

ESSAY

SAMUEL ALITO: POPULIST

William D. Araiza[†]

I. EVALUATIONS OF JUSTICE ALITO	16
II. THE EVIDENCE.....	20
A. <i>Brown v. Entertainment Merchants</i>	20
B. <i>Caetano v. Massachusetts</i>	24
C. <i>Snyder v. Phelps</i>	26
D. <i>Fisher v. University of Texas</i>	29
E. <i>Ricci v. DeStefano</i>	31
III. EVALUATING THE OPINIONS.....	33
A. Differences, Similarities, and Caveats	33
B. Justice Alito’s Rhetorical Style	36
IV. SAMUEL ALITO: POPULIST	43

In 2015, the tenth anniversary of Justice Samuel Alito’s ascension to the Court passed without the level of attention lavished on the same milestone reached that year by Chief Justice John Roberts.¹ The difference in attention is understandable: the Chief Justiceship has given John Roberts

[†] Professor of Law, Brooklyn Law School. Thanks to participants at the Loyola University Chicago Law School’s Constitutional Law Colloquium, and in particular Eric Berger and Corinna Lain, for helpful comments on an earlier version of this Essay. Thanks also to Mark Potkewitz for fine research assistance.

¹ See, e.g., Symposium, *Ten Years as the Chief: Examining a Decade of John Roberts on the Supreme Court*, 38 CARDOZO L. REV. Issue Num. 2 (2016); Constitutional Accountability Center, *ROBERTS AT 10: A LOOK AT THE FIRST DECADE OF JOHN ROBERTS’S TENURE AS CHIEF JUSTICE*, <http://theconstitution.org/sites/default/files/briefs/Roberts-at-10-A-Look-at-the-First-Decade.pdf> [<https://perma.cc/LQ7E-4AB4>]. One exception is an issue of the *Yale Law Journal*’s online publication, which published three short essays in 2016 devoted to Justice Alito’s first ten years on the Court. See Brianne J. Gorod, *Sam Alito: The Court’s Most Consistent Conservative*, 126 YALE L.J. F. 362 (2016), www.yalelawjournal.org/forum/sam-alito-the-courts-most-consistent-conservative [<https://perma.cc/A7NE-56KM>]; John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J. F. 374 (2016), www.yalelawjournal.org/forum/the-unitary-executive-and-the-scope-of-executive-power [<https://perma.cc/K9U9-4S8Z>]; Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164 (2016), <http://www.yalelawjournal.org/forum/the-distinctive-role-of-justice-samuel-alito> [<https://perma.cc/B8YL-A8QP>].

a level of public prominence and influence that his counterparts on the Court cannot match. At the same time, his jurisprudential approach, which mixes an incrementalism that observers have suggested masks a long-term agenda with high-profile compromise votes,² make him an irresistible object of study.

But Justice Alito deserves his due. After all, while Chief Justice Roberts replaced a fellow reliable conservative vote (that of Chief Justice William Rehnquist), Justice Alito's replacement of Justice Sandra Day O'Connor moved the Court decisively to the right on several constitutional issues.³ In addition to the change in results, however, Justice Alito's rhetoric is also notable and merits consideration. In a number of high-profile cases, Justice Alito has deployed facts and employed reasoning and rhetoric in a remarkably interesting way, one that this Essay labels "populist." The impact of this style on law, the Court, and public perceptions of both, constitutes interesting and important topics for any student of the Court, its place in the American political structure, and the nature of the law it pronounces.

² See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012). In *National Federation* Chief Justice Roberts provided the fifth vote to uphold the constitutionality of the individual mandate that is the heart of the Affordable Care Act, but did so based on the taxing power rather than on the more controversial Commerce Clause ground. See also *infra* note 4.

³ Most notably, Justice Alito's replacement of Justice O'Connor created a slim but durable five-vote majority that is deeply skeptical of campaign finance laws. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (striking down an Arizona law, which provided public funding to state office candidates who agreed to limit expenditures, on the basis of the First Amendment); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (holding that First Amendment protects independent corporate expenditures for electioneering communications). Justice O'Connor criticized the result in *Arizona Free Enterprise Club* and has stated that she would have voted the other way in *Citizens United*. See Jeffrey Rosen, *Why I Miss Sandra Day O'Connor*, NEW REPUBLIC (July 1, 2011) <https://newrepublic.com/article/91146/sandra-day-oconnor-supreme-court-alito> [<https://perma.cc/73SG-BQJA>]. The replacement also likely changed the result of the case challenging the federal "partial-birth" abortion law, *Gonzalez v. Carhart*, 550 U.S. 124 (2007), in which a five-justice majority including Justice Alito upheld the federal law. In addition, it is possible that this replacement moved the Court to the right on affirmative action cases. Even though Justice Kennedy recently authored an opinion for the Court upholding the University of Texas's affirmative action admissions program in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), he earlier dissented from Justice O'Connor's majority opinion upholding such a plan in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Thus, it is possible that, despite his approval of the Texas plan, Justice Kennedy remains more grudging than Justice O'Connor in his acceptance of such plans, with the result that in some future case Justice Alito's presence on the Court in place of Justice O'Connor may in fact change the outcome.

Part I of this Essay introduces the topic by identifying and considering several evaluations of Justice Alito's work on the Court. Those evaluations hover near but do not precisely reflect this Essay's thesis; thus, they help contextualize this examination. Part II examines several high-profile cases where Justice Alito has written opinions reflecting this populist style. Part III evaluates those opinions. It begins by identifying their relevant characteristics—both those that unite them and those that distinguish them from each other. It then explains how those opinions differ from opinions written by other justices, both those currently on the Court and those who have left it, which also emphasized the particular facts of the case. It suggests that the effect of Justice Alito's writing may be to create a parallel, or complementary, mode of communication, in which standard doctrinal analysis appears alongside less elite and more accessible understandings of the legal issue at question—a phenomenon this Essay calls “acoustic complementarity.”

Part III ends by observing that Justice Alito may not be the only justice on the current Court who is prone to speaking in this register. Justice Sonia Sotomayor has found a distinctive voice of her own, one that at times echoes Justice Alito's more accessible, populist communication. The fact that her adoption of that style is often in the service of viewpoints very different from Justice Alito's suggests that dialogue among the justices may soon feature debates between different viewpoints employing similar populist rhetoric. This potential will make the Court, and its opinions, a much more interesting locus of political and social debate in the coming years.

The Essay concludes by offering a preliminary evaluation of this style. That evaluation reaches an ambivalent conclusion. Such a style may be problematic, given the political and social polarization of American society today. However, it also involves and engages the American public in the justices' dialogues about constitutional meaning, and thus holds the potential to include the American people more deeply in the shaping of that meaning. In that sense, this style holds the promise of evolving into the rhetorical component of popular constitutionalists' calls for a larger public role in shaping constitutional law.

I

EVALUATIONS OF JUSTICE ALITO

As noted in the introduction, since his accession to the

Court, Justice Alito has not generated the level of interest and academic commentary that other members of the conservative majority have. As the introduction noted, Chief Justice Roberts has been the subject of intense discussion, not just due to his role as Chief Justice, but also because of his penchants both for short-term compromise and his suspected long-term goal to reshape constitutional law—phenomena that sometimes manifest in the same case.⁴ Similar attention has been focused on other justices, as well. For example, Justice Scalia had generated enormous commentary during his career on the Court, in particular due to his ongoing campaign to have the Court embrace textualist statutory analysis and originalist constitutional analysis. Justice Thomas has similarly generated voluminous commentary given his own commitment to originalism, which at times has seemed even purer than Justice Scalia's.⁵ Justice Kennedy's position at the Court's pivot point, and his embrace of sometimes-inscrutable constitutional doctrine, has provided no small share of opportunities for commentary.⁶

This is not to say that Justice Alito has gone completely unnoticed, either in academic literature⁷ or the popular press. Both academic⁸ and popular⁹ writings have identified him as the most reliable conservative justice on the Court. For example, in 2016, Erwin Chemerinsky trenchantly remarked that Justice Alito's judicial philosophy amounted to the

⁴ See, e.g., *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 457 (2007) (voting to rule on narrow, statutory grounds, in favor of a challenger to a campaign finance regulation, but laying the groundwork for a broader, constitutional, attack in *Citizens United v. FEC*, 558 U.S. 310 (2010)); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (doing the same with regard to the preclearance provisions of the Voting Rights Act).

⁵ Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (describing himself as a potentially "faint-hearted" originalist).

⁶ See, e.g., Ilya Shapiro, *A Faint-hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 333, 333–35 (2010) (reviewing HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* (2009)) (noting the importance of Justice Kennedy as the swing vote on the Court after the retirement of Justice O'Connor).

⁷ See, e.g., Gorod, *supra* note 1.

⁸ *Id.*

⁹ See Tom Donnelly & Brianne Gorod, *None to the Right of Samuel Alito*, THE ATLANTIC, Jan. 30, 2016, <https://www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/> [https://perma.cc/M4BN-EZUC]; Stephanie Mencimer, *Conservatives Say They Want Another Antonin Scalia. They Really Want Another Sam Alito*, MOTHER JONES, May/June 2016, <http://www.motherjones.com/politics/2016/06/samuel-alito-profile-antonin-scalia-supreme-court-appointment> [https://perma.cc/AX6H-PV4R].

