5-1-2014

Justice Samuel Alito: biography and analysis of judicial decisions

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"If I'm confirmed, I'll be myself," stated then Supreme Court nominee Samuel Alito at his confirmation hearings on January 11, 2006.[1] The conservative justice would stay true to his word while serving as the 110th Supreme Court Justice since January 31, 2006.

This paper will detail the life of Samuel Alito, the New Jersey born lawyer whose dream was to someday become a Supreme Court Justice. Further, this paper will provide a description of Justice Alito's jurisprudential approach, as well as an analysis of ten of his opinions covering a variety of topics. Finally, I will discuss my view on how Justice Alito's background and jurisprudential approach have influenced those opinions since joining the Court.

Biography of Justice Samuel Anthony Alito, Jr.

Justice Alito was born in Trenton, New Jersey on April 1, 1950 to Samuel and Rose Alito, both of whom were schoolteachers. Justice Alito was raised in Hamilton Township, New Jersey, near Trenton, where he attended Steiner High School. After high school, Justice Alito went on to obtain an undergraduate degree from Princeton University.[2] During his time at Princeton, Justice Alito became involved with the American Whig-Cliosophic Society, leading a Debate Panel on various issues such as the decriminalization of sodomy and the ending of discrimination in hiring practices. [3] Justice

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[1] http://www.freerepublic.com/focus/f-news/1556319/posts.

[2] Alito Called 'Perfect' Student, The Washington Times (December 13, 2005) http://www.washingtontimes.com/news/2005/dec/13/20051213-123632-5671r/. This article discusses Justice Alito's upbringing and early school years.

[3] http://whigclio.princeton.edu/history/. History of the American Whig Cliosophic Society. The American Whig-Cliosophic Society is the oldest college literary and debating club in the United States. Originally two separate groups, Whig and Clio (as they have been known commonly for most of their history) grew out of two earlier student societies, the Plain Dealing Club (Whig) and the Well Meaning Club (Clio),

Alito was also a member of the Concerned Alumni of Princeton (CAP), a conservative group formed in 1972. It is said that the primary purpose of CAP was to oppose Princeton's decisions regarding affirmative action, as well as limit the number of women who attended Princeton. Justice Alito's association with CAP would come back to haunt him while awaiting confirmation on his nomination to the Supreme Court.[4] Justice Alito graduated from Princeton University's Woodrow Wilson School of Public and International Affairs with a Bachelor of Arts in 1972. In his yearbook, Justice Alito left a message stating that he had hoped to one day be a member of the Supreme Court.[5]

Also during his time at Princeton, Justice Alito received a low lottery number in the Selective Service draft. To avoid being drafted immediately, Justice Alito joined Princeton's Reserve Officers' Training Corps instead.[6] Justice Alito would go on to be commissioned as a Second Lieutenant in the U.S. Army Signal Corps after graduating from Princeton and was assigned to the United States Army Reserve. After graduating

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founded about 1765 to promote literary and debating activities. Similar groups had appeared in other American colleges during the eighteenth century; most of them had been short-lived. Such was the fate of the Plain Dealing and Well Meaning Clubs; conflicts between the two groups led to their suppression in March 1769.

[4] Joe Conason, Alito's Ugly Association, Salon (January 13, 2006, 2:00 PM), http://www.salon.com/2006/01/13/alito_controversy/.
This article described Justice Alito's association with Concerned Alumni of Princeton. Having been categorized as a racist group, many criticized Alito's involvement with CAP. Justice Alito included his membership in the organization on a job application he filled out in 1985 to work for the Reagan Administration. However, no other CAP files were found tying Alito to CAP.

[5] Alito has a record of steady conservatism, reputation for civility, *Chicago Tribune* (October 31, 2005), http://www.mercurynews.com/mld/mercurynews/news/politics/13046683.htm.

[6] Alito Joined ROTC While at Princeton, The Washington Post (November 3, 2005), http://www.washingtonpost.com/wpdyn/content/article/2005/11/02/AR2005110202722.html.

from Yale Law, Justice Alito served on activity duty until in 1975, then on inactive duty until he was honorably discharged in 1980.

After graduating from Princeton in 1972, Justice Alito was admitted into Yale Law School where he graduated in 1975. At Yale, Justice Alito was the editor of the Yale law Journal.[7] Following law school, Justice Alito would go on to clerk for Third Circuit Court of Appeals Judge Leonard I. Garth in 1976 and 1977 in Newark, New Jersey. From 1977 to 1981, Alito was the Assistant United States District Attorney in New Jersey. Following that position, Justice Alito became the Assistant to Solicitor General Rex E. Lee from 1981 to 1985, arguing a dozen cases before the Supreme Court of the United States. Following his position as the Assistant Solicitor General, Justice Alito became the Deputy Assistant to Attorney General Edwin Meese from 1985-1987. Thereafter, Justice Alito would become the United States Attorney for the District of New Jersey from 1987 until he was nominated to become a Court of Appeals Judge by President H.W. Bush in 1990.[8]

Having been rated as "well qualified" by the American Bar Association, Justice Alito was unanimously confirmed by the Senate on April 27, 1990 to serve as a judge in the United States Third Circuit Court of Appeals.[9] As a Third Circuit judge, Justice Alito

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[7] Samuel A. Alito's Note, The Yale Law Journal (August 31, 2005), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/samuel-a.-alito's-note/.

[8] http://supreme.lp.findlaw.com/supreme_court/justices/alito.html

[9] Joel Roberts, Alito Sworn in as High Court Justice (January 31, 2006, 8:56 AM), http://www.cbsnews.com/stories/2006/01/31/politics/main1260362.shtml.

wrote noteworthy opinions dealing with First [10], Fourth[11] [12], and Eighth Amendment issues, as well as civil rights issues.[13]

During his time serving on the Third Circuit, Justice Alito was also able to spend time as an adjunct professor at Seton Hall Law from 1999 to 2004. While at Seton Hall Law, Justice Alito taught courses in Constitutional Law and a course on terrorism and civil liberties. After Justice Alito left his position as a Third Circuit Court of Appeals judge and adjunct professor for a seat on the United States Supreme Court, Justice Alito came back to Seton Hall Law in 2007 to deliver a commencement speech for the graduating class.

Of the nine Supreme Court Justices, Justice Alito is still considered to be relatively new to the bench. Only Sonia Sotomayor (2009) and Elena Kagan (2010) have shorter current tenures as Justices. On October 31, 2005, Justice Alito was nominated by

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[10] *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), Justice Alito wrote the majority opinion holding that a public school district's anti-harassment policy was unconstitutionally overbroad and therefore violated First Amendment guarantees of free speech. Alito's opinion stated, "No court or legislature has ever suggested that unwelcome speech directed at another's 'values' may be prohibited under the rubric of anti-discrimination."

[11] *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), majority held that a strip search of a mother and daughter located in a home to be searched according to a properly executed search warrant, but were not criminal suspects named in the warrant, was unconstitutional. Alito, dissenting, argued that qualified immunity should have protected police officers from a finding of having violated constitutional rights when they strip-searched the mother and her daughter.

