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REJOINER

Union next to our liberty most dear: Anatomy of *Saxe v State College Area School District and Constance Martin*, Righting Wrongs in the Sea of Rights

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Heritage Education Initiative

A Project Established by the Pennsylvania General Assembly at Penn State University

Although we suppose at least two interests in every court case, when reflecting upon those decisions we dislike, while we know two sides seek to occupy the same space, we often think as if only one side stood before us. The classic case that exemplifies the point is found in the three renderings of *Brown v. Board of Education of Topeka Kansas*. We suppose the National Association for the Advancement of Colored People's and the American Civil Liberties Union's advocacy of *Brown* good law, we suppose civil rights a worthy cause and we suppose justice prevailed. But what law was deposed in order for *Brown* to succeed? What babies of rights were thrown out in the bathwater of supposed bad law? Namely, what was the other side of *Brown*, the defendants' side? Was *Brown* really a halleluiah moment celebrating freedoms secured, or does *Brown* represent the awesome power of the state usurping freedom of all?

Playing devil's advocate in spite of ourselves, what if we read *Brown* as if it made bad law?

We look at *Brown* with the conviction that whites elected to school boards in the 1950s were enemies of the state, that the state through the Court was the protector of the people. Yet how different would *Brown* look if we began our reading of *Brown* with the worry and conviction that the state in the robes of the Court was the enemy of the people, and yes, tempered with equal fervor that the state in the shroud of school boards was the enemy of the people? Outside courts, what if we begin our civil discourse on the premise that the state in all its legislative authority is the enemy of the people; that the state in its presidential executive orders is the enemy of the people?

Into this mix have we forgotten that our rights encased within the First Amendment trump the state in all its usurpations; that rights must and always come first despite any attempt or temporary success of the state to usurp those rights? What if we begin our reading with the dictum that although law may pretend otherwise, our rights are immune to the mischief of law, court, and presidential order; that no governmental action can extinguish our rights at any time under any condition; that "congress shall make no law..." stands as permanent warning and assurance that the state must respect its citizens?

Life teaches that skiffs of paper make poor boats, but these vessels of constitutions and bills of rights are and have remained necessary and sufficient to save us on occasion. In practical terms, although our rights remain safe in theory, as individual citizens we cannot save ourselves from abuse, oppression, and tyranny without some assistance. Thankfully our founding fathers bequeathed us the necessary and sufficient armaments and mechanisms to thwart usurpations.

Ten years have past since *Saxe v State College Area School District and Constance Martin* began; and although *Saxe* has been the subject of public and scholarly attention in dozens of articles from the *New York Times* to the inaugural issue of *The Journal of Educational Controversy*, a standard citation in school law textbooks, and more urgently examined by worried school-boards across the country, in telling my side of this story, this is the first time I have broken my self-imposed silence in print, post, or stump. Since the decision was rendered in 2001, it has been quite amusing to read about *Saxe*, to learn about your supposed motives from people pretending to know a story never read, as if reviewing a movie never watched, and also to see yourself in the third person. The most amusing read of *Saxe* is, of course, those fumbling and bumbling to make silk purses out of sow ears.

As told *ad nauseam*, the story about *Saxe* centers on lunatics and crazies, religious fanatics and homophobes, bullies and other meanies who hover about the public square, lurking, agitating, and otherwise bothering good folk. *Saxe* is about the self-possessed cracked up between Bibles and constitutions who go wherever the spirit leads them, the public be damned. *Saxe* is about how we good folk must tolerate nuts among us; that the law compels justice to be blind and our hearts to be constantly troubled and torn. It is frustrating to be sure, but we need only suffer these people until that happy day when our educational institutions and society complete the transformation of these niggling Winstons and Jeffersons Smiths, these would-be everymen, who have difficulty believing what we manufacture as appropriate reading, that sow ears are actually silk purses.

