DAVENPORT V. WASHINGTON EDUC. ASS'N AND SEIDEMANN V. BOWEN: NEW LIMITATIONS ON PUBLIC EMPLOYEE UNIONS' USE OF NON-MEMBER FEES

SEPTEMBER 2007

Overview

Two recent decisions, one from the Supreme Court, *Davenport v. Washington Educ. Ass'n*,[1] and the other from the Second Circuit Court of Appeals, *Seidemann v. Bowen*,[2] have sharply limited the ability of unions to use moneys collected from fee payers for any purpose other than collective bargaining.

Fee payers are nonunion employees who work in an agency shop in which the union acts as the exclusive bargaining representative for all employees. Although not all employees are required to join the union, even non-member fee payers must contribute to the union because the union's collective bargaining benefits all employees. In 1977, however, the Supreme Court held that the First Amendment bars public-sector unions from using the payments of non-members who object to the union's political activities for any purpose other than collective bargaining.[3] The Court ruled that fee payers who object to the union's political activities are entitled to an advance reimbursement of any portion of their fees spent on those activities.

Prior to *Davenport*, the Supreme Court had not addressed the question of whether a law requiring a public-sector union to receive "affirmative authorization" before using agency fees (moneys collected from fee payers) for political purposes

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violates the union's First Amendment rights. In *Davenport*, the Court held that a Washington state statute that prohibited a union from using "agency shop fees paid by an individual who is not a member of the organization . . . to influence an election or to operate a political committee, unless affirmatively authorized by the individual" was "simply a condition on the union's exercise of this extraordinary power"[4] and did not violate the union's First Amendment rights.

In *Seidemann v. Bowen*, a case decided two months after the Supreme Court's decision in *Davenport*, the Second Circuit held that unions cannot require fee payers to annually renew their objections to, and claims for reimbursement of, moneys allocated to non-collective bargaining activities. The *Seidemann* decision reinterprets the requirement that unions use "narrowly drawn objection procedures" to safeguard the First Amendment rights of fee payers.[5] Unions must now assume that objections are continuing rather than require that the dissenter renew them annually. *Seidemann* sets a high standard for review of union procedures and aligns the Second Circuit with the Fifth and Seventh Circuits. In so doing, the court rejected the reasoning of the District of Columbia and Sixth Circuits, which have found that requiring annual renewal of objections is not an unreasonable procedure.[6]

Background: Union Shops and First Amendment Rights

Although many states have enacted labor laws that authorize a union to establish an agency shop, the Supreme Court has recognized that such arrangements can raise First Amendment concerns. In *Chicago Teachers Union, Local No. 1 v. Hudson*, the Court held that even though nonunion employees benefited from a union's collective bargaining activities, they were entitled to a refund of any dues paid that went to the union's political activities. In other words, though employees are required to pay for the benefits they receive from the union's collective bargaining, they are not required to pay for its political activities.

The Court held that the proper way to balance the union's First Amendment right to political activity and the non-member's First Amendment right not to be enlisted in a political cause with which the employee disagrees is by means of "carefully tailored" union procedures and by giving the aggrieved employee the right to assert their claim and have it heard by a neutral third party.[7] The Court described its delicate balancing test:

> [A]lthough the government interest in labor peace is strong enough to support an agency shop, notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

The *Hudson* Court imposed procedural requirements on public-sector unions to ensure that a fee payer's First Amendment rights were not violated by a union's use of his payments. The Court concluded that under the Constitution, a union's collection of fees from non-members must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[8] Until *Seidemann*, so long as a union provided an explanation of its spending, expeditious appeals before a neutral party, and an escrow account, it could require objectors to renew their claims annually. Moreover, prior to *Davenport*, the Supreme Court had not required a union to secure affirmative consent before spending agency fee payments for non-collective bargaining purposes.

