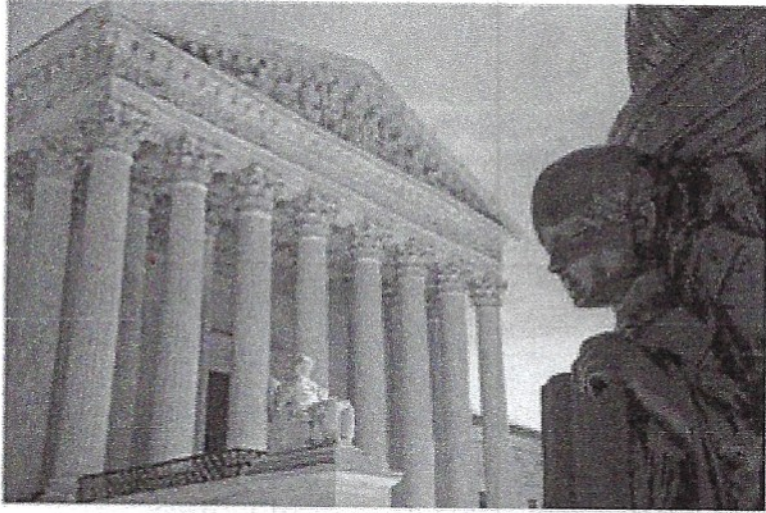


An interpretive method disciplines the decisionmaking process, but it doesn't free judges of the need to exercise judgment.



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Even Originalist Judges Make Mistakes

By Samuel A. Alito Jr.

How should a judge interpret the Constitution? I subscribe to the theory of originalism—that constitutional provisions should be understood to mean what the public would have taken them to mean when they were adopted. Years ago, speaking to a group of eager young originalists, I was asked whether I considered myself a true adherent to their creed. I said I did, adding that I thought of myself as a “practical originalist.” On reflection, I think a better description might be “working judicial originalist”—a judge who strives to achieve originalist aims within the framework of our judicial system.

I envision an originalist judge driving down a highway. Along the way, he sees seven off-ramps. Six of these are wrong turns, and the seventh places an originalist judge at a crucial crossroads.

• Insecure originalism. Even though originalism has a strong intellectual foundation and has won important judicial respect, insecure originalists remain in what Prof. Adrian Vermeule has called a “defensive crouch.” Wary of being charged with “results oriented” decision-making, they are allergic to any evaluation of results. That is a mistake. No neutral theory will produce a socially desirable result in every case. But unless originalism is widely viewed as generally producing good results, it is hard to see how it can survive as more than an academic curiosity.

Insecure originalists may worry that they are subconsciously engaging in “judicial activism” in the service of their own policy preferences. As a result, they may welcome occasions when their originalist analysis leads to results they dislike. They experience a brief catharsis, a release of their anxiety about succumbing to temptation.

Twenty-first-century originalists should shed this insecure mindset. When originalist analysis seems at first to lead to a result that makes no sense, judges should check their work. An originalist judge shouldn't cavalierly or happily embrace results that defy common sense and should be on guard against subconsciously setting a higher bar for legal arguments that yield outcomes he finds desirable as a policy matter. We must follow the law wherever it leads. That doesn't require a thumb on the scale against appealing outcomes.

• Show-it-to-me-in-black-and-white originalism. An originalist judge must always start with the text of the Constitution and be wary about going beyond it. But there are times when an important originalist principle isn't set out explicitly but emerges from the Constitution's structure.

One example is the anticommandeering principle that provided the basis for Justice Antonin Scalia's opinion for the court in *Printz v.*

U.S. (1997) and mine in *Murphy v. National Collegiate Athletic Association* (2018). No provision of the Constitution says in so many words that Congress may not compel state officials to carry out federal law-enforcement responsibilities or to enact legislation. But that is an unmistakable inference from constitutional structure. The same is true of the presidential immunity we recognized in *Trump v. U.S.* (2024).

