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The justice explains his interpretive method and defends it against a hostile biographer—and his highschool English teacher.



MATTHEW COOK

'Practical Originalism' and Its Facile Critics

THE WEEKEND INTERVIEW with Samuel Alito

By James Taranto

Washington

Reports of his end have been greatly exaggerated: "Justice Samuel Alito, who wrote the Supreme Court's opinion reversing Roe v. Wade, is retiring, the court announced Tuesday." National Public Radio's Nina Totenberg wrote those words as the court's term ended on June 30, stuck them atop a canned story, and pulled the editorial trigger.

Her enormous scoop turned out to be empty, and NPR retracted it in minutes. Ms. Totenberg, 82, said she had been confused by an announcement from Chief Justice John Roberts about staff retirements.

"Obviously I'm here for another term," Justice Alito, 76, says a month later, during a rare summertime visit to his chambers. Some conservatives have publicly suggested he should retire and take one for the team, as Stephen Breyer did in 2022 and Ruth Bader Ginsburg didn't when Barack Obama was president, both under intense pressure from the left. Do such calls bother Justice Alito?

"It's not pleasant, in the sense that it's a reminder of mortality," he

says. "It's like, what are those vultures doing up there? They are flying around. But it goes with life tenure."

I observe that he might also take offense at the implication that he and a younger replacement would be interchangeable. "Yeah, I think some of those who call for the retirement of judges think that way," he says. "I don't watch cable news at all anymore, but I assume this is still true. They'd have some . . . 20-somethings to talk about some important issue, 'and he is a Democratic strategist and she is a Republican strategist.' I never knew what that meant. . . . So yeah, 20-somethings, 30-somethings, particularly if they're not lawyers, I'm sure that's how they see the court."

June 30 marked the completion of Justice Alito's 20th full term, an anniversary that has occasioned a fair amount of retrospection. Two biographies were published in April, one admiring ("Alito: The Justice Who Reshaped the Supreme

Court and Restored the Constitution" by Mollie Hemingway) and one hostile ("Revenge for the Sixties: Sam Alito and the Triumph of the Conservative Legal Movement" by Peter Canellos). His own book, "So Ordered: An Originalist's View of the Constitution, the Court, and Our Country," a collection of speeches spanning his time as a justice, is set for release on the first Tuesday in October.

Mr. Canellos's book has many interesting details and might have been good if he had written without an ideological agenda or with the skill to conceal it. Instead, his premise pervades the narrative like a Freudian fixation: that a conservative worldview is deviant or pathological and requires a psychological explanation. Mr. Canellos puts Justice Alito's philosophy down to "intense feelings of anger and betrayal" and trots out a series of gossipy quotes from people who knew the young Sam Alito and disapprove of the older man's work on the court. Note

A representative passage: " 'He certainly at Princeton, I would say, was just a nice guy, and bordering on humble,' said one friend who went on to a legal career.

'Nobody would describe him in his written opinions or from the bench as humble or a nice guy anymore. . . . I listen to a lot of Supreme Court oral arguments, and sometimes I am shocked at the tone and the nastiness of some of his questions.' " Anyone who has encountered Justice Alito off the bench can attest that he is a nice and humble guy, and he demonstrates his humility by responding diffidently when I describe this line of criticism from the book: "Well, I suppose I don't like to read about myself," he says, "so I suppose I should read it." But why would anyone assume that a confident professional at the pinnacle of his field must have an oversize ego?

As for "nastiness," that's probably about substance more than tone.

By definition, liberals are the nice people. When they anonymously denounce their alleged friends, it is in the service of a higher kindness. Note

To the extent that Mr. Canellos advances a jurisprudential critique, it is that Justice Alito doesn't live up to his billing as an originalist— one who interprets the Constitution's text based on its original public meaning at the time it was adopted. Justice Alito has called himself a "practical originalist," and Mr. Canellos construes the adjective as a self-conferred license to cheat. "Sometimes, he would deviate from an originalist analysis to raise practical concerns," Mr.

Canellos writes of Justice Alito's early years on the court. "Usually, these observations served to push him in an even more conservative direction."

