

# **THE ALITO OPINIONS**

A Report of the Alito Project at the Yale Law School  
December 19, 2005

## INTRODUCTION

Samuel A. Alito Jr. was nominated to the United States Court of Appeals for the Third Circuit by President George H.W. Bush on February 20, 1990, and confirmed by the Senate on April 27, 1990. He took the oath of office on April 30, 1990.

The Alito Project at the Yale Law School has conducted a comprehensive review of Judge Alito's published opinions from his more than fifteen years on the Federal bench. We reviewed 299 cases in which Judge Alito wrote a majority opinion, 52 where he wrote a concurrence, and 64 where he wrote in dissent. An appendix to this report lists all these opinions. Judge Alito also has voted on, but not authored, many other Third Circuit decisions. Some of these already have garnered media attention, such as *Jenkins v. Manning* on voting rights; *LePage's v. 3M* on antitrust; and *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, on standing in an environmental case. We chose to focus solely on the opinions that Judge Alito wrote and therefore do not include those cases in our analysis.

This report puts special focus on the opinions that most clearly suggest how Judge Alito might discharge the duties of his office if he is confirmed as a Justice of the United States Supreme Court. Our review indicates that when confronted with situations where statutory language and controlling precedent are clear, Judge Alito defers to settled law. However, in many cases Judge Alito has had more latitude to decide questions where statutory language is ambiguous, precedents are in conflict, or the Supreme Court has not issued a controlling decision. These opinions are especially significant because they provide more insight into Judge Alito's own judicial philosophy and because it inevitably falls to the Supreme Court to decide closely contested issues.

From these cases, we identified several trends in Judge Alito's judicial approach: he rules in favor of institutional actors and defers to agency decisions in many settings while showing skepticism toward individual litigants' claims; he appears to support a narrow view of civil rights, prisoners' rights, and workers' rights but a broad view of religious freedoms; he appears willing to uphold legislative restrictions on abortion; and he is willing to limit congressional power. When able, he has sought to move the law to achieve the broad philosophical purposes articulated in the memorandum he submitted in November 1985 as part of his application to become Deputy Assistant Attorney General in charge of the Office of Legal Counsel. (A copy of his statement is also included in the appendix).

Among the specific findings that underlie our conclusions are:

**Limits on Congressional Power:** Several of Judge Alito's opinions have imposed limits on Congressional authority. Judge Alito has held Congress to a more stringent standard than that of the Supreme Court or other appeals courts hearing challenges to the same statutes. For example, Judge Alito argued in dissent in *United States v. Rybar* against a ban on machine guns that five other appellate courts and the Third Circuit itself

upheld. Judge Alito also authored the majority opinion in *Chittister v. Department of Community and Economic Development*, invalidating parts of the Family and Medical Leave Act for exceeding the bounds of congressional authority—a position the Supreme Court subsequently rejected.

**Reproductive Rights:** In one dissent, Judge Alito would have upheld a Pennsylvania law requiring a wife to notify her husband before having an abortion. The Supreme Court rejected his reasoning, finding that the law imposed an undue burden on the wife.

**Procedural Fairness:** When given latitude in cases involving individuals' procedural rights, Judge Alito consistently has decided to limit access to courts, at times leaving litigants with fewer procedural options. He has construed narrowly the constitutional requirements that individuals receive notice and an opportunity to be heard before being deprived of their rights. He has strictly interpreted standing requirements and has limited causes of action. He also has been reluctant to review the actions of executive branch officials, making it more difficult for individuals to hold the government accountable for its actions. There is also evidence that Judge Alito gives some groups of litigants more leeway than others to pursue their claims.

**Free Speech:** Although Judge Alito has supported the free speech claims of business interests, government agents, and student groups, and has protected the press against libel claims, he has refused to extend this support to the claims of prisoners seeking access to newspapers and photographs of their families.

**Immigration:** While other appellate courts recently have criticized the Board of Immigration Appeals' (BIA) failure to make reasonable decisions regarding the deportation or asylum claims of immigrants, Judge Alito was prepared to uphold the BIA's decision to deport immigrants in seven of eight deportation decisions reviewed and to uphold the BIA's decision in seven of nine asylum cases.

**Law Enforcement:** Judge Alito's opinions reveal a willingness to defer to law enforcement officials in criminal cases and a lack of sensitivity to class-based disparities in the criminal justice system. There is some evidence that he may treat wealthy litigants differently. Even when he finds that a defendant's rights have been violated, he consistently declines to provide a remedy. As a result he ruled for the government in almost every case reviewed.

**Civil Rights:** In the area of civil rights law, Judge Alito consistently has used procedural and evidentiary standards to rule against female, minority, age, and disability claimants. He has taken a markedly different approach to religious discrimination, ruling in favor of religious minorities in various contexts.

**Workers' Rights:** In the related field of workers' rights, Judge Alito consistently has sought to limit the scope and reach of statutes protecting workers' rights and to raise the bar that employee plaintiffs must overcome to bring legal claims. While many of these cases involved technical procedural issues, Judge Alito's opinions are consistent in

outcome. The employee or union would have prevailed in only five of the 35 employment and labor opinions he wrote.

**Environmental Law:** When deciding environmental cases, Judge Alito tends to defer to regulatory agency decisions. He is reluctant to preempt state environmental laws and directives unless a federal statute is clear in its intent to achieve this effect.

Our report also examines Judge Alito's opinions on other issues, including copyright, bankruptcy, and tax law. In sum, our hope is that the analysis set forth in this document will help readers make an informed decision about the wisdom of appointing Judge Alito to the nation's highest court.

*The Alito Project*

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## I. LIMITS ON CONGRESSIONAL POWER

In the future, the Supreme Court will have to resolve ongoing disputes about the issue of constitutional limits on Congress's power to enact laws. Beginning in the early 1990s, the Supreme Court broke from long-settled precedent in this area and placed greater restraints on Congress by limiting its power under the Commerce Clause and Section 5 of the Fourteenth Amendment. Although Judge Alito has not written many opinions dealing with limits to the legislative power, in two—*United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), and *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000)—he imposed new restrictions on Congress and in doing so revealed a willingness to curb legislative authority. Judge Alito has held Congress to a standard that is even more stringent than that of the Supreme Court or other appeals courts hearing challenges to the same laws.

*Rybar* involved Congress's power to legislate under the Commerce Clause. The defendant in *Rybar* was a licensed gun dealer who sold several machine guns at a gun show. He challenged the portion of the Firearms Owners' Protection Act of 1986 that made it a crime to "transfer or possess a machine gun." Although the Third Circuit panel upheld the machine gun law at issue in *Rybar* as a proper exercise of the Commerce Power, Judge Alito dissented, doubting that the regulated activity had a substantial effect upon interstate commerce.

Judge Alito began his analysis in *Rybar* with the then-recent Supreme Court decision—*United States v. Lopez*, 514 U.S. 549 (1995)—the case that marked the beginning of a break with decades of Supreme Court interpretation granting expansive power to Congress under the Commerce Clause. In *Lopez*, the Court struck down a law banning possession of handguns within 1000 feet of a school as beyond the power of Congress under the Commerce Clause, indicating a narrower interpretation of the Commerce Clause than previously existed.

In his dissent in *Rybar*, Judge Alito argued that his "problem with" the machine gun prohibition stemmed from the absence of empirical proof of the connection between machine gun sales and interstate commerce. He added, "I would view this case differently if Congress as a whole or even one of the responsible congressional committees had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce." *Rybar* 103 F.3d at 292.

Judge Alito seemed willing to accept that an activity has a substantial effect upon interstate commerce only if Congress had provided explicit empirical findings establishing that effect when it passed the statute regulating that activity under the Commerce Clause. He acknowledged, "Of course, Congress is not obligated to make findings." *Id.* at 292. But, he continued, should Congress choose not to make such findings, a court should not grant Congress's judgment any deference. He concluded by stating "we are left with no congressional findings and no appreciable empirical support"

for the substantial effect theory, and that “we should require at least some empirical support before we sustain a novel law.” *Id.* at 294. Chief Judge Sloviter’s majority opinion criticized Judge Alito’s empirical requirement as violating the separation of powers, running counter to the deference that the judiciary owes to its two coordinate branches of government, and requiring Congress or the Executive to “play Show and Tell with the federal courts.” *Id.* at 282.

Judge Alito’s dissent in *Rybar* differs substantially from the overall pattern of circuit court opinions on this same issue. The *Rybar* suit was the sixth challenge to the statute on Commerce Clause grounds heard in an appeals court after the Supreme Court issued its opinion in *Lopez*, and it was the sixth time that the statute was upheld. The circuit courts heard another five cases challenging the machine gun prohibition after *Rybar*, and four also upheld the statute. Only two appellate court decisions were not unanimous (*Rybar* itself and *U.S. v. Beuckelaere*, 91 F.3d 81 (6th Cir. 1996)). The one case that held that the machine gun regulation unconstitutional, *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), was vacated and remanded by the Supreme Court after *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), in which the Court upheld Congress’s prohibition on marijuana possession as intrinsically related to an interstate market in the drug.

Judge Alito has also demonstrated a willingness to curb congressional power through interpretation of the Eleventh Amendment. Under the Supreme Court’s interpretation of the Eleventh Amendment, an individual may not sue a state in federal court without the state’s consent unless Congress abrogates the state’s Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power. Section 5 of the Fourteenth Amendment has been deemed a constitutional provision which grants Congress the authority to abrogate the States’ sovereign immunity. In order to abrogate sovereign immunity pursuant to the Fourteenth Amendment, however, Congress must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. According to a 1997 decision of the Supreme Court, the legislation must have a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

In *Chittister v. Department of Community and Economic Development*, Judge Alito wrote an opinion for the Third Circuit court that found that part of the federal Family and Medical Leave Act (FMLA) exceeded the bounds of Section 5 of the Fourteenth Amendment and thus was prohibited by the Eleventh Amendment. The FMLA required employers, including states, to provide employees with twelve weeks of unpaid sick leave if needed to care for a family member or a serious health condition and permitted employees to sue in federal court if such leave was not granted. Chittister, a former employee of the Pennsylvania Department of Community and Economic Development, brought suit claiming that he was denied such leave.

Judge Alito ruled that the congressional record discussing the greater burden of family caretaking that traditionally falls on women was inadequate to demonstrate a

violation of the Fourteenth Amendment's Equal Protection guarantee, stating that "notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause." *Chittister*, 226 F.3d at 228-29. According to Judge Alito, "the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave." *Id.* at 229.

The Supreme Court has since upheld as constitutional the part of the FMLA that Judge Alito rejected in *Chittister*. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court upheld the provisions, stating that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735. Chief Justices Rehnquist and Justice O'Connor, two who championed claims of state sovereignty and had been members of the *Lopez* majority, both voted in the majority in *Hibbs*.

While Judge Alito's opinions have kept Congress within what he understands as the constitutionally mandated limits on its powers in the interest of the FMLA or gun regulation, he has been more willing to accept congressional restrictions on the methods available to courts to remedy constitutional violations. In *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999), a class action suit by prisoners in Pennsylvania alleging violations of the Eighth Amendment's ban on cruel and unusual punishment was settled by a consent decree entered into by the prisoners and Pennsylvania prisons specifying a detailed slate of prison management policies. Because the suit was not fully adjudicated, but rather resolved on the basis of a consent decree, there was not an official finding made by the district court that the Pennsylvania prisons were violating prisoners' constitutional rights. After Congress passed the Prison Litigation Reform Act of 1996 (PLRA), which directed that consent decrees settling allegations of abuse in prisons could be terminated if the relief specified in the decree was not narrowly drawn, the Pennsylvania prisons applied for and were granted a termination of the consent decree, which the prisoners then challenged. Judge Alito held that with regard to the consent decree, the PLRA "exercised [Congress's] Article I authority to prescribe rules for courts to apply when issuing or perpetuating prospective relief. Those rules do not transgress the separation-of-powers doctrine." *Id.* at 184-85. While the prisoners contended that the law underlying the consent decree was based on the Eighth Amendment, which did not change as a result of the PLRA, Judge Alito held that "the law underlying the consent decree is not the Eighth Amendment; it is the courts' statutory authority to issue prospective injunctive relief in the absence of an ongoing violation of a federal right." *Id.* at 185. This holding seems to put into issue the longstanding tradition that the power of the federal judiciary to grant injunctive relief for constitutional violations lies in the Constitution itself.



## II. REPRODUCTIVE RIGHTS

While there is obvious disagreement about whether *Roe v. Wade*, 410 U.S. 113 (1973), should be overturned, the Supreme Court has negotiated a moderate interpretation of abortion rights, reaffirming the central holding of *Roe* while adopting a balanced evaluation of regulations affecting abortion. Judge Alito's two concurrences and one dissent on abortion rights show him to have a permissive stance towards restrictions on abortion. Where there was a Supreme Court decision directly on point, Judge Alito applied controlling precedent. But in the case where the law was unclear, it is easier to see in which direction Judge Alito has attempted to move the law. There, Judge Alito would subject plaintiffs challenging regulations on abortion to extremely high burdens of proof before striking down restrictions on the right of a woman to choose to have an abortion.

The most revealing of Judge Alito's opinions on reproductive rights was filed in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991). The lawsuit challenged the Pennsylvania Abortion Control Act of 1982, which instituted a number of regulations on abortion providers and women seeking abortions. The district court struck down all the restrictions as unconstitutional. The Third Circuit reversed, upholding all the provisions except for the one requiring spousal notification before a woman could obtain an abortion. Judge Alito dissented from part of the majority decision to strike down "spousal consent" provision, referred to as Section 3209, which required a woman to get her husband's consent before obtaining a legal abortion, except in certain narrow circumstances.

The key question about which the majority and Judge Alito disagreed was whether Section 3209 placed an "undue burden" on a woman seeking an abortion. Under Supreme Court precedent, a regulation that does not impose an undue burden is evaluated under the very lenient constitutional standard—if the law serves a legitimate state purpose, and is rationally related to furthering that purpose, it is constitutional. Conversely, if a regulation in fact imposes an undue burden on women seeking abortions, then it is subjected to a more demanding standard under which a statute is only upheld if it is narrowly tailored to serve a compelling state interest. For practical purposes, statutes evaluated under the more lenient rational basis review are almost always upheld as constitutional, and statutes evaluated under the higher, or strict scrutiny, standard are almost always struck down as unconstitutional. Determining whether Section 3209 was an undue burden, therefore, virtually decided whether it was unconstitutional or not.

