



MEMORANDUM

TO: Jay A. Sekulow

FROM: John P. Tuskey
Laura B. Hernandez
Shannon Woodruff
Erik Zimmerman

RE: The Judicial Philosophy of Potential Supreme Court
Nominee, Samuel Alito

DATE: October 28, 2005



MEMORANDUM

SAMUEL ALITO

United States Appellate Judge for the Third Circuit Court of Appeals

I. BACKGROUND & EXPERIENCE

Judge Alito is 55 years old and has served on the United States Court of Appeals for the Third Circuit for the past 15 years. Alito received his B.A. from Princeton University in 1972 and his J.D. from Yale Law School in 1975. He was Phi Beta Kappa and editor of the Yale Law Journal. Upon graduation from Yale, he was commissioned as a second lieutenant in the Army and served on active duty for training from September through December of 1975. Alito served in the Army Reserves from 1972 until 1980, when he was honorably discharged as a Captain.

Alito clerked for the law firm of Warren, Goldberg & Berman in Trenton, New Jersey from January through June of 1976, and then he clerked for Judge Leonard I. Garth, U. S. Appellate Judge for the Third Circuit Court of Appeals from July, 1976 through August 1977. In 1977, Alito served as Assistant U.S. Attorney in the city of Newark from, then as Assistant to the Solicitor General of the United States in 1981 and as Deputy Assistant Attorney General for the Department of Justice in 1985. In 1987, he became the U.S. Attorney for the District of New Jersey. In 1990, he was appointed to his current position on the Third Circuit by President George H. W. Bush. The text of Judge Alito's confirmation hearing for his seat on the Third Circuit covers less than two full pages; however, that text is replete with warm comments and high praises from Senator Kennedy.

II. ANALYSIS OF SPECIFIC ISSUES

A. Abortion

Judge Alito was on the panel that decided the landmark abortion case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ which was ultimately decided by the Supreme Court.² At issue in *Casey* were several abortion regulations requiring a 24-hour waiting period, informed consent, parental consent, and spousal notification before a woman could obtain an abortion. The statute also included reporting requirements for both physicians and abortion facilities. The court viewed Justice O'Connor's "undue burden" standard as superceding *Roe* and applied it to uphold all of the regulations except for the spousal notification requirement.³ The court concluded that the unlimited number of foreseeable consequences resulting from coerced notification – such as physical, psychological, and economic abuse or retaliation – were themselves an undue burden,⁴ and the state's interest in protecting a husband's interest was not a compelling one.⁵

Judge Alito agreed with the court that the "undue burden" test set out in Justice O'Connor's opinions in *Webster v. Reproductive Health Services*⁶ and *Hodgson v. Minnesota*⁷ "changed the law that we are bound to apply" and "now represents the governing legal

¹ 947 F.2d 682 (3rd Cir. 1991).

² See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

³ *Casey*, 947 F.2d at 719.

⁴ *Id.* at 713.

⁵ *Id.* at 715.

⁶ 492 U.S. 490 (1989).

⁷ 497 U.S. 417 (1990).

standard.”⁸ However, Judge Alito dissented from the court’s conclusion that the spousal notification requirement constituted an undue burden and would have upheld the provision under rational basis review.⁹

Judge Alito also dissented from the court’s interpretation of Justice O’Connor’s opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), to mean that the two-parent notification requirement without judicial bypass imposed an “undue burden” and did not serve a compelling interest.¹⁰ According to Alito, O’Connor found the notice statute unconstitutional under the rational relationship test, as articulated in the lead opinion in *Hodgson*, written by Justice Stevens.¹¹ He noted that, in either event, her position in no way undermined his conclusion that Section 3209 had not been shown to create an undue burden.¹²

After a review of Justice O’Connor’s opinions explaining the meaning of “undue burden,”¹³ Alito concluded that

an undue burden does not exist unless a law (a) prohibits abortion or gives another person the authority to veto an abortion or (b) has

⁸ *Casey*, 947 F.2d at 720. Under O’Connor’s test, as set forth in *Webster* and *Hodgson*, a law that imposes an “undue burden” must satisfy strict scrutiny and serve a “compelling” state interest. By contrast, a law that does not impose an “undue burden” must simply be “rationally” or “reasonably” related to a “legitimate” state interest. See *Webster*, 492 U.S. at 530 (O’Connor, J., concurring) and *Hodgson*, 110 S. Ct. at 2949-50 (O’Connor, J., concurring). As Justice Scalia noted in his dissent in *Casey*, the undue burden test that Justice O’Connor enunciated in *Webster* and *Hodgson* differs significantly from the undue burden test that the joint opinion enunciated in *Casey*. See *Casey*, 505 U.S. at 987-92 (Scalia, J., dissenting).