Republican Party platform, while Akhil Amar observed that, unlike other conservative or liberal justices, Justice Alito had never crossed to the other side of the ideological divide in order to create a 5-4 majority.¹⁰ Moving beyond simple results-based evaluations, Neil Siegel has written that Justice Alito has emerged as the voice of “Americans who hold traditionalist conservative beliefs” on social issues such as same-sex marriage, speech, and crime.¹¹ Clay Calvert, commenting on Justice Alito’s First Amendment jurisprudence, identified his personal sense of morality and sense of the substantive merit of the speech in question as critical to his decision on whether to find that speech protected by the First Amendment.¹²

Despite characterizations of Justice Alito as the Court’s most conservative member,¹³ commentators have discerned other themes as well in Justice Alito’s jurisprudence. For example, observers of his early years on the Court noted his tendency to ally with Chief Justice Roberts’s incrementalist approach to changing constitutional law.¹⁴ That approach, which involves distinguishing rather than outright overruling disfavored precedent with the possible goal of eventually undermining it, has been remarked on extensively as a hallmark of the Chief Justice.¹⁵ But commentators have also noted Justice Alito’s tendency to sign onto the Chief Justice’s opinions of this sort, often creating a two- (or sometimes three-) justice buffer between the liberal bloc seeking to apply the precedent expansively (or, as they would say, faithfully) and Justices Scalia and Thomas, who often called for its outright overruling.¹⁶ Others have commented on particular aspects of

¹⁰ See Mencimer, *supra* note 9. See also Gorod, *supra* note 1 (arguing that Justice Alito is the Court’s most consistent conservative in terms of results).

¹¹ See Siegel, *supra* note 1 at 165.

¹² See Clay Calvert, *Justice Samuel A. Alito’s Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 115 (2011). This Essay examines two of the cases Professor Calvert discusses. See *infra* text accompanying notes 25–38 (discussing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) and notes 46–61 (discussing *Snyder v. Phelps*, 562 U.S. 443 (2011)).

¹³ See *supra* notes 9–10 and accompanying text.

¹⁴ See, e.g., Starr, *infra* note 16.

¹⁵ See Lawrence Baum, *Supreme Court Justices as Human Decision Makers*, 41 OHIO N. L. REV. 567, 587 (2015); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 218 (2009).

¹⁶ See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 593 (2007) (Alito, J. joined by Roberts, C.J., and Kennedy, J.) (giving a narrow reading to, but declining to overrule, *Flast v. Cohen*, 392 U.S. 83 (1968)); *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 458 (2007) [hereinafter WRTL] (Roberts, C.J., joined by Alito, J.) (giving a narrow reading to, but declining to

his jurisprudence, including constitutional criminal procedure¹⁷ and the First Amendment.¹⁸

This Essay takes a different tack. Building on those commentators who detect a traditionalist streak in Justice Alito's jurisprudence,¹⁹ and, more distantly, those who simply see the work of a committed political conservative,²⁰ it considers Justice Alito's rhetorical style as one that reflects a constitutional jurisprudence informed by practical, "folk" wisdom. Such a style downplays formal doctrinal rules in favor of heavy reliance on the moral equities raised by the facts, or at least elevates that latter approach to an equally prominent place in constitutional adjudication. Thus, this approach understands the meaning of constitutional and quasi-constitutional²¹ rights provisions as at least partially informed by "folk" or "common sense" understandings of what those provisions should mean or what conduct they value and thus protect. This approach stands in contrast to the prevailing approach to constitutional adjudication, one marked by formulas that translate the often-vague words of the given provision into doctrinal tests consisting of sets of abstract "elements" or "prongs."²² This latter approach can fairly be called "elite," because it values a web of intricate, abstract rules likely to be understood only by those learned in the law. By contrast, the approach this Essay identifies has a fair claim to the term "populist," given its more direct translation of the constitutional text into results based on instinctive reactions to the particular underlying facts.

To be sure, in the current era "populist," "populism," "elite," and "elitism" struggle to remain neutral terms rather than weapons hurled by political combatants. Nevertheless,

overrule, *McConnell v. FEC*, 540 U.S. 93 (2003)); see also *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (Kennedy, J., joined by Roberts, C.J. and Alito, J) (giving a narrow reading to, but declining to overrule, the line of cases beginning with *Hunter v. Erickson*, 393 U.S. 385 (1969)). For a discussion of *WRTL*, *Hein*, and Justice Alito's tendency to align with Chief Justice Roberts's incrementalist approach, see Kenneth W. Starr, *The Roberts Court at Three: A Response*, 54 WAYNE L. REV. 1015, 1020-21 (2008).

¹⁷ See Gonzalez, *infra* note 59 at 696-705.

¹⁸ See Calvert, *supra* note 12.

¹⁹ See, e.g., Siegel, *supra* note 1.

²⁰ See, e.g., Mencimer, *supra* note 9 (quoting Dean Erwin Chemerinsky).

²¹ See *infra* text accompanying notes 73-84 (discussing Justice Alito's concurring opinion in a Title VII case that had constitutional undertones).

²² Commenting on this latter approach several decades ago, Robert Nagel described it as "the formulaic constitution." See Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985).

there may be real value in considering Justice Alito's rhetoric as "populist," given both those very battles that currently rage in the political arena and the likelihood that Justice Alito will remain a member of a slim, but durable majority coalition on the Court. Given that he will likely remain on the prevailing side of many cases for the foreseeable future, it behooves us to consider what may be driving his approach to deciding cases, especially when, as in the examples that follow, he abandons either the Court majority's result or its reasoning.

II THE EVIDENCE

In a number of high-profile cases Justice Alito has written what this Essay calls "discretionary" opinions or components thereof—that is, either solitary dissents or concurrences, or parts of concurrences or dissents that were unnecessary to his explanation of how he would have decided the case.²³ These opinions presumably reflect Justice Alito's particular concerns, priorities, and rhetorical style, given that he did not have to write them in order to register his views on a case.²⁴ Thus, these opinions provide a particularly valuable window into his thinking and his rhetorical approach.

A. *Brown v. Entertainment Merchants*

Several of these opinions are quite striking for their heavy

²³ In one sense, the latter part of this definition is the classic definition of *dicta*. However, that characterization needs to be qualified in this context. Some of these opinions are either dissents or concurrences in a judgment whose majority opinion attracted enough votes to constitute a majority of the Court. Thus, when Justice Alito writes such an opinion but then goes beyond what he needs to say in order to state his own conclusion about how the case should come out, that part of his opinion is not precisely *dicta*, since the entire opinion is unnecessary to the holding of the case.

²⁴ Of course, this categorization is not precise. For example, a dissenting opinion when Justice Alito is the only dissenting justice—as he was, for example, in *Snyder v. Phelps*, 562 U.S. 443 (2011), one of the cases this Essay examines—should probably be considered "non-discretionary" since, literally, he had nobody else to rely on to express his dissenting views. By contrast, a dissenting opinion by Justice Alito that speaks only for him, even though another justice has written a dissent (in particular, one that commands the assent of multiple dissenting justices) can reasonably be considered "discretionary," since that other dissent was available for Justice Alito to join had he so wished. Similarly, a component of a dissenting or concurring opinion which was not necessary to explain how he would have decided the case can also be fairly characterized as "discretionary." See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805, 813 (2011) (Alito, J., concurring in the judgment) ("Having outlined how I would decide this case, I will now briefly elaborate on my reasons for questioning the wisdom of the Court's approach.").

reliance on the facts of the case for reasons that go beyond obvious relevance to conventional constitutional doctrine. Perhaps the most notable opinion on that score is Justice Alito's concurrence in the judgment in *Brown v. Entertainment Merchants Association*,²⁵ a case dealing with the First Amendment rights of children to access violent video games. In *Entertainment Merchants* a seven-justice majority struck down California's attempt to limit minors' access to violent video games. Writing for five of those justices, Justice Scalia concluded that access to such speech was historically protected, even for children. As a result of that conclusion, the Court applied strict scrutiny to California's content-based restriction on that access, and concluded that the statute failed that scrutiny.

Justice Alito's opinion, which Chief Justice Roberts joined, agreed with the majority's decision to strike down the law. But rather than agreeing with the majority that the law enacted a content-based restriction on minors' access to speech that they had a right to view, and in turn failed strict scrutiny, he based his vote on the distinct conclusion that the California law was unconstitutionally vague.²⁶ That part of his opinion was carefully-written and hewed closely to the relevant precedent.

However, despite his conclusion about the law's unconstitutionally vagueness, he continued on to critique the majority's reasoning, which he feared unduly restricted states' leeway to regulate such access through more precisely-drafted statutes.²⁷ This latter part of his opinion—a part that, strictly speaking, was not necessary in order for him to state the reasons for his vote in the case—went into enormous detail about the graphic nature of the video games in question. He described the violence in “some of these games” as “astounding,”²⁸ and then spent a paragraph graphically describing some of that violence.²⁹ Seemingly unsatisfied with

²⁵ 564 U.S. 786 (2011).

²⁶ *See id.* at 805–13 (Alito, J., concurring in the judgment).

²⁷ *See id.* at 813–16.

²⁸ *Id.* at 818.