On having *Saxe* explained by now-Supreme Court Justice Sam Alito, who centered, squared and dispensed the law with great clarity, the still shocked and disbelieving ostriches neither see nor acknowledge the 800-pound gorilla of sense and

sensibility in placid repose. To the trusted commentators on *Saxe*, to be sure there are two sides of *Saxe*: the one they like (the side who lost, and the side they struggle to defend and continually fail to reconcile with the law); and the other: the side they do not like, the side they do not understand, and the side they fear.

This fear is misplaced, for emperors must wear clothes, and it is the state, not *Saxe*, who is an irrepressible beast that can only be slowed and stymied by vigilant citizens thankfully armed with an impressive array of auxiliary precautions. Until the Court entered into the dispute (seemingly on the wrong side of the issue), it never occurs to readers of *Saxe* that *Saxe* actually began as an individual standing up to the usurpations of the state; that *Saxe* was not the story of so-called crazies and nuts as would-be enemies of the state, but *Saxe* is the story of the state as enemy of the people.

Saxe is an important case, not because I say or made it so, but because it has become good law, applied law (or so I claim). At its core, *Saxe* is located between two rocks, the First Amendment's speech clause (represented by Citizen *Saxe*) and a totally irresponsible local school board (representing the state). Rightfully, the Court struck down this vile policy for what it was, an unconstitutional abomination. Although the story told in the pages of this journal and elsewhere is well known, the untold story of *Saxe* should be centered on defendant Constance Martin posing as regal school board president and her willing board colleagues. The story of Mrs. Martin and company defines and illustrates the abusive power of the state; it is the story about the selfish whims of the few to determine what is and what is not free speech for all; it is the story about the state presuming to decide whose speech is privileged and whose speech shall be punished; it is the story of how individuals in authority under the cover of law and at the expense of the people connive to usurp the rights of others in order to advance personal agendas. Turning *Saxe* upside down and casting light on its tyrants lurking in the shadows reveals an entirely different rendering of this case.

If the reader will indulge my admitted conceits (and deft shifts between first and third person), cast in a new light, the new storyline centers on free speech and the right and duty of every citizen to stand guard to protect their most basic freedoms. Those who first objected to the Constitution fretted over the awesome power of the state; they were correct to demand a Bill of Rights as one of many additional auxiliary precautions to protect citizens against the real and potentially abusive nature of the state. At heart, *Saxe* is the chilling story of the how Constance Martin and company, acting as the state through a local school board, sought to trample on and destroy the sacred rights of every citizen in one small town in Pennsylvania.

Anatomy of a Lawsuit

The beginnings of the case, not traced in *Saxe*, started when Professor *Saxe*, acting as a national content-expert on history standards, was invited by this district's school officials to review and stamp as authorized a locally produced fifth-grade U. S. history unit. As reported in the pages of *The Weekly Standard* (1997), *Saxe* argued that the district's unit twisted the founding into a warped distortion of American history, wholly inappropriate and unsuited for American children. For example, students were not asked to study closely and emulate the Declaration of Independence and its founding principles, but rather to reject and rewrite another set of precepts more aligned to Marx and social justice theory than Madison and the Federalist Papers. Three months after Mrs. Martin (as school board chair) received my 36-page review (1996) alerting her to what I held as a transgression of American history (and violation of the State School Code's requirements for citizenship and American history), the district's superintendent threatened me with a lawsuit if I persisted to "defame the school district." With this stance taken by an indignant and immovable administration, presumably supported by Mrs. Martin and its school board, it was clear to me that neither a pleasant nor rigorous intellectual and professional discourse was protocol in this district. The administration quickly found a more agreeable reviewer and the U.S. History unit entered service as written. Strike one, two, three against the school district: strike one for not teaching constitutional principles; strike two for not owning up to and correcting its omission; and strike three for attacking and threatening *Saxe* with litigation for daring to question these emperors without clothes!