⁹ *Casey*, 947 F.2d at 720.

¹⁰ *Id.* at 725.

¹¹ *Id.*

¹² *Id.*

¹³ Alito relied upon the following cases for his conclusion: *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 464 (1983) (O’Connor, J., dissenting) (an undue burden has been found “in situations involving absolute obstacles or severe limitations on the abortion decision,” not where a regulation “may ‘inhibit’ abortion to some degree”); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O’Connor, J., dissenting) (criticizing the majority approach under which “the mere possibility that some women will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it”); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (no undue burden was imposed by a law requiring notice to both parents or judicial authorization before a minor could obtain an abortion); *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476 (1983) (O’Connor, J., concurring and dissenting) (statute requiring parental consent or judicial authorization “imposes no undue burden”).

the practical effect of imposing “severe limitations,” rather than simply inhibiting abortions “to some degree” or inhibiting “some women.” Furthermore, Justice O’Connor’s opinions disclose that the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors seeking abortions in *Hodgson* or *Matheson* or the burden created by the regulations in *Akron* that appreciably increased costs. Since the laws at issue in those cases had inhibiting effects that almost certainly were substantial enough to dissuade some women from obtaining abortions, it appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown.¹⁴

According to Alito, the plaintiffs did not carry their burden of proving that the spousal notification provision would have the kind of broad impact needed to establish an “undue burden.”

Alito aptly noted that plaintiffs’ ability to show an undue burden was limited by two objective factors: first, that “the ‘vast majority’ of married women voluntarily inform their husbands before seeking an abortion,” and, second, “the overwhelming majority of abortions are sought by unmarried women.”¹⁵ Moreover, the provision included four significant exceptions allowing a woman to avoid the notification requirement if she believes that: (1) he is not the father of the child, (2) he cannot be found after diligent effort, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) she has reason to believe that notification is likely to result in the infliction of bodily injury upon her.¹⁶ Alito was troubled by the fact that “the plaintiffs did not even roughly substantiate how many women might be inhibited from obtaining an abortion or otherwise harmed by Section 3209.”¹⁷ As to the

¹⁴ *Casey*, 947 F.2d at 721.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 724.

plaintiffs' presentation of statistical evidence concerning spousal abuse and battered women, Alito acknowledged the national problem as one of grave concern but pointed out that, "[w]hether the legislature's approach represents sound public policy is not a question for us to decide. Our task here is simply to decide whether Section 3209 meets constitutional standards."¹⁸ Consequently, Alito concluded that plaintiffs failed to prove that Section 3209 imposed an undue burden.

Moreover, because plaintiffs made a facial attack, Judge Alito explained that they could not rely on a "worst-case analysis" or on "proof showing only that the provision would impose an undue burden 'under some conceivable set of circumstances.'"¹⁹ "Clearly, the plaintiffs did not substantiate the impact of Section 3209 with the degree of analytical rigor that should be demanded before striking down a state statute."²⁰

Finally, Alito subjected the notice provision to rational basis review, briefly describing the legitimacy of the state's interest in furthering the husband's interest in the fetus:

The Supreme Court has held that a man has a fundamental interest in preserving his ability to father a child. The Court's opinions also seem to establish that a husband who is willing to participate in raising a child has a fundamental interest in the child's welfare. It follows that a husband has a "legitimate" interest in the welfare of a fetus he has conceived with his wife.²¹

¹⁸ *Id.*

¹⁹ *Id.* at 721, n.1 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)).

²⁰ *Id.* at 722. Judge Alito's adherence to the *Salerno* standard is significant because it indicates adherence to the notion that courts exist to remedy injuries to actual parties before them, not to decide abstract constitutional issues for the sake of deciding or settling those issues. For further elaboration of this point, see the discussion on this issue with regard to Justice Janice Brown, *supra* at 26-27.

²¹ *Id.* at 725 (internal citations omitted).