²⁹ *Id.*

Victims by the dozens are killed with every imaginable implement, including machineguns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

his raw description of that violence, he then highlighted what he called the “base,” “antisocial theme[s]”³⁰ of those games, which included allowing players to play the role of rapist and ethnic cleanser, and to re-enact mass killings and the assassination of President Kennedy.³¹

Justice Scalia, the author of the majority opinion, questioned the relevance to the First Amendment issue of this catalog of horrors. Indeed, he suggested that Justice Alito’s expression of revulsion toward that speech unwittingly reflected the very reason conventional First Amendment doctrine protected it:

Justice Alito has done considerable independent research to identify video games in which “the violence is astounding.” . . . Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.³²

To be sure, Justice Alito did provide a reason for his presentation of the (deeply troubling) facts surrounding video games. As he explained it, he presented those facts to argue, *contra* the majority, that the interactivity and violence of video games renders them qualitatively different from the violent books, cartoons, and other child-focused media that the Court

³⁰ *Id.* at 818–19.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in ‘ethnic cleansing’ and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository. (footnotes omitted).

³¹ *See id.*

³² *Id.* at 798–99.

had found to be historically accessible to children.³³ Nevertheless, Scalia's critique of Alito's factual presentation—in particular, his accusation that “Justice Alito recounts all these disgusting video games in order to disgust us”—reflects a suspicion that it was, in fact, the undesirable content of those games that made Justice Alito question their constitutionally-protected status as applied to minors' access. And indeed, his presentation not just of those games' violence, but of their anti-social themes (*e.g.*, racism and misogyny) does indeed suggest that it was their “disgustingness” that mattered for his constitutional analysis.

This introductory example reveals several themes of the opinions this Essay identifies as significant. It shows Justice Alito's willingness to go beyond the record created by the parties,³⁴ his focus on the unsavory or unpleasant aspects of the case or the claim,³⁵ and, at least according to Justice Scalia in *Entertainment Merchants*, those facts' lack of relevance to the conventional legal doctrine governing that issue.³⁶

Together, these aspects suggest that the term “populist,” as imprecise as it is, may constitute a reasonably appropriate description for these sorts of opinions. If, as suggested in the introduction, “populism” implies the opposite of “elitism,” then one can understand how going beyond the case's formal record, and focusing on inherently unsettling facts even when they do not relate to the governing doctrine, reflects an impatience with formal, or elite, legal rules and, instead, favors a more instinctive reaction to the case. After all, as Justice Scalia says in *Entertainment Merchants*, the effect of Justice

³³ Compare *id.* at 798 (majority opinion) (“California claims that video games present special problems because they are ‘interactive,’ in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind.”) with *id.* at 816 (Alito, J., concurring in the judgment) (“Finally, the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before.”).

³⁴ See, *e.g.*, *infra* notes 70–72 and accompanying text (discussing similar extra-record research by Justice Alito in his dissenting opinion in *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016)).

³⁵ See, *e.g.*, *infra* notes 49, 78–84 and accompanying text (discussing, respectively, Justice Alito's discussion of similarly unsavory facts in *Snyder v. Phelps*, 562 U.S. 443 (2011) and *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

³⁶ See, *e.g.*, *infra* notes 42–44 and accompanying text and 78–84 and accompanying text (discussing, respectively, Justice Alito's focus on arguably-irrelevant facts in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) and *Ricci*, 557 U.S. 557).

Alito's argument is to "arouse the reader's ire, and the reader's desire to put an end to this horrible message,"³⁷ and Justice Scalia's answer to his own (rhetorical) question about the relevance of those facts to First Amendment doctrine is a mystified "[w]ho knows?"³⁸ If one equates "populism" with an unlearned but common-sense folk wisdom, then it becomes comprehensible to understand arguments such as Justice Alito's vehement criticism of violent video games in *Entertainment Merchants* as a populist one.

B. *Caetano v. Massachusetts*

Other examples exist of Justice Alito's heavy focus on disturbing, but doctrinally-irrelevant, facts. In *Caetano v. Massachusetts*,³⁹ the Court held that the Second Amendment protected the right of a person to possess a stun gun for self-defense. The Court's *per curiam* decision, in addition to triggering no dissents, was very brief.⁴⁰ It was also strikingly abstract: the Court's opinion did not mention a word about the facts, except to note the decision the Court was reversing. In particular, it failed to mention any facts about Caetano's arrest and conviction, even neglecting to identify Caetano as the possessor of the stun gun in question. Instead, the Court simply set forth the lower court's three justifications for upholding the gun possession conviction, and refuted them one by one.

Justice Alito, joined by Justice Thomas, wrote separately in order to chide the majority for what he called its "grudging" vindication of the right in question.⁴¹ Much of his opinion (perhaps tellingly styled a "concurrence in the judgment" rather than a simple "concurrence") was devoted to applying Second Amendment doctrine to the facts of the defendant's possession of a stun gun, presumably to make absolutely clear how that doctrine supported the Court's result. But Justice Alito's opinion began by providing intricate details about the facts of Jaime Caetano's worries about and interaction with her ex-boyfriend, even including the dialogue the two persons uttered during a confrontation that led her to brandish the weapon.⁴² Strikingly, that confrontation pre-dated the

³⁷ *Entertainment Merchants*, 564 U.S. at 799.

³⁸ *Id.*

³⁹ 136 S. Ct. 1027 (2016).

⁴⁰ The opinion totals 456 words. *See id.* at 1027–28.

⁴¹ *Id.* at 1033 (Alito, J., concurring in the judgment).

⁴² *See id.* at 1028–29.

completely-unrelated incident in which police found her gun and arrested her for violating the state law that prohibited her from possessing it—the incident that gave rise to the case.

Toward the end of his opinion he again returned to Caetano's particular situation. He stated that "a weapon is an effective means of self-defense only if one is prepared to use it, and it is presumptuous to tell Caetano she should have been ready to shoot the father of her two young children if she wanted to protect herself."⁴³ Even more tellingly, his opinion ended with the following attack on the state's conduct—an attack that went far beyond what was necessary in order to establish that Second Amendment doctrine compelled a decision striking down the state law:

A State's most basic responsibility is to keep its people safe. The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself. To make matters worse, the Commonwealth chose to deploy its prosecutorial resources to prosecute and convict her of a criminal offense for arming herself with a nonlethal weapon that may well have saved her life. The Supreme Judicial Court then affirmed her conviction on the flimsiest of grounds. This Court's grudging *per curiam* now sends the case back to that same court. And the consequences for Caetano may prove more tragic still, as her conviction likely bars her from ever bearing arms for self-defense.

If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.⁴⁴

Thus, as in *Entertainment Merchants*, in *Caetano* Justice Alito wrote an opinion that focused heavily on the facts of the case, seemingly to make a point about his understanding of the constitutional issue. Even more so than in *Entertainment Merchants*, his opinion in *Caetano* was utterly discretionary, and his recitation of the facts of the case was even more disconnected from the underlying doctrinal analysis than in that earlier case.

In addition to being disconnected from conventional Second Amendment doctrine, Justice Alito's presentation of Caetano's confrontation with her ex-boyfriend was highly dramatic. As he tells the story, an earlier "bad altercation" with

⁴³ *Id.* at 1033.

⁴⁴ *Id.*

the man had put her in the hospital and left her homeless. “She obtained multiple restraining orders . . . but the order proved futile. So when a friend offered her a stun gun for self-defense against [her] former boy friend, Caetano accepted the weapon.” At that point, Justice Alito added a literary element of suspense: beginning the next paragraph of his opinion, he wrote, “It is a good thing she did.” The paragraph that followed described the two antagonists’ physical disparities (“Caetano’s abuser towered over her by nearly a foot and outweighed her by close to 100 pounds.”), his threats and her special status as a custodial parent (“He ‘started screaming’ that she was ‘not gonna [expletive deleted] work at this place’ any more because she should be home with the kids they had together.”), and culminated in Caetano’s triumph, aided by her exercise of her Second-Amendment rights (“But she didn’t need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: ‘I’m not gonna take this anymore. . . . I don’t wanna have to [use the stun gun on] you, but if you don’t leave me alone, I’m gonna have to.’ The gambit worked. The ex-boyfriend ‘got scared and he left [her] alone.’”).⁴⁵

To be sure, Justice Alito clearly viewed those facts as reinforcing the point that the Second Amendment serves to guarantee Americans’ right to defend themselves. But the facts of Jaime Caetano’s exercise of that right did nothing to clarify that contours of that right beyond highlighting how her particular (highly disturbing) facts implicated the underlying self-defense justification for the right’s inclusion in the Bill of Rights. And, of course, the exceptionally dramatic nature of his presentation of those facts stands yet an additional step removed from any relevance to actual Second Amendment doctrine.

C. *Snyder v. Phelps*

Another notable example of Justice Alito’s deep focus on facts appears in his dissenting opinion in *Snyder v. Phelps*.⁴⁶ In *Snyder* the Court threw out tort verdicts reached against the Westboro Baptist Church, the controversial anti-Catholic and anti-gay ministry that pickets high profile funerals and funerals of those the Church believes promote evil, including those of soldiers killed in the line of duty. *Snyder* involved the

⁴⁵ *Id.* at 1028.