Judge Alito would have held that the spousal consent provision of Section 3209 did not create an undue burden. The Supreme Court later held the spousal consent provision to be unconstitutional and rejected Judge Alito's conclusions and reasoning. Judge Alito's dissent from the Third Circuit's majority opinion is all the more notable because of the method of his analysis.

First, Judge Alito analyzed what constituted a burden in a quantitative way, blurring differences in what kind of a burden was imposed on women in varying circumstances. He stated 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.” *Casey*, 947 F.2d at 721 (citing *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)). His conception, therefore, of how to evaluate an undue burden was to quantify the obstacle to obtaining an abortion that a regulation erected and then to compare that quantity to the obstruction posed by other regulations found not to be undue burdens. This method of analysis overlooked a fundamental difference between parental notice requirements and spousal notice requirements that the Supreme Court found relevant, specifically, that “a State may not give to a man the kind of dominion over his wife that parents exercise over their children” *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).

Second, Judge Alito understood the undue burden test to be a strict two-prong test: “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 the practical effect of imposing ‘severe limitations,’ rather than simply inhibiting abortions ‘to some degree’ or inhibiting ‘some women.’” Judge Alito interpreted the second prong to mean 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.” *Casey*, 947 F.2d. at 721. Judge Alito would have required a showing of “heavy impact” on a broad spectrum of women and then argued that such an impact had not been established. As he noted in his dissent, “the ‘vast majority’ of married women voluntarily inform their husbands before seeking an abortion,” and “the overwhelming majority of abortions are sought by unmarried women,” so, he continued, “Section 3209 cannot affect more than about 5% of married women seeking abortions or an even smaller percentage of all women desiring abortions.” *Id.* at 722. The Supreme Court disagreed with this method of analysis. As the Court said, “[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.” *Casey*, 505 U.S. at 894.

Judge Alito demanded empirical evidence of the number of women affected by § 3209 and the number of women who would actually be inhibited from obtaining an abortion by the regulation from the plaintiffs challenging it. He noted repeatedly that the plaintiffs “do not appear to have offered any evidence showing how many (or indeed that any actual women) would be affected by this asserted imperfection in the statute”; that a discussion of pregnancy as a source of spousal abuse “provides no basis for determining how many women would be adversely affected by Section 3209”; and that analysis of the questionable psychological capability of battered women to submit a signed statement asserting fear of abuse “fail[s] to show how many of the women potentially affected by Section 3209 . . . are victims of battering.” He concluded that “clearly, then, this evidence does not show how many women would be inhibited or otherwise harmed by Section 3209.” *Id.* at 723 n.6.

The Supreme Court did not put to the plaintiffs the task of producing empirical evidence of the number of women a challenged provision would affect. It did not do it in *Casey*, nor even in the earlier decision of Justice O'Connor that Judge Alito cited for this odd requirement. *Id.* at 722 n.2. While Justice O'Connor did discuss whether challengers of a statute "could succeed in making the threshold showing of undue burden," she was not referring to a threshold showing of quantifiable numbers of women affected. In the three statements of Justice O'Connor that Judge Alito cited, Justice O'Connor was concerned with the accuracy of printed materials describing fetal development provided to women seeking abortions, whether information about assistance available to help fund medical care and the father's responsibility to pay child support would place a limitation on the decision to obtain an abortion, and whether reporting requirements placed on physicians performing abortions would create a threat of identification of women obtaining abortions. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 831-32 (1986) (O'Connor, J., dissenting). In none of these examples did she insist on a showing of the number of women such regulations would affect or the number of women whose decisions might be changed by the regulations. It was thus not at all surprising that, when the Supreme Court reviewed *Casey* itself, it decided that making validity turn on the precise number of people injured by Section 3209 would be alien to our constitutional traditions.

In another case, *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000), there is little to glean about Judge Alito's judicial philosophy as his decision was compelled by a recent Supreme Court case directly on point. *Farmer* was a case challenging a statute banning partial-birth abortions, in which the majority opinion found that the statute was unconstitutional. Judge Alito wrote a separate concurrence only to point out that the recent Supreme Court decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), "requires" and "compels" the majority's opinion striking the statute down. *Farmer*, 220 F.3d at 152-53 (Alito, J., concurring).

A last case, *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), which may provide some insight into Judge Alito's views on the ongoing controversy about *Roe v. Wade*, was not actually an abortion case. Rather, it was a suit claiming that New Jersey's wrongful death statutes were unconstitutional for not recognizing the claims of a fetus. The majority held, among other things, that an Equal Protection argument cannot be made on behalf of a fetus. Judge Alito again wrote a separate concurrence to note that Supreme Court precedent compelled the judgment, saying "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." *Id.* at 1409. He then stated that he found "the court's suggestion that there could be 'human beings' who are not 'constitutional persons' . . . unfortunate." *Id.*

### III. PROCEDURAL FAIRNESS

In cases involving procedural issues, Judge Alito has had to weigh our nation's desire to protect the rights of every individual against the danger of overburdening the courts or infringing too deeply on legislative or executive prerogatives. When the governing law was well established, Judge Alito generally decided procedural disputes according to precedent. However, when the law was less certain, Judge Alito consistently struck a balance that limited access to courts and left individual litigants with fewer safeguards or remedies. He narrowly construed the constitutional requirements that individuals receive notice and an opportunity to be heard before being deprived of their rights. He has left some litigants without judicial recourse by denying standing or restricting causes of action. And he has been reluctant to review the actions of executive branch officials, making it more difficult for individuals to use the courts to hold the government accountable for its actions. Judge Alito also appears to have given some groups of litigants more latitude than others to pursue their claims.

Individuals cannot defend themselves or vindicate their rights unless they are informed about actions taken against them. The Supreme Court has long recognized that “[a]n elementary requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

On several occasions, Judge Alito has articulated a relatively narrow view of what constitutes sufficient notice. In *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (en banc), the government mailed notice of a forfeiture proceeding to a correctional institution. The plaintiff, an inmate there, never received it. As a result, he did not have an opportunity to contest the action and his property was forfeited. Hearing the case en banc, ten of the eleven judges of the Third Circuit concluded that the government could not rely on direct mail to provide notice to federal inmates unless it could show that “procedures at the receiving facility were reasonably calculated to deliver notice to the intended recipient.” *Id.* at 150. The majority explained that when dealing with inmates, “the relative difficulty to the government to effect actual notice is reduced, while the ability of prisoners to ensure that they receive notices directed to them suffers.” *Id.* Judge Alito was alone in dissent. Despite the special circumstances faced by incarcerated individuals, he maintained that “service of notice by mail [is] sufficient to satisfy the minimum requirements of due process.” *Id.* at 159.

The Third Circuit faced a similar question in *United States v. McGlory*, 202 F.3d 664 (3d Cir. 2000). In that case, the government sent notice of a forfeiture action to the U.S. Marshals Service rather than directly to the plaintiff's place of incarceration. The notice was never received. Nine of the eleven members of the en banc court agreed that the government's method of service failed to satisfy due process. In dissent, Judge Alito acknowledged that using the Marshals Service as an intermediary increased the chance that notice would be lost and increased the time it took for notice to be received. He

concluded, however, that “even if this is true, it does not matter for purposes of the Due Process Clause.” *Id.* at 675. A closely divided Supreme Court subsequently adopted a position similar to Judge Alito’s. In *Dusenbery v. United States*, 534 U.S. 161 (2002), the five-member majority narrowly construed the notice rights of incarcerated individuals.

Elsewhere, Judge Alito refused to extend the filing deadline for an incarcerated pro se litigant who had not received notice of the district court’s judgment, despite the litigant’s attempts to inform the clerk of his change in address. *See Poole v. Family Court*, 368 F.3d 263 (3d Cir. 2004). Although the Federal Rules of Appellate Procedure allowed the court to grant an extension under these circumstances, Judge Alito held that the litigant should have filed a “motion to reopen” rather than a “notice of appeal.” *Id.* at 268. Judge Alito admitted that his fairly technical interpretation “may lead to harsh results,” but he maintained that it provided the most consistent reading of the rules. *Id.* at 269.

The *Poole* decision illustrates the close link between the right to notice and the right to a hearing. Because Mr. Poole did not receive timely notice of the lower court’s judgment, he was denied the opportunity to appeal. Elsewhere, Judge Alito has been skeptical of litigants’ claims that they should have received a hearing before being deprived of their property or liberty by the government. In *Homar v. Gilbert*, 89 F.3d 1009 (3d Cir. 1996), Judge Alito dissented from the Third Circuit’s ruling that a police officer must be given a hearing before being suspended without pay and then demoted due to drug-related charges. He expressed his “understanding that a public employer may generally suspend a public employee for cause, with pay, and without a hearing—even absent an emergency situation—because such a suspension does not ordinarily implicate any constitutionally protected property interest.” *Id.* at 1026. Judge Alito also ruled against an individual’s claim of a liberty interest when a hearing was sought in *Benn v. Universal Health System, Inc.*, 371 F.3d 165 (3d Cir. 2004). Alito ruled that a man involuntarily confined in a psychiatric facility was not entitled to a hearing before being confined: “[I]n an emergency situation, a short-term commitment without a hearing does not violate procedural due process.” *Id.* at 174.

When a litigant has sought a hearing based on clear statutory guidelines rather than the Constitution’s due process guarantee, Judge Alito has been somewhat more receptive to the litigant’s claim. In *Welch v. Folsom*, 925 F.2d 666 (3d Cir. 1991), Judge Alito reversed a district court’s decision dismissing an inmate’s pro se complaint. He explained that the district court was incorrect in its view that the plaintiff was required to serve process on his adversary. Instead, under federal statute, officers of the court were obliged to serve process in the type of suit at issue. As a result, Alito permitted the plaintiff to go forward with his action.

Sometimes, the ability of people to air their grievances and defend their interests depends on more than a single hearing. Judges must be willing to let well-pled cases go to trial instead of dismissing them at a preliminary stage. In a number of instances, Judge Alito affirmed, or would have affirmed if in the majority, district court denials of summary judgment and permitted cases to proceed to the trial phase. In a case involving

the free exercise of religion, Judge Alito insisted, contrary to the view of most of his colleagues, that the plaintiff should have the opportunity to take her case to trial. *See C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc). Nine of the eleven judges who heard the case thought that the plaintiffs had not sufficiently stated a claim. Judge Alito's dissent accused the court of "duck[ing] the issue and bas[ing] its decision on a spurious procedural ground." *Id.* at 203. Judge Alito's desire to see the plaintiff pursue her free exercise claim seems in stark contrast to his position in a case like *Poole*, where he relied on a technical procedural rule to deny the plaintiff an opportunity to appeal.

In other instances, Judge Alito has taken a more restrictive approach to trial rights. In *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994), Judge Alito took the unusual step of granting a writ of mandamus, effectively reversing a trial court's denial of summary judgment. The decision of a trial court to deny summary judgment and proceed with trial is typically unreviewable. Judge Alito acknowledged that "writs of mandamus are restricted to extraordinary situations" and "must be invoked sparingly." *Id.* at 1288-89. Nevertheless, he used the writ to compel the trial court to grant summary judgment in favor of a company accused of conspiring to conceal the dangers of asbestos. The company argued, and Judge Alito held over a strongly voiced dissent, that the company's First Amendment associational rights would be threatened by a continuation of the suit. Judge Alito relied in part on the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that case, the court held that the NAACP had a First Amendment right to boycott white-owned businesses and could not be held liable for violence associated with the boycott unless the group itself had illegal aims. Judge Alito admitted that the conduct at issue in *Claiborne Hardware* "was of much greater societal importance," but he concluded that the right of the asbestos manufacturer to associate with other asbestos manufacturers should be judged under the same "strict standard." *Id.* at 1290-91.

Judge Alito also has tended to construe standing doctrine narrowly, thereby preventing plaintiffs from litigating their grievances in court. For instance, in *ACLU-NJ v. Wall* *ACLU-Nj*, 246 F.3d 258 (3d Cir. 2001), Judge Alito ruled that taxpayers in Wall Township had no standing to challenge a holiday display they found offensive. Even though the Supreme Court generally has construed standing broadly in the Establishment Clause context, Judge Alito argued that the plaintiffs could not bring suit because they had not proven that the township spent money on the display, and because they had not had sufficient exposure to the display. In Judge Alito's words, "While we assume that the [plaintiffs] disagreed with the 1999 display for some reason, we cannot assume that [they] suffered the type of injury that would confer standing." *Id.* at 266.

In *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992) (en banc), Judge Alito would have denied standing to a criminal defendant who claimed that his grand jury was selected in a racially discriminatory manner. Judge Alito acknowledged the Supreme Court's position that "criminal defendants and civil litigants have third-party standing to assert the rights of prospective petit jurors who are peremptorily challenged because of race." *Id.* at 1244-45 (Alito, J., concurring). However, he did not think the Court's precedent should "be applied to a case involving the exclusion of potential grand jurors."

The majority of Judge Alito's Third Circuit colleagues disagreed. They explained, "It is important to heed the [Supreme] Court's recognition that an infected jury selection proceeding undermines the integrity of the jury system and lays the groundwork for the denial of future criminal defendants' constitutional guarantees." *Id.* at 1228 n.8.

Judge Alito also wrote opinions denying plaintiffs standing in *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164 (3d Cir. 2001), and in *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998). In the former case, a Russian vodka producer sued an American vodka distiller for false advertising and false designation of origin. Judge Alito rejected the suit because, in his view, the plaintiffs' injury—not being able to sell vodka in the United States under the brand name they claimed was theirs—was insufficient to create standing. "[A]ny future diminution of sales in this country, or any potential barrier to entering the United States vodka market, is 'conjectural' or 'hypothetical' . . . ." 266 F.3d at 177. Judge Alito also argued that even if the plaintiffs had suffered a sufficient injury, they still lacked standing because "'the conduct complained of,' i.e., the defendants' allegedly false and misleading representation of their vodka . . . is not the cause of the core injury claimed by the plaintiffs." *Id.*

In the *Conte Brothers* case, engine additive retailers sued makers of competing products for false advertising. Judge Alito "perceive[d] no constitutional obstacle to [the court's] consideration of this case." 165 F.3d at 225. Nevertheless, he ruled that the plaintiffs could not proceed with their suit because they lacked standing—not under Article III of the Constitution, but as a matter of prudence. To make this ruling, Judge Alito downplayed the so-called "zone of interests" test with "its liberal tilt toward recognizing standing." Under that test, anyone within the zone protected by a statute has standing. Alito insisted that "it is more appropriate to inquire as to the class's statutory standing free from the formalistic constraints of that test." *Id.* at 226. Judge Alito then analyzed the text and purposes of the statute under which the plaintiffs had sued, and concluded that prudential standing did not exist because "[c]onferring standing to the full extent implied by the [statute] would give standing to parties, such as consumers, having no competitive or commercial interests affected by the conduct at issue." *Id.* at 229.