Davenport

A. Case History

In 1992, Washington state voters approved the Fair Campaign Practices Act (the "Act"). At the time of the decision under review by the Supreme Court, §760 of the Act provided that "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."[9]

Notwithstanding the provisions of §760, the Washington Education Association (the "WEA"), the exclusive bargaining agent for some 70,000 public education employees in Washington State, did not obtain affirmative authorization from non-members before using "agency fees" collected from them for "nonchargeable expenditures." Rather, it

> sent a "Hudson packet" to all nonmembers twice a year, notifying them of their right to object to paying fees for nonchargeable expenditures, and giving them three options: (1) pay full agency fees by not objecting within 30 days; (2) object to paying for non-chargeable expenses and receive a rebate as calculated by respondent; or (3) object to paying for non-chargeable expenses and receive a rebate as determined by an arbitrator. Respondent held in escrow any agency fees that were reasonably in dispute until the Hudson process was complete.[10]

The WEA's procedures were challenged in two separate lawsuits. In one, the trial court held that the procedures violated §760, awarding monetary damages and injunctive relief. In the other, the trial judge "held that §760 provided a private right of action, certified a class of nonmembers, and stayed the proceedings pending interlocutory appeal."[11] The Supreme Court of Washington held that "although a nonmember's failure to object after receiving the Hudson packet did not satisfy §760's affirmative-authorization requirement, that requirement violated the First Amendment."[12]

B. The Supreme Court's Decision

A unanimous Court, with Justice Scalia writing for Justices Stevens, Kennedy, Souter, Thomas, Ginsberg, and Justices Breyer, Roberts, and Alito concurring, vacated the decision of the Supreme Court of Washington. Justice Scalia wrote that in *Davenport*, there should have been no balancing of constitutional rights "for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees."[13]

Hudson, the Court explained, sets only a floor of procedural protections for a dissenting employee. "The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions."[14] In other words, although a state must ensure that a public-sector union provides at least the procedural protections mandated by *Hudson*, states are free to provide even more protections for the First Amendment rights of the dissenting employee. As the Court observed:

> The Supreme Court of Washington read far too much into our admonition that "dissent is not to be presumed." We meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including those who had not objected . . .[O]ur repeated affirmation that *courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.

C. Significance of the Decision

The *Davenport* decision opens the door for more laws restricting how a union may use agency fees. By upholding the requirement that the union obtain affirmative consent from dissenters, the Supreme Court placed an additional burden on union efforts to raise funds for election-related activities. Rather than the presumption that silence equals fee payers' acceptance, unions may now be forced to assume, unless they are expressly told otherwise, that fee payers oppose the use of payments for election-related activities.

Seidemann

A. Case History

David Seidemann, a tenured professor of geology at Brooklyn College, had a history of taking issue with certain of the practices of the Professional Staff Congress of the City of New York (PSC/CUNY), the union that represents CUNY professors. Seidemann established an organization, the CUNY Alliance For Responsible Unionism (CARU), as a vehicle to express his stated disapproval of PSC and its leadership, which, he claimed, embarked on "quixotic ideological crusades."[15] While Seidemann worked in an agency shop and was therefore obligated to pay the union for its collective bargaining, he opposed the union's non-collective bargaining work and, in accordance with PSC procedure, filed objections annually.

PSC required that objectors renew their claims every year. The union sent out a notice letter outlining the objection procedures annually. Objectors had a month to mail their objections and were granted an advance rebate. If the objector disputed the amount, they were required to specify the percentage of disputed fees and make their appeal to the union president within 35 days. The objector was then entitled to an "expeditious hearing" before a neutral arbitrator.[16]

Although the Second Circuit has long interpreted *Hudson* to require that unions' objection procedures be "narrowly drawn," until *Seidemann*, it had not found that requiring annual objections violated this precept.

B. The Second Circuit's Decision

In *Seidemann*, Judge Hall wrote for a unanimous panel including Judges Pooler and Sack, which held that requiring a fee payer to object annually placed an undue and impermissible burden on an employee's *First Amendment* right to object. The Second Circuit noted that no Supreme Court decision, including *Davenport*, had found that "merely because an employee must initially make his burden known, a union may thereafter refuse to accept a dissenter's notice that his objection is continuing."[17] Building on the Supreme Court's *Davenport* decision, the Second Circuit adopted the Fifth Circuit's reasoning that without a legitimate reason for the union's requirement, "the annual written objection procedure is an unnecessary and arbitrary interference with the employees' exercise of their *First Amendment* rights."[18] Essentially, without an explanation by the union of a legitimate need for annual objections, requiring annual renewal of objections is too broadly drawn to meet the narrow-tailoring requirement. While the employee bears the initial burden of making her or his objection known, once the objection has been made the union must show "a legitimate need for disallowing continuing objections."[19] PSC defended its annual objection requirement as a strategy to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members" but the Second Circuit held "that rationale cannot carry the day in light of *Hudson's* and *Andrew's* requirements that procedures for objecting be drawn narrowly."[20]