⁴⁶ 562 U.S. 443 (2011).

funeral of Matthew Snyder, a Catholic U.S. soldier killed in Iraq. The Church picketed the funeral proceedings held at a church; the picketers stood on public property and obeyed police instructions throughout.

An eight-justice majority⁴⁷ threw out the lower court's verdict against the church for intentional infliction of emotional distress.⁴⁸ Writing for the Court, Chief Justice Roberts concluded that the Church's speech, dealing with matters such as the nation's policy toward homosexuality and the Catholic Church's sexual abuse scandal, addressed matters of public importance. Given the protected nature of their speech, and the fact that the picketers expressed their views on public property while complying with police directions, the Court found that the tort verdict against the Church violated the First Amendment.

Justice Alito dissented. The first section of his opinion consisted of a graphic recounting of the hateful speech made by the Church, coupled with a disapproving explanation of its strategy of picketing military and other high-profile funerals in order to obtain publicity.⁴⁹ Strikingly, he preceded this recitation with a statement that the Church had abandoned any claim that its speech did not satisfy the standards for liability under the intentional infliction tort.⁵⁰ That conclusion—that there was no need to establish whether the speech satisfied the standard for IIED liability—removed the primary justification he might have had for recounting the facts.

It appears that only two possible doctrinal reasons exist for his presentation of these facts. First, he may have presented them in order to demonstrate that the speech was not on matters of public interest. This is a very weak argument: while it is likely that both the majority and dissent selectively presented the messages on the Church's picket signs,⁵¹ the majority opinion clearly established the Church's preoccupation with larger social and political issues, and the

⁴⁷ Justice Breyer joined the majority opinion but also wrote a separate concurrence. *See id.* at 461 (Breyer, J., concurring).

⁴⁸ The Court also threw out the intrusion on seclusion and civil conspiracy verdicts. *See id.* at 459–60. However, the IIED verdict occupied the largest part of the Court's attention. *Compare id.* at 451–59 (analyzing the IIED claims) *with id.* at 459–60 (analyzing the other two claims).

⁴⁹ *See id.* at 466–71 (Alito, J., dissenting).

⁵⁰ *See id.* at 464–65.

⁵¹ *Compare id.* at 454 (majority opinion) *with id.* at 468–70 (Alito, J., dissenting).

connection the Church drew between those issues and the individuals whose funerals it chose to picket. This conclusion also reflects the generally-recognized fact that the Church is in fact quite outspoken on those general issues.⁵²

Second, Justice Alito may have recited those facts in order to show that the Church's speech "intentionally inflicted" "grave injury."⁵³ As he argued just before launching into that recitation, such a conclusion would prove, in his view, that the speech therefore fell into an unprotected category, as words that "form 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"⁵⁴ Regardless of its correctness as a matter of doctrine,⁵⁵ this latter argument necessarily means that the constitutional status of particular types of speech turns on what the Court has, on other occasions, characterized as an *ad hoc* judicial or legislative balancing of the costs and benefits of speech.⁵⁶ The Court's characterization of this approach as *ad hoc* is pejorative;⁵⁷ for Justice Alito, however, it would fit neatly into an approach in which the cruelty of particular speech was relevant to its constitutionally-protected status.⁵⁸

Given that possible explanation for his inclusion of those facts, the length, detail, and agitated tone of his presentation makes perfect sense. If the point of that presentation is to show how cruel and hateful the Church's speech was, then one would expect him to describe it in the ways that he did—

⁵² Indeed, Justice Alito himself may have implicitly conceded the weakness of his argument when he stated that he had "*attempted to show*" the private focus of the Church's speech. *Id.* at 471 (emphasis added).

⁵³ *Id.* at 465.

⁵⁴ *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). To be sure, as is well-known, the Court has recently insisted that the *Chaplinsky* categories of unprotected speech are derived from historical analysis, and are not susceptible to supplementation by *ad hoc* weighing of the costs and benefits of new candidates for inclusion. See *United States v. Stevens*, 559 U.S. 460, 472 (2010); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011); *Alvarez v. United States*, 132 S. Ct. 2537, 2544 (2012). Strikingly, Justice Alito is the only justice who has not joined any of those majority opinions. See *infra* note 105.

⁵⁵ See cases cited *supra* note 54 (criticizing such an approach to identifying unprotected categories of speech).

⁵⁶ See cases cited *supra* note 54.

⁵⁷ See cases cited *supra* note 54 (describing that approach as "startling and dangerous").

⁵⁸ See *Calvert*, *supra* note 12; see also *infra* note 105 (noting that, of the current justices (other than Justice Gorsuch), only Justice Alito has declined to join an opinion rejecting such an *ad hoc* approach).

graphically, at length, and with an anguished tone.⁵⁹ Indeed, it also explains his otherwise-curious insistence on noting that the Church had many alternative locations to make its speech—literally, anywhere else in the nation, but at least at many other sites that might be related to the Catholic Church, the military, or to government policy.⁶⁰ By noting that the Church’s practice of picketing military and other high-profile funerals garnered it attention, he may have been hoping to buttress his argument that the Church intentionally singled out events like the Snyder funeral as fora for its speech.⁶¹ Again, the raw ugliness of the Church’s conduct—not just in terms of the speech but in its intentional choice of the funeral to make that speech—perhaps helped Justice Alito argue that it should be unprotected based on the *ad hoc* balancing he argued underlay *Chaplinsky*.⁶²

D. *Fisher v. University of Texas*

A recent opinion by Justice Alito reflects an indictment of state officials similar to the one he delivered several years earlier in *Caetano*. In *Fisher v. University of Texas at Austin*,⁶³

⁵⁹ See, e.g., Alberto R. Gonzales, *In Search of Justice: An Examination of the Appointments of John G. Roberts and Samuel A. Alito to the Supreme Court and Their Impact on American Jurisprudence*, 22 WM. & MARY BILL OF RTS. J. 647, 707 (2014) (describing Justice Alito’s arguments in *Snyder* as “not as concise as some of his other disagreements with the majority, nor . . . founded squarely in precedent” and concluding that “what Justice Alito conveyed most clearly in his dissent was concern for the victim of what he perceives as an unjust assault”); see also *id.* at 707 n.557 (Speculating that “Justice Alito argues for a practical, impact-based solution against arguments often grounded more in ideal”).

⁶⁰ See *Snyder v. Phelps*, 562 U.S. 443, 466 (2011) (Alito, J., dissenting) (“On the morning of Matthew Snyder’s funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.)”). See also Calvert, *supra* note 12 at 150 (commenting on this aspect of Justice Alito’s opinion by noting that “[b]eing media savvy in terms of staging news events . . . does not exempt one from the protection of the First Amendment.”).

⁶¹ Cf. *Snyder*, 562 U.S. at 465 (Alito, J., dissenting) (specifying that the unprotected status of speech of this sort depends in part on whether the injury the speech caused was “intentionally inflicted”).

⁶² See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁶³ 136 S. Ct. 2198 (2016).

Justice Alito wrote the lead dissent⁶⁴ to a four-justice majority opinion⁶⁵ upholding the University of Texas undergraduate college's use of race as an admissions factor. Both Justice Kennedy's majority and Justice Alito's dissenting opinions agreed that the university's admissions plan had to satisfy strict scrutiny in order to survive. However, they disagreed—fundamentally—on whether the plan satisfied that standard. Justice Alito's argument that the plan failed strict scrutiny was suffused throughout with distrust of the university's officials.⁶⁶

Justice Alito's expression of distrust does not necessarily constitute a case of ignoring doctrine in favor of reaching a gut decision condemning the school. Rather, strict scrutiny in the university admissions context requires schools to make good-faith efforts to find non-race-based methods of achieving the constitutionally-legitimate goal of a diverse student body.⁶⁷ Justice Alito's dissent accused the University of Texas of failing to make such efforts. For example, he rejected the school's argument that the minority students admitted under the university's race-blind "Top Ten Percent" program did not fully satisfy the school's diversity goals for particular classes, observing that the school failed to track those students' curricular choices as compared with minority students admitted through its race-conscious program.⁶⁸ He found another reason to question the school's good faith when he questioned why the school's concern with critical masses of Latino and African-American students did not apply to Asian-Americans, even though they constituted a smaller portion of the university's undergraduate class than Latinos.⁶⁹

But Justice Alito's allegations of bad faith went beyond the limited context of the university's obligation to seek out race-neutral means of attaining its legitimate goals, and that, in

⁶⁴ Justice Alito wrote for himself, Chief Justice Roberts, and Justice Thomas. Justice Thomas wrote a brief separate dissent for himself only.

⁶⁵ Justice Kennedy wrote for himself and Justices Breyer, Ginsburg, and Sotomayor. Justice Scalia had died before the case was handed down, while Justice Kagan recused herself.

⁶⁶ *E.g., id.* at 2215 (Alito, J., dissenting) ("To the extent that [the University] has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid.")

⁶⁷ *See, e.g., id.* at 2208 (majority opinion) ("A university . . . bears the burden of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense.") (internal quotations omitted).

⁶⁸ *See id.* at 2226–30 (Alito, J., dissenting).