Whether a litigant has standing is distinct from whether a litigant has a cause of action. As the Supreme Court has explained, while standing addresses "whether a plaintiff is sufficiently adversarial to a defendant to create a . . . case or controversy," a "cause of action" refers to "whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). In some instances, Judge Alito has been reluctant to find that plaintiffs have a cause of action that would enable them to seek relief. For example, in *Robert S. v. Stetson School, Inc.*, 256 F.3d 159 (3d Cir. 2001), a child was abused while attending a private school for juvenile sex offenders. He had been referred to the school by the state. The issue was whether the state was sufficiently implicated to allow the plaintiff to seek relief for the violation of his constitutional rights. Judge Alito acknowledged that the school "worked in close concert with state and local governments," relying on them for much of its funding. *Id.* at 163. In addition, the school

provided services that the government “was required by state law to provide.” *Id.* at 166. Nevertheless, Judge Alito concluded that the plaintiff could not pursue his case because he “failed to show that the challenged actions of the Stetson staff may be fairly attributed to the state.” *Id.* at 169.

Elsewhere, Judge Alito has construed statutes in favor of plaintiffs’ attempts to state a claim. In *ErieNet, Inc. v. VelocityNet, Inc.*, 156 F.3d 513 (3d Cir. 1998), Judge Alito dissented from the court’s decision that the Telephone Consumer Protection Act did not allow consumer actions to be brought in federal court. In his view, the fact that the Act granted jurisdiction to state courts did not “divest[ ] district courts of the jurisdiction they possess” to hear federal claims. *Id.* at 523. In *Pennsylvania Department of Environmental Resources v. United States Postal Service*, 13 F.3d 62 (3d Cir. 1993), Judge Alito reversed a district court decision precluding state regulators from pursuing an environmental enforcement action against the U.S. Postal Service. He rejected the attempt of the Postal Service to claim sovereign immunity from suit, explaining that “the ‘sue-and-be-sued’ provision of the [Postal Reorganization Act] waives the Postal Service’s immunity from civil penalties.” *Id.* at 69.

As the *U.S. Postal Service* case implies, litigants sometimes seek relief not from private parties but from the government itself. On occasion, Judge Alito has overruled the actions of government administrators. In *Thomas v. Commissioner*, 294 F.3d 568 (3d Cir. 2002) (en banc), for instance, he held that a Social Security claimant was entitled to disability benefits despite an administrative law judge’s finding to the contrary. The Supreme Court later reversed that decision in *Barnhart v. Thomas*, 540 U.S. 20 (2003).

In most cases, however, Judge Alito has been deferential to the government, sometimes arguing that litigants were not entitled to judicial review. In two related cases, Judge Alito dissented from Third Circuit rulings that Department of Defense base closure decisions were reviewable by courts. *See Specter v. Garrett*, 995 F.2d 404 (3d Cir. 2003); *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992) (en banc). Judge Alito acknowledged the general presumption in favor of judicial review, but wrote that “it seems to me that the statutory scheme is grounded on concepts—speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package of recommendations—that are inconsistent with judicial review.” *Specter*, 971 F.2d at 961. The Supreme Court subsequently adopted a position similar to Judge Alito’s in *Dalton v. Specter*, 511 U.S. 462 (1994).

The dominant theme of Judge Alito’s procedural jurisprudence, then, is his willingness to place limits on litigants’ ability to pursue their claims in court. Judge Alito has permitted individuals to be deprived of property or liberty without actual notice or a prior hearing. He has narrowly construed standing doctrine and the existence of causes of action. And he has shown great deference to agency decisions. To be sure, not all of Judge Alito’s decisions fit this pattern, but his general skepticism of litigants’ claims is clear.



#### IV. RELIGION

There are two central questions in the constitutional law of religion. First, to what extent may the government “establish” religion (either through funding or through advocacy)? Second, how should claims that laws or policies infringe people’s religious freedom be treated? In his Establishment Clause and Free Exercise Clause opinions, Judge Alito has provided strong answers to both of these questions. He has consistently sided with government actors when they have been accused of violating the separation of church and state. Thus he found no constitutional violation in towns’ holiday displays, public schools’ postings of student-drawn religious pictures, and the use of school facilities by religious groups. Judge Alito has also sided with religious groups and individuals who claim that laws or policies discriminate against them or are applied unequally to them, even in the face of Supreme Court precedent that is skeptical of such claims.

Current Establishment Clause doctrine forbids the government from communicating a message of endorsement of religion. The government can neither intend to endorse religion, nor act in such a way that a reasonable observer would interpret the action as a religious endorsement. *See Lynch v. Donnelly*, 465 U.S. 668, 687 (O’Connor, J., concurring). In his opinion for the court in *ACLU-NJ v. Schundler*, 168 F.3d 92 (3d Cir. 1999), Judge Alito adopted a more permissive stance toward enforcement of the Establishment Clause. An earlier Third Circuit panel concluded that Jersey City’s display of a nativity scene on city hall plaza violated the Establishment Clause, and that “the City’s addition of Santa, Frosty, and a red sled did little to secularize that message.” *ACLU-NJ v. Schundler*, 104 F.3d 1435, 1452 (3d Cir. 1997). When the case returned after Jersey City modified the display, the district court relied on the previous Third Circuit opinion and struck down the new display. On appeal, Judge Alito overturned the district court’s decision and ruled that the modified holiday display was permissible. Though conceding that, unlike the display approved by the Supreme Court in *Lynch*, “the Jersey City display was situated in front of City Hall on public land,” Judge Alito wrote that “we see no reasonable basis for distinguishing the modified Jersey City display from the display upheld in *Lynch*.” 168 F.3d at 104. Judge Nygaard dissented from Judge Alito’s ruling, stressing that the panel should defer to the Third Circuit’s invalidation of Jersey City’s original holiday display, and that the modified display’s message did not change because of the insertion of a few secular symbols. *Id.* at 115.

Confronting another holiday display in *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001), Judge Alito declined to reach the merits of the dispute at all. Instead, he held that the plaintiffs had no standing to bring the suit because they had not proven that the township spent any public funds on the display, and because they had not had sufficient exposure to the display. Judge Alito wrote that the plaintiffs may have had standing to challenge an earlier Township display, but then distinguished the modified display even though it was located in the same building, a municipal complex, as the original display. According to Judge Alito, the two displays were different because it was unclear whether the plaintiffs “observed the [modified] display in the course of satisfying

a civic obligation at the municipal building,” and because the plaintiffs did not “provide[] testimony regarding their reaction to the 1999 display.” *Id.* at 266.

Another aspect of Establishment Clause doctrine deals not with religious displays but rather with the use of public facilities by religious persons and groups. In both cases of this type in which he has been involved, Judge Alito ruled in favor of the religious party seeking equal use of the public facility. In *Child Evangelism v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004), the Third Circuit examined a public school’s decision to prevent Child Evangelism, a “Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls,” from organizing activities on school grounds. *Id.* at 521. Judge Alito held that the exclusion of Child Evangelism constituted unconstitutional discrimination against a viewpoint. He also argued that “equal access” for Child Evangelism “would not result in an impermissible endorsement of religion.” *Id.* at 530. Responding to the argument that schoolchildren might believe that their school supports the beliefs of groups that are active on its property, Judge Alito wrote that if the school “is legitimately worried about possible misunderstandings there are obvious steps that it can take. [It] can send home an announcement to parents . . . .” *Id.* at 534.

In *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc), the Third Circuit considered a case in which a first grader’s religiously themed drawing was moved from a place of prominence in a class display to “a less prominent spot at the end of the hall.” *Id.* at 203. The en banc majority dismissed the suit because of problems with the plaintiffs’ complaint. Judge Alito, however, dissented sharply, writing that he found the court’s discussion “baffling,” and that “nothing in the record supports the Court’s apparent belief, and there is much that points in the other direction.” *Id.* at 208. Analogously to *Child Evangelism*, Judge Alito argued that “discriminatory treatment of the poster because of its ‘religious theme’ would violate the First Amendment,” *id.* at 210, and would qualify as viewpoint discrimination. Judge Alito rejected the idea that an art display including student-drawn posters with religious themes reasonably could be seen as government endorsement of religion.

The second great constitutional command regarding religion is that government must not abridge the free exercise of people’s religious beliefs. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court interpreted the Free Exercise Clause as meaning that generally applicable laws that incidentally burden a religious practice are subject to only light judicial scrutiny. Statutes that target or discriminate against particular religious practices, on the other hand, are subject to strict scrutiny.

In the Free Exercise Clause cases in which he has been involved, Judge Alito consistently has ruled in favor of claimants who argue that their religious beliefs are being discriminated against. In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), for example, a Native American bear owner sued the Pennsylvania Game Commission when it would not exempt him from a fee requirement even though the plaintiff purchased the bears because of his religious beliefs. Writing for the court, Judge Alito held that the relevant Pennsylvania statute was not a generally applicable law because it

“feature[d] both individualized and categorical secular exemptions,” i.e. for circuses and zoos and in cases of hardship or extraordinary circumstances. *Id.* at 212. As a result, the statute was subject to strict scrutiny, which it clearly failed since “[i]t is doubtful that [the state’s] interests qualify as compelling,” and since even if they were compelling, “the scheme is substantially underinclusive.” *Id.* at 214.

Judge Alito employed a similar analysis in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). In that case, two Sunni Muslims on the Newark police force brought suit to enjoin the Newark police department from disciplining them for refusing to comply with a “no-beard” policy. As in *Blackhawk*, Judge Alito held that the policy at issue was not generally applicable because “the Department provide[d] medical—but not religious—exemptions from its ‘no-beard’ policy.” *Id.* at 365. He conceded that the Supreme Court in its relevant precedents “did speak in terms of ‘individualized exemptions,’” but argued that what was really animating the Court in those cases “was the prospect of the government’s deciding that secular motivations are more important than religious motivations.” *Id.* Since the Newark police department’s policy revealed “a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not,” the policy was subject to strict scrutiny, which it too failed. *Id.* at 366.

The only case in which Judge Alito appears to have ruled against a Free Exercise Clause claimant is *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002). In that case, prisoners belonging to a group known as “Five Percent Nation” challenged the designation of their (arguably religious) group as a “Security Threat Group,” subject to isolation and transfer. Applying the factors laid out by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987), Judge Alito rejected the prisoners’ claim. He concluded that “three of the four *Turner* factors weigh strongly in favor of the STG Policy,” and that “[t]he remaining factor—the availability of alternative means of exercising the circumscribed right—presents a closer question, but . . . it too is met.” *Id.* at 521. It is important to note here that prisoners’ claims of constitutional violations are treated more skeptically by courts than similar allegations by people outside the penal system, hence Judge Alito invoked the *Turner* factors instead of the usual panoply of Supreme Court Free Exercise decisions.

In general, Judge Alito’s opinions tend to give governmental actors substantial leeway before holding that they have violated the Establishment Clause. He thus has denied claims of parties offended by government-sponsored displays that include religious elements. He has been friendly, however, to litigants claiming that government laws or policies infringe on their right to free exercise of their beliefs.

## V. FREE SPEECH

Judge Alito has a mixed record on free speech. He has vindicated free speech claims in the commercial and public employee contexts and he has protected the press against libel claims. In the contentious area of hate speech regulation, Judge Alito sided with students' free speech interests over the countervailing speech interests of the targeted community. In the prisoners' rights context, Judge Alito has taken a narrow view of the First Amendment guarantee of freedom of speech, supporting near complete deference to restrictions enacted by prison officials.

The commercial speech case, *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), involved a newspaper's right not only to publish but also to receive payments for alcohol advertising. After the *Pitt News* challenged a Pennsylvania law banning paid liquor ads in university newspapers, a District Court dismissed the claim, holding that the law had "no effect on *The Pitt News*' freedom of expression" because the paper remained free to print whatever alcohol ads it wanted as long as it was not paid for engaging in the expression. Writing for the majority, Judge Alito disagreed. He ruled that the law was unconstitutional because, as a majority of Pitt students were over 21, the law was not narrowly tailored to the University's goal of reducing underage drinking. He also concluded that the statute violated the First Amendment because it imposed an undue financial burden on one segment of the media.

Judge Alito also upheld speech protections in the public employee context. In *Swartzwelder v. McNeilly*, 297 F.3d 228, 240 (3d Cir. 2002), the majority ruled that a police department policy requiring employees to submit testimony in advance of testifying as expert witnesses violated the employees' First Amendment rights. Judge Alito wrote the opinion, concluding that police officers' expert testimony is a matter of public concern and therefore any regulations on such activity must be narrowly tailored to achieve the police department's goals. Alito especially objected to the tailoring of the Department's policy because it restricted officer testimony on official and non-official matters.

In another case involving the speech rights of public employees, Judge Alito, speaking for the majority, held that an employee who was retaliated against for reporting abuses in his department had a right to seek injunctive relief in the courts for constitutional violations, even without exhausting administrative remedies. Alito reasoned that "there is a presumed availability of federal equitable relief against threatened invasions of constitutional interests." Even if administrative remedies have been made available, Judge Alito concluded, the court should "be very hesitant before concluding that congress has impliedly . . . restrict[ed] . . . authority to award injunctive relief to vindicate constitutional rights." *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995).

In Judge Alito's libel jurisprudence, he has set high evidentiary standards for plaintiffs to recover. In *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001), Judge Alito considered the claim of C. Delores Tucker, an anti-"gangsta rap" activist who was suing

*Time* and *Newsweek* for making false statements about her sex life. Judge Alito deemed Tucker a public figure, which meant she had to show that the statements were made with “reckless disregard for the truth” before she could recover. Judge Alito acknowledged that the *Time* reporter strayed dramatically from professional standards by ignoring a press release issued by Tucker and relying on unreliable sources but ruled that those deviations were not sufficient to show reckless disregard for the truth.

