then each substitution of a justice potentially has an enormous effect on the composition of the Court, and it's beneficial to have the expression of a variety of views.

I think, personally, nine is a good number. Somewhere in a middle range. Some state supreme courts have seven; they find that workable. Something in sort of a middle range would be a good number.

Importance of Maintaining Confidentiality

John Malcolm: One of the most remarkable features about the Court in an age of incessant leaks is the confidentiality that long covered its internal deliberations. Unfortunately, that changed this last term with the horrific and completely unprecedented leak of your draft majority opinion in *Dobbs*. How has the leak affected the Court?

Justice Alito: It was a grave betrayal of trust by somebody, and it was a shock because nothing like that had happened in the past. So it certainly changed the atmosphere at the Court for the remainder of last term. The leak also made those of us who were thought to be in the majority in support of overruling *Roe* and *Casey*[29] targets for assassination because it gave people a rational reason to think they could prevent that from happening by killing one of us. We know that a man has been charged with attempting to kill Justice [Brett] Kavanaugh. It's a pending case, so I won't say anything more about that.

But that was last term. Now we're in a new term. I think that all of the justices, and I think the people who work in the building—we have wonderful staff—want to get back to normal to the greatest degree possible. That's what we hope will happen. I think everybody is working on that.

During my 16 years on the Court, the justices have always gotten along very well on a personal level. I think members of the public, when they read our opinions, probably get the wrong impression. In our opinions, we sometimes disagree pretty passionately about the law, and we have not in recent years been all that restrained about the terms in which we express our disagreement. I'm as guilty as others probably on this score, but none of that is personal, and that is something that I wish the public understood.

"In the Hearts of Men and Women"

John Malcolm: I know you have to try to get along. A very prominent lawyer who's here in the audience—and I'm going to steal his line—said that "You may be life tenured, but I'm sure at times it seems like a life sentence." I'm sure that's true.

One final question. In a speech a number of years ago at the National Constitution Center, you said, "Constitutional rights, the precious freedoms that are protected by the Bill of Rights, are always fragile, they are always threatened. The judiciary and others in government have a role to play in protecting those rights."[30] Then you quoted a great jurist, Learned Hand, who once wrote, "Liberty lies in the hearts of men and women. When it dies there, no Constitution, no law, no court can save it."[31] I was wondering if you could elaborate a little bit on that and your thoughts on the precious values in our Constitution and its fragility.

Justice Alito: The enforcement of rights almost always has costs, and there will be those in government who from time to time want to restrict rights. What happens when they try to do that? Who is going to be there to try to stop this from happening? We hope the courts will do that. Most of the time, the courts do that. But in the end, the judiciary is the weakest of the three branches. If it came down to a bare-knuckles fight between the judiciary and either the executive or Congress, there's no doubt who would lose.

Plus, judges are human beings. If the society comes to the point of thinking, "This particular right is not very important, and, in fact, protecting it actually is a bad thing. It has bad consequences. We don't like it anymore," the judges are human beings, so that popular view over time will eventually affect the thinking of judges, and they will be less enthusiastic and less vigilant about enforcing that right.

Hand was absolutely correct: Liberty has to live in the hearts of ordinary citizens, and if it dies there, then it will die out.

The Honorable Samuel Alito is an Associate Justice of the United States Supreme Court. **John G. Malcolm** is Vice President of the Institute for Constitutional Government, Director of the Edwin J. Meese III Center for Legal and Judicial Studies, and Ed and Sherry Gilbertson Senior Legal Fellow at The Heritage Foundation.

Endnotes

1. 377 U.S. 533 (1964).
2. Mark Bernstein, *A Tiger on the Court: Sam Alito '72 at Princeton*, Princetonian Alumni Weekly, Mar. 8, 2006, available at https://paw.princeton.edu/article/tiger-court-sam-alito-72-princeton.
3. Jacob Leibenluft, *Alito Was Quiet Scholar*, Yale Daily News, Nov. 3, 2005, https://yaledailynews.com/blog/2005/11/03/alito-was-quiet-scholar/.
4. Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).
5. 397 U.S. 254 (1970).
6. Charles Reich, The Greening of America (1970).
7. 247 U.S. 251 (1918).
8. 468 U.S. 364 (1984).
9. Samuel Alito, Speech at the Notre Dame Law School 2022 Religious Liberty Summit, Jul. 20–22, available at https://www.youtube.com/watch?v=uci4uni608E.
10. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1905 (2021) (Alito, J., concurring in judgment).
11. 137 S. Ct. 1744 (2017).
12. *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015).
13. *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001).
14. 559 U.S. 460 (2010).
15. 562 U.S. 443 (2011).
16. 567 U.S. 709 (2012).
17. 564 U.S. 786 (2011).
18. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
19. 139 S. Ct. 2400 (2019).
20. 575 U.S. 43 (2015).
21. 140 S. Ct. 1731 (2020).
22. 410 U.S. 113 (1973).
23. 576 U.S. 644 (2015).
24. "We all declare for Liberty; but in using the same word we do not all mean the same thing." *Dobbs v. Jackson Woman's Health Organization*, 597 U.S. _____ (2022) (quoting Abraham Lincoln, Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864)) (internal quotation marks omitted).
25. *See*, *e.g.*, Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, Politico, Sep. 14, 2022, available at https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766; Hillel Aron, *Justice Sotomayor: "There's Going to Be Some Question About the Court's Legitimacy"*, Courthouse News Service, Sep. 15, 2022, available at https://www.courthousenews.com/justice-sotomayor-theres-going-to-be-some-question-about-the-courts-legitimacy/.
26. Brad Dress, *Alito: Questioning Supreme Court Legitimacy "Crosses an Important Line"*, The Hill, Sep. 29, 2022, available at https://thehill.com/homenews/3666845-alito-questioning-supreme-court-legitimacy-crosses-an-important-line/.
27. Samuel Alito, Address to the Federalist Society 2020 National Lawyers Convention (Nov. 12, 2020), available at https://www.youtube.com/watch?v=VMnukCVIZWQ.
28. Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirstin Gillibrand as *Amicus Curiae* in Support of Respondents, *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525 (2020), at 17.
29. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
30. Samuel Alito, Speech at the National Constitution Center (Oct. 27, 2014), available at https://www.youtube.com/watch?v=ZOX-GeDQy_8.
31. Learned Hand, "The Spirit of Liberty" (May 21, 1944), available at https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944.