⁶⁹ *See id.* at 2226–30, 2236.

order to be credible, race-conscious actions motivated by such goals should apply to all minority races. Most notably, again going beyond the record,⁷⁰ he accused the university of deviating from its stated admissions procedures, not in the context of race, but rather as part of a scheme to admit applicants at the behest of “politically connected individuals.”⁷¹ This accusation did not directly impact the credibility of the university’s race-based admissions policies; nevertheless, Justice Alito wielded it to cast doubt on the university’s good faith more generally. Indeed, he devoted a full paragraph of his opinion to the university’s secretiveness regarding the implementation of this scheme,⁷² specifying unsavory details such as the intentional minimization of the creation of documents and the shredding of such documents as were created. Again, technically this scheme had nothing to do with the equal protection challenge in front of the Court, except in the very tangential sense that it revealed the university to be an untrustworthy institution as a general matter.

E. *Ricci v. DeStefano*

A similar focus on a party’s extraneous acts arose in Justice Alito’s concurring opinion in *Ricci v. DeStefano*.⁷³ *Ricci* considered the proof burden a city employer had to shoulder in order to justify race-conscious action as an appropriate response to a claim of disparate impact liability under Title VII. It dealt with the City of New Haven, Connecticut, and its decision to throw out the results of a firefighter promotion test when that test yielded racially-disparate results. The dissent, which would have applied a rule making it easier for the city to justify its remedial action, also protested that Justice Kennedy’s majority opinion “le[ft] out important parts of the story.”⁷⁴

Justice Alito (joined by Justices Scalia and Thomas) joined the majority opinion but also wrote separately to complain that the dissent itself “provide[d] an incomplete description of the

⁷⁰ See *id.* at 2211–12 (majority opinion) (observing that Justice Alito’s argument on this point was based on extra-record evidence); cf. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 798 (2011) (majority opinion) (noting that Justice Alito had done “considerable independent research” to identify particularly violent video games).

⁷¹ *Fisher*, 136 S. Ct. at 2240 (Alito, J., dissenting).

⁷² See *id.*

⁷³ 557 U.S. 557 (2009).

⁷⁴ *Id.* at 608, 609 (Ginsburg, J., dissenting).

[relevant] events,”⁷⁵ and to highlight other facts that he believed justified the Court’s rejection of New Haven’s actions even under the dissent’s own more employer-friendly standard.⁷⁶ Thus, his opinion explicitly focused on the facts of the case. But his presentation of those facts went well beyond what reasonably would have mattered to an argument about the appropriate application of the relevant legal standard.⁷⁷ He described an African-American minister, Boise Kimber, a major player in New Haven politics and a major force lobbying the city to throw out the test results, as a “self-professed ‘kingmaker.’”⁷⁸

To be sure, such a description might conceivably be appropriate, given Justice Alito’s claim that the city threw out the test results in order to “placate a politically important racial constituency.”⁷⁹ But his description of that “kingmaker” was decidedly unflattering, and irrelevant to the underlying issue. In describing the political ties between Reverend Kimber and the city mayor, Justice Alito described Reverend Kimber as having “threatened a race riot during the murder trial of the black man arrested for killing [a] white Yalie” who Justice Alito named in his opinion.⁸⁰ He continued that Reverend Kimber “continues to call whites racist if they question his actions.”⁸¹ He described his presentation at a public hearing as “a loud, minutes-long outburst.”⁸² Perhaps most strikingly of all, Justice Alito observed that the mayor had been a character witness at the “kingmaker’s” trial “for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath.”⁸³ He concluded his opinion with a deeply sympathetic presentation of the situations faced by individual firefighters who scored well on the exam, only to have the test results thrown out.⁸⁴

⁷⁵ *Id.* at 596 (Alito, J., concurring).

⁷⁶ As such, Justice Alito’s concurrence constitutes a classic example of a discretionary opinion.

⁷⁷ To repeat, he concluded that the facts supported a verdict against the city even under the dissent’s proposed standard, which was more favorable to such actions.

⁷⁸ *Id.* at 598 (Alito, J., concurring).

⁷⁹ *Id.* at 597.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.* at 607.

Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession. In order to qualify for promotion, they

III

EVALUATING THE OPINIONS

In all of the opinions discussed above, Justice Alito emphasized the troubling facts of the particular cases reaching the Court. But before we can evaluate those opinions, and the rhetorical style informing them, they must be parsed and distinguished. Differences between these opinions illustrate the cautions that one must take before finding meaningful similarities between them and in turn evaluating them and their potential impact.

A. Differences, Similarities, and Caveats

First, these opinions feature varying degrees of emphasis on the troubling, but doctrinally-tangential, facts. Justice Alito's concurrence in *Caetano* places heavy emphasis on the facts, presumably to illustrate how the Second Amendment right was implicated by Jaime Caetano's decision to possess a stun gun. His dissent in *Snyder* featured a similarly detailed presentation of the Westboro Baptist Church's speech. By contrast, his concurrence in the judgment in *Entertainment Merchants* places relatively less emphasis on the troubling facts surrounding the video games at issue, even if his outrage (or, as Justice Scalia put it, Justice Alito's "disgust")⁸⁵ nevertheless heightened the impact of those relatively sparse facts.

Further toward the other end of the spectrum, Justice Alito's accusation in his *Fisher* dissent that the University of Texas had engaged in admissions chicanery occupied only a small part of his analysis, albeit one that reinforced the theme running through his entire opinion that the university could not be trusted to use race-based admissions criteria. Perhaps at the furthest end of the spectrum on this criterion is his concurrence in *Ricci*. That opinion featured facts—most

made personal sacrifices. Petitioner Frank Ricci, who is dyslexic, found it necessary to hire someone, at considerable expense, to read onto audiotape the content of the books and study materials. He studied an average of eight to thirteen hours a day . . . , even listening to audio tapes while driving his car. Petitioner Benjamin Vargas, who is Hispanic, had to give up a part-time job, and his wife had to take leave from her own job in order to take care of their three young children while Vargas studied. Vargas devoted countless hours to study . . . , missed two of his children's birthdays and over two weeks of vacation time, and incurred significant financial expense during the three-month study period. (internal quotations and citations omitted).

⁸⁵ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798 (2011).

notably that the preacher's trial at which the defendant-mayor testified as a character witness involved unsavory allegations of "stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath"⁸⁶—that would be hard to characterize as relevant to the legal standard Justice Alito was purporting to apply. But that apparent drive-by attack, as well as his concluding reminder of the human costs imposed on the firefighters who had studied for and succeeded on the rejected test,⁸⁷ occupied only minor parts of his factual analysis.⁸⁸

Perhaps more importantly than these facts' relative prominence in the given opinion, the opinions discussed above also differ in the doctrinal role they purported to play in the analysis. For example, in *Snyder*—unlike in *Fisher*, *Entertainment Merchants*, and *Caetano*—Justice Alito attempted to explain how those facts refuted the Court's conclusion that the Church's speech was constitutionally protected—either because the speech did not relate to public issues or because it possessed the characteristics that Justice Alito believed marked the speech as an additional *Chaplinsky*-type category of unprotected speech.⁸⁹ Similarly, it is possible—perhaps—to understand Justice Alito's characterization of the political operative in *Ricci* as a "self-professed 'kingmaker'"⁹⁰ as relevant to his argument that the city threw out the firefighter test results due to political pressure rather than good-faith doubt about the test's reliability.⁹¹

⁸⁶ *Ricci v. DeStefano*, 557 U.S. 557, 598 (2009) (Alito, J., concurring).

⁸⁷ *See id.* at 607.

⁸⁸ Other opinions by Justice Alito exhibit similar characteristics, but in quantities small enough as to perhaps render them not real exemplars of the phenomenon this Essay discusses. For example, his solitary dissent in *United States v. Stevens* provided a brief but chilling description of an actual "crush video," that is, a sexual fetish video that depicts small animals being crushed by a woman wearing sharp heels. *See* 559 U.S. 460, 491 (Alito, J., dissenting). *See also id.* at 482 (describing such videos as "depraved"). His description was apparently designed to establish that such videos constituted animal cruelty, conduct that states could and did prohibit, and which thus allowed Justice Alito to analogize such expression to child pornography and the constitutional argument for allowing its prohibition. Regardless of whether that description was necessary to his argument, it constitutes a sufficiently small part of his opinion as to warrant exclusion from this Essay's consideration.

⁸⁹ *See supra* notes 54–55 and accompanying text.

⁹⁰ *Ricci*, 557 U.S. at 598.

⁹¹ Even accepting this justification for his characterization of that person, the added recitation of the particular crime for which that person was tried—"stealing prepaid funeral expenses from an elderly woman and then lying about

By contrast, Justice Alito's allegation of admissions cheating by the University of Texas with regard to legacy and politically-influential applicants is only indirectly relevant to the question of its good faith with regard to its conclusion about the need for race-based admissions criteria. Even more tangential is his catalog of the horrors of violent video games in his *Entertainment Merchants* concurrence—indeed, Justice Scalia expressed rhetorical mystification at the point of Justice Alito's attack, at least judged by the standards of conventional First Amendment doctrine.⁹² Finally, Justice Alito's recitation of Jaime Caetano's facts served only to illustrate graphically what the Court conceded to be the case—that her possession of the stun gun was protected by the Second Amendment. Indeed, the more dramatic parts of his factual presentation in *Caetano* did not even illustrate that doctrinal point.⁹³ They were clearly superfluous under any conventional understanding of the constitutional analysis.