[12] Strip-Search Case a Likely Topic at Alito Hearing, Fox News (November 28, 2005), http://www.foxnews.com/story/2005/11/28/strip-search-case-likely-topic-at-alito-hearing/.
Justice Alito's opinion drew much criticism from Democrats opposing his nomination to the Supreme Court for being an "extremist."

[13] *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003), Justice Alito wrote the majority opinion granting a writ of habeas corpus to a black state prisoner after state courts had refused to consider the testimony of a witness who stated that a juror had uttered derogatory remarks about blacks during an encounter in the courthouse after the conclusion of the trial.

President George W. Bush to take over for retiring justice, Sandra Day O'Connor.[14] However, Justice Alito was not President Bush's first or even second choice to be O'Connor's replacement. Originally, current Chief Justice John Roberts was nominated to fill the vacancy to be left by O'Connor. Due to the sudden death of then Chief Justice William Rehnquist, President Bush withdrew Roberts' nomination to fill O'Connor's seat and nominated Roberts to fill Chief Justice Rehnquist's seat. President Bush then nominated Harriet Miers to replace O'Connor. Miers would withdraw her nomination after receiving widespread criticism from conservatives. After Miers withdrew her nomination, Justice Alito was finally nominated. Justice Alito's nomination was met with opposition from many Democratic Senators, who characterized Alito as being a "hard-right conservative."[15] During his confirmation hearing, Justice Alito was asked about his past association with the Conservative Alumni of Princeton, as well as his stance on abortion.[16] The American Civil Liberties Union also formally opposed Justice Alito's nomination. Nonetheless, the Senate confirmed Justice Alito on January 31, 2006 by a vote of 58-42.[17] Justice Alito became the 110th Justice to serve on the Court, as well as the 11th Catholic and only the second Italian-American to serve.

Justice Alito's jurisprudential approach

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[14] Bush Picks Appeals Court Judge to Succeed O'Connor on Court, The New York Times (October 31, 2005), http://www.nytimes.com/2005/10/31/politics/politicsspecial1/31cnd-court.html?ex=1136955600&en=7f7e8f24c9ed7674&ei=5070&_r=1&.
This article describes the course of events that took place leading to Justice Alito being nominated to the Supreme Court.

[15] There Will Be No One to the Right of Sam Alito, (October 31, 2005, 8:17 AM), http://thinkprogress.org/politics/2005/10/31/2381/alito-turley/.

[16] Jane Roh, Dems Slam Alito's Alumni Group, Fox News (January 12, 2006), http://www.foxnews.com/story/2006/01/12/dems-slam-alito-alumni-group/.

[17] David Welna, Alito Confirmed as Newest Supreme Court Justice, National Public Radio (January 31, 2006, 6:22 PM), http://www.npr.org/templates/story/story.php?storyId=5181091.

Justice Alito is well known for his conservative stance on issues. He is one of the most conservative Justices on the court alongside Justices Scalia, Thomas, and Roberts. According to a U.S. News article, as of 2008, Justice Alito had voted conservative on Supreme Court issues 74% of the time. [18] He is sometimes referred to by the nickname "Scalito" in reference to similarities to Justice Scalia's conservative views and Italian roots.[19] However, Alito has also been described as having "a substantial libertarian dimension to his jurisprudence as well as a conservative one."[20] In his first term serving as Supreme Court Justice, three cases had to be reargued since Justice Alito was to be the deciding vote. In each of those three cases, Justice Alito voted with the four other conservative Justices in order to break the tie. The three cases were *Garcetti v. Ceballos*[21], *Hudson v. Michigan*[22], and *Kansas v. Marsh.* [23]

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[18] Justin Ewers, Ranking the Politics of Supreme Court Justices, US News (May 12, 2008), http://www.usnews.com/news/national/articles/2008/05/12/ranking-the-politics-of-supreme-court-justices.
This article describes voting tendencies of the Supreme Court Justices.
[19] Vaughn Ververs, You Say Scalito, I Say Alito, CBS News (November 1, 2005, 11:35 AM) http://www.cbsnews.com/8301-500486_162-999542-500486.html
[20]Ilya Somin, Alito's Libertarian Streak, CATO Institute (November 10, 2005), http://www.cato.org/publications/commentary/alitos-libertarian-streak
[21] *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court held that a violation of the "knock-and-announce" rule by police does not require the suppression of the evidence found during a search.
[22] *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that statements made by public employees pursuant to their official duties are not protected by the First Amendment from employer discipline.
[23] *Kansas v. Marsh*, 548 U.S. 163 (2006), the Court held that the Eighth Amendment did not prohibit states from imposing the death penalty when mitigating and aggressive sentencing factors were in equipoise.

In a 2012, the New York Court Watcher published an article articulating each Justices voting patterns on various topics.[24] When it comes to highly partisan-charged cases, Justice Alito votes like a conservative Republican politician 92% of the time. When it comes to more ideological voting patterns, Justice Alito votes conservative 88% of the time. Finally, when it comes to levels of judicial activism, Justice Alito votes for activism (to invalidate a law) nearly 63% of the time instead of voting for restraint and deferring to lawmakers.

Analysis of Justice Alito's opinions

This paper will further analyze ten opinions written by Justice Alito, including 3 majority opinions, three concurring opinions, and four dissenting opinions.

Analysis of Majority Opinions

The first majority opinion written by Justice Alito is *Davis v. Federal Electronics Commission.*[25] In *Davis*, the Court held that §319(a)[26] and (b)[27] of the Bipartisan

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[24] Part 7: Focus on Justice Alito, New York Court Watcher (May 25, 2012), http://www.newyorkcourtwatcher.com/2012/05/part-7-focus-on-justice-alito-supreme.html.
This article breaks down Justice Alito's voting records.

[25] 554 U.S. 724 (2008)

[26] §319(a) is also known as the "Millionaire's Amendment," which provides that when a candidates expenditure of personal funds exceeds $350,000 (known as the Opposition Personal Funds Amount), a new regulatory scheme comes into play. The non-self-financing candidate will now be able to receive individual contributions at treble the normal limit of $2,300, and may accept coordinated party expenditures without limit.

[27] §319(b) requires candidates to make three types of disclosures in order to calculate the OPFA: a declaration of intent revealing the amount of personal funds the candidate intends to spend in excess of $350,000, an "initial notification" within 24 hours of exceeding $350,000 mark, and an additional notification within 24 hours of making or becoming obligated to make each additional expenditure of $10,000 or more using personal funds. Notifications must provide the amount of each expenditure and must be filed with the Federal Election Commission. Candidate will be subject to civil and criminal penalties for failure to comply.