Beyond commercial and public employee speech, Judge Alito has demonstrated a willingness to extend student’s speech interests in the face of strong countervailing interests. In 1999, a Pennsylvania school district instituted a policy designed to protect students from harassment based on personal characteristics, in response to a rise in hate motivated violence particularly against homosexuals. In response, a group of students who “believe...that homosexuality is a sin...and believe that they have a right to speak out about the sinful nature and harmful effects of homosexuality,” challenged the policy’s constitutionality. Once again writing for the majority, Judge Alito objected to the policy because it was not narrowly tailored. He argued that “[t]here is no categorical ‘harassment’ exception” to the First Amendment’s free speech clause, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001), and concluded that regulation of student speech is permissible only when the speech would “substantially disrupt or interfere with the work of the school or the rights of other students,” *id.* at 211. Judge Alito deemed the Pennsylvania policy too broad, because it would forbid both disruptive and non-disruptive speech. *Id.* at 218.

Judge Alito’s free speech decisions change when the party before him is a prison inmate. In the two cases Judge Alito has considered that involve prisoner access to reading materials, he has articulated a clear position of deference to prison officials, even in the absence of evidence to support free speech restrictions.

In *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999), Judge Alito upheld a New Jersey statute’s restrictions on prisoner access to pornographic materials. The court’s role in such a case, he explained, was not to question whether the theories presented by the prisoners or the prison officials were “more reasonable,” but to ask whether “the logical connection between the [statute] and the asserted goal . . . is so remote as to render the policy arbitrary or irrational.” Judge Alito saw “no reason to question [the prison’s] assertion that the statute serves [its] purpose,” and therefore rejected the prisoners’ claim.

Judge Alito extended this rationale in the recent *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), where he argued in dissent that prisons can deny indefinitely prisoners’ access to certain reading materials including newspapers and photographs of their families, even if the prisons cannot adduce any evidence that the ban serves a reasonable penological purpose. Judge Alito was prepared to uphold the policy even as applied to prisoners in Long-Term Security Units, where they were held indefinitely for months or years at a time. While Judge Alito acknowledged as “troubling” the fact that prison officials had made no attempt to pursue alternative means of securing prisoners’ rights to such material, he declined to rule against their judgment.

In *Banks*, as in *Waterman*, Judge Alito argued that the standard for judging such restrictions should be whether prison officials can induce any “logical connection” between the policy and the stated goal, even if, as the Third Circuit majority explained he DOC has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose.” For example, the prison’s claim that allowing paper goods in the unit could lead to fires wholly ignored the fact that prisoners already had access to religious and legal materials that could have been used for the same purpose, and that, as the majority explained, “[t]here is no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC.” Nonetheless, Judge Alito insisted that the court should trust prison officials that there must have been a legitimate reason for denying a long-term prisoner access to even a single picture of his young child.

This claim of deference—requiring no evidence—stands in marked contrast to the position Judge Alito has taken when examining Congressional measures under the Commerce Clause. It is also inconsistent with the position he has taken on free speech rights of non-prisoners. It is, however, consistent with Judge Alito’s approach to prisoners in other contexts.

## VI. COPYRIGHT

Copyright law is characterized by a divide between those who believe that expanding private control over information is necessary to spur investment in new creation and those who believe that the most effective way to enrich our culture is to permit creators to build on old works without facing down costly legal barriers. Recently, the Supreme Court has been drawn into this polarized debate. In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Court was called upon to decide on the validity of the Copyright Term Extension Act (CTEA), which extended the term of federal copyright retroactively to works that otherwise would have entered the public domain. In *MGM Studios, Inc. v. Grokster*, 125 S.Ct. 2764 (2005), the Court determined that peer-to-peer file sharing networks that have been used to disseminate works in the public domain could be held liable for copyright infringements committed by their users. As the Internet and other forms of technology continue to develop, it is certain that the Court will be called upon more frequently to take sides in this ongoing debate between proprietary control and public domain access.

Judge Alito has authored only one significant copyright opinion, *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004). In that case, a manufacturer of screw fasteners brought a copyright infringement action alleging that a competitor had copied and used its part-identification system that employed part numbers to designate screw fastener components. In a detailed opinion, Judge Alito found that the part numbers were not entitled to copyright protection because they were not original for the purposes of copyright law. Rather, they were similar to short phrases and titles of works, entities that copyright law traditionally has excluded from the scope of its coverage.

In reaching his conclusion, Judge Alito adopted two independent lines of reasoning. First, he argued that the element of originality is constitutionally mandated by Article I, Section 8, Clause 8, of the U.S. Constitution and that the Supreme Court set a standard for that originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The opinion proceeds to establish that Southco's numbering system was analogous to the collection of numbers and addresses in *Feist*, which the Court found to lack any creative spark. *Southco*, 390 F.3d at 282. In response to Southco's argument that its numbering system was analogous to a photograph, Judge Alito observed that "numbers are purely functional," unlike works of art such as a photograph or a portrait, and therefore not eligible for protection.

Judge Alito's second line of reasoning involved an analogy to short phrases and titles of works, and a reliance on the Copyright Office's policy of excluding these works from the scope of copyright protection. Judge Alito examined the rationale for these exclusions and concluded that if the part numbers were copyrightable any use of the numbers would be a potential infringement. He asked rhetorically, "Could a company or person thereby obtain the exclusive right to use the number 4,710,202 or 47,102?" and concluded that an affirmative answer would be a matter of concern, since an individual who later sought to use the number would need to depend on the fair use privilege, an

affirmative defense that inhibits use. *Id.* at 286. This view seems to indicate a sensitivity to the problems associated with granting a monopoly privilege over common expression.



## VII. IMMIGRATION

Judge Alito's immigration opinions suggest a belief in a smoothly functioning deportation system that merits judicial deference. This vision of the immigration system stands in stark contrast to that of other federal judges. In November 2005, Judge Richard Posner opened an opinion by observing that the Seventh Circuit has reversed in whole or in part the Board of Immigration Appeals (BIA)—the highest administrative court to handle immigration cases—in “a staggering 40 percent” of cases in the past year. He noted that “criticisms of the Board and the immigration judges have frequently been severe.” *Benslimane v. Gonzales*, No. 04-1339, slip op. at 1 (7th Cir. Nov. 30, 2005). Judge Posner then included nearly two pages of citations gleaned from recent judicial opinions rejecting the reasoning and misconduct of immigration judges and the BIA. Other appellate judges regularly note that our immigration laws can have harsh results, such as removal of long-time residents from their family and community and the return of asylum-seekers to countries where they may face persecution, but that the ambiguity in the statutes permits judges to take a more compassionate approach.

In eight published immigration opinions not involving asylum applications, Judge Alito sided with the BIA seven times. He authored three majority opinions upholding BIA decisions and four dissents emphasizing that the majority should have affirmed the BIA or remanded to it for further consideration. The lone exception to his trend of voting for deportation, his majority opinion in *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005), involved adherence to a closely related decision by the Supreme Court. In his nine published opinions in asylum cases, Judge Alito urged affirmance of the BIA seven times.

Judge Alito's strong deference to the BIA is evident from his earliest immigration opinions dealing with deportation and exclusion (both merged under the term “removal” in 1996 revisions to federal immigration statutes). In *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994), the majority held that the BIA had undervalued or ignored evidence relevant to whether an immigrant could seek a waiver from a deportation order, such as the fact that his seriously ill brother depended on him for transportation to dialysis treatments. Judge Alito asserted in dissent that “[t]he majority has wandered well beyond the limited scope of appellate review that we are permitted to exercise in a case like this.” *Id.* at 587. Judge Alito also argued that because such waivers are committed to the Attorney General's discretion, “the majority has usurped the BIA's place and weighed the relevant factors for itself. . . . I cannot endorse this approach.” *Id.* at 588 n.6.

Judge Alito's deferential posture has persisted throughout his judicial career. In *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), Judge Alito dissented from a majority opinion vacating a removal order against a Korean couple, legal residents with children who were U.S. citizens, for filing false tax returns. The majority concluded that the relevant removal provision did not extend to tax offenses. Judge Alito, however, would have held that “filing a false tax return and thereby causing a tax loss of more than \$10,000 falls squarely within the definition of an ‘aggravated felony,’” *id.* at 225, and

urged deference to the BIA's construction of the statute. Judge Alito acknowledged that his interpretation made the removal provision redundant with another one, a result contrary to settled principles of statutory construction: "[w]hile good statutory draftsmanship seeks to avoid surplusage, other goals, such as certainty and the avoidance of litigation, are sometimes more important." *Id.* at 226.

In *Partyka v. Attorney General*, 417 F.3d 408 (3d Cir. 2005), the majority vacated the BIA's deportation order for an immigrant convicted of assaulting a local law enforcement officer after a scuffle in which he tried to fight off a police dog (the bites hospitalized him for three days). While Judge Alito, in dissent, agreed that the immigration judge had misread the relevant New Jersey criminal statute, he would have remanded the case to the BIA, as "the BIA is the final authority on the meaning of its own decisions." *Id.* at 417. *See also* Judge Alito's majority opinion in *Bokvun v. Ashcroft*, 283 F.3d 166 (2002) (upholding a removal order based on the maximum instead of the minimum sentence the immigrant had received in state court).

In the past decade, Congress has enacted numerous statutes that attempt to limit the jurisdiction of federal courts to review immigration decisions, either on direct appeal or on petition for a writ of habeas corpus. Judge Alito has argued consistently for an expansive interpretation of the statutes. In *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), the majority held that the 1996 amendments to the immigration statutes did not divest the federal courts of habeas jurisdiction to review a particular class of removal orders. The majority also concluded that Congress had not intended to retroactively eliminate waivers of deportation, an important form of immigration relief. Judge Alito dissented on both points, which put him in the distinct minority of appellate judges confronting these issues. When the Supreme Court took up both issues in another case, it held against each of Judge Alito's positions. *INS v. St. Cyr*, 533 U.S. 289 (2001) (noting that the circuit courts were arrayed 10 to 1 against the habeas position that Judge Alito took).

In another jurisdiction-stripping case, *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003), Judge Alito wrote the majority opinion dismissing an immigrant's petition for a review of a deportation order. Acosta pled *nolo contendere*—which means he did not admit to guilt but also did not contest the facts—to a drug charge under a state procedure that allowed probation without the entry of a verdict. Judge Alito ruled that the relevant INA provision "unambiguously points to the conclusion that the disposition of Acosta's criminal case in the Court of Common Pleas constitutes a 'conviction,'" *id.* at 222, and therefore concluded that the circuit court lacked jurisdiction to hear the petition for review of his removal. Judge Alito also indicated, once again, a high level of deference to the BIA, noting that "even if we were to accept that [the statutory language] creates some ambiguity, . . . we are bound to follow the BIA's construction" as long as it is not "impermissible." *Id.* at 225.

Although Judge Alito has shown deference to state court decisions in capital and other criminal cases, he sided with the BIA against a state court when the two conflicted. In *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003), the district court denied Munroe's habeas corpus petition after the BIA had ordered his deportation, deeming him an

“aggravated felon” ineligible for any relief based on his state fraud conviction. The state court ordered Munroe to pay restitution of \$11,522 to banks he had defrauded, but, after learning that the conviction would cause Munroe’s automatic deportation because the victims had lost more than \$10,000 (the amount being a trigger for removal), the court reduced its judgment to \$9,999. Judge Alito’s opinion affirmed Munroe’s deportation order on the ground that the victims’ loss exceeded the \$10,000 threshold, regardless of the revised restitution order. Judge Alito accuses the state court of not respecting the separation of powers, declaring that the decision to reduce the restitution could be seen as “usurp[ing] Congress’s plenary power to set the terms and conditions of American citizenship and the executive’s discretion to administer the immigration laws.” *Id.* at 227-28.

In the sole non-asylum immigration decision in which Judge Alito rejected the BIA’s analysis, *Oyebanji v. Gonzales*, noted above, an intervening Supreme Court decision on a closely related issue guided the outcome. Oyebanji had been convicted of vehicular homicide after driving recklessly while under the influence. The BIA ordered him removed after classifying his conviction as a “crime of violence” that fell into the “aggravated felony” category permitting removal. Judge Alito reversed both the district court and the BIA in adherence to a recent unanimous Supreme Court holding that certain negligent driving-while-intoxicated convictions do not constitute aggravated felonies, because a negligent crime is not a “crime of violence.” Judge Alito extended the logic to *Oyebanji*, obeying what he called the Court’s “considered dicta” suggesting that reckless and negligent conduct could fall into the same category. *Id.* at 265.

Judge Alito’s asylum opinions are also deferential toward agency decisions. In seven of nine published opinions that he authored, Judge Alito favored affirming a removal order. In *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), the petitioner’s fiancée was forced by the Chinese government to undergo an abortion. *Id.* at 222. Asylum laws explicitly deem forced abortion to be past persecution, and the statute has been applied to grant relief to the spouse of a person forced to undergo an abortion. In *Chen*, the Immigration Judge granted relief to the unmarried petitioner, finding that the only reason Chen and his fiancée were not married was because of marital age restrictions in China. The BIA reversed, declining to extend protection to the unmarried petitioner. Judge Alito upheld the BIA’s application of the statute, arguing that the “BIA’s interest in promoting administrability and verifiability is sufficient to clear the low hurdle presented by the step two standard. . . .” *Id.* at 229.

Judge Alito has denied relief even when he has shown sympathy for the victims of the alleged persecution. In *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), Judge Alito argued that “if a woman’s opposition to the . . . laws in question is so profound that she would choose to suffer the severe consequences of noncompliance,” she may be eligible for asylum as a member of a particular social group. *Id.* at 1241. While this is a more expansive understanding of cognizable social group claims than commonly accepted, Judge Alito denied relief to the petitioner because the record of the administrative proceeding did not demonstrate the strength of petitioner’s feminist convictions. *Id.*

Judge Alito's dissenting opinions also consistently argue for deference to BIA interpretations and rulings. In *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003), a six-judge majority of the court, sitting en banc, held that the Immigration Judge's adverse credibility finding in a Guinean applicant's asylum claim was not supported by substantial evidence and remanded the case. The BIA had affirmed summarily the Immigration Judge's decision. Judge Alito argued against the remand, noting that the "limited role" of judicial review of the Attorney General's authority with respect to credibility determinations "sometimes puts us in the uncomfortable position of deferring to a credibility determination about which we are skeptical. But the statute leaves us no alternative." *Id.* at 262. The majority sharply criticized this position, suggesting that Judge Alito's interpretation "guts the statutory standard." *Id.* at 251, n.22. Judge Alito similarly dissented in *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997), where the Third Circuit reviewed the claim of a prominent Chinese engineer who feared persecution for failure to report potential defectors to the government. The majority held that the BIA's interpretation of the term "persecution," which did not recognize the political nature of Chang's decision and its potential consequences, was based on an impermissible construction of the Immigration and Nationality Act. Judge Alito, writing in dissent, argued that although "[t]he facts of this case . . . arouse considerable sympathy for petitioner, . . . [t]here is . . . no basis for upsetting the decision of the Board of Immigration Appeals." *Id.* at 1068.