Finally, it is surely the case that Justice Alito is not the only justice to highlight facts that are, strictly speaking, extraneous to the precise legal question at issue. Far from it. Former and current justices from across the ideological spectrum have written opinions that highlight troubling or outrageous facts, even when a more bloodless opinion would have sufficed. Justice Jackson's dissent in *Terminiello v. Chicago*,⁹⁴ an early First Amendment “heckler's veto” case, contained what even he conceded was a “long recital of [the troubling] facts.”⁹⁵ On the modern Court, Justice Kennedy's opinion in *Obergefell v. Hodges*⁹⁶ began with a long introduction to the plaintiff-same-sex couples and their reasons for seeking to marry.⁹⁷ His dissent in *Stenberg v. Carhart*⁹⁸ provided a graphic description of the abortion

the matter under oath”—is hard to understand except as an attempt to color the reader's perception of that person. *Ricci*, 557 U.S. at 598. See *supra* note 83 and accompanying text.

⁹² See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (suggesting that the only point of Justice Alito's critique of those games would be to demonstrate the odiousness of their underlying ideas—a motive that, if true, would demonstrate the unconstitutionality of the government's action).

⁹³ See *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (Alito, J., concurring in the judgment) (recounting the actual dialogue of the confrontation between Caetano and her ex-boyfriend).

⁹⁴ 337 U.S. 1 (1949).

⁹⁵ *Id.* at 13–14 (Jackson, J., dissenting).

⁹⁶ 135 S. Ct. 2584 (2015).

⁹⁷ See *id.* at 2594–95.

⁹⁸ 530 U.S. 914 (2000).

procedure the State of Nebraska had attempted to outlaw.⁹⁹ Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁰⁰ began and ended with a discussion of the facts of Lilly Ledbetter's own encounter with sex discrimination in the workplace.¹⁰¹ Slightly more removed, Justice Thomas's anguished quotation from a Frederick Douglass speech at the start of his dissenting opinion in *Grutter v. Bollinger*¹⁰² has, at least formally, little to do with the meaning of the Fourteenth Amendment, which was not ratified until three years later. These examples make clear that, as a general matter, the inclusion of ostensibly extraneous facts is not unique to Justice Alito.¹⁰³

B. Justice Alito's Rhetorical Style

Despite the differences between the Alito opinions discussed in Part II, and despite the similarities between those opinions and opinions written by other justices, something distinctive remains about Justice Alito's use of the facts in the examples provided above. In those opinions, he appeared to use the facts to convince the reader that his proposed resolution of the issue must necessarily be correct. In other words, the picture Justice Alito painted—for example, in *Snyder* of hateful picketers opportunistically latching on to a public grieving ceremony in order to gain publicity, and in *Entertainment Merchants* of video games that are novel in their depiction of gruesome and anti-social violence—was presented

⁹⁹ See *id.* at 957–60 (2000) (Kennedy, J., dissenting).

¹⁰⁰ 550 U.S. 618 (2007).

¹⁰¹ See *id.* at 643, 661 (Ginsburg, J., dissenting). Ironically, Justice Alito wrote the majority opinion in *Ledbetter*, which features a remarkably banal statement of the facts. 550 U.S. at 621–22 (“Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire & Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors’ evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA).”) (internal citation omitted).

¹⁰² 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part). Notably, Justice Scalia, who joined the rest of Justice Thomas's dissent in *Grutter*, did not join that introductory portion of the opinion. *Id.* at 349

¹⁰³ Indeed, as subpart III.B explains, Justice Sonia Sotomayor may use facts in a way somewhat analogous to Justice Alito.

as part of his answer to the relevant constitutional question.¹⁰⁴ The meaning of the relevant constitutional provision (in these two examples, the First Amendment Speech Clause) is thus found in Justice Alito's perception of what must be obvious common sense, as illustrated by the facts he presents.¹⁰⁵

Justice Alito's rhetoric is distinctive in another way—its drama. His words convey in dramatic—indeed, theatrical—terms the threat Jaime Caetano faced, the truly awful scenes and themes of violent video games, and the pettiness (in both meanings of the term) of the larceny of which the “self-professed kingmaker” in *Ricci* was accused. Similarly dramatic is his description of the cloak-and-dagger nefariousness of the University of Texas's shadow admissions system (complete with references to shredded documents) and, of course, the crude and deeply disrespectful signs brandished by the Westboro Baptist Church members in *Snyder*.

To be sure, Justice Alito does not reject the standard “formulaic”¹⁰⁶ approach to constitutional adjudication employed by his colleagues. Even in the opinions this Essay discusses, he couples the fact-emphasis identified above with

¹⁰⁴ One might make a similar argument about Justice Kennedy's argument in *Stenberg v. Carhart*, 530 U.S. 914, 957–60 (2000), that the gruesomeness of the procedure he described justified the state's prohibition of it in pursuit of its legitimate interest “in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus”). *Id.* at 961 (Kennedy, J., dissenting).

¹⁰⁵ On this point, a more general point bears noting. In the context of the doctrine governing the identification of unprotected speech (*i.e.*, the “*Chaplinsky* doctrine”), Justice Alito is alone on the current Court (not counting Justice Gorsuch) in having declined to join an opinion rejecting *ad hoc* balancing as the proper approach to identifying categories of unprotected speech. See *United States v. Stevens*, 559 U.S. 460, 470 (2010) (describing such an *ad hoc* approach as “startling”) (Roberts, C.J., joined by all the justices except Justice Alito); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (quoting *Stevens*, 559 U.S. at 470) (Scalia, J., joined by all the justices except Roberts, C.J., and Thomas and Alito, JJ.); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2011) (Kennedy, J., joined by Roberts, C.J., and Ginsburg and Sotomayor, JJ.).

One can make too much of this point, but it is surely significant to how Justice Alito understands how facts relate to law—that he rejects a purely historical approach to the unprotected categories question. Instead, he appears to endorse an approach that forthrightly examines the connection between the negative impact a type of speech has and its constitutionally-protected status. See *generally* Calvert, *supra* note 12 (making a similar argument). Such an approach makes it both appropriate and, indeed, necessary, to consider the facts of the case in which the Court must decide that status.

¹⁰⁶ See *generally* Nagel, *supra* note 22 at 165 (describing as “formulaic” a style of Supreme Court opinion writing that, in the author's view, had become “the most common method of constitutional exegesis” over the thirty years prior to the article's publication in 1985).

more conventional approaches to deciding the case at hand. As one might expect, this phenomenon is most obvious in the cases where his presentation of potentially tangential facts occupies a relatively smaller part of his opinion. For example, his analysis of the University of Texas's race-conscious admissions policy largely hews to the Court's doctrine requiring such policies to satisfy strict scrutiny; his discussion of the extraneous facts surrounding the university's legacy and politically-influential applicant process occupies a small part of a long opinion. But even in *Caetano*, which probably features the most dramatic exposition of facts, Justice Alito was careful to reinforce the *per curiam* opinion's doctrinal analysis that required the rejection of the state court's refusal to vindicate *Caetano*'s Second Amendment claim.

This practice of pairing the more "populist" approach this Essay has identified with more conventional legal analysis raises a fascinating question of Justice Alito's goals. Of course, it is impossible to know what he subjectively intended with any of these opinions, at least short of his own disclosure of his views.¹⁰⁷ Objectively, however, it is possible to identify a phenomenon illustrated by his practice of combining standard doctrinal analysis with more "populist" appeals.

Over thirty years ago Meir Dan-Cohen coined the term "acoustic separation" to refer to the distinction between the public's knowledge of the law at one level (what he called "conduct rules") and judges' knowledge of the law at a different level (what he called "decision rules").¹⁰⁸ While the conduct/decision rules distinction is not important for our purposes, Professor Dan-Cohen's idea of a distinction between

¹⁰⁷ This Essay does not purport to explain Justice Alito's rhetorical choices based on any particular aspect of his personality or upbringing. Such attempts to explain a justice's (or any other decision-maker's) substantive or rhetorical decisions inevitably encounter a welter of problems. See, e.g., Adam Hirsh, *Searching Inside Justice Holmes*, 82 VA. L. REV. 385, 395 (1996) (describing the methodology of psychohistory as "a deeply problematic exercise, fraught with numerous perils"); Peter Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 7 (2003) (stating that it is "fruitless" and "arguably inappropriate" to attempt to "psychoanalyze" justices). See generally DAVID E. STANNARD, *SHRINKING HISTORY: ON FREUD AND THE FAILURE OF PSYCHOHISTORY* (1980) (discussing the merits and problems of such an approach).

¹⁰⁸ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law*, 97 HARV. L. REV. 625, 630-34 (1984). For a quick explanation of the distinction, and of acoustic separation in general, see *Legal Theory Lexicon 013: Conduct Rules and Decision Rules*, LEGAL THEORY LEXICON (Sept. 24, 2017), http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le_3.html [<https://perma.cc/UFH6-4DGS>].

the public's and the judiciary's knowledge or understanding of the law provides an interesting parallel with Justice Alito's opinions in the cases this Essay has examined.¹⁰⁹ In particular, one might find in those opinions an "acoustic complementarity," in which Justice Alito's application of standard doctrinal tools appears alongside a more fact-intensive approach that speaks more immediately to lay readers of his opinions.¹¹⁰ On this theory, his engagement with his colleagues' (and the profession's) more formulaic approach to legal issues allows him to remain part of, and influence, the professional dialogue, while his simultaneous willingness to speak more directly to lay readers, by means of his fact presentations and his implicit connection of those presentations to the Constitution's meaning, allows him to communicate with a different audience.