Campaign Reform Act[28] are unconstitutional because they are a violation of the First Amendment right to spend one's own money to advocate for one's own election. First, Justice Alito's opinion looked to determine whether or not Davis had standing to invoke federal jurisdiction. "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior' and likely to be redressed by a favorable ruling." The majority stated that Davis did have standing to challenge §319(b). Since Davis was forced to file a §319 (b) disclosure statement, a finding that §319(b) is unconstitutional would have spared him from making those disclosures and from being threatened with an enforcement action by the FEC. However, the majority further noted that just because Davis has standing to challenge §319 (b), it does not necessarily follow that he has standing to challenge §319(a). The FEC argued that Davis lacked standing to attack the constitutionality of §319(a) because he suffered no injury, since his opponent had not qualified for asymmetrical limits. The majority rejected FEC's argument, holding that the injury required for standing need not be actualized. A party has standing to sue where the threatened injury is real, immediate, and direct. The majority held that since Davis had declared his intent to spend at least $350,000 of his own money, he was faced with the threat of injury when his opponent was then allowed to receive contributions on more favorable terms. Further, the majority held that even though the election was over, the issues were not moot because the disputes were capable of being repeated.

After determining that Davis did have standing, Justice Alito then turned to the merits of Davis' claim that the First Amendment was violated by the contribution limits

[28] The BCRA is a United States federal law that amended the Federal Election Campaign Act of 1971, which regulates the financing of political campaigns.

imposed by §319(a). Justice Alito noted that for the campaign finance limitations to be constitutional, they must apply equally to all candidates and must be justified by important governmental interests. First, Justice Alito stated that §319 (a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limits. As a result, a candidate using personal funds to finance his campaign produces fundraising advantages for his opponent, thus imposing a substantial burden on the self-financing candidate. As §319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, Justice Alito stated that the provision couldn't stand unless it is justified by a compelling state interest. The FEC argued that the compelling state interest furthered by §319(a) is the elimination of corruption or the perception of corruption. The majority rejected the FEC's anti-corruption argument, stating that since the statute gave liberalized limits for non-self-financing candidates, it doesn't make sense that the denial of liberalized limits to self-financing candidates can be regarded as serving anti-corruption goals sufficiently to justify the resulting constitutional burden.

The FEC also argued that the §319(a)'s asymmetrical limits are justified because they essentially level the playing field between wealthy individuals and candidates who are not as wealthy. The majority stated in response to this argument that "the concept that government restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.*, at 12.

Finally, the majority discussed the remaining issue as to the constitutionality of §319(b)'s disclosure requirements. The majority stated that there must be a relevant correlation or substantial relation between the governmental interest and the information

required to be disclosed in order for the disclosure requirements to pass constitutional muster. The strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. The majority found that since §319(b)'s disclosure requirements were designed to implement asymmetrical contribution limits provided for in §319(a), now determined to be unconstitutional, the requirements of §319(b) cannot be justified and it follows that they too are unconstitutional. The majority held that the judgment of the District Court be reversed, and the case remanded for further proceedings.

The second majority opinion written by Justice Alito is *National Aeronautics and Space Administration (NASA), et al. v. Nelson, et al.*[29] In NASA, the majority held that NASA's background checks of contract employees do not violate any constitutional privacy right.[30] The basic facts are as follows: the Jet Propulsion Laboratory (JPL), a NASA facility that is operated by the California Institute of Technology (Caltech), was subject to the requirement of background checks since JPL were staffed by contract employees. The respondents here, employees of JPL argued that the background checks violated a constitutional right to informational privacy and sued NASA, Caltech, and the Department of Commerce. The circuit court held that portions of the background-check forms were likely unconstitutional, particularly the parts requiring disclosure of drug treatment or counseling, as well as questions concerning an employees financial integrity and mental stability because they were not narrowly tailored to meet the Government's interests.

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[29] 131 S.Ct. 746 (2011).

[30] In 2004, President George W. Bush issued a directive requiring federal contract employees, with long-term access to federal facilities, to undergo background investigations.

In an 8-0 decision, the Supreme Court did not definitively state whether a constitutional privacy right exists.[31] However, as they have done in two previous cases, the Supreme Court hinted that such a right might exist, and assuming it does, ruled that the background checks do not violate such a right.[32] First, the Court noted that the questions challenged by the respondents are part of a standard employment background check of the sort used by millions of private employers. The only reason this situation arose was because of the requirement that federal contract employees, with long-term access to federal facilities, were now required to submit to background checks, when they never were before. The Court noted that the Government has always had an interest in conducting basic employment background checks. The fact that Cal Tech was the direct employer makes no difference about the government's interest in this case, as JPL was operating under a Government contract.

After establishing that the Government has an interest in administering background checks, the Court explained that the portions of the forms in question consisted of reasonable, employment-related inquiries that further the Government's interests in managing its internal operations. Justice Alito stated that the question asking employees about recent drug use is not irrelevant as the "Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties."[33] Justice Alito further stated that the follow-up questions regarding treatment and counseling is also reasonable as the Government uses those questions to separate out the drug users who have taken steps to address and overcome

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[31] Justice Kagan did not take part in the consideration or the decision of this case.
[32] Court took this approach in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. General Services Administration*, 433 U.S 425 (1977).
[33] *NASA* at 10

their problems. Treatment, Alito states, is a mitigating factor that the Government uses to determining whether to grant contract employees long-term access to federal facilities. Also as to the issue of Governmental interest, the Court's opinion notes that the Government does not have the burden of demonstrating that the questions asked are "necessary" or the "least restrictive means" used to obtain the information. When the Government acts as a manager of its internal affairs, it only needs to show a "reasonable interest" in obtaining the information.

As to the issue of whether the broad, open-ended questions violated respondents' informational-privacy rights, Justice Alito writes that the questions in this case are reasonably aimed to identify and separate strong candidates from the weaker candidates. The reasonableness of the open-ended questions is illustrated by their "pervasiveness in the public and private sector as the use of open-ended questions in employment background checks appears to be equally commonplace in both the private and public sector."[34] Furthermore, any information obtained by the Government is protected from disclosure to the public under the Privacy Act.[35] Although Justices Alito, Scalia, and Thomas tend to be in agreement on most issues, Justices Scalia and Thomas wrote their own, separate concurring opinions. Both Justices stated that the issue of a constitutional right to informational privacy should have been decided, and both believed it should have been decided in the negative.

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[34] *NASA* at 11.

[35] The Privacy Act of 1974, 5 U.S.C. § 552a, requires written consent before the Government may disclose records pertaining to any individual §552a(b). The Act also imposes criminal liability for willful violations of its nondisclosure obligations.§552a(i)(1).

The third and final majority opinion written by Justice Alito is *Fitzgerald v. Barnstable School Committee, et al.*[36] The Supreme Court held in *Fitzgerald* that parents could sue a school committee under the Equal Protection Clause of the 14th Amendment. In doing so, the Supreme Court stated that Title IX[37] does not preclude a 42 U.S.C. §1983 action alleging unconstitutional gender discrimination in schools. [38]

A quick summary of the facts is as follows: Jacqueline Fitzgerald was a kindergartener in the Barnstable School District. On separate occasions, a third-grade boy bullied Jacqueline. The first time, Jacqueline was bullied on the school bus. The second time, she was bullied in the classroom. The boy would bully Jacqueline into lifting up her skirt, pull down her underpants, and spread her legs. After the initial incident, the school set up a meeting between the parents, the school principal, and another school official. The alleged bully, the bus driver, and several students were also questioned, but the school could not corroborate Jacqueline's story. After the second incident occurred, another meeting was set up with Jacqueline's parents, but the school determined there was insufficient evidence to warrant discipline. The local police department also conducted their own investigation, but also found that there was insufficient evidence to bring criminal charges. The school principal did suggest remedial measures to the

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[36] 555 U.S. 246 (2009).