Shortly thereafter, following the lead of neighboring Penn State University's push to multiculturalize its programs and policies with social justice features (a fashionable phenomena then sweeping college and university campuses throughout the country) and encouraged by those university professors (and spouses thereof) serving as school board directors, Mrs. Martin (then an official with a local special interest advocacy group) took it upon herself to use her position as school board president to install an all-school policy of exclusive inclusion, elevating those students and dispositions aligned to her personal values and interests.

Ah, the plot does thicken!

The public was alarmed and so was Saxe. After repeated attempts to reason with Mrs. Martin failed to make an impression, a group of parents requested that Saxe present a set of questions and statements before the board. The parents invited Professor Saxe to serve as mediator between their interests and the school board (Saxe was then a seated member of the Pennsylvania State Board of Education), believing him a sympathetic ear, ideal spokesman for citizen rights, and someone whose public standing would command the board's attention.

On the appointed night, taking up their requests as respectful and legitimate issues, Professor Saxe addressed the school board with the parents' list of questions and concerns. The board not only totally ignored the parents' questions and concerns as reported by Professor Saxe, they proceeded to fashion the new policy without any change or alteration (reminiscent of pre-Scott Brown Obama and his Democrats on health care). Ignored by its public officials, Saxe advised the dissenting parents to field candidates to serve on the school board. Turning Saxe's advice on him, they encouraged him to run for office. Although later withdrawing from the race to pursue other interests, throughout the spring and into the summer, Saxe and other dissenting candidates repeatedly and respectfully requested the school board to change its policy (that by then Saxe had predicted would not pass constitutional muster). As public pressure mounted, pushed by charged emotions on both sides--those for and against the sweeping (so-called) anti-discrimination-harassment policy, the school board staged an "open forum" in mid-summer. Initially accepting all speakers, at the last minute the school board instituted a lottery that effectively limited access to free speech. Although Saxe had requested and received a speaking slot, it is little wonder that the school board did not advance his name to the final speakers' list.

The "open forum" ended as it started: The school board remained unmoved. Within a few weeks the school board passed the new policy. Shortly thereafter, the American Family Association sent a team of attorneys to speak with the outraged and disgruntled parents. Just as the NAACP and the ACLU sends lawyers into disputes to press its causes, the AFA sought cases to advance its priorities, in this instance to halt the progress of anti-constitutional social justice policies and programs arrayed against traditional family values. The AFA listened carefully to the group of some dozen citizens lay out their concerns. In addition to concerned parents, Professor Saxe was invited to discuss his views on the constitutionality of the policy, in particular how the policy authorized school officials to punish as harassment *any* speech or behavior uttered or demonstrated by any citizen on or off campus that was perceived to offend, denigrate, or belittle a particular favored sub-set of students.

In short order, a month later, AFA joined Professor Saxe's effort to stop School Board President Constance Martin and her colleagues from violating the First Amendment rights of the district's 7,000 students, their parents and the other 110,000 citizens in the school district writ large. While AFA crafted the case to score points related to its family values mission (not unlike the NAACP's efforts in *Brown* and its many other cases), Saxe's interest remained focused on Martin's abuse of the First Amendment. Interestingly, not a single civics teacher in the school district (or any other teacher) and not one law or political science professor at the near-by Penn State University (or any other professor) supported the lawsuit or recognized any merit in challenging Martin's unconstitutional attempt to usurp Saxe's First Amendment rights before *or* after the Third-Circuit's definitive 3-0 decision. In addition, throughout the entire episode from filing to decision, Professor Saxe continued to be castigated and ridiculed by the media. Even Saxe's Penn State department head publicly derided Professor Saxe, dismissing his suit as frivolous. Displaying hostility unworthy of a public educator charged to teach future teachers about civics and the Constitution, this same department head demonstrated his cozy relationship with the school district by earlier signing off on the same fifth-grade U.S. History unit Professor Saxe declined to approve.