Judge Alito concluded that the spousal notice provision was rationally related to that legitimate state interest.²²

Another abortion case in which Judge Alito participated was *Planned Parenthood of Central New Jersey v. Farmer*,²³ striking down New Jersey's partial birth abortion ban. The court held that the ban – nearly identical to the one before the Supreme Court in *Carhart v. Stenberg*²⁴ – was void for vagueness and placed an undue burden on a woman's constitutional right to obtain an abortion.²⁵ Although the Supreme Court had issued its opinion in *Carhart*, the Third Circuit panel decided to issue an opinion it had written prior to *Carhart*. The court explained its reason for doing so:

Because nothing in that opinion is at odds with this Court's opinion; because, in many respects, that opinion confirms and supports this Court's conclusions and, in other respects, goes both further than and not as far as, this opinion; and, because we see no reason for further delay, we issue this opinion without change.²⁶

Judge Alito did not join the majority opinion which, in his opinion “was never necessary and is now obsolete” and criticized it for “fail[ing] to discuss the one authority that dictates the result in this appeal.”²⁷ Alito wrote a brief concurring opinion, only to explain that, because of the virtually identical language contained in the New Jersey statute, *Carhart* “compels affirmance of the decision of the district court” finding the statute unconstitutional.²⁸

²² *Id.* at 727.

²³ 220 F.3d 127 (3rd Cir. 1999).

²⁴ 530 U.S. 914 (2000).

²⁵ *Farmer*, 220 F.3d at 130.

²⁶ *Id.*

²⁷ *Id.* at 152.

²⁸ *Id.* at 153.

Alito wrote a very brief concurrence in *Alexander v. Whitman*,²⁹ that, although it did not involve abortion, shed some more light on his thinking about *Roe* and substantive due process in general. In *Alexander*, a mother who delivered a stillborn baby as the result of alleged medical malpractice challenged New Jersey's Wrongful Death and Survival Action Acts as violative of the Equal Protection and Due Process Clauses because they denied recovery on behalf of stillborn children. The district court dismissed her complaint and the Third Circuit affirmed, in part based on its conclusion that, under *Roe*, the child did not fall within the protections afforded "persons" as that term is used in the Fourteenth Amendment.³⁰

Judge Alito agreed with the majority opinion almost completely, but wrote to comment on two points raised in the opinion. He first addressed the majority's response to the plaintiffs' assertion that the stillborn child was a human being from the moment of conception. The majority wrote: "The short answer to plaintiffs' argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons."³¹ Alito was critical of the majority's reasoning:

I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.³²

Alito also made brief but noteworthy reference to what he considered to be the proper considerations in a substantive due process decision:

²⁹ 114 F.3d 1392 (3rd Cir. 1997).

³⁰ *Id.* at 1400.

³¹ *Id.* at 1402.

³² *Id.* at 1409.

I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized.³³

B Free Speech

In 2004, Judge Alito wrote for a unanimous court in *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*,³⁴ in which the court upheld a lower-court order requiring a school district to allow a bible-study group to set up an information table at an elementary school back-to-school night. The opinion noted that having established a limited public forum, the school district “is bound to ‘respect the lawful boundaries it has itself set.’ It may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ . . . nor may it discriminate against speech on the basis of its viewpoint.”³⁵ The opinion also noted:

To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint. *See Cornelius*, 473 U.S. at 812 (warning that “the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers”). Although the ten groups specifically approved by [the school district] are apparently not controversial or divisive in that community, at least some would be controversial and divisive elsewhere. Even in the school setting, “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not enough to justify the suppression of speech.³⁶

In response to the school board’s argument that banning the bible-study group was necessary to avoid a violation of the Establishment Clause, the opinion stated “[t]he Supreme

³³ *Id.*

³⁴ 386 F.3d 514 (3d Cir. 2004).

³⁵ *Id.* at 526 (internal citations omitted).

³⁶ *Id.* at 527-28 (internal citations omitted).

Court has repeatedly ‘rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.’”³⁷

In 2001, Judge Alito authored an opinion holding that a public school’s anti-harassment policy violated the First Amendment in *Saxe v. State College Area Sch. Dist.*³⁸ The policy at issue in *Saxe* prohibited both verbal and physical conduct described in its definition of harassment:

Harassment means verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or offensive environment.

Harassment can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.³⁹

The plaintiff feared that, under the policy, his children could be punished for speaking out against homosexuality⁴⁰ or on other moral and religious issues and challenged the policy as unconstitutionally vague and overbroad.⁴¹ The district court dismissed the plaintiffs’ free speech

³⁷ *Id.* at 530 (internal citations omitted).

³⁸ 240 F.3d 200 (3rd Cir. 2001).

³⁹ *Id.* at 203.

⁴⁰ The policy includes examples of specific types of harassment. For example, harassment on the basis of sexual orientation extends to “negative name calling and degrading behavior.” *Id.* at 203.