In the only two cases in which Judge Alito argued against deportation, he did so to enforce the government's own prior interpretation of a relevant regulation that the BIA failed to respect. In *Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004), and *Zhang v. Gonzales*, 405 F.3d 150 (3d Cir. 2005), the regulation at issue required asylum applicants to authenticate official documents submitted in support of their applications. The government previously had issued an interpretation of this regulation that permitted applicants an opportunity to provide various alternative means of authentication. In each case, the BIA discounted unauthenticated government documents. Judge Alito reversed, admonishing the BIA to follow the government's own prior interpretation of the regulation and give applicants an opportunity to provide alternative means of authentication. *See Liu*, 372 F.3d at 532-33; *Zhang*, 405 F.3d at 155-56.

Judge Alito has voted to deny an asylum request or to uphold an order of deportation in nearly all of the immigration cases about which he has written. He has followed the law when it was clear but has deferred to the government position in virtually all cases where it was not.

## VIII. EFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court, in a 1984 case *Strickland v. Washington*, 466 U.S. 668 (1984) held that poor lawyering provides grounds for overturning a judicial proceeding only if a defense attorney commits a violation of legal norms that “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland* established two criteria that a defendant must demonstrate before a judge can vacate the outcome of a judicial proceeding on the ground that a defendant had inadequate legal counsel: A defendant must show both that his attorney’s actions fell “outside the wide range of professionally competent assistance” and also that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 668, 690, 698.

Judge Alito’s best known opinion in a case involving allegations of ineffective defense counsel is *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), which the Supreme Court reversed in early 2005 in *Rompilla v. Beard*, 125 S. Ct. 2456 (2005). In 1988, a Pennsylvania jury convicted Ronald Rompilla of murder and sentenced him to death. Rompilla filed a habeas petition in federal court, alleging that his trial attorneys failed to discover and present evidence of mitigating circumstances at sentencing.

Rompilla’s trial attorneys interviewed Rompilla and members of his family prior to sentencing in a bid to turn up mitigating evidence to present to the jury, but did not examine Rompilla’s educational records and took only a cursory look at court and prison records from a prior conviction. At sentencing, they presented several of Rompilla’s family members to make an impassioned plea for his life. They failed in this plea.

While Rompilla was on death row, new attorneys examined Rompilla’s prison, education, and hospital records. The records indicated that he had been a victim of severe abuse as a child—his father was an alcoholic and locked Rompilla in an excrement-filled dog pen—and that he had IQ test scores in the mentally retarded range. Both the child abuse and the mental retardation could have been considered mitigating circumstances under Pennsylvania law. Rompilla’s federal habeas petition alleged that his counsel’s failure to examine the records violated his right to adequate representation.

Judge Alito held that the attorneys’ failure “did not fall below the constitutionally mandated level of representation,” *id.* at 253, and suggested that a defendant has a duty to point his attorneys towards exculpatory evidence. “Trial counsel had grounds for believing that if there was any mitigating evidence of this sort to be found, at least a hint of its availability would be disclosed in interviews.” *Rompilla*, 355 F.3d at 251, 252.

In reversing Judge Alito’s opinion, Justice Souter wrote for a four-member plurality of the Supreme Court that held that Rompilla’s attorneys had an affirmative duty to examine records from his prior conviction. “It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking.”

*Beard*, 125 S. Ct. at 2467. The Court then held that evidence contained in the file would have led to the discovery of additional mitigating circumstances that could have been presented at sentencing.

Justice O'Connor provided the fifth, concurring vote to overturn Judge Alito's holding in *Rompilla*. O'Connor wrote that she does not believe that the Constitution requires defense attorneys to examine their client's past court records in every case, but that the prosecutor's intention to use the prior conviction against *Rompilla* imposed a duty on his attorneys in this case. "In the particular circumstances of this case, the attorneys' failure to obtain and review the case file from their client's prior conviction did not meet standards of 'reasonable professional judgment.'" *Id.* at 2471.

In his other opinions, Judge Alito rarely has accepted a prisoner's claim of ineffective assistance of counsel. *Buehl v. Vaughn*, 166 F.3d 163 (3d Cir. 1999), is representative of his approach. Roger Buehl, sentenced to death after being convicted of a triple homicide, alleged that his attorneys committed numerous errors at trial and on appeal. Judge Alito first concluded that none of the alleged errors individually could meet the *Strickland* criteria. He then dismissed Buehl's contention that the errors cumulatively violated his Sixth Amendment rights. "After conducting this review, we conclude that the District Court correctly determined that the overwhelming evidence of Buehl's guilt prevents him from satisfying *Strickland*'s prejudice prong." *Id.* at 180.

Judge Alito also dismissed *Strickland* claims in *Lewis v. Mazurkiewicz*, 915 F.2d 106 (3d Cir. 1990) (trial counsel's allegedly poor strategic advice and failure to call a witness was reasonable under the circumstances); *U.S. v. Roberson*, 194 F.3d 408 (3d Cir. 1999) (prisoner alleged that his attorney failed to request that the sentencing judge sentence him for possession of "cocaine base," not "crack," but Judge Alito held that there had been no error because the prisoner had plead guilty to selling "crack"); *George v. Sively*, 254 F.3d 438 (3d Cir. 2001) (counsel's failure to request a jury instruction regarding state of mind, or mens rea, was permissible because the trial judge previously had rejected the defense's mens rea arguments); *Keller v. Larkins*, 251 F.3d 408 (3d Cir. 2001) (prisoner's ineffective assistance of counsel claims were barred by procedural default because the prisoner had failed to petition the Pennsylvania Supreme Court for review, though a due process claim was remanded for consideration by the district court); *Wenger v. Frank*, 266 F.3d 218 (3d Cir. 2001) (defendant had failed to exhaust his appeals in the state court system); and *U.S. v. Jeffries*, 73 Fed. Appx. 535 (3d Cir. 2003) (unpublished) (inmate failed to establish that he actually had asked his attorney to file an appeal, and, consequently, the attorney's failure to do so was reasonable).

Although Judge Alito's opinions do not appear to articulate a hard-and-fast standard for determining when an attorney provides inadequate representation, he has vacated the outcome of a judicial proceeding where the attorney's negligence was particularly egregious. For example, in *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002), Judge Alito vacated an inmate's death sentence because the inmate's trial attorney failed to object to the way the trial judge answered a jury question about whether the jury could "recommend life imprisonment with a guarantee of no parole." *Id.* at 157. The trial

judge's answer implied that the jury could not recommend such a sentence, despite the fact that Pennsylvania law stipulates that a murder defendant sentenced to life cannot be paroled unless the state's governor first commutes the sentence to a term of years. Judge Alito wrote of the defense attorney's performance, "The jury's question should have put counsel on alert, and the first words out of the judge's mouth in response should have triggered deafening alarm bells in counsel's head." *Id.* at 159. In another case, Judge Alito vacated a prisoner's sentence on a drug possession-with-intent to distribute charge on the basis of *Strickland. Jansen v. U.S.*, 369 F.3d 237 (3d Cir. 2004). Both the defendant and the state agreed that, while some of the defendant's cocaine was for sale, the rest was for personal use. At sentencing, the defense attorney did not object to the trial judge calculating a sentence that assumed all of the cocaine had been intended for distribution. Judge Alito wrote, "At trial the government did not argue that none of these drugs were for personal use; rather it argued that some of the drugs . . . were to be sold to enable him to continue to obtain drugs for personal use . . . . Despite a strong presumption that counsel's performance was reasonable, that presumption is overcome here." *Id.* at 243.

## IX. RESPONSIBLE LAW ENFORCEMENT

The Constitution places limits on the actions of law enforcement agencies, and it is the job of the federal judiciary to make certain those limits are respected. On this issue, Judge Alito's opinions as a federal judge reveal deference to government power and a lack of sensitivity to class-based disparities in the criminal justice system. In some cases, Judge Alito may have treated wealthy litigants somewhat differently than he treated others. Even when he finds that a defendant's rights have been violated, Judge Alito has often declined to provide a remedy.

Judge Alito's preference for governmental authority over individual rights is clear from the consistent latitude he gives to police officers in performing searches. In dissent in *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), Judge Alito would have permitted the strip search of a ten-year-old girl and her mother even though neither of them was named in the warrant. Judge Alito complained that the majority's narrow reading of the warrant was too "technical and legalistic," *id.* at 247, and that he knew of "no legal principle that bars an officer from searching a child (in a proper manner) if a warrant has been issued and the warrant is not illegal on its face," *id.* at 249.

In another case involving the Fourth Amendment bar on unreasonable searches and seizures, Judge Alito interpreted a search warrant granting officers the authority to seize "all drug paraphernalia" as giving them the power to answer the suspect's telephone while in his home and gather evidence from the caller by pretending to be the defendant. See *United States v. Stiver*, 9 F.3d 298 (3d Cir. 1993). Although Judge Alito found that "[f]ederal and state criminal statutes define 'drug paraphernalia' more narrowly," he nonetheless concluded that the telephone counted as "drug paraphernalia" for purposes of the search. *Id.* at 303, n.7.

In addition to interpreting warrants broadly, Judge Alito defers to police authorities even in the absence of a warrant. In *United States v. Lee*, 359 F.3d 194 (3d Cir. 2004), the FBI hid a video camera in the defendant's hotel room in order to record conversations they expected the defendant to have with an informant regarding illegal bribery payments. They did not have a warrant. Although the video camera remained in the defendant's hotel room twenty-four hours a day, Judge Alito found no violation of the defendant's Fourth Amendment privacy interests. Judge Alito recognized that other courts had disallowed such practices as a "prophylactic rule designed to stamp out a law enforcement technique that the Court viewed as creating an unacceptable risk of abuse." *Id.* at 202. In his view, however, "[e]ven assuming for the sake of argument that we have the authority to adopt such a rule, . . . we would not do so." *Id.* Judge Alito dismissed the dissent's concern that the camera "could potentially broadcast some images of [the defendant's] bedroom and bathroom activities throughout the day and night," *id.* at 224, concluding that it was not "intuitively obvious that there is much risk of such abuse," *id.* at 202.



Although Judge Alito declined to limit police conduct in these cases involving alleged street crime, he ruled differently in a case involving the alleged tax evasion of a wealthy doctor and his wife. In *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001), the court, in an opinion by Judge Alito held that government agents had violated the couple's constitutional rights by excessively detaining them without probable cause, interrogating them without informing them of their *Miranda* rights, and conducting a body pat-down search of the wife when she was wearing only a nightgown. "Dr. Leveto's detention," he wrote, "arguably increased the stigma imposed by the agents' search, for it allowed co-workers to see how Dr. Leveto was being treated by the authorities and prevented Dr. Leveto from responding to client needs. . . . Moreover, Dr. Leveto's detention involved the inconvenience and indignity of a forced ride with IRS agents to his home and back to his office." Judge Alito did not express similar concern about the "stigma" or "indignity" of police searches in other cases, such as the young girl and her mother who were strip-searched in *Groody*.

Even in cases where Judge Alito has found constitutional violations, he has read exceptions to deny relief. In *United States v. Zimmerman*, 277 F.3d 426 (3d Cir. 2002), the majority reversed a district court denial of the defendant's motion to suppress evidence found in his home. The panel decision reasoned that the information used to obtain the warrant was so stale that the police had had no probable cause to execute the warrant. Neither party denied this fact. Judge Alito dissented, reading a "good faith" exception to excuse the police conduct: "The good faith exception instructs that suppression of evidence is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant's authority." *Id.* at 436 (internal quotations omitted). Although the majority found that "[a]ny reasonably well-trained officer" would have recognized the warrant at issue as insufficiently supported by probable cause, *id.* at 436, and called the government's attempt to allege otherwise "disingenuous," *id.* at 438, Judge Alito disagreed, "[e]ven if the search warrant's authorization to seize the critical evidentiary items was not supported by fresh probable cause," *id.*

Judge Alito has sided with government officials in qualified immunity cases as well. The qualified immunity doctrine holds that officers cannot be held liable for violating the law while exercising their official responsibilities unless the law at issue is settled and clear. In *Leveto*, the tax evasion case described above, Judge Alito applied the qualified immunity doctrine to deny relief to the plaintiffs even though he found that their Fourth Amendment rights had been violated. After spending nearly twenty pages detailing the indignities the Levetos faced, Judge Alito wrote one line about qualified immunity and affirmed dismissal of their claim. 258 F. 3d at 175. In *Groody*, also described above, Judge Alito noted that he would have applied the qualified immunity doctrine to excuse the officers who strip-searched the ten-year-old girl had he not felt that the warrant authorized their search anyway.

Likewise, when a defendant's rights have been violated but the good faith doctrine does not apply, Judge Alito frequently has held that the resulting error was harmless. For example, in *Brosius v. Warden*, 278 F.3d 239 (3d Cir. 2002), Judge Alito found that although the defendant had not been read his *Miranda* rights, no violation took

place because the defendant was not in custody at the time he made the contested statements. *Id.* at 247. But regardless, “[e]ven if [the defendant] was ‘suspected’ and even if the statements that he provided [at the initial interview] should have been suppressed,” wrote Judge Alito, “the failure to suppress those statements was harmless error.” *Id.* at 248. In another case, *Elkin v. Fauver*, 969 F.2d 48 (3d Cir. 1992), the plaintiff was a prisoner who had been sanctioned for a disciplinary infraction based on a failed drug test. The district court had found the defendants—corrections employees—in civil contempt because the chain-of-custody form they used in collecting the plaintiff’s urine did not comply with a previous district court order detailing what the form should include. Judge Alito reversed the lower court decision, calling the failure to use the proper form harmless error.

In another case, Judge Alito applied different standards to the prosecution and the defense in a way that produced results favorable to the government. He granted procedural leeway to the prosecution that he did not grant to the defense. For example, in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), Judge Alito in dissent went to great lengths to demonstrate the defendant did not challenge the relevant portions of the jury instructions in his state appeals; however, Judge Alito found it appropriate to raise the issue of procedural default, which issue the prosecution had never briefed.