Mr. Canellos quotes sources who agree. "David felt Alito's judgments became more ideologically motivated than he expected they would be," says the widower of David J.

Stoll, who clerked for Judge Alito on the Third U.S. Circuit Court of Appeals in 1991-92 and later worked for Lambda Legal, which describes itself as "at the forefront of the fight for legal and lived equality for the LGBTQ+ community and everyone living with HIV+." The widower reports that Stoll found the justice's views on same-sex marriage "personally distressing." But if Stoll formulated an originalist argument for his position, it doesn't make it into Mr.

Canellos's book.

Somebody has offered such an argument, and Justice Alito mentions it at the outset of our interview when I ask him about his own book. When the court was considering *Obergefell v. Hodges* (2015), Steven Calabresi, an originalist law professor at Northwestern University, joined a friend-of-the-court brief arguing that the 14th Amendment's Equal Protection Clause "prohibits caste legislation that discriminates against a social class" and that laws incorporating the traditional understanding of marriage did precisely that.

No justice adopted that argument or even cited the brief. In dissent, Justice Antonin Scalia asserted the opposite: "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases." The 5-4 majority decided the case principally on due-process grounds, in the sort of fluffy living-constitutional language Justice Anthony Kennedy favored when the subject involved sex.

Justice Alito wrote his own dissent and didn't join Scalia's. He took the Calabresi argument seriously enough to rebut it respectfully in a 2025 speech, which is adapted as the first chapter of his coming book. He cites it as an example of "Icarian originalism," one of six "wrong turns" that originalists sometimes take. The name comes from the boy in the Greek myth who flew too close to the sun. Note

"You can take an important principle that is in the Constitution, like equal treatment," Justice Alito says, "and if you view it at a very high level of generality, you can say that the Constitution requires equal treatment in a context that never occurred to, or never could have occurred to, those who adopted the provision." If they had confronted the question, he has little doubt they would have answered no. Note

Justice Alito characterizes Mr.

Calabresi as "quite a brilliant originalist scholar" and clearly regards his analysis as an honest mistake. Note

He has less patience for commentators who seek to debunk originalism by measuring its practitioners against a caricature of the method.

"Some of those nonoriginalists," he says, "want originalism to be unpalatable." I ask for an example, and he cites a quip Scalia once made: "He said at the time of the adoption of the Eighth Amendment, it was acceptable to brand people and put them in the stocks and execute children of a young age." He said, "Well, I'm a weakhearted originalist because I won't go so far." I think they love that kind of an example. Note

What is the practical originalist's view of branding? "The pragmatic view is that that is not an issue that has come before us," Justice Alito says with a chuckle.

His broader point: "There is not an algorithm that yields a definitive answer to every question that is asked, and determining the applicable level of generality requires an analysis of what this provision is getting at. What is the fundamental rule here? I think even Justice Scalia recognized that. Although there were instances in which I thought that his view of original public meaning was too mechanical."

He cites *Brown v. Entertainment Merchants Association* (2011), a clinic in how the same jurisprudential method can produce different results. By a 7-2 vote the justices struck down a California law prohibiting the sale or rental of violent videogames to minors. Justice Alito joined the judgment on narrow grounds but disagreed with Scalia's majority opinion, which likened the games to "The Odyssey," "Lord of the Flies" and other literary works describing extreme violence. Justice Alito's rebuttal: "We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar." Note

Justice Clarence Thomas produced a third originalist opinion, which diverged even more dramatically from Scalia's analysis. He dissented on the grounds that "'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." The living constitutionalists were split too.

While three liberal justices joined Scalia's majority opinion, Justice Breyer filed a dissent that leaned on social-science evidence of harm from violent videogames.

