



2006

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Recommended Citation

Crawford, Jon G. (2006) "Saxe as an Erosion of Individual Protections: A Response to Colitti," *Journal of Educational Controversy*. Vol. 1 : No. 1 , Article 13.

Available at: <https://cedar.wvu.edu/jec/vol1/iss1/13>

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REJOINDER

Saxe as an Erosion of Individual Protections: A Response to Colitti

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Colitti asserts the United States Court of Appeals for the Third Circuit's decision in *Saxe v. State College Area School District*^[1] (2001) maligned a Pennsylvania public school board's well-intended anti-harassment policy, thereby denying "constitutional protection to minority groups, especially gays." Colitti's analysis reflects a misguided understanding of the federal judiciary's duty to interpret and apply the U.S. Constitution and a myopic perspective of the *Saxe* opinion.

Over two centuries ago in *Marbury v. Madison* (1803) the Supreme Court declared "one of the fundamental principles of our society" is that our Constitution is the "paramount law of the nation," thereby rendering legislative acts that are repugnant to the Constitution void.^[2] When *Saxe* arrived before the Court of Appeals for the Third Circuit the question was whether the school board's anti-harassment policy, when considered in its totality, was repugnant to the U.S. Constitution, specifically the "First Amendment's guarantee of freedom of speech."^[3]

The District Court found the anti-harassment policy did not violate the Constitution.^[4] However, the appellate panel concluded the District Court erred in identifying a "categorical 'harassment exception' to the First Amendment's speech clause."^[5] Specifically, the appellate court believed the policy was written so expansively as to cover "simple acts of teasing and name-calling among school children."^[6] This was problematic because the First Amendment affords protection to "a wide variety of speech that listeners may consider deeply offensive,"^[7] including content- or viewpoint-based speech that demands "the most exacting First Amendment scrutiny" before it may be prohibited.^[8]

Colitti argues the *Saxe* opinion "flies in the face" of society's demand for "safe and orderly schools." Indeed, the Third Circuit acknowledged school officials have a compelling interest in preventing discrimination in their schools.^[9] However, this compelling interest does not allow school leaders to adopt broad reaching anti-harassment policies that collide with the U.S. Constitution.^[10]

The anti-harassment policy's fatal flaw was the fact that it extended coverage to harassment beyond that covered by federal statutes. For example, the policy addressed harassment based upon "a catch-all category of 'other personal characteristics'" such as "clothing, appearance, hobbies and values, and social skills, none of which are protected under federal law."^[11] The court noted a prohibition on "disparaging speech directed at a person's values" would constitute a restriction on "moral and political discourse ... the core concern of the First Amendment."^[12] The appellate panel further noted the Supreme Court had previously held "simple acts of teasing and name-calling" within the public school setting "were insufficient" to establish liability under a harassment claim.^[13]

As such, in order to pass muster under the Constitution the anti-harassment policy needed to "be justified as a permissible regulation of speech within the schools."^[14] At the time of the *Saxe* decision the Supreme Court had decided three cases, *Tinker v. Des Moines* (1969),^[15] *Bethel School District v. Fraser* (1986),^[16] and *Hazelwood School District v. Kuhlmeier* (1988),^[17] which together provided school officials and lower courts the First Amendment's limits for regulating in-school student speech.

Colitti chided the Third Circuit for conveniently ignoring *Chaplinsky v. New Hampshire* (1942)^[18] in deciding *Saxe*. Curiously, he describes *Chaplinsky* as an "on-point landmark case." The fact that *Chaplinsky* announced that "fighting words"^[19] would fall under the narrow category of speech unprotected by the First Amendment may merit status as a landmark case. However, *Chaplinsky* is not an "on-point case." *Chaplinsky* involved interpretation of a criminal statute and had nothing to do with student speech within the public school setting. When *Saxe* was decided, the Supreme Court's trilogy of school student speech cases, *Tinker*, *Fraser*, and *Hazelwood*, were recognized as the "on-point cases" to be used in judging the constitutionality of student speech.

Tinker, often referred to as the "arm band case," established the general rule that school officials could prohibit student speech only if they could reasonably forecast the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or collide with the rights of others.^[20] Over seventeen years after *Tinker*, Matthew Fraser, a high school senior, delivered a nomination speech during a school assembly for a fellow student who was running for a student council office.^[21] Throughout the speech, Fraser referred to the candidate using "an elaborate, graphic, and explicit sexual metaphor."^[22] After delivering the speech Fraser was disciplined. Thereafter, the Supreme Court carved out an exception to *Tinker*, holding that school officials could prohibit in-school student speech that was "lewd and indecent."^[23]

Hazelwood School District v. Kuhlmeier^[24] was the only other case in existence at the time of the *Saxe* ruling in which the High Court had examined the parameters for regulating student speech within the public schools. Here, students challenged a high school principal's decision to delete student articles on teen pregnancy and the impact of divorce on students from the school-sponsored newspaper. In upholding the principal's decision the Court explained that school officials could "exercise editorial control over the style and content of student speech in school-sponsored expressive activities as long as [its] actions are reasonably related to legitimate pedagogical concerns."^[25]