[37] Title IX is a portion of the Equal Opportunity in Education Act, which states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. §1681(a).

[38] 42 U.S.C. §1983 states, in relevant part "Every person who… subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Fitzgeralds, which were rejected because the Fitzgeralds felt that the proposals were punishing their daughter (having her transfer busses). The Fitzgeralds requested that the school transfer the boy instead or place a monitor on the bus, but the school never acted on their requests. The Fitzgeralds began to drive their daughter to school instead, but the boy continued to bully Jacqueline at school, all of which were reported to the school. Finally, the Fitzgeralds filed suit, alleging that the school system's response to their allegations of sexual harassment had been inadequate. They claimed a violation of Title IX against the Barnstable School Committee and a claim under 42 U.S.C. §1983 for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment.

The school committee filed a motion for summary judgment on the Title IX claim, which was granted by the District Court. The First Circuit Court of Appeals affirmed the District Court's decision and held that Title IX precluded § 1983 claims based on equal protection. The Court of Appeals characterized Title IX's implied private remedy as "sufficiently comprehensive to preclude use of §1983 to advance statutory claims based on Title IX itself." *Id.* at 5. The Court of Appeals believes that according to Congress, Title IX was the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions. The United States Supreme Court reversed and remanded.

Justice Alito's opinion states that when determining whether a subsequent statute precludes the enforcement of a federal right under §1983, the Court places primary emphasis on the nature and extent of that statute's remedial scheme, as well as Congress' legislative intent. Justice Alito states that Title IX has no administration exhaustion requirement and no notice provisions like other statutes have. Justice Alito also

recognized an implied right of action on behalf of the plaintiffs, which allows them to file directly in court and be eligible to obtain the full range of remedies. As a result, parallel and concurrent §1983 claims will neither circumvent required procedures nor allow access to new remedies. Justice Alito goes on to also note that Title IX does not express a private means of redress, which leads the Court to believe that Congress did not intend to preclude reliance on §1983 as a remedy for substantial equal protection claim.

Finally, Justice Alito compares the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause. Justice Alito concluded that that Congress did not intend Title IX to preclude §1983 constitutional suits because Title IX's protections are narrower in some aspects, and broader in others. Justice Alito notes that Title IX has been interpreted as not authorizing suit against school officials, teachers, and other individuals, whereas §1983 equal protection claims may be brought against individuals as well as municipalities and other state entities. The opinion also goes on to list several activities that may be challenged on constitutional grounds, but Title IX exempts from its restrictions, thus making them not actionable under Title IX. Furthermore, even when the an activity is subject to both Title IX and the Equal Protection Clause, Justice Alito explains that the standards for establishing liability may not be wholly congruent. Therefore, the Court concluded that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools or a substitute for §1983 suits as a means of enforcing constitutional rights. The Court held that §1983 suits based on the Equal Protection Clause remain available to the Fitzgeralds alleging unconstitutional gender discrimination in schools.

Analysis of Concurring Opinions

The first of Justice Alito's concurring opinions to be analyzed is a Fourth Amendment case dealing with the issue of what constitutes a search. In *United States v. Jones*[39], the Supreme Court held that installing a Global Positioning System tracking device on an automobile in order to monitor the car's movements did in fact constitute a search under the Fourth Amendment.

In this case, the police suspected respondent Antoine Jones of various narcotics violations. The police obtained a warrant to attach GPS tracking device to the underside of defendant's car. However, the warrant was applied for in the District of Columbia and to be installed within 10 days. On the 11th day, the GPS was installed in Maryland, not in the District of Columbia as the warrant stated. The police then continued to monitor the vehicle for 24 hours a day for 28 days after installing the device. The device gathered more than 2,000 pages of data over the 4-week period. The government was able to gather enough information from the GPS device to bring a multiple-count indictment against Jones, ultimately finding him guilty on conspiracy to distribute and to possession with intent to distribute five or more kilograms of cocaine and 50 or more grams of cocaine base. Jones argued that the installation of the GPS device constituted an unreasonable search under the Fourth Amendment. The U.S. Court of Appeals for the District of Columbia overturned his conviction based on a finding that the installation of the GPS device was a search because it violated Jones' reasonable expectation of privacy. The Supreme Court granted certiorari.

The issue presented to the Supreme Court was whether the installation of the GPS device without a warrant violates Jones' Fourth Amendment rights. All nine justices

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[39] 132 S.Ct. 945 (2012)

voted unanimously that it did in fact violate Jones' Fourth Amendment right, but they did not agree on the reasoning. The majority opinion, written by Justice Scalia, held that the installation of the GPS device constituted a trespass on private property and thus violated Jones' right to be free from an unreasonable search. Justice Alito, in his concurring opinion, which was joined by Justices Ginsburg, Breyer, and Kagan, felt that the GPS device violated Jones' "reasonable expectation of privacy," and thus constituted a search.

The majority stated that when determining whether a "search" had occurred under the meaning of the Fourth Amendment, the appropriate inquiry is whether or not a trespass or physical intrusion of private property had occurred. Although Justice Scalia acknowledged that in *Katz* the Court used the "reasonable expectation of privacy" approach to determine whether or not there was a search, he also argued that numerous post-*Katz* cases used the "trespass" inquiry to determine whether a search had occurred. [40] Justice Scalia believes that the Fourth Amendment provides more than one level of protection. The initial inquiry should be that of trespass, and then, if there was no trespass, whether or not the defendant has a "reasonable expectation of privacy." In this case, since the majority feels that the installation of the GPS device was a trespass, there is no need to determine any further whether Jones' reasonable expectation of privacy was violated.

The nickname "Scalito" refers to Justice Alito's similarities in his views with Justice Scalia. Although they both agree in the holding of this case, they take very different approaches in reaching their decision. Justice Alito did not believe that trespass

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[40] *Katz v. United States*, 389 U.S. 347 (1967)- In *Katz*, the Court held that individuals with a "reasonable expectation of privacy" are protected from unreasonable search and seizure under the Fourth Amendment.

was the proper inquiry in a case where the issue is a GPS device. Justice Alito believes that in a case where an electronic device was used, *Katz's* "reasonable expectation of privacy" test should be the appropriate inquiry.

Justice Alito explained in detail the history of Fourth Amendment search analyses. Before *Katz*, cases in which there was no trespass, it was held that there was no search. *Katz* finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation.[41] Even though the means used by the police to listen in on phone conversations did not physically intrude on the area occupied by the defendant, the Court held that an actual trespass is neither necessary nor sufficient to establish a constitutional violation. Justice Alito cites to the Court's decision in *Oliver v. United States*[42], where the Court found there to be a trespass, but not a Fourth Amendment Violation. In *Oliver*, the Court wrote, "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. The premise that property interests control the right of the Government to search and seize has been discredited."