Understanding Justice Alito's opinions as aspiring to engage in two different levels of dialogue with two different sets of interlocutors allows us to make two final points. First, if this speculation reflects at least the effect of, if not necessarily the intent behind, the Alito opinions examined above,¹¹¹ then the American public may be in for an interesting education about constitutional law, from a justice who perhaps wants Americans to understand that law at a more direct level, unmediated by doctrinal tests. Whatever one thinks of the underlying principles Justice Alito perceives as grounding the relevant legal issue,¹¹² it has been years—perhaps decades—

¹⁰⁹ For another example, see Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 46–53 (2010) (using Professor Dan-Cohen's terminology to explain a similar disconnect between the meaning professional and lay readers have taken from the modern Court's constitutional criminal procedure jurisprudence).

¹¹⁰ Indeed, it is quite possible that his employment of dramatic facts may be highlighted in the popular press's coverage of those opinions, thus reinforcing his communication with lay readers.

¹¹¹ See *supra* note 107 (disclaiming any intention to probe Justice Alito's subjective motivations).

¹¹² It should be noted that this Essay's focus on the folk or lay character of Justice Alito's focus on facts has elided questions about what those facts apparently mean to him with regard to the meaning of the relevant constitutional principle. The clearest example of this is *Entertainment Merchants*. In his majority opinion, Justice Scalia not only criticized Justice Alito for what he (Scalia) believed to be the lack of relevance of Alito's description of the video games' violence and anti-social themes, but further suggested that, if they were relevant at all, they actually undermined the law's constitutionality, by suggesting a "disgust" with certain ideas. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). It is just as easy to envision a justice embracing a libertarian, but similarly "populist," perspective on the First Amendment. This Essay's focus on the rhetoric of some of Justice Alito's writing does not engage

since the Court included a jurist who was sincerely interested in communicating his view of the law in such terms.¹¹³

Second, if Justice Alito's rhetoric does in fact engage the American public in civic education, that class may be co-taught. In two recent opinions, Justice Sonia Sotomayor has emerged as a distinctive voice that, in a way akin to Justice Alito's, speaks directly to the American public in addition to her colleagues.¹¹⁴ In *Utah v. Strieff*,¹¹⁵ she dissented from a holding that the after-determined existence of a valid arrest warrant justified an exception from the exclusionary rule when the evidence was obtained as a result of an unconstitutional seizure. In addition to engaging the majority's doctrinal analysis,¹¹⁶ she also discussed, when explicitly writing for herself only,¹¹⁷ the effect the majority's holding would have on minority men who would now be subject to the humiliations of searches initiated by police officers who were trained to stop and search them and then run a warrant check in the hope of finding an outstanding warrant that, after *Strieff*, would cure any exclusionary rule violation.¹¹⁸

Speaking in frank terms unencumbered by formal doctrine or even formal trial-type proof, Justice Sotomayor wrote that "it is no secret that people of color are disproportionate victims of this type of scrutiny."¹¹⁹ Reinforcing the sense of direct communication with the lay public, she observed that the ability of police officers to stop and search individuals seemingly at will—an ability reinforced by the Court's holding in *Strieff*—has historically caused minority parents to give their

the question of his substantive commitments.

¹¹³ See, e.g., Nagel, *supra* note 22 at 182 (concluding thirty years ago that the Court's standard formulaic approach "exclude[d] the general public from the Court's audience"); *id.* at 191–92 (providing several examples from earlier periods in the Court's history where justices spoke in a more accessible way).

¹¹⁴ For a slightly different perspective on Justice Sotomayor's distinctive voice, see David Fontana, *The People's Justice?*, 123 YALE L.J. F. 447 (2014) (focusing on Justice Sotomayor's distinctive practices regarding her extra-judicial appearances).

¹¹⁵ 136 S. Ct. 2056 (2016).

¹¹⁶ See *id.* at 2064–68.

¹¹⁷ *Id.* at 2069 ("Writing only for myself, and drawing on my professional experiences, I would add that unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name.") (emphasis added).

¹¹⁸ See *id.* at 2070 (Sotomayor, J., dissenting) (discussing the humiliations and disparate impact on minorities); *id.* at 2069 (Sotomayor, J., joined by Ginsburg, J., dissenting) (noting police training to act in this way). The latter cite is to a part of Justice Sotomayor's dissent joined by Justice Ginsburg; the former cite is to the part of her dissent where Justice Sotomayor spoke only for herself.

¹¹⁹ *Id.* at 2070.

children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”¹²⁰ Supporting these observations of social reality—observations that, in her view, justified a different result on the underlying Fourth Amendment issue—she concluded that portion of her discussion by citing writers who discussed racial justice in the United States from social and personal perspectives, rather than as matters of formal legal doctrine.¹²¹

Equally noteworthy was Justice Sotomayor’s dissent in *Schuette v. Coalition to Defend Affirmative Action*.¹²² In *Schuette*, the Court upheld a voter referendum that amended the Michigan Constitution in ways that, among other things, prohibited state colleges and universities from adopting race-conscious admissions policies.¹²³ A majority of the Court rejected the plaintiffs’ argument that that amendment unconstitutionally restructured the state’s political process to the detriment of minority interests.¹²⁴ A three-justice plurality distinguished a line of cases beginning with *Hunter v. Erickson*,¹²⁵ which held such restructurings unconstitutional to the extent they harmed minority interests.¹²⁶ Justice Scalia, joined by Justice Thomas, critiqued the *Hunter* line more profoundly, calling for its overruling.¹²⁷

Justice Sotomayor, writing for herself and Justice Ginsburg, dissented.¹²⁸ As in *Strieff*,¹²⁹ the bulk of her analysis

¹²⁰ *Id.*

¹²¹ *See id.* at 2070–71.

¹²² 134 S. Ct. 1623 (2014).

¹²³ *See id.* at 1629 (quoting the amendment in full).

¹²⁴ The plaintiffs’ argument, rejected by the Court, was that the amendment made it more difficult for minorities to enact their desired policies, by placing race-based admissions criteria beyond the reach of the normal political process while leaving other admissions preferences subject to that process. *See id.* at 1626, 1636 (stating that the “question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued” and holding that “courts may not disempower the voters from choosing which path to follow”).

¹²⁵ 393 U.S. 385 (1969).

¹²⁶ *See Schuette*, 134 S. Ct. at 1629 (Kennedy, J., joined by Roberts, C.J. and Alito, J.).

¹²⁷ *See id.* at 1639 (Scalia, J., concurring in the judgment). Justice Breyer concurred on a much narrower ground that allowed him to avoid confronting the *Hunter* line entirely. *See id.* at 1650 (Breyer, J., concurring in the judgment) (“In my view, however, neither *Hunter* nor [a successor case] applies here.”).

¹²⁸ *Id.* at 1651 (Sotomayor, J., dissenting).

¹²⁹ *See Utah v. Strieff*, 136 S. Ct. 2056, 2064–68 (2016).

focused on doctrine—in particular, the applicability of *Hunter* and its progeny, which the plurality had distinguished.¹³⁰ But her argument went beyond doctrine. When engaging both the plurality’s and Justice Scalia’s critiques of the *Hunter* line, she also spoke personally, in a way that addressed a central question of the Court’s race equality jurisprudence: whether the Constitution allowed government—here, the federal courts applying *Hunter*—to take account of race.

She did so in response to the other opinions’ conclusions that *Hunter* and its progeny “raise serious constitutional concerns”¹³¹ because of their race-consciousness. Confronting in stark, non-doctrinal language the question whether race “matters,”¹³² she insisted that it did—that is, she insisted that the persistence of discrimination required that the task of its eradication authorized government (here, courts) to be race-conscious. Speaking in terms the public could easily understand, she argued that race “matters” because of the long history and current persistence of discrimination and because of the “stark socioeconomic disparities” caused by “persistent racial inequality in society.”¹³³

But, according to Justice Sotomayor, race “matters” for another reason. In a remarkably personal paragraph, she attempted to convey the isolation felt by many members of racial minorities in America today:

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man’s view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman’s sense of self when she states her hometown, and then is pressed, “No, where are you *really* from?”, regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of

¹³⁰ See *Schuetz*, 134 S. Ct. at 1659-63 (Sotomayor, J., dissenting) (applying *Hunter*); *id.* at 1663-671667 (Sotomayor, J., dissenting) (critiquing the plurality’s and Justice Breyer’s attempts to distinguish *Hunter*).

¹³¹ *Schuetz*, 134 S. Ct. at 1634 (plurality opinion); see also *id.* at 1675 (Sotomayor, J., dissenting).

¹³² *Id.* at 1676.