Judge Alito’s acceptance of government arguments appears in his habeas jurisprudence as well. His position in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), that the court lacked jurisdiction to hear a habeas appeal in a deportation case, was discussed in the immigration section above—and his position was subsequently rejected by the Supreme Court. In *Fiore v. White*, 149 F.3d 221 (3d Cir. 1998), the defendant and one of his employees were convicted of operating a waste disposal facility without a permit. On the employee’s appeal, the Pennsylvania Supreme Court upheld a reversal of his conviction because the court did not believe that the evidence supported a conviction under the relevant law. Though the defendant’s case was nearly identical to his employee’s, the Pennsylvania Supreme Court refused to apply its decision retroactively to the defendant’s case. The defendant filed a federal habeas petition, arguing that the Due Process Clause required retroactive application of the Pennsylvania Supreme Court’s decision reversing his employee’s conviction. The district court granted his petition, but Judge Alito reversed, reading Supreme Court precedent on retroactivity narrowly to uphold the government’s conviction. In *Meyers v. Gillis*, 93 F.3d 1147 (3d Cir. 1996), the defendant plead guilty to a criminal homicide. Upon his petition for a writ of habeas corpus, the district court found that the plea was improperly accepted by the court prior to a development of the factual basis supporting his plea. The district court granted the defendant’s petition. Again, Judge Alito reversed, holding that the evidence fairly supported a finding that the factual basis was sufficiently developed.

In one of the few instances when Judge Alito sided with the defendant, he provided a road map for the district court to secure a conviction on remand. In *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), the defendant moved to suppress evidence seized when he was pulled over in his car. Judge Alito wrote for the panel that the government did not demonstrate probable cause for a full search, but then went on to

suggest that the stop might have been permissible as a temporary stop and frisk. One of Judge Alito's colleagues wrote separately to protest Judge Alito's decision to remand to the district court to determine if there was a permissible stop and frisk under the less rigorous "reasonable and articulable suspicion." As the concurring colleague asserted, it was not "asking too much to expect attorneys to attempt to meet their burdens of proof when issues are first litigated. A court should not have to connect the dots of inferences scattered as far apart as the ones on this record to construct a picture of what occurred during the stop." *Id.* at 536.

Out of more than fifty cases in which Judge Alito wrote an opinion on these criminal procedure issues, he sided with the government more than 90 percent of the time. In addition to his permissive approach to searches and his willingness to use exceptions to deny relief, his treatment of other procedural issues reveals deference to governmental authority.

## X. CIVIL RIGHTS

Judge Alito has had the opportunity to rule on a significant number of civil rights cases in the jury, voting, and employment contexts, involving the categories of race, gender, age, disability, and religion. For the most part, these cases turn on legal technicalities: the definitions and standards of proof and legally cognizable harms and debates over burden-shifting and whether decision-making on the basis of certain individual traits such as race or sex is inherently illegal. Despite their highly technical nature, these issues are vitally important. These technicalities effectively draw the line between legal differentiation and arbitrary, and thus illegal, discrimination. Interestingly, although Judge Alito has consistently used procedural and evidentiary standards to rule against female, minority, age and disability claimants, he has taken a markedly different approach to religious discrimination.

Judge Alito has generally been solicitous to the discrimination claims of certain religious groups. In *Abramson v. William Paterson College*, 260 F.3d 265 (3d Cir. 2001), for instance, an Orthodox Jewish professor brought a religious discrimination claim under Title VII of the Civil Rights Act of 1964 arising from harassment against the college who employed her. Judge Alito upheld her claim against the college, dismissing as mere pretext the college's proffered neutral reasons for their treatment of her. *Id.* Judge Alito wrote that the harassment rose to the level of illegal discrimination because, "Criticism of an employee's effort to reconcile his or her schedule with the observance of Jewish holidays delivers the message that the religious observer is not welcome at the place of employment." *Id.* at 290. In other religious discrimination cases brought by religious minorities outside the employment context, Judge Alito has also sided with some consistency with the claimant. (See Religion Section, p. 17).

In the area of jury selection, Judge Alito often has been skeptical of claims of race-based discrimination. In the habeas corpus case of *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1993), for example, the trial judge selected a grand jury with the explicit goal of creating a racial cross-section of the community. On appeal, Judge Alito wrote an opinion concurring with the majority that the African-American defendant had no juror discrimination claim because, despite the trial judge's racial cross-section selection strategy, there was no evidence any black jurors ultimately were excluded from the jury on account of their race. Alone, Judge Alito went on to state that even had a black juror been excluded as a result of the racial cross-section strategy, still no claim would exist because "[s]uch a grand jury has the same composition as the median grand jury selected by a purely random selection procedure." *Id.* at 1243.

On the other hand, in the recent case of *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), Judge Alito upheld an African-American defendant's claim that certain jurors were struck on account of their race. In *Brinson*, Judge Alito noted that the Supreme Court's jury discrimination doctrine "was designed to ensure that a State does not use peremptory challenges to remove any black juror because of his race. . . . Thus, a prosecutor's decision to refrain from discriminating against some African American

jurors does not cure discrimination against others.” *Id.* at 233. Judge Alito was not swayed by the prosecutor’s objections that both the victim and defendant were African-American and that the defense struck African-Americans from the jury as well, declaring that an inference of discrimination “may be created by a variety of different circumstances.” *Id.* at 233-34.

In *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2004), the Third Circuit reversed a lower court’s rejection of a jury discrimination claim, stating that, based on the statistics presented, an “amateur with a pocket calculator” could conclude that the prosecutor was striking jurors based on their race. *Id.* at 281. Dissenting, Judge Alito wrote that other reasons besides race could have been at issue. He wrote, “Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. Our ‘amateur with a calculator’ would conclude that ‘there is little chance of randomly selecting’ left-handers in five out of six presidential elections. But does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?” *Id.* at 327. The majority chided the analogy, pointing out that it “minimize[d] the history of discrimination against black jurors.” *Id.* at 292.

In cases involving claims of racial discrimination in the employment context, Judge Alito’s opinions reflect skepticism about the legitimacy of these claims. In *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), the plaintiff, an African-American woman, was a Marriott employee who had been promoted through the lower ranks at the hotel. When a director position opened up, she applied for the job, but Marriott gave the position to a white woman instead. The plaintiff sued, claiming that the hotel’s hiring decision was biased by race. The district court held that the plaintiff had not made out a sufficient case. The Third Circuit reversed, finding that the employee had raised legitimate questions of fact as to whether the employer’s motivations were discriminatory and sending the case back to the lower court for trial. Judge Alito dissented. He proposed a standard that would have made it harder for the employee to make out her case. He wrote that “[i]t is not enough for the evidence to be such that a reasonable factfinder could disagree with the employer as to which candidate was better qualified. Instead, the evidence must be such that a reasonable factfinder can infer that the employer was not truly looking for the best qualified candidate.” *Id.* at 999. He went on to state that “in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to find minor inconsistencies in terms of the employer’s having failed to follow its internal procedures to the letter. What we end up doing then is converting anti-discrimination law into a ‘conditions of employment’ law, because we are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. This represents an unwarranted extension of the anti-discrimination laws.” *Id.* at 1003. In response, the majority wrote that employment discrimination laws “would be eviscerated” under Judge Alito’s proposed standard.

In *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 196 (1994), an African-American man applied for several promotions at a company that he had served for more than twenty-three years. He was rejected each time. He brought an antidiscrimination claim. To support his case, he sought to introduce evidence that he had experienced racial harassment in the workplace. While the majority held that the plaintiff should have been allowed to present his evidence, Judge Alito dissented, arguing that the evidence would have been too prejudicial. Once again, Judge Alito's opinion would have again made proving racial discrimination claims more difficult.

*Hopp v. City of Pittsburgh*, 194 F.3d 434 (3d Cir. 1999), was one of the five cases in which Judge Alito upheld claims of employment discrimination. In *Hopp*, the jury found that the white police officers had been denied promotion on account of their race. In deferring to the jury's finding of fact, Alito wrote, "[w]e must affirm unless we find that the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Id.* at 439.

In age discrimination cases, Judge Alito has insisted on a narrow interpretation of procedural and evidentiary rules that prevents the claimant from prevailing in most cases. In *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184 (3d Cir. 1990), a group of employees claiming age discrimination alleged that their manager acknowledged in a meeting that by laying off the plaintiffs the company "might be violating . . . labor laws" and "maybe . . . were doing something illegal or against the contract." *Id.* at 186. Judge Alito interpreted these statements narrowly, explaining that they "lack appreciable probative value." *Id.* at 186. While plaintiffs argued that it was plausible and indeed likely that the manager was referring to antidiscrimination laws, Judge Alito found this argument unreasonable and "remote at best." *Id.* at 188.

Judge Alito was similarly unsympathetic to an employee in *Parker v. Royal Oak Enters.*, 85 Fed. Appx. 292 (3d Cir. 2003) (unpublished opinion). Here, an employee missed by sixteen days the deadline for filing an Equal Employment Opportunity Claim (EEOC) contesting his forced retirement. Judge Alito, writing for the majority, denied the employee an exception, even though he claimed he was negotiating a consulting contract with his employer during part of that time. *Id.* at 295. In another age discrimination case Judge Alito wrote for the majority to deny plaintiffs an opportunity to recover damages on an EEOC claim even though they had successfully proven that they suffered discrimination. *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990). He based his ruling on the grounds that their claim was decided by a prior adjudication and was foreclosed under the doctrine of res judicata. The trial judge spoke to the equities favoring the plaintiffs. According to Alito, however, though the equities favored the plaintiffs, "[t]he district court's desire to provide full relief for all of the victims . . . is certainly understandable, but the district court lacked the authority to put aside the rules of res judicata." *Id.* at 492-93.

Judge Alito sided with the plaintiff in only one age discrimination case reviewed, *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 235 (3d Cir. 1999). However, one of the two central questions in this case did not require any interpretation

of the evidence; rather, Judge Alito ruled that the line of cases on which the lower court had relied to find for the defendant had been superseded by more recent Supreme Court cases. On the second question, Judge Alito found sufficient controversy to remand because of compelling direct evidence provided by a deposition that managers routinely considered “which individuals would be discharged under each option [of seniority system]” before deciding which option to apply and because management testimony concerning those employment policies were contradictory. *Id.* at 237.

In disability discrimination cases, Judge Alito has insisted on similarly high procedural and evidentiary barriers. In *Donahue v. Consolidated Rail Corp.* 224 F.3d 226 (3d Cir. 2000), Judge Alito wrote a majority opinion denying a train worker’s discrimination claim stemming from his employer’s failure to transfer him to a new job. Judge Alito insisted that the employee had not adduced enough evidence of his fitness for the position despite the worker’s claim that the Americans with Disabilities Act (ADA) placed the burden of proof on the employer. In *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368 (3d Cir. 1991), Judge Alito dissented from a majority decision to allow a medical student injured in a car accident to sue her school for failing to provide reasonable accommodation for her injury. In dissent, Judge Alito argued that Nathanson had not met her burden of showing that it was the school’s failure to accommodate her—and not other personal factors—that caused her to stop attending classes.

In yet another disability case involving evidentiary determinations, Judge Alito wrote a majority opinion overturning a district court’s decision to consider only injury-related evidence in assessing a disability claim. In *Mondzelewski v. Pathmark*, 162 F.3d 778 (3d Cir. 1998), a meat packer alleged he was harassed on the job after suffering injuries that restricted his lifting ability. The district court dismissed his ADA claim because his injuries did not meet the statutory requirement of “substantially limiting” a major life activity. Judge Alito, speaking for the majority, reversed the decision because the district court focused solely on the plaintiff’s on-the-job injuries and failed to assess how his other personal characteristics—most notably his sixth grade education—would affect that determination. When both the plaintiff’s injury and his personal characteristics were considered, Judge Alito determined that the injury had substantially limited the type of employment opportunities available to the plaintiff, and therefore he could pursue his claim.

When ruling in sex discrimination cases, Judge Alito focused on tangible harms and tended to impose a higher burden of proof on plaintiffs. For example, in *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997), in evaluating a female employee’s claim that after filing a sexual harassment complaint she suffered from retaliation, he wrote, “The alleged ‘unsubstantiated oral reprimands’ and ‘unnecessary derogatory comments’ suffered by Robinson following her complaint do not rise to the level of what our cases have described as ‘adverse employment action.’” *Id.* at 1300. Judge Alito also rejected Robinson’s claim that Assistant Police Chief Edwards acquiesced in the alleged harassment by the accused harasser Dickerson, because, even though Edwards had a higher rank than Dickerson, Edwards did not have direct supervisory control over him.

Finally, Judge Alito upheld the trial court's refusal to admit an official report that showed Dickerson previously had created an "uncomfortable" work environment for another woman. He argued that because the report details Dickerson's conduct towards another woman, it "in no way put the City on notice that Dickerson was harassing Robinson." *Id.* at 1306. Judge Alito however did reverse the district court's ruling that the plaintiff had not presented sufficient evidence to have a jury hear her claim that Dickerson refused a transfer she had requested because she had not obliged his advances.

Even more notable is *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), where Judge Alito was the only one of twelve judges who voted against granting a trial to a former hotel employee who alleged that a denial of promotion was based on her sex. Judge Alito differed from the majority on the question of how much evidence a person alleging discrimination must show in order to get her case to trial. The majority believed that when the plaintiff in an employment discrimination suit has produced some evidence of discrimination and offered evidence that the employer's excuses are disingenuous, the case should proceed to a jury. Judge Alito, however, would have required a plaintiff to meet a higher standard of evidence to survive a motion for summary judgment. He would have allowed such defense motions to be granted "when the evidence in the record could not persuade a rational trier of fact that intentional discrimination on the ground alleged by the plaintiff was a determinative cause of the challenged employment action." *Id.* at 1078 (emphasis added). In Judge Alito's view, the majority's approach would create an unfair inference of discrimination in cases where the defendant had presented far more compelling evidence but where plaintiff had presented some evidence. It would also allow suits to proceed to trial in situations where "[t]he employer may not wish to disclose his real reasons for not promoting B because the news as to his criteria for promoting B over A [e.g. nepotism] would likely hurt his reputation and lower employee morale." *Id.* at 1086 n.