- Icarian originalism. Like the boy in Greek mythology who flew too close to the sun, originalists sometimes lose sight of what constitutional text would have meant to ordinary people when those provisions were adopted. Instead, they assume that those provisions embody broad abstract principles, which justify results that would have astonished the lawmakers who ratified them.

A prime example is a scholarly brief filed in *Obergefell v. Hodges* (2015). The Due Process Clause of the 14th Amendment provides that no person may be deprived of “liberty” without due process. For an originalist, the question presented in *Obergefell* was whether the term “liberty” was understood to include the right to legal recognition of a same-sex marriage. It is impossible to maintain that the general public or lawmakers in 1868 understood the amendment as requiring states to recognize such unions. Yet that’s what the brief argued.

It cited a statement in a Scalia opinion to the effect that a 19th-century statute prohibiting the theft of goods would apply to the theft of microwave ovens. Justice Scalia didn’t answer that comment, but I will hazard a response. Broadly worded constitutional provisions can be regarded as delegating a degree of authority to apply those provisions to new situations. Identifying how far this delegation of authority extends calls for the exercise of judgment. In the case of the theft statute, it is easy to imagine the legislators’ anticipating that new forms of personal property would come into use and would merit the same protection as older items. That seems an easy case.

Other, real cases present harder problems. Take *Kyllo v. U.S.* (2001), decided in 2001. A police officer sitting in a car on a public street aimed a thermal imaging device at a house to detect heat emanating from lamps used to grow marijuana. Was this a search, requiring compliance with the Fourth Amendment? Justice Scalia’s opinion for the court held that it was, because the device allowed the police to intrude on the privacy of the home’s interior. It was plausible to assume that the framers delegated to future courts the authority to apply the amendment to new means of invading what the amendment was meant to protect.

That was a reasonable judgment call, and applying established legal rules to new situations always requires a degree of judgment. Icarian originalism disregards such limits and thereby risks a crash.

- Archaeological originalism. This is the opposite of Icarian originalism. It burrows deep into the legal past in search of an artifact that will indisputably resolve a difficult issue—even though 21st-century English speakers can read our Constitution without difficulty.

U.S. v. Jones (2012) illustrates why archaeological originalism is sometimes attractive to jurists: It provides a way of avoiding difficult judgment calls. Law-enforcement officers who suspected Antoine Jones of drug trafficking placed a small GPS tracking device underneath his car and remotely monitored its movements on public streets for 28 days. The question was whether that constituted an illegal search.

Needless to say, there were no GPS tracking devices in 1791, or even any motor vehicles. So where should originalists look for an answer to the question *Jones* presented? The court dug up a historical artifact and used it to decide the case. That find was the common-law tort of trespass to chattels. That tort takes place when a person intentionally interferes with another person’s lawful possession of movable personal property. Writing for the majority, Justice Scalia reasoned that attaching the GPS device constituted such a tort and therefore fell within the scope of the Fourth Amendment.

But suits for trespass to chattels generally require some proof of damage. In the court’s very broad reading, merely placing an unwanted object on an item of personal property without causing any physical damage is tortious. If that were so, you could sue when an ad for a pizza place is placed on the windshield of your car. What *Jones* called for wasn’t a search through the historical sand. It was an exercise of judgment similar to the one made in *Kyllo*.

- Partial originalism. This occurs when an originalist rule is combined with a nonoriginalist one and the decision is presented as originalist. An example is *Collins v. Virginia* (2018). Ryan Collins had covered a motorcycle with a tarp and parked in the driveway of a house that belonged to a woman with whom he was spending the night. A police officer had probable cause to believe that the motorcycle was stolen and that Mr. Collins had driven it in an illegal high-speed chase. The officer checked and confirmed his suspicions.

The court held that because the officer entered the house’s curtilage—property surrounding it that has the same constitutional protection as the house itself—he had committed what would be a trespass under common law, and therefore he needed a

warrant. That would have been a sound originalist argument if the house belonged to Mr. Collins. But at common law, a mere guest couldn't sue a person for trespassing on the host's property.

