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## ARTICLE

### **How Judge Alito Applied the First Amendment on Campus: His Important Decision On a Public School's Anti-Harassment Policy**

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President Bush's current Supreme Court nominee, Judge Samuel Alito, has so far faced intense scrutiny regarding what his views on *Roe v. Wade* may be. But what are his views in other types of constitutional law cases?

A decision Judge Alito authored in 2001, for the U.S. Court of Appeals for the Third Circuit, is telling both as to his temperament, and his take on the First Amendment.

[Saxe v. State College Area School District](#) addressed a clash between the First Amendment and a Pennsylvania public school district's anti-harassment policy.

The opinion - written for a three-judge appellate panel - was careful, intelligent, and scholarly, but also realistic. Judge Alito was pro-free-speech, but also showed concern for the plight of students who face the type of harassment that interferes with their ability to get an education.

I wrote an earlier column suggesting that prior to becoming Chief Justice, John Roberts tended to push Supreme Court precedent further than it was meant to go in his appellate decisions, in the direction of his ideological preferences.

But, in my view, this key opinion by Judge Alito indicates the opposite: Judge Alito's readings of Supreme Court precedent, in this important opinion, are thorough and fair.

#### **The Plaintiffs, the Policy, and Why the Case Was Ripe For Judicial Review**

The plaintiffs in *Saxe* described themselves as Christians who "believe, and their religion teaches, that homosexuality is a sin," and "that they have a right to speak out about the sinful nature and harmful effects of homosexuality."

They sued because they feared that, if they voiced their beliefs on campus, they would be punished under the school district's anti-harassment policy - which includes harassment on the basis of sexual orientation, and forbids "negative name-calling and degrading behavior."

This kind of "chilling" effect, in the First Amendment context, made the case ripe for adjudication: Courts have made clear that a plaintiff need not speak out before suing, as long as he alleges a credible fear that if he does speak out, baleful consequences will result.

#### **Judge Alito's Analysis: Recognizing the First Amendment/Anti-Harassment Clash**

Judge Alito's opinion demonstrated a nuanced understanding of both federal harassment law, and First Amendment law - as well as the interplay between them.

As he noted, a very clear First Amendment principle says that speech cannot be censored simply because listeners are offended by it. Another First Amendment principle says that censoring speech because of its content should signal loud alarm bells.

Harassing speech involves both of these principles. It may hurt the listener and thus affect the listener's conditions of employment - the typical context of harassment cases -- or as in this case, education, but it does so because it is offensive, and thus because of its content. Thus, a serious First Amendment issue can arise.

Alito focused on claims of what is called "hostile environment" harassment. He pointed out that "a disparaging comment directed at an individual's sex, race, or some other personal characteristic has the potential to create a 'hostile environment' - and thus come within the ambit of anti-discrimination laws - precisely because of its sensitive subject matter and because of the odious viewpoint it expresses." (Emphasis added.)

Such comments, if sufficiently severe or pervasive, force the law to draw a fine line between First Amendment-protected speech, and the kind of harassment that can virtually drive a worker from the office - or a student from the campus.

### **A Reasonable Result: Attempting to Narrow A Broad Policy to Make It Constitutional**

Judge Alito appreciated this clash. And he made clear that in drawing the line, he would not neglect the value of "preventing discrimination ...in the schools," which he recognized as a "compelling interest."

Moreover, Judge Alito did not just pay lip service to this interest; he also tried to narrow the policy so that it could both serve the interest of protecting students against harassment, and pass muster under the First Amendment. Indeed, he noted that a court's job is, in part, to see if it can save an unconstitutional policy by narrowing it so that only the acceptable, constitutional parts of it are left.

But even after an attempt to narrow the policy, he still found it too broad. In support of this conclusion, he noted, among other points, that the policy failed to distinguish whether the alleged harassment occurred "in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility." Yet, as I will explain, context can be crucial here.

### **Captive Audiences: A Crucial Issue on Campus, as Judge Alito Noted**

One reason context matters when it comes to campus speech - as Judge Alito noted - is that free speech interests diminish, and the possibility of harassment increases, when a school audience "is 'captive' and cannot avoid the objectionable speech."

This makes a great deal of sense. On a school campus, this distinction can matter a great deal as to whether students feel welcome or feel harassed.

Consider two examples: If an anti-gay speech were part of a mandatory "Freshperson Welcome," its effect would predictably be to harass, hurt, and alienate gay students.

But suppose, instead, that incoming students wander past several activity tables - including a conspicuous Bi-Gay-Lesbian Student Association table, with pro-gay pamphlets, and a conspicuous Christian Students table with anti-gay pamphlets. The effect is very different.

The point on campus, after all, should be tolerance, not agreement.

### **A Neutral Decision That Could Favor Any Kind of Controversial Speaker**

So who won the case in the end? The Christians - but, significantly, not because they were Christian. To Judge Alito's credit, it is easy to imagine this opinion having been written almost exactly the same way, had the plaintiffs instead been gay students who complained that the school was trying to silence their "harassing" criticism of Christian students for their anti-gay teachings. The gay students, too, would have been allowed to speak, by the very same logic.

That is the way an opinion that, like this one, addresses a facial challenge (that is, a challenge independent of any particular application of the statute) ought to be written. But all too often, such opinions are skewed by the identity of the plaintiff. That's not the case here. One test of a fair judge is if you can switch parties, and know you'd still get the same result. For this opinion, at least, Judge Alito surely passes that test.