



Alito: hypocrisy in high places

By HARVEY SILVERGLATE AND JAMES TIERNEY | July 3, 2007

The First Amendment took two big hits from the Supreme Court on June 25. Freedom of religion lost in *Hein v. Freedom From Religion Foundation*, while freedom of speech was battered in *Morse v. Frederick*. That's bad news on its own, but these cases also suggest the disturbing possibility that the newest justice, Samuel Alito Jr. — whom "Freedom Watch," along with many others, has hailed as a true friend of civil liberties — cast the crucial fifth vote against the First Amendment in each decision on the basis of his religious views.

In the first case, an organization of atheist taxpayers argued that federal funding of President Bush's faith-based initiatives and social programs violated the separation of church and state. They relied on a 1968 decision by the high court that allows taxpayers to challenge governmental religious expenditures in court.

But in the wake of this past week's decision, a taxpayer's right to do so will be greatly reduced. Now, future challenges may only target *congressional* appropriations for religious purposes. When the president uses public funds for religious purposes without an authorization from Congress, taxpayers have no "standing" to sue. In effect, Alito and four other justices licensed presidential subterfuge against the First Amendment when religion is in play.

With this decision, Alito appeared to be beating back atheists while protecting faith-based organizations' right to suckle at the taxpayer teat via the executive branch. (One could make a similar argument about Justice Antonin Scalia.)

The impression that Alito engages in judicial sleight of hand when it comes to religious challenges to the First Amendment was strengthened when, on the same day, he issued his opinion in *Morse*. Here, Alito refused to protect the speech of a Juneau, Alaska, high-school

student, Joseph Frederick. Let out of school early with his classmates to watch the passing of the Olympic torch, Frederick unfurled a banner bearing the message BONG HITS 4 JESUS. The school principal interpreted the banner as a pro-drug message, confiscated it, and suspended Frederick for 10 days. He sued.

In a series of nearly incomprehensible opinions, five justices, including Alito, denied Frederick's free-speech rights. Instead, they chose to limit a 1969 opinion, *Tinkerv. Des Moines Independent School District*, which declared that public-school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Alito's separate concurring opinion argued that, though students' speech might be protected when it is not "disruptive," Frederick's banner was unprotected since it could reasonably be interpreted as advocating illegal drug use, and was therefore disruptive of the school's educational mission.

But neither Alito nor the other justices mentioned the nine-foot-tall gorilla in the living room: linking the Lord's name to bong hits. Blasphemy! While the Court's "liberals" and "conservatives" debated the drug message of the banner, Jesus's name went unspoken.

There is reason to believe, however, that Alito was offended less by the reference to "bong hits" than by the hit, so to speak, against Jesus. As an appellate judge, Alito had decided a case — *Saxe v. State College Area School District* — that declared a Pennsylvania school district's anti-harassment policy to be overly broad and therefore unconstitutional. In that 2001 case, two public-school students and their father, who described themselves as "Christians [who] believe . . . that homosexuality is a sin," sued to invalidate the school's policy. Though they felt "compelled by their religion to speak out on . . . moral issues," the father believed that his children's speech would be interpreted as harassment of gay students, rather than as religiously motivated free speech.

Alito agreed, concluding that such speech — while unwelcome in the eyes of gay students and others — could hardly be seen to "pose a realistic threat of substantial disruption" and "is within a student's First Amendment rights." What one student considered hate speech, Alito argued, another could fairly consider free speech. He invalidated the code, pushing back against would-be academic censors seeking to outlaw politically incorrect speech.

In the wake of *Morse*, it is necessary to rethink Alito's apparently principled position in *Saxe*, which this column noted favorably in the past. Alito's double standard protects a religious kid's undoubted right to tell a gay student he is going to Hell, but not another kid's right to make a

nonsensical statement linking Jesus with drug use. This solicitousness toward the religious right is unprincipled judicial activism.

The beauty of “judicial reasoning” is that it can define and protect the blessings of liberty in a constitutional society. But it can also be a cover for blatant hypocrisy.