Judging Alito: Church-state entanglements

by Melissa Rogers in the January 10, 2006 issue

The First Amendment protects religious freedom in two ways: by prohibiting the government from interfering with citizens' religious exercise and by barring the state from promoting faith. Judging from his record, Supreme Court nominee Samuel Alito seems apt to uphold the first safeguard but inclined to erode the second.

In a 1985 application to be deputy assistant to the attorney general under President Ronald Reagan, Alito noted that he had "developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment." He added that it had been "an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly."

The most famous Warren Court Establishment Clause cases are decisions that struck down school-sponsored prayer and Bible readings in public school classrooms. The Reagan administration supported a constitutional amendment in 1982 that would have returned state-sponsored prayers to public schools. So Alito's statement raises questions about whether he would seek to reverse course on key religious-liberty issues that have been long settled.

When public schools sponsor prayers, the government invades a sacred realm. The state not only coerces the consciences of those who don't share whatever faith it chooses to embrace, but also gains a measure of control over how and when children worship. After more than 40 years in which religious diversity has increased in the country, any suggestion that the Court should trim its sails on these decisions would be a radical and dangerous proposition.

In the 1996 case of *ACLU v. Black Horse Pike Regional Board of Education*, Alito dissented from a decision striking down a public school's policy that allowed the

senior class to vote to determine if a student-led prayer would be included in high school graduation ceremonies. The federal appellate court on which Alito sits heard this case after the Supreme Court had decided the 1992 case of *Lee v. Weisman*, in which it prohibited clergy-led prayer at a middle school graduation, but before it heard the 2000 case of *Doe v. Santa Fe*, in which it struck down a policy allowing students to vote on whether prayers would be said before public high school football games.

The majority in *Black Horse* believed that the Lee decision dictated the result in the case, and it took issue with the notion that precious individual rights could be subjected to a school-sponsored majority vote. Joining a dissenting opinion written by one of his colleagues, Alito maintained that the *Lee* decision was limited to its specific facts. He found no constitutional fault with students' voting on prayer and said that the voting made it clear that any prayer was attributable to the students, not the state.

The judge's willingness to sacrifice individual liberties on the altar of majoritarianism reflects a judicial philosophy that could sanction various forms of state sponsorship of popular faiths. This flouts the notion of equal religious liberty and the purpose of the Bill of Rights. As the Court said in 1943: "The very purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Also embedded in the dissenting opinion in *Black Horse* is the idea that the Constitution permits the government to promote religion generally. In the 1968 decision of *Epperson v. Arkansas*, the Warren Court struck down a law forbidding the teaching of evolution in public schools and said: "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." This principal was recently affirmed by a closely divided Court.

Alito apparently disagrees with the Court majority on this matter. In the *Black Horse* case, Alito and his fellow dissenters first noted that "the members of the [Supreme] Court divide as to whether the Establishment Clause precludes the government from conveying a message that it endorses or encourages religion in a generic sense, or especially acknowledges or accommodates the broad Judeo-Christian heritage of our

civil and social order." These judges then took the minority side in the debate, saying that "the First Amendment does not condemn legislation or official policy that has the effect of assisting religion generally."

The Supreme Court already has said that nondenominational prayer before legislative sessions and a longstanding Ten Commandments display in a public park do not violate the Constitution. Using similar reasoning, it is likely to find no constitutional problem with the words *under God* in the Pledge of Allegiance and with items such as small religious symbols that have appeared on city seals for years. The real question is not how these narrow issues will be decided, but whether the Court will further open the door for the government to advance religion.

What damage is done when the state sponsors "nonsectarian" religious exercises? When it erects new monuments to sacred scriptures that reflect the teachings of several faiths? When the government seeks to place its stamp of approval on religion "generally"? Even when religious expressions are relatively broad-based, they still come from some traditions and not others. When the state promotes religion in these ways, it sends a message that some citizens are more equal than others.

Part of the genius of the American experiment has been that it regards religious identity, or lack thereof, as irrelevant to the value of citizenship. This has helped to encourage remarkable civic peace. If the government is broadly permitted to endorse religion generally, one can be sure that the state will regularly embrace more popular faiths, and thus send a signal to adherents of all others that they are second-class citizens.

This kind of state endorsement of religion also intrudes into the sacred space in which decisions about faith are made. As Justice Sandra Day O'Connor recently noted, the founders "conceived of a Republic receptive to voluntary religious expression," and "voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices."

Moreover, state promotion of religion inevitably distorts and weakens religion. When the state embraces religion, aspects of the faith that aren't useful to it are downplayed, while aspects that are useful to the state are magnified. This warps religion and withers its spiritual force.

Taking such a stance does not mean that religion cannot be expressed and practiced in the public square. As the Court has noted: “There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” So, for example, while public schools cannot sponsor prayers at graduation, religious groups may hold baccalaureate services that are filled with prayers and hymns and do so on school property during nonschool hours if the school rents its space on an equal basis to other nongovernmental groups. And though the government itself cannot endorse religion, government officials may speak about their faith in personal ways. One of the great virtues of this system is that it ensures that individuals and groups, rather than the state, control religious expression and worship.

Judge Alito seems not to have encountered a case on the related issue of government funding of religious institutions, although he apparently supported the Reagan administration’s efforts to provide government aid to private schools offering religious instruction. The Court is likely just one justice away from allowing government grant and contract funds to be used for religious instruction, worship, evangelism and other religious activities when the funds are given to religious organizations along with other nongovernmental organizations. Alito could be the justice who provides the crucial vote.

This move not only would violate the principle of governmental neutrality by using state funds to support religion; it also would lead to a loss of religion’s independence from government. What the government funds it will control, even if what it funds is religious.

Some argue that the government ought to be able to subsidize the religious activities of nongovernmental organizations on the same basis that it subsidizes the nonreligious activities of such groups. This ignores the fact that the First Amendment singles out religion for special treatment. The limits the Establishment Clause places on government’s relationship with faith are balanced by the special accommodations for religion that flow from the Free Exercise Clause. For example, though the government must not fund religious activities, even though it may subsidize nonreligious activities, it must offer special protection for religious autonomy. These limits work together to ensure that religion can pursue its mission as it sees fit, rather than as the government sees fit.

Senators should closely question Alito on these subjects. They should not be cowed by those who insist that this debate is between the godless and the God-fearing or between those who value Christianity and those who want to oppress it. It is not. Senators should forcefully articulate the ways in which changes such as these would devalue the liberties of all citizens and compromise the faith that is favored and funded by the state.