Justice Alito's opinion also points to flaws in the majority's reasoning. He believes the majority's reliance on trespass will lead to incongruous results based on the type of surveillance used (attaching a device for a short period of time is unconstitutional, but following the same car for a much longer period of time using unmarked cars would not be), may be difficult to apply in certain states (community property states), and cause problems in cases involving surveillance that is carried out by making electronic, but not

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[41] *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end to the phone conversation.

[42] 466 U.S. 170 (1984)

physical, contact with the item being tracked. Justice Alito believes the *Katz*-based expectation of privacy test allows the Court to circumvent those problems, while also being able to adapt to society's ever changing expectations of privacy. "The availability and use of...new devices will continue to shape the average person's expectations about the privacy of his or her daily movements."

The second concurring opinion to be discussed is Justice Alito's opinion in *Salazar v. Buono*.[43] *Salazar* dealt with the issue of a cross that was placed on federal ground as a war memorial. The memorial cross, having been located at the Mojave National Preserve since 1934, was ordered to be taken down after a District Court found that the location of the cross on federal ground violated the Establishment Clause.[44] In order to comply with the District Court's permanent injunction, while not offending war veterans, Congress passed a land exchange agreement in which an acre of land containing the cross was conveyed to the VFW in consideration for 5 acres of land. This way the location of the cross would no longer be on federal land.

The Ninth Circuit Court of Appeals affirmed the District Court's finding that the land exchange transfer was an attempt to evade the permanent injunction and therefore invalid, and also affirmed the permanent injunction. The Supreme Court granted certiorari.

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[43] 559 U.S. 700 (2010)

[44] The First Amendment's Establishment Clause prohibits the government from making any law "respecting an establishment of religion." This clause not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favor one religion over another. It also prohibits the government from unduly preferring religion over non-religion, or non-religion over religion. http://www.law.cornell.edu/wex/establishment_clause

In a 5-4 decision, the Supreme Court found that the cross may stay, but remanded the case for further proceedings. The plurality opinion, written by Justice Kennedy, and joined by Chief Justice Roberts and Justice Alito in part, held that the District Court erred in ordering an injunction and removal of the cross. Justice Kennedy's opinion states that a court must consider all of the circumstances bearing on the need for preventive relief before ordering an injunction. In regard to the land transfer statute, Justice Kennedy believes that the District Court failed to consider the context in which the land transfer statute was enacted. In ordering the case to be remanded, the plurality concluded that the District Court should conduct a proper inquiry into the necessity for injunctive relief in light of the land transfer statute.

Justice Alito, concurring in the judgment, wrote his own concurring opinion. Justice Alito wrote that he agreed with Justice Kennedy's opinion except that he would not remand the case for the lower courts to decide whether implementation of the land transfer statute would violate the District Court's injunction or the Establishment Clause. Justice Alito believes that the facts have been sufficiently developed to allow the Supreme Court to decide the case, concluding that the statute may be implemented. Justice Alito notes that the District Court did not take into account the context in which the statute was enacted and the reasons for its passage. Alito writes that the purpose of the cross was not to promote a Christian message, but to honor fallen soldiers. Thus, the Government was caught in a dilemma- either remove the cross and risk offending the veterans who fought for our country, or risk a violation of the Constitution. Therefore, Congress passed the land-transfer statute. Justice Alito states that Congress chose the land-transfer statute as an "alternative approach designed to eliminate any perception of

religious sponsorship stemming from the location of the cross on federally owned land, while at the same time avoiding the disturbing symbolism associated with the destruction of the monument." Justice Alito also agrees with Justice Scalia's concurring opinion that the meaning of the injunction was that the Government could not allow the cross to remain on federal land, a problem solved by the land-transfer statute.

Finally, Justice Alito addresses the dissents point that implementing the statute would constitute an endorsement of Christianity and therefore violate the Establishment Clause. Using the "endorsement test," Justice Alito notes that an observer familiar with the origin and history of the monument would also know that the monument is located on privately owned property, and the owner has no obligation to preserve the monument's present design. Thus, as Justice Alito believes, a reasonable observer would appreciate the fact the Congress was trying to find an accommodating solution to a difficult situation.

The final concurring opinion written by Justice Alito to be discussed is *Crawford v. Metropolitan Government of Nashville*.[45] By unanimous decision, the Court held that Title VII of the 1964 Civil Rights Act protects an employee from unlawful sexual harassment even though the harassed employees did not report the harassment themselves. The Court found that as long as an employee cooperated with an investigation of the alleged misconduct, he or she is still protected under the anti-retaliation provision of Title VII.

Vicky Crawford had been working for Metropolitan Government of Nashville and Davidson County for nearly 30 years. In 2002, the department of human resources began

[45] 555 US 271 (2009)

to investigate Dr. Gene Hughes, an employee relations director working for the Metro School District, after several woman had complained that Dr. Hughes had sexually harassed them. Since Crawford had worked closely with Dr. Hughes, she was questioned during the investigation. Crawford described several occasions where Dr. Hughes sexually harassed her. However, because there were no witnesses to Crawford's, or any of the other women's allegations, no disciplinary action was taken against Dr. Hughes. However, all of the women, including Crawford, who responded that Hughes had sexually harassed them, were fired. After being fired, Crawford sued her former employer under Title VII.[46] The District Court held that Title VII did not protect Crawford because she did not oppose the illegal conduct, she was only responding to an investigation. The Court also held that Crawford was not protected against retaliation for her dismissal because her employer initiated the investigation and a charge had not been filed with the Equal Employment Opportunity Commission until after she had been terminated. The Sixth Circuit Court of Appeals affirmed.

Justice Souter, writing for the majority, disagreed with the Sixth Circuit's interpretation of the word "oppose" in the statute. The Sixth Circuit interpreted the word "oppose" to mean an active or consistent opposition to the behavior being complained of. Thus, the Sixth Circuit Court found that since Crawford did not initiate the investigation, she did not "oppose" the behavior. The majority however, held that since the word "oppose" is not defined anywhere in the statue, that it carries its ordinary dictionary

[46] Title VII of the Civil Right Act of 1964 prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin.

meaning.[47] Thus, the word "oppose" goes beyond active behavior and applies to a situation where someone has not taken any action to advance a position besides merely disclosing it. The Court found that one may "oppose" behavior just by responding to someone else's question rather than initiating a complaint. Metro argued for the Sixth Circuit's interpretation of the word "oppose," stating that employers will be less likely to raise questions about possible discrimination if an employee can easily raise a retaliation charge if things go badly for the employee. The majority rejected Metro's argument as being inconsistent with the statute's primary objective of avoiding harm to employees, and would undermine the Faragher-Ellerth scheme.[48] The Court held that if an employee who reported discrimination only by responding to an employer's questions could be penalized without remedy, then employees would have a good reason not to report the discrimination at all.