⁴¹ *Id.* at 203.

claims based on its conclusion that harassment is not entitled to First Amendment protection and that the policy prohibited no more speech than was already unlawful under federal and state anti-discrimination law and therefore did not violate the First Amendment.⁴²

In an opinion authored by Judge Alito, the Court of Appeals reversed, explaining that “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause” and that the challenged policy prohibited a substantial amount of speech that would not constitute actionable harassment under either federal or state law.⁴³ Furthermore, Alito explained that the “sweeping assertion” that harassment has never been protected under the First Amendment, “belies the very real tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech.”⁴⁴

After reviewing the scope of existing anti-harassment laws, upon which the challenged policy was purportedly based, Alito criticized the district court for “exaggerat[ing] the current state of the case law in this area”:

There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications. Where pure expression is involved, anti-discrimination law steers into the territory of the First Amendment.⁴⁵

Alito explained that this type of “content- or viewpoint-based restriction is ordinarily subject to

⁴² *Id.* at 204.

⁴³ *Id.*

⁴⁴ *Id.* at 210.

⁴⁵ *Id.* at 206 (internal citations omitted).

the most exacting First Amendment scrutiny,” and compared it to the hate-speech ordinance struck down in *R.A.V. v. City of St. Paul*:⁴⁶ “Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.”⁴⁷

⁴⁶ 505 U.S. 377 (1992).

⁴⁷ *Saxe*, 240 F.3d at 207. Alito concluded that this policy was not merely a regulation of speech’s “secondary effects,” nor did it qualify as a “time, place and manner” regulation. *Id.* at 209.

After conducting a cursory review of the relevant case law regarding speech regulations within the schools,⁴⁸ Alito ultimately rested his opinion on the policy’s overbreadth. Alito applied the test set forth by the Supreme Court in *Tinker v. Des Moines Independent Community Sch. Dist.*,⁴⁹ that restrictions on student speech will be upheld only where necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. He concluded that the policy failed the *Tinker* test because it punishes not only speech that actually causes disruption, but speech that merely intends to do so – speech “which has the purpose or effect of” creating a hostile environment.⁵⁰ Moreover, the policy’s “hostile environment” prong “does not, on its face, require any threshold showing of severity or pervasiveness” and, therefore, could be applied to speech that merely offends someone.⁵¹

When it comes to statutory construction, Alito subscribes to the elementary rule that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”⁵² Before declaring the anti-harassment policy in *Saxe* unconstitutional, Alito first asked whether it was susceptible to a reasonable limiting construction and determined it was not.⁵³

⁴⁸ Alito demonstrated a solid understanding of the scope of students’ rights in the public schools in his discussion of the following cases: *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503 (1969), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and *Hedges v. Wauconda Comm. United Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993).

⁴⁹ 393 U.S. 503 (1969).

⁵⁰ *Saxe*, 240 F.3d at 216.

⁵¹ *Id.*

⁵² *Id.* at 215.

⁵³ *Id.* at 215-17.

Judge Alito took a strong position in support of the free speech rights of a first grader in *C.H. v. Oliva*.⁵⁴ In *Oliva*, in the spirit of the Thanksgiving holiday, a teacher asked students to make posters depicting what they were thankful for.⁵⁵ Plaintiff's poster indicated he was thankful for Jesus and was placed on display along with other children's posters in the school hallway.⁵⁶ Subsequently, the poster was removed because of its religious theme.⁵⁷ The majority remanded the case on procedural grounds⁵⁸; however, Alito wrote a dissenting opinion, accusing the majority of ducking the First Amendment issue that was squarely presented.⁵⁹ Judge Alito offered an extensive discussion of viewpoint discrimination which he summarized as follows:

I would hold that discriminatory treatment of the poster because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two propositions: first, even in a "closed forum," governmental "viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.⁶⁰

C. Free Exercise

Judge Alito authored the majority opinion in *Fraternal Order of Police v. City of*

⁵⁴ 226 F.3d 198 (3rd Cir. 2000).

⁵⁵ *Id.* at 201.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The court vacated the district court's dismissal of plaintiff's claims and remanded to allow plaintiff to amend the allegations of her complaint to include personal involvement on the part of defendants.

⁵⁹ *Id.* at 203.

⁶⁰ *Id.* at 210.

Newark,⁶¹ in which the court held that the city’s policy against police officers wearing beards, which only made exemptions for secular medical reasons, violated the Free Exercise Clause of the First Amendment. The plaintiffs, two devout Sunni Muslims who were under a religious obligation to grow beards, sued after they were disciplined for violating the “no-beard” policy.