Until the writing of this article (a full ten years after the filing), *Saxe* has been described as the work of Christian homophobic fundamentalists hell-bent on using the judicial system to wage holy war on the innocent good people of Pennsylvania. As noted, law suits, like coins, have two sides, and so, is it possible that rather than leading a holy war on Connie Martin and the school board, perhaps Professor Saxe was defending the United States Constitution, the First Amendment, and the rights of all citizens in State College, Pennsylvania, against *Martin's* tyranny? Rather than accepting the liberal spin on *Saxe* issued by Connie Martin, the media, Penn State professors, and every other *Saxe* reviewer since, did it ever occur to anyone that perhaps Connie Martin, and *not* Professor Saxe, abused the U.S. Constitution? After all, we do not need to pretend other outcomes, for did not the Court, in effect, find *Martin* guilty of constitutional abuse? After ten years, isn't it odd that not one academic or media reviewer of *Saxe* has hit upon the theory that perhaps Connie Martin used her legislative authority to advance her own personal agenda, the public and Constitution be damned?

Thankfully, future Supreme Court Justice Sam Alito cut through the nonsense and recognized *Saxe* for what it was: a gross violation of First Amendment rights. That Connie Martin and the other perpetrators of this debacle were entrusted with the civic education of young citizens is more than a betrayal of duty and trust, it is a permanent disgrace and humiliation for themselves *and* the citizens of State College, Pennsylvania. *Saxe* illustrates one of the greatest dangers to our republic: when those ignorant of our Constitution become vulnerable to legislative mischief, but more particularly, when those

ignorant of or deliberately choosing to ignore our Constitution when entrusted as the people's representatives become arrogant bullies and tyrants ever ready and hell-bent on destroying our rights and liberties.

Returning to a more disinterested voice, *Saxe* exemplifies social justice advocacy in microcosm by illustrating two essential oppositions:

- Social justice advocates agitate for cultural advances through legislative and judicial forms that cannot be squared with the Constitution.
- Among our legislative authorities and citizens in general, a profound disconnect exists between practical applications of America's founding principles and operative-working understandings of our legal system.

In true libertarian style, accepting that our constitutional rights extend to all citizens without exception, I have no problem with advocacy as in anyone working to persuade fellow citizens to adopt a particular view/policy. I also have no problem with legislators/representatives pushing agendas on behalf of themselves and their constituents (for any rights whatever). Moreover, I have no problem with citizens seeking to redefine our legal forms or revise American society to match a particular worldview. My position in *Saxe* is more philosophical-reflective and I want to stress that at no time then or since did I ever personally take a public stand against homosexuals or the rights of homosexuals.

In plain and simple terms my position in *Saxe* was no denigration of homosexual rights, but exactly the opposite: *Saxe* was centered on defending everyone's common civil rights and specifically the right to dissent. Dismissing partisan charges as without substance, *Saxe* was about the state moving beyond the boundaries set by Law; the state reaching far beyond our legal traditions; the state acting unconstitutionally; that if the state sought to rewrite the Bill of Rights (as was anticipated by the founders who understood the nature and proclivities of factional interests in power), the state was obligated not merely to consult but also square itself with the Constitution.

The lesson learned by *Saxe* is that having failed to recognize the Constitutional issues and the potential liability of action, the state erred in legislating an unconstitutional policy that sought to create special status or preferred citizenship for some, while limiting or eliminating the freedom of speech of all others. As supposed but not detailed by *Saxe*, this rejoinder charges that the state acted upon the personal whims of its legislators who not merely stood ignorant of the Constitution, but worse, whose errors abrogated their Constitutional duties.

In speaking out against false charges, personal attacks, and the partisan misreadings of *Saxe*, my interest is not merely righting these wrongs of those who misrepresent and obscure the law, but to cast light on the general ignorance of citizens on the Constitution amid those who would be king. At end, *Saxe* illustrates and magnifies our republic's Achilles heel: the imperative that citizens possess an understanding of the sacred founding principles as seated in our founding documents, that unless the state fulfills its mandate found in the Constitution's Article IV, Section 4, its citizens' rights are doomed to be abused, stolen, and lost by those who would have us believe sow ears to be silk purses.

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