In *Watson v. Southeastern Pennsylvania Transportation Authority*, 207 F.3d 207 (3d Cir. 2000), Judge Alito narrowly construed legislation that aimed to make it easier for victims of discrimination to win their law suits. In that case, the plaintiff argued that the Civil Rights Act of 1991 lowered the standard of causation required for *all* discriminatory treatment cases against employers. However, considering cases from other circuits, Judge Alito held that the statutory text applied only to a subset of cases, known as "mixed-motive" cases—that is, cases where the employment decision is based on both permissible and impermissible grounds. Thereby Judge Alito upheld the more stringent standard associated with so-called "pretext" cases, in which plaintiff must demonstrate that the impermissible factor (such as race or gender) was the determinative basis for the employer's action, rather than just one "motivating" factor among others.

In the context of these civil rights cases, Judge Alito seems relatively willing to defer to the claims of institutional actors such as employers and the government, over those of individuals advancing civil rights claims. He also generally has deferred to the decisions of lower courts. When dealing with race-based, gender-based, disability-based and age-based claims, Judge Alito has occasionally proven sympathetic, but has more often stringently applied evidentiary standards and procedural rules to reject such claims.



In the religion context however, Judge Alito has applied Supreme Court doctrine so as to clear the way for religious minorities to bring successful discrimination claims.

## **XI. TAX AND BANKRUPTCY**

In the areas of tax and bankruptcy, judges often are asked to decide whether or not individual litigants have used the relevant statutory provisions legitimately. Judge Alito has stressed the need to protect the system from abuse, and evinces an understanding of the complexity of the regulatory framework.

In *Nicholson v. Commissioner*, 60 F.3d 1020 (3d Cir. 1995), Judge Alito set a very high burden of proof for the plaintiff but found for the plaintiff nonetheless. The Nicholsons had engaged in a complex financial arrangement (which reasonably could have been considered a tax shelter) involving leased assets. After the Nicholsons won against the IRS in an earlier case, they went on the offensive, suing to recover their litigation costs. In an opinion closely examining intricate leasing and leveraging arrangements, Judge Alito agreed that the government's position had been "unreasonable" and awarded costs.

Judge Alito was less taxpayer-friendly when interpreting the "innocent spouse" provision of the tax code. This provision holds that one spouse should not be held jointly and severally liable for the tax evasion of the other spouse if certain conditions are present, particularly if the "innocent" spouse was unaware of the scheme. In *Purificado v. Commissioner*, 9 F.3d 290 (3d Cir. 1993), a case involving two tax-evading husbands and their wives, he ruled against one wife married to an alcoholic husband who committed fraud. After considering testimony that the wives' children had used drugs and committed crimes and that there had been major illnesses in the family during the period in question, Judge Alito dismissed concerns that his ruling was inequitable, writing "[w]hile the facts and circumstances related by [the wives] evoke our sympathy, these facts and circumstances have no rational bearing on whether it would be inequitable to hold them liable for the taxes and additions due on the joint returns they signed." *Id.* at 297.

Judge Alito's bankruptcy opinions demonstrate a willingness to limit people's ability to file for bankruptcy. In *In re Tamecki*, 229 F.3d 205 (3d Cir. 2000), Judge Alito joined an opinion that would make it significantly easier for the government to dismiss bankruptcy petitions merely by alleging that the petition was filed in bad faith, even where there was hardly any evidence to lead to this allegation. The debtor was a construction worker with marital and health problems earning less than \$4,000 a year. When he fell ill and was unable to work, he wracked up significant credit card debt by using unsolicited "live checks," that were mailed to him by a major credit card company. The trustee alleged that Tamecki filed for bankruptcy in bad faith because the man had been involved in a lengthy separation with his wife but had not filed for divorce; the trustee alleged the man was delaying his divorce so that creditors could not get his house. In a vigorous dissent, Judge Rendell noted that the few courts that have dealt with bad-faith dismissal held that such a dismissal should be limited to extremely rare circumstances, such as when the bankrupt party flaunted a lavish lifestyle. Rendell worried that the majority decision would make it extremely easy for the government to keep consumers from filing for bankruptcy. *In re Tamecki*, 229 F.3d at 209-11. Judge

Alito joined the majority, but also wrote a separate concurrence that downplayed the policy concerns of the dissent by “clarify[ing] the narrow point of disagreement between the majority and the dissent” as merely a subtle difference in opinion on burden shifting. *Id.* at 208 (Alito, J. concurring).

## XII. WORKERS' RIGHTS

In the United States, employees enjoy certain rights and protections at the workplace. Statutes guarantee minimum wages and maximum hour protections to workers, prohibit employers from discriminating based on protected immutable characteristics such as race and gender, and protect employees' right to associate and self-organize in order to bargain with their employers about working conditions.

While these workplace statutes are firmly entrenched, there is broad disagreement as to their scope and reach. Some judges read these statutes very narrowly, favoring employers' property interests, upholding managerial discretion, and expressing suspicion of unfettered government interference. Other judges, in contrast, emphasize the important rights of individual employees and defend the power of Congress to protect basic rights inside the workplace.

Based on a review of his written opinions in the area of worker rights, Judge Alito falls into the former camp, limiting the scope and reach of workplace statutes and making it more difficult for plaintiffs to bring legal claims. Judge Alito's opinions are remarkably consistent in outcome. Of the 35 employment and labor cases in which Judge Alito has written an opinion (majority, concurrence, or dissent), in only five cases has his result favored the employee or union.

Judge Alito has consistently construed these statutes in ways that limit the number of workers covered by them. He has effectively exempted states, as employers, from the Family Medical Leave Act (*Chittister v. Dept of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000), which was effectively overruled by *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)); read the "small newspaper" exemption in the Fair Labor Standards Act broadly, thereby excluding a larger number of employees from its coverage (*Reich v. Gateway Pres*, 13 F.3d 685 (3d Cir. 1994) (Alito, J., dissenting)); sought to limit the jurisdiction of the Mine Safety and Health Review Commission to not reach coal processing sites, and thus not cover employees who work in those facilities (*RNS Services, Inc., v. Secretary of Labor*, 115 F.3d 182 (3d Cir. 1997) (Alito, J., dissenting)); interpreted federal law requiring employers to give 60 day notice to its employees before shutting down to not apply to government ordered closings (*Hotel Employees and Restaurant Employees Int'l Union v. Elsinore Shore Associates*, 173 F.3d 175 (1998) (Alito, J., concurring)); and read the Privacy Act to limit the right of unions to force a public employer to disclose to the union the home addresses of employees within the bargaining unit represented by that union (*Federal Labor Relations Authority v. Dep't of Navy*, 966 F.2d 747 (3d Cir. 1992) (Alito, J., dissenting)).

Judge Alito's opinions concerning workers' rights also show great deference to employer discretion over workplace decisions. In *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), an employee claimed that she was not promoted because of her race. As discussed above in the Civil Rights section, the majority harshly criticized Judge Alito's dissent, arguing that "Title VII would be eviscerated if our analysis were to halt where

the dissent suggests” because it would serve to “immunize an employer from the reach of Title VII if the employer’s belief that it selected the ‘best’ candidate was the result of conscious racial bias.” *Id.* at 993.

In *Glass v. Philadelphia Electric Co.*, 34 F.3d 188 (3d Cir. 1994), another race discrimination case, the company claimed that it was not the plaintiff’s race but instead a prior poor performance evaluation that explained the promotion denial. Glass instead claimed that the poor evaluation resulted from racist treatment by co-workers, which management tolerated. The trial judge, while allowing management officials to testify that the poor evaluation was determinative, did not allow Glass to provide evidence or to cross-examine the management officials as to the possible reasons for that evaluation, holding that the evidence was more prejudicial than relevant to the issue. The Third Circuit held that the district court erred in excluding the employee’s evidence concerning the allegedly hostile work environment and remanded for a new trial. Judge Alito dissented, arguing that while the evidence of racial harassment had “some probative value,” *id.* at 196, its value was limited. Emphasizing management statements at trial, Judge Alito noted that while the company focused upon the performance evaluation in explaining its decision, company officials also testified to other reasons based on their subjective impression of Glass’s demeanor and attitude. Judge Alito found these additional explanations sufficient.

In *Delli Santi v. CNA Ins.*, 88 F.3d 192 (3d Cir. 1996), a company launched an internal investigation of a female employee in retaliation for her complaints of sex and age discrimination. The internal investigation uncovered that the plaintiff had inflated her expense accounts in violation of company policy, and the company promptly fired her. Delli Santi alleged that she was terminated not because of the expense accounts but because of her discrimination complaints. The jury agreed, and returned a verdict for the plaintiff, but the district court reversed, holding that the company would have fired her for the illegal conduct even if she never had made the discrimination complaints. The majority on the Third Circuit reversed, finding that the company’s expense account explanation was merely a pretext for the real, discriminatory reason for the discharge. Looking at the policy in practice, the court found that no employee had ever been investigated or punished on account of expense reports, and the launching of the investigation itself had an unlawful purpose. In dissent, Judge Alito argued that since the company had a policy against the conduct, it had the right to fire her for violating that policy. He agreed that the company launched the investigation with discriminatory intent but would have held that the actual termination was legitimate because of Santi’s violation of company policy.

However, in cases where the employer does not present a consistent explanation for its conduct, Judge Alito has ruled against the employer. In *Showalter v. University of Pittsburgh Medical Center*, 190 F.3d 231 (3d Cir. 1999), an age discrimination case discussed above in the Civil Rights Section, Judge Alito reversed the lower court’s grant of summary judgment for the employer and ordered a trial. In attempting to refute the plaintiff’s claim of discrimination, various company officials offered contradictory accounts of the reasons for its employment decision. Judge Alito found the conflicting

stories significant, holding that it raised the implication that the stated explanations were pretextual.

The one exception to Judge Alito's pattern of granting latitude to employer conduct is in the area of religious discrimination. In those cases, he engages in a more rigorous analysis of an employer's behavior and is less likely to give them the benefit of the doubt. A good example is *Abramson v. William Paterson College*, 260 F.3d 265 (3d Cir. 2001), discussed above in the Civil Rights Section above.

In contrast to his deference to employers, Judge Alito has shown little deference to the administrative agencies that administer workplace statutes. In fact, in his reviews of decisions by the National Labor Relations Board (NLRB), Judge Alito's written opinions have supported reversal in every case. This lack of deference is in stark contrast to the appreciable deference he shows to agency decisions in other areas of the law, such as immigration and the environment.

In *NLRB v. Alan Motors*, Judge Alito overturned an NLRB decision that held that the employer violated the National Labor Relations Act (NLRA) by refusing to rehire an employee because he had engaged in protected union activities. The employer claimed an independent, legitimate reason for the decision. In its holding, the NLRB disregarded the administrative law judge's determination that the employer's testimony was credible. The NLRB found that, while it did not discount the judge's credibility determination, acceptance of bare claims from the employer did not overcome the great weight of the contrary evidence. Judge Alito, writing for the panel, held that because the NLRB did not explicitly reject the administrative law judge's credibility finding, the court should treat the testimony as true and thus find that the employer adequately proffered an independent lawful reason for refusing to rehire the employee.

In *Stardyne v. NLRB*, 41 F.3d 141 (3d Cir. 1994), a corporation with a unionized workforce refused to recognize the union at its spin-off corporation. The NLRB held for the union, finding that the corporations were alter egos—that is, the two companies, while ostensibly separate entities, operated as an integrated enterprise to the extent that they should be considered the same employer and thus subject to the same collective bargaining agreement. However, the NLRB found that while the defendant was liable as an alter ego, the two corporations were not single employers. Judge Alito reversed, finding the holding inconsistent with an earlier NLRB decision, which he claimed held that an employer cannot be an alter ego without also being a single employer. In that case, *Gartner-Harf Co.*, 308 NLRB 531 (NLRB 1992), however, the NLRB only mentioned the distinction between single employers and alter egos in dicta in a footnote. See 308 NLRB at 533, n.8. Judge Alito found the footnote sufficient to deny enforcement.

In *Indiana Hospital, Inc. v. NLRB*, 10 F.3d 151 (3d Cir. 1993), the employer objected to the results of a union election, alleging that the election was tainted by improper NLRB conduct in communicating untrue and pro-union statements to the employees. The NLRB interviewed the employees the company stated had passed on the

information of misconduct, and each employee denied the employer's allegations. At the NLRB hearing, several management officials testified that employees told them of these improper communications, but no employees testified. The company sought to subpoena the case intake logs of the Regional Board office in order to determine which NLRB officers communicated with the employees. The NLRB revoked the subpoenas, holding that the employer was not prejudiced because the employer could have, but did not, call to testify any of the employees allegedly receiving the improper communication. Judge Alito reversed, holding that the employer might have been prejudiced by the revocation, because it could have used the information as an alternative to presenting the evidence through employee testimony.

Judge Alito exhibited the same lack of deference toward the NLRB when reviewing other administrative agencies that regulate the workplace. In *Alden Leeds v. OSHA*, 298 F.3d 256 (2002), Judge Alito reversed the Occupational Safety and Health Administration's (OSHA) citation of a company for failure to abate workplace safety violations. In 1993, the company had been cited for 13 instances of improper storage of chemicals. A year later, OSHA inspected the facility again and found 33 additional instances of improper chemical storage. Because the company had failed to abate the previous violation, the fine was much more severe. Judge Alito found that the original citation put the company on notice only for violations of improper storage of the 13 chemicals listed, not for violations of improper storage generally. Therefore, the agency failed to give adequate notice to the company to satisfy the requirements for a failure-to-abate violation.

Labor unions fare no better with Judge Alito in non-NLRB cases. In fact, in the cases before Judge Alito in which a union and employer are opposed, he has sided with the employer every time. He frequently relies upon procedural technicalities to reverse lower-court decisions favorable to unions. See *Luden's Inc. v. Local 6, BCTWU*, 28 F.3d 347, (3d Cir. 1994), and *Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police*, 920 F.2d 198 (1990). In both cases, Judge Alito found that the unions had not in the lower court raised the particular claim advanced in circuit court, so were precluded from doing so.

In one case, *Caterpillar v. UAW*, 107 F.3d 1052 (1997), Judge Alito strictly interpreted a statutory provision to find criminal liability against the union. The case concerned the legality of a provision in a collective bargaining agreement requiring that the employer provide a paid leave of absence for the workers serving as grievance chairpersons for their union. These provisions, found in many collective bargaining agreements, permit workers to perform collective bargaining functions full-time while continuing to receive pay and benefits from their employer. Dissenting from the court's decision to uphold such a collective bargaining provision, Judge Alito concluded that such arrangements violate the plain meaning of a section of the Labor Management Relations Act. While stating that if he were a legislator, he would not vote to criminalize these agreements, and agreeing that Congress may not have intended to so criminalize, the plain meaning of the statute nevertheless did just that.