The court evaluated the no-beard policy under the Supreme Court’s religious exemption jurisprudence, derived from *Employment Division v. Smith*⁶² and *Church of Lukumi Babalu Aye v. Hialeah*.⁶³ The court held that providing of medical exemptions, but not religious exemptions to the no-beard policy “is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.”⁶⁴ As to the specific level of scrutiny, Alito noted that

[w]hile *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny.⁶⁵

D. Establishment Clause

⁶¹ 170 F.3d 359 (3rd Cir. 1999).

⁶² 494 U.S. 872 (1990).

⁶³ 508 U.S. 520 (1993). Judge Alito disagreed with the district court’s application of the Supreme Court’s pre-*Smith* jurisprudence on the basis of plaintiffs’ argument that *Smith* is limited to the criminal context.

⁶⁴ *Fraternal Order of Police*, 70 F.3d at 365.

⁶⁵ *Id.* at 366, n. 7 (internal citations omitted).

Judge Alito authored the important decision in *ACLU v. Schundler*,⁶⁶ concerning the constitutionality of municipal holiday displays. In *Schundler*, the district court held unconstitutional the display of a crèche and a menorah; thereafter, the display was modified with the addition of secular symbols (large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols), as well as two disclaimers.⁶⁷ It was the constitutionality of this modified display that was before the Third Circuit.

Alito properly looked to the Supreme Court's decisions in *Lynch v. Donnelly*⁶⁸ and *Allegheny v. ACLU*⁶⁹ to evaluate the display. Unable to find any meaningful constitutional distinction between the display at issue and those upheld in *Lynch* and *Allegheny*, the court found the display constitutional.⁷⁰

In *ACLU v. Black Horse Pike Regional Bd. Of Educ.*,⁷¹ the court held that a policy allowing a vote of the senior class to determine if prayer will be included in high school graduation ceremonies was unconstitutional. The majority opinion characterized this case as “a dispute over the constitutionality of prayer at a public high school graduation,”⁷² analyzing it first under *Lee v. Weisman*⁷³ and then under *Lemon v. Kurtzman*.⁷⁴ The opinion essentially

⁶⁶ 168 F.3d 92 (3rd Cir. 1999).

⁶⁷ *Id.* at 95.

⁶⁸ 465 U.S. 668 (1984).

⁶⁹ 492 U.S. 573 (1989).

⁷⁰ *Schundler*, 168 F.3d at 107.

⁷¹ 84 F.3d 1471 (3rd Cir. 1996).

⁷² *Id.* at 1477.

⁷³ 505 U.S. 577 (1992).

⁷⁴ 403 U.S. 602 (1971).

ignored any impact upon the students' right of free speech.

Judge Alito joined the dissent, written by Judge Mansmann, which would have upheld the policy as pure student-initiated, directed, and composed prayer. The dissent recognized the need to examine both the Establishment Clause and free exercise/free speech rights and to balance the graduates' free exercise and speech rights against any compelling state interest in avoiding religious establishments:

The [Supreme] Court's free exercise jurisprudence clearly suggests that a separation policy which overextends into the domain of free exercise and free speech must be suspect.... In light of the Establishment Clause's broad purpose to serve the free exercise of religion, I would hold that here the narrowly fact-bound holding of *Lee*, does not preclude such student directed, composed and delivered prayer as an integral segment of the graduation ceremony, where there is not, by policy, virtually any school administration or faculty involvement. In addition, applying the Court's three-part Establishment Clause analysis articulated in *Lemon*, I would hold that the defendant's challenged activity also meets the *Lemon* test as to compliance with the Establishment Clause.⁷⁵

Given that Judge Alito joined Judge Mansmann's dissent in *Black Horse Pike*, it is likely that Justice Alito would have joined the dissent in *Santa Fe Independent Sch. Dist. v. Doe*.⁷⁶

III. CONCLUSION

On the whole, Judge Alito's opinions reveal a commitment to the hallmark principles of a conservative judicial philosophy. He has been called "Scalito" for having judicial leanings akin to those of Justice Antonin Scalia.⁷⁷ If appointed to the Supreme Court, Judge Alito's opinions would most likely align with those of Justices Scalia and Thomas.

⁷⁵ *Black Horse Pike*, 84 F.3d at 1489 (internal citations omitted).

⁷⁶ 530 U.S. 290 (2000).

⁷⁷ Bill Rankin, *The President-Elect: The Supreme Court*, THE ATLANTA J. & CONST., Dec. 17, 2000.