Justice Alito wrote his own concurring opinion, joined in by Justice Thomas. Justice Alito notes that although he agrees with the majority's primary reasoning, he wrote separately to emphasize that the Court's holding "does not and should not extend beyond employees who testify in internal investigations or engage in analogous

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[47] The Court in *Crawford* used the definition according to Webster's New International Dictionary 1710 (2d ed.1958)- "to resist or antagonize…; to contend against; to confront; resist; withstand."

[48] The Faragher-Ellerth scheme is a defense created from the following cases: *Faragher v. City of Boca* Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). The Faragher-Ellerth Defense is an affirmative defense employers may use to defend against claims of hostile work environment harassment by supervisors or their superiors. Employers may attempt to use the defense if: 1. No tangible adverse employment action was taken against the plaintiff, 2. The employer exercised reasonable care to prevent and promptly correct the harassing behavior, or 3.The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

purposive conduct."[49] Justice Alito disagreed with the Sixth Circuit's interpretation that "opposition" must be consistent and initiated by the employee, but stating that it must be "active and purposive." Justice Alito recognized that the majority's definition of oppose could also consist of "silent" opposition, which may be problematic since it is questionable whether that is protected as well. Justice Alito has a "slippery slope" type concern in allowing "silent" opposition, stating that protecting conduct that is silent may "open the door to retaliation claims by employees who never expressed a word of opposition to their employers."[50] Of particular concern to Justice Alito is the "water cooler hypothetical" where an employee may have expressed opposition to sexual harassment in a private conversation, say at the water cooler or in a private phone call. Justice Alito feels this would lead to uncertainty regarding the time when the employer became aware of the employer's private expression of opposition. Finally, Justice Alito noted that Equal Employment Opportunity Commission retaliation charges doubled between 1992 and 2007 and fears that expanding the interpreted protected opposition conduct would likely cause this trend to accelerate further.

Analysis of Dissenting Opinions

The first of Justice Alito's dissenting opinions to be analyzed is *Florida v. Jardines*.[51] Chief Justice Roberts, as well as Justices Kennedy and Breyer, joined Justice Alito's dissent. Traditionally, these four justices do not take similar stands on the same issue and dissent together. The majority held that a search of the immediate surroundings of a home, through the use of a trained police dog, is a "search" within the meaning of the

[49] *Crawford* at 6.
[50] *Id.* at 7.
[51] 133 S.Ct. 1409 (2013)

Fourth Amendment. Thus, absent consent, the search would require probable cause and a search warrant.

In reaching its decision, the majority focused on the important of homeowner's property rights as opposed to their privacy rights. Following the precedent set in *United States v. Jones*, discussed above, the majority notes that when there is a physical intrusion by police onto a persons home for the purpose of obtaining information, a search has occurred. The majority discusses the protection of the home as being a core value of the Fourth Amendment. Even though a visitor coming onto one's property has the right to approach the door, knock, wait for an answer and then leave, a visitor does not have an invitation to linger on the property or peer into the home. A visitor is not implicitly licensed by the homeowner to linger, and such behavior constitutes a trespass. Thus, bringing a trained police dog up to the door of a home to identify smells of illegal substances constitutes an unreasonable search without a warrant.

Justice Alito vehemently disagrees with the majority's analysis, arguing that their decision is based on a "putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence."[52] Justice Alito argues that the law of trespass gives members of the public a license to use the walkway to approach the front door of a house and remain there for a brief time, just as the officers in this case did. The license, Alito states, is not limited to people who intend to speak to the homeowner, but extends to solicitors, mail carriers, and police officers who wish to gather evidence. A visitor is not required to ring the doorbell. Justice Alito disagrees that a trespass occurred here just because a trained police dog accompanied the officer, noting that the majority could not

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[52] *Jardines* at 9.

find a single case to support their conclusion. Justice Alito notes that there are restrictions on a visitor's course of conduct: the visitor must conform to conduct that would be reasonably expected from a visitor. A visitor would be expected to stick to a path or paved walkway; a visitor would be expected to refrain from wandering into the backyard or looking through bushes, or coming to the front door in the middle of the night. Further, the license to approach the home is limited to the amount of time it would customarily take to approach, pause long enough to see if someone is home, and then leave. Justice Alito also discusses the implied right to approach with regard to police officers. Police officers do not engage in a search when they "approach the front door of a residence and seek to engage in what is termed a 'knock and talk."[53] Even when the objective of a "knock and talk" is to obtain evidence, Justice Alito argues that the license to approach still applies. With regards to the conduct of the officer in this case, Justice Alito believes the officer did not exceed the scope of the license to approach. Alito notes the officer adhered to the customary path, approached at a reasonable hour, and remained at the front door for less than a minute or two.

The majority felt that the officer went too far in approaching the home because he had the objective purpose of conducting a search; Justice Alito disagrees. Based on this rationale, Justice Alito argues that any standard "knock and talk" would not be considered a search. Justice Alito notes that police almost always approach home with the purpose of discovering information, which is the basic purpose of a "knock and talk." The majority contends that a "knock and talk" is different because it involves talking, which all are invited to do. Justice Alito counters this point by mentioning that even when

[53] *Id.* at 11.

officer's conduct a "knock and talk," they may still observe items in plain view and smell odors coming from the home.

Justice Alito also believes that the majority's decision fails under the "reasonable expectation of privacy test," because there is no reasonable expectation of privacy for odors emanating from the home. Justice Alito declares that he would not draw a line between odors that can be smelled by a dog, but not by a human. The majority compared the use of a dog to the use of a thermal imaging device in *Kyollo v. United States.*[54] However, Justice Alito argues that a dog is not a new form of technology like the thermal imaging device in *Kyollo* was. Further, Justice Alito cites that police have used dogs for their acute sense of smell for centuries and even notes that under common law, unleashed dogs were allowed to wander on private property without committing a trespass.

The second of Justice Alito's dissenting opinions comes in *United States v. Alvarez.*[55] The majority in *Alvarez* held that the Stolen Valor Act was unconstitutional under the First Amendment's free speech protections.[56] The incident at issue occurred when Xavier Alvarez introduced himself at district board meeting as a retired marine who was awarded the Congressional Medal of Honor. After it was discovered that Alvarez's statements were not true, he was indicted for violating the Stolen Valor Act. The United States Court of Appeals for the Ninth Circuit reversed the District Court in California's rejection of Alvarez's claim that the Act was unconstitutional.

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[54] 533 U.S. 27 (2001). The majority in *Kyollo* held that the use of a thermal imaging device from a public street to monitor heat radiation emanating from a home was a search under the Fourth Amendment, requiring a warrant.

[55] 132 S. Ct. 2537 (2012).