In addition to requiring that unions now accept continuing objections, the *Seidemann* court found that the union may not require the dissenter to specify the percentage of his or her disputed payments as a prerequisite for arbitration. Rather, the burden is on the union to provide an accurate accounting of its spending on collective bargaining and non-collective bargaining activities. "PSC's requirement that agency fee payers must assert particularized objections as a *sine qua non* to obtain review by an impartial decision-maker violates Seidemann's constitutional right to dissent."[21]

C. Significance of the Decision

With the *Seidemann* decision, after an objector makes his dissent known once, the burden shifts to the union. Not only must the union assume that the objection is ongoing and automatically renew it, but it must also provide the objector with a detailed accounting of fees spent on collective bargaining and non-collective bargaining.

1. *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2383 (2007).
2. *Seidemann v. Bowen*, 2007 U.S. App. LEXIS 18243, at *8 (2d Cir. Aug. 1, 2007).
3. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977).
4. *Davenport*, 127 S.Ct. at 2377-78.
5. *Bowen*, 2007 U.S. App. LEXIS at *8-9 (citing *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 3335, 339 (2d Cir. 1987)).
6. *Id.* at *11.
7. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302 (1986) (internal citations and quotations omitted).
8. *Id.* at 310.
9. *Davenport*, 127 S. Ct. at 2377. The Supreme Court noted that "Washington has since amended §760 to codify a narrower interpretation of "use" of agency-shop fees than the interpretation adopted below by the state trial court that passed on that question." *Id.* at 2377 n.1
10. *Id.* at 2377-78.
11. *Id.* at 2378.
12. *Id.*
13. *Id.* The state law as applied to public-sector unions "is not fairly described as a restriction on how the union can spend "its" money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's money*." *Id.* at 2380.
14. *Id.* at 2379.
15. We Are CARU: The CUNY Alliance for Responsible Unionism, http://www.cuny-aru.org/newsletter/carunewsletter219.htm.
16. *Seidemann*, 2007 U.S. App. LEXIS 18243, at *3.
17. *Id.* at 12 (citing *Davenport*, 127 S. Ct. at 2379).
18. *Id.* at *10 (quoting *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515-17 (5th Cir. 1998)) (emphasis in original).
19. *Id.* at *12-13.
20. *Id.* at *13 (citing *Shea*, 154 F.3d at 515).
21. *Id.* at *16.

LEGISLATION RESTORES PUBLIC EMPLOYEES' WEINGARTEN RIGHT

On July 18, 2007, New York Gov. Eliot Spitzer signed into law L.2007 C.244, a new provision that restores an employee protection lost as a result of the February 20, 2007 decision by New York's highest court in *New York City Transit Authority v. New York State Public Employment Relations Board*.[1] In that case, the New York Court of Appeals held in a split decision that the Taylor Law[2] does not give public employees a "Weingarten right"[3] to union representation during an investigatory interview, even where the employee reasonably believes that the interview might result in disciplinary action. Chief Judge Kaye, in dissent, had urged the legislature to act to remedy the decision.

Gov. Spitzer restores the Weingarten right to public employees, enshrining their right to union representation during an investigatory interview

The statutory provision accomplishes that, making it an improper practice for a public employer to fail to provide or refuse to afford a public employee the right, upon demand, to representation by an employee-organization representative when, during questioning by the public employer, it reasonably appears that he or she may be subject to a potential disciplinary action.[4]

The legislation stipulates that reasonable time to obtain representation shall be afforded to an employee if representation is requested and that an employee has an affirmative defense if denied such representation. Evidence obtained from an interview will be excluded if an employee presents evidence that the employer failed to allow for representation upon request.

Effect of Decision

After the *New York City Transit Authority* decision, public sector employees were without an explicit right under the Taylor Law to representa-

tion when there is a potential for adverse disciplinary action to occur. Public employees still could rely on other potential remedies, such as Civil Service Law §75, which excludes statements made during interviews if an employee has been denied union representation, and Civil Service Law §209, which states that it is an improper practice for an employer or its agents to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed" under the Taylor Law. They also could rely on representation-clauses contained within collective bargaining agreements.

After the Transit Authority decision by the New York Court of Appeals, public sector employees were without an explicit right under the Taylor Law to representation when there is a potential for adverse disciplinary action

Nonetheless, even with the potential negative consequences to an employer for interference with guaranteed union practices or other due process rights of public sector employees, the *New York City Transit Authority* decision, as Chief Judge Kaye expressed in her dissent, augured less protection for New York public employees. The new legislation addresses that concern.