When this student-speech trilogy was applied to the anti-harassment policy the Third Circuit concluded that the policy did "not confine itself to merely vulgar or lewd speech," thereby exceeding *Fraser's* reach."^[26] Similarly, the policy covered "far more" than school-sponsored speech, thus exceeding *Hazelwood's* safe harbor.^[27] Finally, the policy failed to include an explanation for why restrictions on student speech were "necessary to prevent substantial disruption or interference with the work of the school or the rights of other students."^[28] This omission ignored *Tinker's* "requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it."^[29] These flaws led to the ineluctable conclusion that the anti-harassment policy was "substantially overbroad" and, as such, repugnant to the U.S. Constitution.^[30]

The members of the State College Area School District Board of Education were elected to establish policies for the operation of the local schools. The anti-harassment policy was intended to effectuate the electorate's goal of maintaining safe and orderly schools. Therefore, Colitti concludes the Third Circuit's ruling flew in the face of the will of the people. What if the "will of the people" collides with the U.S. Constitution? Under Colitti's reasoning, the Supreme Court's *Brown v. Board of Education* (1954)^[31] decision similarly flew in the face of the will of the people. The duly elected Topeka Board of Education adopted a policy that allowed the operation of segregated elementary schools.^[32] Should the Warren Court accorded "substantial weight" to the statute adopted by the Kansas legislature that allowed local school officials to establish segregated schools? Hopefully, Colitti would not place *Brown* in his same category as *Saxe*, i.e., an example of judicial activism resulting in the undermining of democratic rights or an imperialistic encroachment on basic civil rights.

It is not suggested that *Saxe* merits the landmark status commonly accorded to the *Brown* decision. However, both decisions are reflective of the federal judiciary's proper role as the "impartial guardian of the law."^[33]

Colitti makes great moment of the fact that the anti-harassment policy's goal was to prevent discrimination. Indeed, the Third Circuit noted that "preventing discrimination ... in the schools ... [was] ... a compelling government interest."^[34] Nonetheless, then Judge Alito noted, "we have found no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection."^[35] Even though the anti-harassment policy's goal, preventing discrimination, was appropriate, the State College Area School District Board of Education simply cast their harassment net too wide by including simple acts of teasing and name-calling within the ambit of the policy's reach. As such, contrary to Colitti's assertions, *Saxe* was properly decided and reflected the proper application of the federal judiciary's role within our democratic system of government.

References

- Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
- Saxe v. State College Area School District*, 240 F. 3d 200 (3rd Cir. Pa. 2001)
- Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Notes

[1] *Saxe v. State College Area School District*, 240 F. 3d 200 (3rd Cir. Pa. 2001) (Hereinafter "Saxe").

[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[3] Saxe, 240 F.3d at 202. *See also*, Saxe v. State College Area School District, 77 F. Supp. 2d 621, 622 (M.D. Pa. 1999). (“The primary issue in this case may be stated in two ways: Does a school district violate constitutional boundaries by prohibiting harassment?; or, To what extent does the Constitution protect the right to cast verbal stones?”).

[4] Saxe v. State College Area School District, 77 F. Supp. 2d at 627.

[5] Saxe, 240 F. 3d at 204.

[6] *Id.* at 205 (quoting Davis v. Monroe County Board of Education, 526 U.S. 629, 652 (1999)).

[7] *Id.* at 206 (citing Brandenburg v. Ohio, 395 U.S. 444 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1969)).

[8] Saxe, 240 F. 3d at 206-207.

[9] *Id.* at 209.

[10] *Id.* at 210.

[11] *Id.* at 210.

[12] *Id.*

[13] *Id.* at 211 (quoting Davis v. Monroe County Board of Education, 526 U.S. 629, 651 (1999)).

[14] *Id.* at 211.

[15] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[16] Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

[17] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

[18] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[19] *Id.* at 572 (Describing fighting words as words, which by “their very utterance inflict injury or tend to incite an immediate breach of the peace” and “are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

[20] Tinker, 393 U.S. at 504.

[21] Fraser, 478 U.S. at 677.

[22] *Id.* at 678.

[23] *Id.* at 685.

[24] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

[25] Saxe, 240 F. 3d at 213 (quoting *Hazelwood*, 484 U.S. at 273.).

[26] *Id.* at 216.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 217.

[30] *Id.* at 216.

[31] Brown v. Board of Education, 347 U.S. 483 (1954).

[32] *Id.* at 486 n.1.

[33] See President Obama's May 10, 2010, announcement of Solicitor General Elena Kagan as his nominee to the Supreme Court. ("For nearly 35 years, Justice Stevens has stood as an impartial guardian of the law, faithfully applying the core values of our founding to the cases and controversies of our time. He's done so with restraint and respect for precedent, understanding that a judge's job is to interpret, not make, law, but also with fidelity to the constitutional ideal of equal justice for all."). http://www.realclearpolitics.com/news/ap/politics/2010/May/10/text_of_obama_s_remarks_on_the_nomination_of_kagan.html last accessed May 11, 2010.

[34] Saxe, 240 F. 3d at 209.

[35] *Id.* at 210.