[56] Stolen Valor Act made it illegal for unauthorized persons to wear, buy, sell, barter, trade, or manufacture "any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces. 120 STAT. 3266

The plurality opinion written by Justice Kennedy, joined by Chief Justice Roberts, and Justices Ginsburg and Sotomayor stated that false statements are not excluded from First Amendment protection just because they are false in nature. The Court has never found in prior cases that false statements should constitute a new category of unprotected speech like there is for perjury or threats of violence. Further, the plurality opinion addressed the breadth of the Act. In particular, Justice Kennedy writes how the Act applies to a false statement that is made regardless of the time or place, whether whispered in the home or made in public. Finally, Justice Kennedy's opinion states that the Government did not show how the Act's restriction of free speech exceeds the Government's interest in protecting the integrity of the military honors system. Restrictions on speech are subject to a strict scrutiny test, which the Government did not meet. The plurality opinion notes that the difference between this case and unprotected speech, such as when making a threat, is that these types of false statements alone do not present a grave and imminent threat.

Justice Breyer wrote the concurring opinion, joined by Justice Kagan. They believed that the Stolen Valor Act was unconstitutional under an intermediate scrutiny test. Basically, the concurring opinion stated that the Act fails under the intermediate scrutiny test because it applies in situations where no harm is done; that its restriction on speech is not proportional to the government's interest in protecting false statements.

Justice Alito's dissent, joined by the more usual company of Justices Scalia and Thomas, recognized that the statute created by Congress could not have been drafted more narrowly. The statute only reached knowingly false statements made by the speaker. Further, Justice Alito argues that the majority broke from a long lines of cases

recognizing that the right to free speech does not protect one who makes false factual statements that inflict real harm and serve no purpose.

Justice Alito describes five ways in which the statute is narrowly limited. First, the act only applies to narrow categories of making false statements where the facts can always be proved or disproved with certainty. Second, the type of speech that Act seeks to disqualify is squarely within the speaker's control. Third, conviction under the act requires proof beyond a reasonable doubt that the speaker knew the representation was false. Fourth, the Act only reaches statements that cannot be interpreted as dramatic performances, satire, parody, hyperbole, or the like. Finally, the Act is strictly viewpoint neutral, having no ties to any particular political or ideological message. Noting a growing problem of false claims being made concerning the receipt of military awards, Congress passed the Stolen Valor Act. Justice Alito argues that the Act is consistent with other laws passed by Congress, such 18 U.S.C. §704(a), which makes it a federal offense for anyone to wear, manufacture, or sell military decorations without authorization. The Act attempts to prevent those making the misrepresentations from unlawfully obtaining financial or other material awards, veteran's benefits, and the like. Further, Justice Alito describes it as a "slap in the face of veterans who have paid their price and earned their medals."[57]

Justice Alito counters the plurality opinion's argument that Congress could have preserved the integrity of the honors by different means. Alito argues that the alternative, a public database of all recipients, would not work because the Department of Defense has explained that it cannot create a database for recipients prior to 2001.

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[57] *Alvarez* at 17.

Next, Justice Alito argues that false factual statements possess no intrinsic First Amendment value. Alito recognizes that the First Amendment does not protect false statements consisting of fraud, perjury, and defamation. To support his argument that the First Amendment does not always protect knowingly false statements, Justice Alito states that there are more than 100 federal criminal statues that punish false statements made in connection with areas of federal agency concern. Although Justice Alito agreed with Justice Breyer that in today's world so called "white lies" are harmless and sometimes useful (such as to prevent embarrassment or protect privacy), he differentiated those types of lies with the type made unlawful by the Act. He notes that Alvarez's lies served no lawful purpose, nor did they attempt to prevent an embarrassment or protect one's privacy. The types of statements made by Alvarez consisted of no intrinsic value, and fail to serve any instrumental purpose that the First Amendment might protect. Thus, Alvarez' material misrepresentation should not be protected by the First Amendment.

J.D.B. v. North Carolina[58] is the third case to discuss where Justice Alito wrote a dissenting opinion. This time, more familiar Justices joined Justice Alito: Justices Roberts, Scalia, and Thomas. *J.D.B.* was a case where the Supreme Court found that age is a relevant factor when determining custody for Miranda purposes. J.D.B. was an under-age, special education student who was suspected of committing multiple robberies. A police investigator, a uniformed police officer, and school officials interrogated J.D.B., where he confessed to the crimes. At no time was J.D.B. informed of his Miranda rights or given the opportunity to contact his parents. Any attempts during trial to suppress the confession because Miranda was never given were denied on the

[58] 131 S.Ct. 2394 (2011).

grounds that J.D.B. was not in police custody. The majority held that J.D.B.'s age should have been a consideration in determining whether or not he was in police custody and should have been given his Miranda warnings. The Supreme Court remanded the case to the lower court to make a new finding on custody, taking into account J.D.B.'s age.

The majority found that "To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody – and thus to ignore the very real differences between children and adults – would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults."[59] The majority's main point was that age is relevant in that it affects how a "reasonable person" in the suspect's position would perceive his or her freedom to leave. The Court noted that an adult's judgment and way of thinking is much different than that of a child's. For example, an adult may be able to determine whether or not they are free to leave from a police investigation, whereas a child may feel coerced to stay even though they would be free to leave. The Court discusses that children and adults also differ when it comes to maturity, behavior, experience, and susceptibility. To emphasize this point further, the majority cites to various examples where the law limits or disqualifies children from various activities- such as managing property, entering into a binding contract, and marrying without parental consent. The Court held that "so long as the child's age is known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that [*Miranda*] test."[60]

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[59] *J.D.B.* at 11
[60] *Id.* at 9

Justice Alito's dissenting opinion focused on the majority's holding being inconsistent with the primary justifications of the *Miranda* Rule: "the perceived need for a clear rule that can easily be applied in all cases." Justice Alito notes that the *Miranda* rule places a high value on clarity and certainty. A key contributor to this clarity has been the objective reasonable-person test for determining custody.[61] Justice Alito feels as though the majority's decision shifts the *Miranda* custody determination from a simple, one-size-fits-all test into an inquiry that now must account for the age of the suspect. Thus, as was discussed in Justice Alito's concurring opinion in *Crawford,* Justice Alito is concerned with the "slippery-slope" that this decision may cause. Alito notes that age is not the only personal characteristic that may be correlated with susceptibility to coercive pressures, and fears that this decision will lead to more characteristics being considered. Thus, as Justice Alito puts it, the Court's decision will transform the *Miranda* test from an easy applied rule into a "highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.[62]

Justice Alito notes that historically, the Courts applying this test have focused solely on the objective circumstances of the interrogation, and not the personal characteristics of the person being interrogated. In fact, Justice Alito further contends that the totality of the external circumstances, such as the interrogation itself, is what matters to the Court's whereas personal characteristics of a suspect have consistently been rejected.

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[61] The custody analysis considers whether or not a hypothetical person would consider himself to be confined under the particular circumstances of the situation.
[62] *Id.* at 12

To counter the majority's reasoning for considering age as a factor, Alito notes that many people over the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person. Justice Alito states that *Miranda's* rigid standard are both over-inclusive and under-inclusive, but they at least provide one standard for police to follow. That is why, as Justice Alito puts it, no other Supreme Court case dealing with *Miranda* has before mentioned anything to do with age or other personalized characteristics. Further, if the majority considers age to be a relevant factor, Justice Alito questions how age differs from other factors such as intelligence, cultural background, education, etc. Justice Alito points out that litigants will soon cite to the majority's holding for the proposition that other characteristics should be treated like age and taken into account for purposes of administering *Miranda.* In the end, Justice Alito feels the majority's decision today takes the *Miranda* rule from a simple, clear, and concise test, to a test that is hard for police to follow and difficult for judges to apply.