Case History

New York City Transit Authority involved an interview conducted by the New York City Authority of one of it employees, Igor Komarnitskiy, who was requested to provide the Authority with a written response to an allegation that Komarnitskiy had used a racial slur to another employee when he was asked to show a pass before entering a train yard. According to the Court, when Komarnitskiy provided a response that was prepared with the help of a representative of the Transport Workers Union (TWU), the Authority became suspicious that the TWU representative had influenced or dictated the content of the response. The Authority ordered Komarnitskiy to come to the supervisor's office to prepare a new response, and refused to allow any TWU representatives during this second phase.

TWU filed an improper practice charge against the Authority, claiming it violated Komarnitskiy's Weingarten right. The Public Employment Relations Board (PERB) upheld the charge, and the Authority initiated an Article 78 proceeding to the New York Supreme Court, requesting the annulment of the PERB decision.

The Supreme Court dismissed the proceeding, and the Appellate Division affirmed. The Court of Appeals granted leave to appeal to answer whether Section 202 of the Taylor Law gives a Weingarten right—enjoyed by private sector employees—to public employees in New York.

The Court of Appeals' Decision

The Court of Appeals decided the issue *de novo*, without deferring to PERB's interpretation of the Taylor Law. In a decision written by Judge Smith and joined by Judges Graffeo, Read and Pigott[5], the Court of Appeals focused on a comparison of the Taylor Law and Section 7 of the National Labor Relations Act, as interpreted by the Supreme Court in *NLRB v. J. Weingarten Inc.* The Court of

Appeals acknowledged that both statutes generally give an employee the right to form, join, or assist labor organizations to bargain collectively through representatives of one's choosing, but also noted important distinctions. For example, the Supreme Court in *Weingarten* upheld the NLRB's decision that the statutory right under the National Labor Relations Act to "engage in concerted activities for…mutual aid or protection" included a right to have union representatives present at disciplinary interviews. The Court of Appeals concluded that differences like the absence of the "mutual aid and protection" language from the Taylor Law were not "mere random variations," and that *Weingarten* does not support a holding that the Taylor Law creates a Weingarten right.

The Court of Appeals briefly discussed Civil Service Law §75(2), which gives many, but not all, public employees a Weingarten-like right to representation by a union or an attorney when such employee appears to be a potential subject of disciplinary action. One distinction between §75(2) and the Weingarten right is that under §75(2), a violation to the representation-right results only in the exclusion from a disciplinary hearing of statements made at the interview and evidence obtained as a result of such violation, but does not result in an improper practice proceeding before PERB. Another important distinction is that the Weingarten-like right created by §75(2), unlike the right given under the Taylor Law to "participate in…employee organization[s]," may be surrendered in collective bargaining agreements.

Dissenting Opinion

In dissent, Chief Judge Kaye, joined by Judge Ciparick, stressed the underlying purpose of the Taylor Law, as stated in §200: to "promote harmonious and cooperative relationships between government and its employees…These policies are best effectuated by (the) granting to public employees the right of organization and representation."

In addition, Chief Judge Kaye asserted that the request for union representation has been deemed "participation" under §202. According to Chief Judge Kaye, when the Authority denied a union member the right to seek advice and support from his union representative, it violated Civil Service Law §209-a (1) and denied that employee the right to participate in his employee organization. She concluded the dissent by urging the Legislature to enact, and the Governor to sign, an amendment "to make explicit in the Taylor Law what to my mind is now implicit." That has now occurred.

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1. *New York City Transit Authority v. New York State Public Employment*, 8 N.Y.3d 226, 832 N.Y.S.2d 132 NY, 2007.
2. The Taylor Law is the popular name for The Public Employees Fair Employment Act, a New York State labor relations statute that pertains to public employees in the state.
3. The term "Weingarten right" comes from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, in which the United States Supreme Court held that section 7 of the National Labor Relations Act "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline."
4. The new provision does not grant an employee any right to representation by the representative of an employee organization in a criminal investigation.
5. Judge Jones took no part in the decision.

PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1: SUPREME COURT LIMITS USE OF RACE-CONSCIOUS MEASURES TO INCREASE SCHOOL INTEGRATION

Overview

In the recent case, *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*,[1] a sharply divided Supreme Court limited the ability of public school districts to use race as a factor in deciding where students should attend school. The Court, in a plurality opinion by Chief Justice John G. Roberts, struck down two plans in two different school districts that used race-conscious measures to increase school integration. Justices Scalia, Thomas and Alito joined the plurality opinion in its entirety. Justice Kennedy concurred in the judgment, but criticized parts of the plurality opinion as implying "an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account" and as "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." Justice Breyer, joined by Justices Stevens, Souter, and Ginsberg, filed a dissenting opinion. Justice Stevens filed a separate dissent, and Justice Thomas filed a concurring opinion.

Both the majority and the dissent invoked the Supreme Court's landmark 1954 decision in *Brown v. Bd. of Educ.*,[2] which banned racially segregated schools as a violation of the Fourteenth Amendment's Equal Protection Guarantee. In *Brown*, the Supreme Court held that segregated schooling led to inherently unequal educations for black and white students and was therefore banned by the constitutional guarantee of equal protection. Although the Supreme Court subsequently held in *Regents of Univ. of Cal. v. Bakke*[3] that strict racial quotas are impermissible under the Equal Protection Clause of the Fourteenth Amendment, in *Grutter v. Bollinger*[4] it accepted the use of race as one factor among others to be used in making admissions decisions.[5] Unlike the mechanical quotas at issue in *Regents of Univ. of Cal.*, the law school admission's policy at issue in *Grutter* "ensure[d] that each applicant [was] evaluated as an individual and not in a way that ma[de] race or ethnicity the defining feature of the application."[6]

The plurality relied on *Brown* even as it struck down plans designed to increase classroom integration. For the plurality, what *Brown* required was "determining admission to the public schools on a *nonracial basis*." Applying this to the two school plans, Chief Justice Roberts asked, "What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?" He concluded that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[7]

> *"The way to achieve a system of determining admission to the public schools on a nonracial basis is to stop assigning students on a racial basis."*

The dissenting justices rejected that reasoning with strikingly harsh language. Justice Stevens observed that "there is a cruel irony in the Chief Justice's reliance on our decision in *Brown*," arguing that in so doing, the Chief Justice was "rewrite[ing] the history of one of this Court's most important decisions."[8] Justice Breyer wrote that the plurality opinion "undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause."[9]

The Seattle and Louisville Plans

Both plans challenged in *Parents Involved in Comty. Schools v. Seattle Sch. Dist. No. 1* utilized race to place students in schools only after exhausting other factors. The Seattle school district used its plan to allocate students among over-subscribed high schools. Though Seattle never operated segregated schools and there had never been a finding of *de jure* segregation against the Seattle school district, Seattle's highly segregated housing patterns led to highly segregated schools, and the school district had settled allegations of discriminatory official policies in the past.[10]

Under the Seattle plan, incoming ninth graders chose among any of the district's high schools. If too many students selected the same school as their first choice, the district used a series of tiebreakers to determine which students would be admitted. The first tiebreaker was whether a student has a sibling in the school. The second tiebreaker depended on the student's race and the racial composition of the school. The target racial composition of the school was designed to reflect the racial composition of the district as a whole. If an oversubscribed school was not within 10 percentage points of the target racial percentages, then the district used a tiebreaker to send students whose race would help the school reach its target. The policy was challenged by Parents Involved, an organization of parents with children in the Seattle public schools.

Louisville, unlike Seattle, had operated a segregated school system and had operated under a federal desegregation order from 1975 until 2000, when the order was dissolved by a federal district court. After the desegregation order was lifted, the school district, which was approximately 30% black, followed the plan that was challenged and found unconstitutional by the Court. That plan set guidelines recommending that a school's student population be between 15% and 50% black. Elementary school students were assigned first to their neighborhood school. After kindergarten, students were permitted to transfer between schools within their cluster, so

long as the transfer would result in a school population within the range, *i.e.,* transfers were only forbidden if they would lead to a racial population outside of the racial percentages recommended in the guidelines. Crystal Meredith, a resident, challenged the plan when her kindergarten-age son, Joshua McDonald, was denied a transfer because of his race.