In ruling for Mr. Collins, the court cited *Minnesota v. Olson* (1990), which held that an overnight guest has a reasonable expectation of privacy in somebody else's home. That was a decidedly nonoriginalist precedent. The court also suppressed the evidence against Mr. Collins under the exclusionary rule, which was utterly unknown when the Fourth Amendment was adopted.

• Philosophical originalism. This is the theory that the original meaning of the Constitution embodies the thinking of a particular philosopher. I addressed this mistake in my concurrence in *Fulton v. City of Philadelphia* (2021), in which I set out my understanding of the original meaning of the First Amendment's Free Exercise Clause.

Some academic work on this subject had relied heavily on John Locke's writing about church-state relations. I don't doubt that Locke's ideas were in the air when the First Amendment was adopted, but I rejected the notion that the Free Exercise Clause contains a footnote reading, "See J. Locke, *A Letter Concerning Toleration* (1689)."

When I think about the original public meaning of constitutional provisions, I sometimes envision a scene at a colonial-era tavern. After dinner, travelers and area residents gather around the fireplace and read newspapers that discuss the Bill of Rights. They read the text of the First Amendment and see that it prohibits Congress from making any law that impairs the free exercise of religion. What would they make of that language?

How likely is it that these men had read John Locke's writing on church-state issues? Even if they had some rough awareness of his ideas, how likely is it that they would assume that Congress had incorporated those ideas in the First Amendment? Originalism looks for the original *public* meaning, not the meaning that the most well-read and philosophically minded men of the day might have adduced.

• Academic originalism. Here is the turning point. For scholars, it is the right turn. An originalist judge may in good conscience take the same off-ramp. But for me and many other originalist judges, it isn't the preferred course.

McDonald v. Chicago (2010) illustrates why. The court held that the Second Amendment right to keep and bear arms in the home for self-defense applied to the states. Virtually every other provision of the Bill of Rights had already been held to apply equally to the states and the federal government, "incorporated" by the Due Process Clause of the 14th Amendment.

If we simply read the text of the 14th Amendment, the Due Process Clause seems an unlikely home for substantive rights. Another provision, the Privileges or Immunities Clause, declares that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But in the *Slaughter-House Cases* (1873), the Supreme Court reduced that clause to minor importance.

In *McDonald*, prominent scholars filed a brief urging the court to jettison Due Process incorporation and revive Privileges or Immunities. During oral arguments, the attorney representing Otis McDonald latched onto this argument. He didn't get far. Justice Scalia interrupted him and said that while the Privileges or Immunities argument was "the darling of the professoriate," it was contrary to a century of case law. Scalia recommended that the attorney stick to those precedents.

Why did Scalia, a former law professor, say that? Because accepting the Privileges or Immunities argument would have opened a can of worms. Libertarians, social conservatives, progressives, socialists and others could all make a pitch for whatever rights they favored. If Prof. Scalia had never become a judge, he might have endorsed the professors' argument. But as a member of the judiciary, he was subject to different constraints.

One is the necessity, except in unusual circumstances, to heed precedent, since overturning it can have unsettling consequences. Another is the need to work with colleagues. When a multimember appellate court lays down a precedent that will affect future litigation, it is most helpful if that is done in an opinion that speaks for a majority.

A Supreme Court justice must also decide what to do when the court applies a prior decision from which he dissented. He can stick to his guns and remain in dissent, or he can accept the earlier decision, stay in the conversation, and try to steer the case law toward the right path. Both are honorable choices, but judging is practical work with real-world consequences, and it is done under conditions that may militate against scholarly purity.

Originalism disciplines the decision-making process, but it doesn't eliminate the need for judges to exercise judgment. Originalist judging requires a degree of humility, but it also demands boldness to go where the original public meaning leads,

and self-confidence in the face of a hostile media and legal academy. So originalism isn't easy. But if originalist judges stay on course, I am confident that the theory has a bright future.

Justice Alito is an associate justice of the U.S. Supreme Court. This article is adapted from a 2025 lecture at Antonin Scalia Law School. A longer version appears in Justice Alito's new book, "So Ordered: An Originalist's View of the Constitution, the Court and Our Country," forthcoming Tuesday from Basic Liberty.

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