The final case to be discussed is *Snyder v. Phelps.*[63] Just as in *Alvarez*, discussed above, Justice Alito again dissents in a First Amendment case. Also like in *Alvarez,* Justice Alito believes that the First Amendment should not protect speech that intends to inflict harm or has no intrinsic value. The *Snyder* decision received much media attention and coverage. Albert Snyder, the father of a fallen Marine, brought a suit for intentional infliction of emotional distress against Fred Phelps and his church, the Westboro Baptist Church. Phelps and the WBC picketed Snyder's funeral while holding signs condemning homosexuality. The signs read as such: "You're going to hell", "God hates you", "Fag

[63] *131 S Ct. 1207* (2011)

troops", "Semper fi fags", and Thank God for dead soldiers."[64] The WBC also published an article online denouncing Snyder for raising their son Catholic, which the WBC saw as "raising him for the devil."[65] This wasn't the first funeral picketed by the WBC, as they have done so at numerous funerals across the United States.

In an 8-1 decision, with Justice Alito being the sole dissenter, the Court held that the WBC could not be liable for emotional distress, regardless of how outrageous the speech was. The Court reasoned that as long as the speech was on a public sidewalk, aimed at a public issue, it must receive constitutional protection. The factor the majority harped on the most was the type of speech at issue. Categorizing the speech as a "matter of public concern", the majority firmly believes that matters of political, social, or public concern are entitled to First Amendment protections. The content, form, and context of the speech are looked at to determine whether the speech is of public matter. To this regard, the Court notes that most of the signs were not addressed to the Snyder family in particular. Most of the signs were critical of the United States government, the military, and homosexuality. The Court further noted that the funeral service itself was not disturbed, the WBC had conducted its picketing peacefully on public property, and that Snyder could not hear the WBC's negative speech, nor could he see any more than the top of the picketer's signs.

Justice Alito, as the lone dissenter in this case, believed that freedom of speech is not a license for "vicious verbal assault." Justice Alito does not believe that picketers may intentionally inflict severe emotional injury on private people at times of emotional sensitivity. His basis for this argument is that we allow recovery in tort for the intentional

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[64] *Snyder* at 9
[65] *Id.* at 15

infliction of emotional distress. Thus, he argues, the Supreme Court has recognized that the First Amendment does not shield utterances that form "no essential part of exposition of ideas…of slight social value…that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[66] Justice Alito whole-heartedly believes that when one intentionally inflicts grave injury, the First Amendment should not interfere with recovery. Justice Alito notes that on the day of the funeral, the WBC could have chosen a different location to picket, but they chose Snyder's funeral in order to garner more attention from the media. Thus, any reasonable person Alito argues, would assume that there was a connection between the messages displayed and Snyder or that they were directed at Snyder.

Addressing the majority's rationale that the First Amendment protects the WBC's speech, Alito counters with three different points. First, Alito notes that the First Amendment allows recovery for defamatory statements made on matters of public concern, and that the WBC's attack on the Snyder family should be treated the same. Second, even though the messages were of a public matter, they still attacked the character of a private figure and should not be protected. Finally, Alito sees no reason why statements made on a public street, in close proximity to the funeral, should be regarded as "a free-fire zone in which otherwise actionable verbal attacks are shielded from liability."[67] Alito argues that location of the tort is not dispositive. Comparing to a physical assault, an assailant who was lawfully on the property where the assault occurs is not a defense of the assault that took place. What seemed to trouble Justice Alito the most was that the majority's decision allows innocent victims to be harassed and verbally

[66] *Id.* at 14
[67] *Id.* at 16

assaulted during an emotional time where they are grieving the loss of a loved one, without being able to recover for the infliction of emotional distressed caused to them.

For the final part of this paper, I will discuss my views on how Justice Alito's past and philosophy have influenced his decisions. Justice Alito has been labeled as a conservative. His judicial record shows that he votes conservatively on issues, as well as sides with the other conservative justices a strong majority of the time. During his time at Princeton, he was a part of the ultra conservative group, the Concerned Alumni of Princeton. Growing up as an Italian-American, Justice Alito held close ties to his family, community, and his church. Yet, I do not believe "conservative" is the correct label for Justice Alito. A better-suited label for Justice Alito would be "pragmatist." Every Justice takes the facts into consideration when rendering an opinion, however I believe Justice Alito takes it one step further. Instead of just taking the facts as presented to him, Justice Alito's analysis runs much deeper. His analysis is never just black and white. It takes into account more than just facts; it considers the context, the environment, and the situation in which those facts occurred. Justice Alito's opinions also tend to include a discussion of a ruling's effect well into the future. For example, in *Snyder*, while the rest of the Court found that public speech on public property was constitutionally protected no matter how outrageous, Justice Alito took his analysis in a different direction. His analysis considered the intentions of the WBC in their speech, as well as the door that might be opened by the majority's decision. He discussed how the public speech was purposely aimed at the Snyder family with the intention of causing harm and how the location was chosen for the sole purpose of amplifying their hateful message. Twice more we see Justice Alito's analysis take into consideration the future ramifications of his

decisions. In *Crawford* and again in *J.D.B.*, Alito takes into consideration the "slippery slope" effect of his decision. In *Crawford*, Alito was concerned that allowing "silent" opposition to be protected conduct in regard to harassment in the workplace, would "open the door to retaliation claims by employees who never expressed a word of opposition to their employers."[68] Again in *J.D.B.*, we see that in considering whether age should a factor in administering *Miranda* warnings, Justice Alito felt that the effect of doing so would lead to other personal characteristics being included in the analysis in the future. Thus, the simple and clear *Miranda* test would then turn into a test that is difficult to administer.

J.D.B. was not the only time we saw Justice Alito being concerned with changing a law and the effects that may have. In *Jardines*, Justice Alito opposed the majority's analysis using trespass to determine Fourth Amendment violation. Instead, Justice Alito would have used the "reasonable expectation of privacy" test as had been established in *Katz v. United States*.[69] Alito noted the negative effects that would result for police officers attempting to "knock and talk" under the majority's reasoning.

Finally, I feel that the best case to read to get a true understanding of how Justice Alito analyzes cases would be *Salazar v. Buono*, the case concerning the cross as a monument on federal ground. Although the cross was on federal ground, and although I think everyone realized the land exchange statute was just a ploy to bypass the District Court's injunction, Justice Alito said it best when discussing the "reasonable person" standard to decide the case. A reasonable person would have realized the true meaning of the monument was to honor fallen soldiers of United States, not for the government to

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[68] *129 S. Ct. 846* at 7
[69] *389 U.S. 347* (1967)

occurs in the private between two consenting adults, it should not be illegal. That is how Justice Alito always thought, and continues to do so today.