The Plurality Opinion

By a 5 to 4 vote, the Court struck down both the Seattle and Louisville plans as violating the Fourteenth Amendment's Equal Protection Guarantee, finding that the school districts failed to show a compelling interest for their use of race-based student placements. Chief Justice Roberts noted that in previous cases the Supreme Court had identified two possible compelling government interests that could justify the use of racial classifications in schools: a) "the compelling interest of remedying the effects of past intentional discrimination," and b) "the interest in diversity in higher education upheld in *Grutter*."[11]

Turning first to the compelling interest in remedying past intentional desegregation, the majority found that because the Seattle schools had never been legally segregated or subject to a court-ordered desegregation decree there were no effects of past intentional discrimination to remedy. Although the Louisville schools had been subject to a desegregation decree, the decree had been dissolved. Therefore there were no further effects of past segregation to remedy.[12] Once the desegregation decree was dissolved, the school system "had remedied the Constitutional wrong that allowed race-based assignments."[13] Thus, any further "use of race must be justified on some other basis,"[14] *i.e.*, diversity in higher education.

Chief Justice Roberts next turned to the diversity interest, which was found compelling in *Grutter*. He distinguished the Seattle and Louisville plans from the law school admission plan in *Grutter*

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because the plans at issue took account only of race, not of the "broad[ ] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[15] In both the Seattle and Louisville plans, "when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*, it is the factor."[16]

The plurality and Justice Kennedy diverged as to when they would accept use of race in integration plans. The plurality would do so only when the school is subject to a desegregation order. As stated by Chief Justice Roberts:

> For schools that [have] never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way 'to achieve a system of determining admission to the public schools on a nonracial basis,' is to stop assigning students on a racial basis.[17]

For the plurality, the solution to racially unbalanced school populations would not be an integration plan that takes account of race, but one that is color-blind.

"Perhaps most notably, the plurality equated the racial guidelines used in Seattle and Louisville with the segregared school system rejected in Brown, arguing that both classified students based on race and both therefore violated the Equal Protection Clause."

The plurality opinion further criticized the plans for categorizing students only as black or white, rather than taking account of other minority groups. It also questioned the necessity of using racial classifications at all, noting that the racial classifications affected only three percent of assignments in Louisville and 52 individual students in Seattle. The small number of students affected by the guidelines, the plurality found, suggested that other, race-neutral means could be equally effective.[18] For the plurality, greater use of race would not advance any compelling state interest. In effect, the plurality created a Catch-22 for the use of racial guidelines in that "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using [racial] classifications."[19]

Perhaps most notably, the plurality equated the racial guidelines used in Seattle and Louisville with the segregated school system rejected in *Brown*, arguing that both classified students based on race and both therefore violated the Equal Protection Clause. As Chief Justice Roberts explained:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.[20]

In effect, the plurality embraced a "color-blind Constitution" that would forbid the use of race in making any determination about diversity in the classroom.

Justice Kennedy's Opinion

Because Justice Kennedy was the swing vote, his opinion has garnered much attention and has been viewed as potentially shaping "the practical implications of the decision and provid[ing] school districts with guidelines for how to create systems that can pass muster with the Court."[21] Although Justice Kennedy agreed with the plurality that the plans at issue violated the Equal Protection clause because they assigned racial labels to an overly broad class of citizens – students, he found the remainder of the plurality's opinion "inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause."[22] Significantly, Justice Kennedy appears to reject the plurality's embrace of a color-blind Constitution:

> The enduring hope is that race should not matter; the reality is that too often it does . . .[P]arts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.[23]

Moreover, Justice Kennedy notes that he does not accept a Constitutional distinction between *de facto* and *de jure* segregation.[24] He views the plurality opinion as being "at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling."[25] Justice Kennedy finds that view "profoundly mistaken" and rejects the proposition that the "Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools."[26] Thus, there is no Constitutional bar on programs designed to attack *de facto* segregation.

Justice Kennedy begins by accepting the importance of diversity, "having classrooms that reflect the racial makeup of the surrounding community," as a compelling government interest, and acknowledges

> *"The plurality opinion is too dismissive of the legitimate interest goverenment has in ensuring all people have equal opportunity regardless of their race."*

that this goal remains unaccomplished.[27] Moreover, Kennedy finds that it is acceptable for public school authorities "to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[28] Kennedy's view that "diversity . . . is a compelling educational goal a school district may pursue"[29] stands in sharp contrast with the plurality's rejection of such a compelling interest. Thus, because the school districts have a compelling interest in creating diverse schools, they have met the first requirement of strict scrutiny review.[30] But in order to have their race-based systems upheld, the school districts must next show that they used a narrowly tailored means to achieve that goal.