Social science was also central in another, more famous *Brown* case. In *Plessy v. Ferguson* (1896), the court upheld "separate but equal" segregation, with Justice John Marshall Harlan declaring in a lone dissent that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Brown v. Board of Education* (1954) overturned *Plessy* — sort of. It didn't say the Constitution is colorblind. Instead, the court held that educational segregation "generates a feeling of inferiority" in black children and thus is "inherently unequal," an empirical claim it backed with sociological studies. Note

This June 2, over a dissent from the three liberal justices, the court issued an unsigned order in *Allen v. Milligan*, a congressional redistricting case from Alabama. It began by noting that *Louisiana v.*

Callais, decided five weeks earlier, had resolved a "tension" between "the Voting Rights Act of 1965 and our colorblind Constitution." It was the first time the court as a whole had called the Constitution colorblind—and it did so with so little fanfare that Justice Alito, who wrote for the majority in *Callais*, didn't notice the milestone.

"I was not aware that that was the first time we had ever said it," he says. Then he doublechecks my claim, asking: "The court hadn't said it in *Students for Fair Admissions*?" It hadn't, although that 2023 decision, written by Chief Justice Roberts, approvingly quoted Harlan's *Plessy* dissent, and Justice Thomas filed a solo concurrence "to offer an originalist defense of the colorblind Constitution."

A few days before Justice Alito and I met, Justice Elena Kagan gave a speech in which she offered a qualified defense of the court. "Is this court very conservative? Does it do a bunch of things that are out of the playbook of the conservative legal movement that I think are deeply wrong? You know, yes," she said. "But is this court the kind of puppet for the current administration? I think definitely not."

The president lost three major cases in the 2025-26 term: *Learning Resources v. Trump* (tariffs), *Trump v. Cook* (Federal Reserve independence) and *Trump v. Barbara* (birthright citizenship). Each of the decisions was written by Chief Justice Roberts and joined by the three liberals and one or two of Mr. Trump's three appointees. Justice Alito (as well as Justice Thomas) dissented in all three cases.

This leads his critics to accuse him of being a rubber stamp for the administration. "As Trump pressed for more power," Mr.

Canellos writes in his prologue, "the drumbeat of cases threatened to reveal whether the conservative legal movement was, in fact, devoted to a dispassionate reading of the Constitution or simply clearing a path for conservative politicians." His epilogue asserts that "Alito was especially vulnerable to a charge of partisanship."

"I vote in every case the way I think the case should be decided," Justice Alito says. "If that means a high correlation with what Trump wants, fine. If it means zero correlation with what Trump wants, fine as well. I think it's wrong, it's absolutely wrong, to say, 'Well, you know what? I'm going to decide some cases this way and some cases the other way so that people will say, 'Well, he's objective, because sometimes he favors this side and other times he favors that side.'' There have been people who've recommended to me that I do that. I'm not going to do that. I'm going to decide them all the way that I think they should be decided. I explain why I've done it. People can agree, people can disagree." One assumes any liberal justice would say the same about her votes against the administration.

Much of today's commentary about the Supreme Court, from the right as well as the left, is partisan and legally shallow. Those of us who regard the court as an essential institution find it particularly distressing how personal it often gets.

Occasionally, though, that provides some levity. I can't resist inviting Justice Alito to respond to a passage in Mr. Canellos's book that I find hilarious. An assistant to the author tracked down Elaine Tarr, a retired highschool English teacher, who shared her thoughts on the student she taught some 60 years ago.

"When he was on that short list, and a couple of newspaper and TV people came to interview me, and I had remembered saying Sam had a strong moral compass," she says.

"That's what I believed at the time—he was straight and narrow.

I think he had a sense of right and wrong. Where Sam has picked up all of these ideas now, you've got me. . . . How has he become this ultra, ultra conservative?"

Then she takes a stab at psychoanalysis: "He was very responsible, made sure everything was on the dotted line. . . . Even his penmanship was very well formed. There was nothing sloppy about it. He was very methodical, very methodical. Does that equate with rigidity? I'm not going to answer that one. How flexible a thinker was he? I'm not sure about that either."

It's a prime example of resultsoriented judging. Does anyone think Mr. Canellos and Mrs. Tarr would draw a different conclusion about Justice Alito if teenage Sam's handwriting had been atrocious?

Justice Alito listens as I read him the passage, then answers graciously: "She was a very good teacher, and she did make an important contribution to my education by urging me to read more broadly. So I won't say anything. I didn't know that she had said that, and I didn't know that her views about me had changed in that way. So anyway, that's news to me."

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