In the area of workers rights, Judge Alito's opinions almost always come to the same result. He has sought to limit the reach of statutes that protect workers and has shown great deference to employer explanations of workplace decisions while declining to bestow that same treatment to government agencies.



### XIII. ENVIRONMENTAL LAW

Judge Alito has authored only four opinions in environmental law, making it difficult to assess his approach broadly. The two clearest messages that emerge are that Judge Alito tends to defer to regulatory agency expertise and that he only will preempt state environmental laws and directives when a federal statute is clear in its intent to “occupy the field.” In all four of his environmental opinions, this approach led Judge Alito to rule in favor of the environmental regulatory agency party to the suit.

In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court held that a reviewing court cannot substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency to which Congress has delegated regulatory authority. Rather, a reviewing court’s only task is to determine whether the agency considered all relevant factors and articulated a rational connection between the facts found and the choice made.

Judge Alito applied this guidance in deciding *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3d Cir. 1997), involving a dispute between Pennsylvania and the U.S. Environmental Protection Agency (EPA) over the “attainment status” of Pittsburgh-Beaver Valley under the Clean Air Act. Pennsylvania requested that the EPA change the area’s designation from non-attainment to attainment status of national ambient air quality standards (NAAQS) for ozone. After granting final notice in favor of re-designation, the EPA received new data for the area showing multiple spikes in ozone levels that exceeded those permissible by NAAQS. Interpreting the Clean Air Act as prohibiting the grant of attainment status to an area that it knows has not met attainment standards, the EPA revoked its grant of re-designation and denied Pennsylvania’s request. Though Judge Alito expressed sympathy with the view that the rule “threatens serious economic harm,” he found the EPA’s interpretation of Clean Air Act requirements to be “plainly a reasonable one,” even if “not statutorily compelled.” *Id.* at 109, 117. Noting that “a reviewing court must be at its most deferential when reviewing factual determinations within an agency’s area of special expertise,” Judge Alito found that the EPA’s decision was not “arbitrary, capricious or an abuse of discretion,” and ruled for the EPA. *Id.* at 117.

Judge Alito again protected state regulatory authority in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Conroy*, 24 F.3d 568 (3d 1994). The Pennsylvania Department of Environmental Resources (DER), concerned about the failure of a bankrupt printing company owner to remove hazardous waste that was endangering the environment as well as the public’s health and safety, decided to hire a private contractor to clean up the facility. The DER then filed an administrative expense claim with the bankruptcy court, seeking to recover the amount it had paid to the contractor, as well as an additional 10 percent for administrative and legal expenses. In holding that the DER was entitled to recover the full amount, Judge Alito reasoned that “if the DER had not itself undertaken to clean up the printing company facility, the Conroys could not have escaped their obligation to do so by abandoning the hazardous

property.” *Id.* at 569. The costs incurred by the DER were thus “a portion of the actual, necessary costs and expenses of preserving the estate.” *Id.*

Two of Judge Alito’s opinions illustrate his reluctance to hold that federal law preempts state laws. Faced with another case involving the cleanup of hazardous waste, *Manor Care, Inc. v. Yaskin, Commissioner of the New Jersey Department of Environmental Protection*, 950 F.2d 122 (3d Cir. 1991), Judge Alito permitted the New Jersey Department of Environmental Protection (DEP) to sue, under a state law, parties responsible for creating hazardous waste in order to recover cleanup costs. Judge Alito held that Congress did not intend for the federal Superfund Act to “occupy the field or to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes.” *Id.* at 126. In his analysis, Judge Alito explained that federal law may preempt state law by express provision or by “evidence of congressional intent to occupy a field and leave no room for supplementary state regulation.” *Id.* at 125. He found that neither of those conditions was met in this case.

In *Commonwealth of Pennsylvania, Department of Environmental Resources v. United States Postal Service*, 13 F.3d 62 (3d Cir. 1993), Judge Alito ruled that a state regulatory agency can sue the Postal Service to enforce compliance with state environmental regulations, rejecting the Postal Service’s affirmative defense of sovereign immunity. Judge Alito relied on the Supreme Court’s decisions in *Franchise Tax Board v. USPS* and *Loeffler v. Frank* to support his view that the “sue-and-be-sued” provisions of the 1970 Postal Reorganization Act (PRA) broadly waived the Postal Service’s sovereign immunity and required the courts to treat the Postal Service like any other business. He rejected the Postal Service’s assertion that a later statute narrowed the original waiver, noting that nothing in the later statute or in its legislative history revealed an intent to narrow the waiver of sovereign immunity of entities subject to sue-and-be-sued clauses.

## APPENDIX

### 1. CASES REVIEWED BY THE ALITO PROJECT

#### A. Opinions

*MBIA Insurance v. Wells Fargo Minnesota*, 426 F.3d 204 (2005)  
*Jackie McDowell et.al. v. Philidelphia Housing Authority*, 423 F.3d 233 (2005)  
*Larry Ololade Oyebanji v. Gonzales*, 418 F.3d 260 (2005)  
*Overall v. Univ. of Pennsylvania*, 412 F.3d 492 (2005)  
*Xiu Ling Zhang v. Gonzales*, 405 F.3d 150 (2005)  
*Bronshtein v. Horn*, 404 F.3d 700 (2005)  
*Trippe Manufacturing v. Niles Audio*, 401 F.3d 529 (2005)  
*Brinson v. Vaughn*, 398 F.3d 225 (2005)  
*Southco v. Kanebridge*, 390 F.3d 276 (2004)  
*Child Evangelism Fellowship v. Stafford School District*, 386 F.3d 514 (2004)  
*GAF Corp. v. GAF Corp.*, 85 F.3d 313 (2004)  
*Soltane v. US Dept of Justice, INS*, 381 F.3d 143 (2004)  
*Cshore Regional High School v. P.S.*, 381 F.3d 194 (2004)  
*Blackhawk v. Pennsylvania*, 381 F.3d 202 (2004)  
*Chen v. Ashcroft*, 381 F.3d 221 (2004)  
*Fielder v. Varner*, 379 F.3d 113 (2004)  
*Pitt News v. Pappert*, 379 F.3d 96 (2004)  
*Khodara Environmental v. Blakey*, 376 F.3d 187 (2004)  
*US v. Pray*, 373 F.3d 358 (2004)  
*Liu v. Ashcroft*, 372 F.3d 529 (2004)  
*Benn v. Universal Health System*, 371 F.3d 165 (2004)  
*Polini v. Lucent*, 100 Fed.Appx 112 (2004)  
*White v. Comm. Workers of America*, 370 F.3d 346 (2004)  
*Poole v. Family Court of Newcastle County*, 368 F.3d 263 (2004)  
*US v. Wright*, 363 F.3d 237 (2004)  
*US v. Lloyd* 361 F.3d 197 (2004)  
*Hay Group v. EBS*, 360 F.3d 404 (2004)  
*US v. Lee*, 359 F.3d 194 (2004)  
*US v. Santo*, 87 Fed. Appx 818 (2004)  
*Jimenez-Mora v. Ashcroft*, 86 Fed. Appx 527 (2004)  
*Rompilla v. Horn*, 355 F.3d 233 (2004)  
*Parker v. Royal Oak*, 85 Fed. Appx 292 (2003)  
*Munroe v. Ashcroft*, 353 F.3d 225 (2003)  
*US v. D'amario*, 350 F.3d 348 (2003)  
*Reardon v. Hendricks*, 82 Fed. Appx 273 (2003)  
*Federal Mogul-Global v. Creditors*, 348 F.3d 390 (2003)  
*Roche v. NJ Manufacturers Insurance Company*, 78 Fed. Appx 183 (2003)  
*Forbes v. Lower Merion*, 76 Fed. Appx 475 (2003)  
*Mccabe v. Philadelphia*, 76 Fed. Appx 464 (2003)

*Wong v. Ashcroft*, 76 Fed. Appx 446 (2003)  
*US v. Warren*, 76 Fed. Appx 432 (2003)  
*Williams v. Price*, 343 F.3d 223 (2003)  
*US v. Jeffries*, 73 Fed. Appx 535 (2003)  
*Hray v. Ashcroft*, 74 Fed. Appx 167 (2003)  
*Lazorko V. Pennsylvania Hospital*, 71 Fed. Appx 956 (2003)  
*Acosta v. Ashcroft*, 341 F.3d 218 (2003)  
*Cooper v. Great Atlantic and Pacific Tea Co.*, 2003 U.S. App LEXIS 16122 (2003)  
*US v. Earhart*, 2003 U.S. App LEXIS 16039 (2003)  
*Hechinger*, 335 F.3d 243 (2003)  
*US v. Lacroix*, 69 Fed. Appx 566 (2003)  
*US v. Francis*, 71 Fed. Appx 901 (2003)  
*Masda Corp. v. Empire Comfort Systems*, 69 Fed. Appx 85 (2003)  
*US v. Carstarphen*, 65 Fed. Appx 424 (2003)  
*Artz v. Barnhart*, 330 F.3d 170 (2003)  
*Desi's Pizza v. Wilkes Barre*, 321 F.3d 411 (2003)  
*US v. Thomas*, 319 F.3d 640 (2003)  
*United Artists v. Warrington*, 316 F.3d 392 (2003)  
*Adams v. Coppola*, 53 Fed. Appx 661 (2002)  
*Forbes v Lower Merion*, 313 F.3d 144 (2002)  
*Chadwick v. Janecka*, 312 F.3d 597 (2002)  
*Romero v. Smithkline Beecham*, 309 F.3d 113 (2002)  
*US v. \$92,422.57*, 307 F.3d 137 (2002)  
*US v. Cohen*, 301 F.3d 152 (2002)  
*Lawson v. Fortis*, 301 F.3d 159 (2002)  
*US v. Tiller*, 302 F.3d 98 (2002)  
*Chadwick v. Janecka*, 302 F.3d 107 (2002)  
*Betterbox v. BB Technologies*, 300 F.3d 325 (2002)  
*Leeds v. Occ. Safety and Health Review Commission*, 298 F.3d 256 (2002)  
*Hechinger*, 298 F.3d 219 (2002)  
*Swartzwelder v. McNeilly*, 297 F.3d 228 (2002)  
*Carpenter v. Vaughn*, 296 F.3d 138 (2002)  
*Thomas v. SS Commissioner*, 294 F.3d 568 (2002)  
*Shapiro v. Lakewood*, 292 F.3d 356 (2002)  
*Transamerica v. Aviation Office of America Inc.*, 292 F.3d 384 (2002)  
*Neonatology v. IRS*, 293 F.3d 128 (2002)  
*Truesdell v. Philadelphia Housing Authority*, 290 F.3d 159 (2002)  
*Ziccardi v. Philadelphia*, 288 F.3d 57 (2002)  
*Nextel v. Kingston*, 286 F.3d 687 (2002)  
*Pennsylvania Pharmacists v. Houstoun*, 283 F.3d 531 (2002)  
*Fraise v. Terhune*, 283 F.3d 506 (2002)  
*Bovkun v. Ashcroft*, 283 F.3d 166 (2002)  
*Nextel v. Unity*, 282 F.3d 257 (2002)  
*Brosius v. Warden*, 278 F.3d 239 (2002)  
*US v. Gricco*, 277 F.3d 339 (2002)  
*Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164 (2001)

*Wenger v. Frank*, 266 F.3d 218 (2001)  
*Acceptance Ins. Co. v. Sloan*, 263 F.3d 278 (2001)  
*Leckey v. Stefano*, 263 F.3d 267 (2001)  
*Southco, Inc. v. Kanebridge Corp.*, 258 F.3d 148 (2001)  
*Einhorn v. Fleming Foods, Inc.*, 258 F.3d 192 (2001)  
*Leveto v. Lapina*, 258 F.3d 156 (2001)  
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## 2. JUDGE ALITO'S 1985 APPLICATION STATEMENT

Below is the full text of the statement Samuel Alito submitted in November 1985 as part of his application for the position of Deputy Assistant Attorney General in charge of the office of Legal Counsel. Judge Alito graduated from Yale Law School in June 1975, attended Army basic training at Fort Gordon, Georgia, clerked for Leonard Garth in Newark from July 1976 to August 1977, and served as an Assistant US Attorney in Newark from November 1977 to August 1981. He then began work as an assistant to the Solicitor General and had worked in that office for four years before submitting this statement as part of his application to change jobs in the Department of Justice.

I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration. It is obviously very difficult to summarize a set of political views in a sentence but, in capsule form, I believe very strongly in limited government, federalism, free enterprise, the supremacy of the elected branches of government, the need for a strong defense and effective law enforcement, and the legitimacy of a government role in protecting traditional values. In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate. The Administration has already made major strides toward reversing this trend through its judicial appointments, litigation, and public debate, and it is my hope that even greater advances can be achieved during the second term, especially with Attorney General Meese's leadership at the Department of Justice.

When I first became interested in government and politics during the 1960s, the greatest influences on my views were the writings of William F. Buckley, Jr., the National Review, and Barry Goldwater's 1964 campaign. In college, I 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. I discovered the writings of Alexander Bickel advocating judicial restraint, and it was largely for this reason that I decided to go to Yale Law School.

After graduation from law school, completion of my ROTC military commitment, and a judicial clerkship, I joined the U.S. Attorney's office in New Jersey, principally because of my strong views regarding law enforcement.

Most recently, it has 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. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion.

As a federal employee subject to the Hatch Act for nearly a decade, I have been unable to take a role in partisan politics. However, I am a life-long registered Republican and have made the sort of modest political contributions that a federal employee can afford to Republican candidates and conservative causes, including the National Republican Congressional Committee, the National Conservative Political Action Committee, Rep.

Christopher Smith (4th Dist. N.J.), Rep. James Courter (12th Dist. N.J.), Governor Thomas Kean of N.J., and Jeff Bell's 1982 Senate primary campaign in N.J. I am a member of the Federalist Society for Law and Public Policy and a regular participant at its luncheon meetings and a member of the Concerned Alumni of Princeton University, a conservative alumni group. During the past year, I have submitted articles for publication in the National Review and the American Spectator.