¹³³ *Id.*

thoughts: “I do not belong here.”¹³⁴

Regardless of one’s views about the merits of her analysis,¹³⁵ in these portions of her *Schuette* dissent Justice Sotomayor sought to convey a meaning of the Fourteenth Amendment (one that allowed judicial race-consciousness) through starkly human terms. That analysis would not be recognizable in a purely elite, doctrinal analysis. But it speaks to lay readers in a way that such a doctrinal analysis never could, to the same effect as the fact presentations in the opinions written by Justice Alito that this Essay has examined.

IV

SAMUEL ALITO: POPULIST

Webster’s Dictionary defines “populist” as “a believer in the rights, wisdom, or virtues of the common people” and as “a member of a political party claiming to represent the common people.”¹³⁶ This Essay has examined Justice Alito’s “populism” not in the partisan sense of the term, but in the sense of the first definition quoted above. So understood, Justice Alito’s populism, as expressed in the opinions this Essay has examined, stands in contradistinction to elitism—in particular, as expressed in law as neutral, formal legal rules divorced from factual contexts.

Justice Alito’s heavy reliance on the troubling facts of particular cases, as if those facts constitute a sort of *res ipsa loquitur* answer to the legal question at hand, implies the folk wisdom of what the dictionary definition of “populism” calls “the common people.”¹³⁷ So does his emotional presentation of those facts, which similarly suggests, for example, that the horrific portrayals of racist violence in violent video games by themselves render that speech properly subject to government regulation, or that the tense, dangerous confrontation Jaime Caetano experienced with her ex-boyfriend necessarily proved that the stun gun she carried was protected by the Second Amendment.

Justice Alito’s approach and tone sound a distinctive note in Supreme Court opinions. Scholars have criticized the

¹³⁴ *Id.*

¹³⁵ See, e.g., *Schuette*, 134 S. Ct. at 1639 (Roberts, C.J., concurring) (addressing Justice Sotomayor’s more personal critique directly).

¹³⁶ *Populist*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/populist> [<https://perma.cc/227Q-QGE3>].

¹³⁷ *Id.*

Court's opinions for being too long,¹³⁸ too technical and jargon-filled,¹³⁹ and, relatedly, too dependent on doctrinal tests that, in the view of one scholar, "exclud[es] the general public from the Court's audience."¹⁴⁰ This Essay does not speak to the length of Justice Alito's opinions. But it does reveal that some of his opinions cut through jargon and doctrinal tests that are conventionally thought to decide cases, to reach conclusions he presents as self-evident given the facts of the case. As such, they suggest a Constitution whose meaning is even more foundational than that implied by its text.¹⁴¹ Instead, those opinions suggest that the words reflect a type of common folk wisdom in which the text signifies and represents more fundamental (if not necessarily unchanging¹⁴²) truths.

One may find this approach troubling or welcome. On the one hand, its heavy reliance on the moral equities of the case raises serious questions about whether such an approach can truly reflect the promise of a Constitution that guarantees rights in order to protect them from majoritarian oppression. As Justice Scalia stated in *Entertainment Merchants*, responding to Justice Alito's claim that the majority understated the "problem"¹⁴³ caused by video games, "[t]here are all sorts of 'problems'—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism, the problem of spreading a political philosophy hostile to the Constitution, or the problem of encouraging disrespect for the Nation's flag."¹⁴⁴ One could just as easily add "the problem of disrespectful funeral

¹³⁸ See, e.g., Erwin Chemerinsky, *A Failure to Communicate*, 2012 BYU L. REV. 1705, 1713 (2012) (noting that "there are ways in which Court opinions fail to adequately communicate. First, they have become much too long and thus far more difficult for lower courts and government officials to read and rely upon.").

¹³⁹ *Id.* at 1707.

¹⁴⁰ Nagel, *supra* note 22 at 182.

¹⁴¹ *Cf. id.* (arguing that all forms of doctrine "have the natural effect of substituting themselves for primary constitutional meaning").

¹⁴² *Cf.* James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 157-158 (1987) (arguing that Karl Llewellyn's work on the Uniform Commercial Code was inspired by nineteenth century German ideas about the customary, but evolutionary, nature of the Law Merchant).

¹⁴³ *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 821(2011).

¹⁴⁴ *Id.* at 801 n.8 (citing *Nat'l Socialist Party of Am.v. Skokie*, 432 U.S. 43 (1977) (per curiam) (upholding the rights of Nazis to march through a predominantly Jewish neighborhood); *Noto v. United States*, 367 U.S. 290 (1961) (reversing a conviction for Communist speech); and *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a flag burning law)).

picketers” to Justice Scalia’s own implicit addition of “the problem of violent video games” to the type of socially-disfavored speech that is nevertheless constitutionally protected.

More generally, and as reflected by the speech example from the prior paragraph, Justice Alito’s approach may be incompatible with a vision of the Constitution that can speak to all Americans. In a polarized age, can an approach that relies on the dramatic, troubling facts of the particular case before the Court truly be trusted to generate such a broadly-accepted vision? Finally, and again relatedly, one should recognize the internal limitations of Justice Alito’s method. It is not unreasonable to suggest that, if he considers this approach adequate to decide or help him decide a given case, then he should utilize it anytime the facts are similarly egregious. The problem, of course, is that egregiousness is in the eye of the beholder. Recall, for example, that it was Justice Alito, writing for the Court, who provided an utterly bloodless recounting of Lily Ledbetter’s story in *Ledbetter v. Goodyear Tire & Rubber*,¹⁴⁵ leaving it to Justice Ginsburg’s dissent to provide the flesh-and-blood details that ultimately made Lily Ledbetter a political celebrity and helped ensure enactment of a statute overturning the Court’s decision.¹⁴⁶

Nevertheless, there is much to admire in Justice Alito’s willingness (sometimes) to cut through the tangle of formal legal doctrine to present cases in their starkest, factually-richest light. In telling the story of Jaime Caetano’s confrontation, including what he described as her unwillingness to carry a deadly weapon with which to threaten the father of her children, Justice Alito brought into stark relief the self-defense *bona fides* of stun guns, and thus their protection by the Second Amendment, in a way that is far more compelling than the *per curiam* opinion’s arid march through *Heller*’s steps. More tangentially, on one view at least, nothing would damage the credibility of the University of Texas’s request to be trusted with the problematic power to classify based on race as much as the evidence of its lack of trustworthiness on other, unrelated, university admissions

¹⁴⁵ See *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618, 621(2007).

¹⁴⁶ Ledbetter spoke at the 2008 Democratic National Convention, see *Lilly Ledbetter*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lilly_Ledbetter [<https://perma.cc/BK67-H22P>], and the law that overturned the result in *Ledbetter* was named Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5.

issues.

Such direct application of constitutional principles, unmediated by abstract doctrinal steps, tells a story of the Constitution that is far more accessible to lay readers—the general American public. While the comparison may be startling, Justice Alito’s more direct approach can be compared to that of Chief Justice Warren in *Brown v. Board of Education*,¹⁴⁷ when he stated the obvious truth that “[t]o separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁴⁸

To be sure, Justice Alito’s (sometimes) insistence on deciding cases based on their moral valence, just like Justice Sotomayor’s insistence that Americans recognize the reality of race in America when considering questions of police conduct and political structure, carries risk to the extent those justices ground their decisions in particular perspectives that lack a foundation in the constitutional text.¹⁴⁹ But in terms of its communicative power to the American people, this approach has much to commend it, at least as a supplement—what this Essay has called a “complement”¹⁵⁰—to standard doctrinal analysis. One might hope that such an approach could (re-)engage the American people in the project of thinking about constitutional meaning. The risks of such populist engagement are real, particularly in a hyper-partisan age contaminated with xenophobia and resurgent public racism. If the American people do re-engage, we may not like what they insist on. But the risk of further alienation between the Court, the Constitution itself, and the people is perhaps even greater, especially if the Court and the Constitution are expected to play significant roles in reining in political actors actuated by

¹⁴⁷ 347 U.S. 483 (1954).

¹⁴⁸ *Id.* at 494. Indeed, *Brown* soon attracted prominent critics who argued, analogously to Justice Scalia’s critique of Justice Alito’s outrage in *Entertainment Merchants*, that it was inconsistent with an approach to adjudication that was grounded in neutral principles. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959). Again parallel to this Essay’s analysis, *Brown* was also praised by scholars who saw in it an undeniable moral correctness given the actual facts of segregation that established its oppressiveness and structure of racial hierarchy. See Charles L. Black, Jr., *The Lawfulness of the Desegregation Decisions*, 69 YALE L.J. 421 (1960).

¹⁴⁹ This may be a less serious problem with Justice Sotomayor’s approach, to the extent that her perspective, both in *Strieff* and *Schuetz*, ultimately rests on the equality of all citizens, a goal clearly findable in the Fourteenth Amendment.

¹⁵⁰ See *supra* text accompanying note 100.

that same hyper-partisanship and xenophobia.¹⁵¹

Ultimately, regardless of whether one likes the consequences, we may well be in store for such re-engagement. Given the populist tenor of the times, such populist critiques of elite lawmaking may find a more ready audience than in years past. In this sense, Justice Alito may well be the justice most closely in sync with the national mood.

¹⁵¹ See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (refusing to dissolve the lower court's temporary restraining order against the President's travel ban on non-citizens from seven majority-Muslim nations), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017).