For Justice Kennedy, Louisville's racial balancing plan failed the test because it was insufficiently narrowly-tailored to its stated goal of achieving school diversity. The school district's denial of a kindergartener's transfer request was no mere "discrepancy . . . that touches only upon the peripheries of the district's use of individual racial classifications."[31] Rather, it was symptomatic of how the school district "employed these [racial] classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny."[32]

Though the Seattle school district provided more details about "the methods and criteria used to determine assignment decisions on the basis of individual racial classifications," it too failed to meet the requirements of Justice Kennedy's narrowly tailored analysis and "failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."[33] Justice Kennedy's objection, then, is not to the broader goal of increasing classroom diversity, but in the means chosen to effect that goal.

Justice Kennedy distinguishes between mechanisms that are "race conscious" but do not lead to different treatment based solely on race, and those that are race-determinative (*e.g.,* where a black child would be assigned to school A because he was black, whereas a white child would be assigned to school B because she is white).

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for spe-

> cial programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[34]

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- tracking enrollments, performance and other statistics by race."

Justice Kennedy concludes that a school district may determine it has a compelling interest in "avoiding racial isolation" or "achiev[ing] a diverse student population."[35] "Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."[36] Moreover, what is permitted only upon a showing of necessity "is to classify every student on the basis of race and to assign each of them to schools based on that classification."[37]

Justice Breyer's Dissent

Justice Breyer's dissent, joined by Justices Stevens, Souter and Ginsberg, invokes the legacy of *Brown* and the public interests at stake in creating an integrated public primary and secondary education system. Justice Breyer explains that since *Brown*, the Court has "understood that the Constitution permits local communities to adopt desegregation plans even where it does not require them to do so."[38] In other words, though *Brown's* constitutional holding set a floor for desegregation, it did not set a ceiling.[39]

> *"The plurality…undermines Brown's promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause."*

This argument is key to Justice Breyer's dissent. He maintains that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[40] Thus, in *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 16 (1971), the Court held that local school authorities had "broad discretionary powers" that allowed them to "formulate and implement educational policy" that might include deciding that "each school should have a prescribed ratio of [black] to white students reflecting the proportion for the district as a whole." Justice Breyer notes that in the decades since *Swann*, "myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake

of eradicating earlier school segregation, bringing about integration, or preventing retrogression."[41] For Justice Breyer, the Seattle and Louisville plans before the Court were simply two such plans.

Justice Breyer criticizes the majority's distinction between *de jure* and *de facto* segregation. If *de jure* segregation is the "crucial variable," then an integration plan legal one day, under a desegregation order, would become unlawful the next, after the order is dissolved.[42] Moreover, he points to the precedent supporting the requirement of "race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown."[43] Breyer therefore concludes that the distinction between segregation by law and segregation by fact is "meaningless in the present context."[44]

Underlying Justice Breyer's entire dissent is his belief that there is a difference between race-conscious measures that are discriminatory and those that seek to bring the races together. To the four dissenting Justices, the Fourteenth Amendment requires that the Constitution not be color-blind, but be aware of the differences among the races. Though the Constitution nearly always forbids "the use of race-conscious criteria in defiance of [the Amendment's] purpose, namely to keep the races apart," it is more permissive of "the use of race-conscious criteria to further [the Amendment's] purpose, namely to bring the races together."[45] Therefore, when evaluating a race-conscious mechanism that seeks to further the Fourteenth Amendment's fundamental purpose of bringing the races together, the Court should not use a strict scrutiny standard, but rather a lower tier of review. For the dissent, the key to making this determination should be the context of the race-conscious methods being employed. Evaluating the context of race-conscious mechanisms serves as a safeguard to ensure that racially divisive measures are unable to reap the benefits of the lower tier of review. Justice Breyer's dissent concludes that because both of the race-conscious plans at issue sought to "advance or to maintain racial integration in primary and secondary schools[,]" the Court should subject them to a less burdensome review.[46] Nonetheless, Justice Breyer frankly acknowledges that although "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word . . . it does require the careful review I have just described."[47]

Finally, Justice Breyer turns to the interest at stake in these race-conscious integration programs. Breyer identifies the interest as "diversity" and "integration," which he defines as "the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience."[48] Justice Breyer criticizes Justice Kennedy's list of suggested race-conscious means of achieving diversity as impracticable and inefficient[49] and, in contrast to Kennedy, finds that the use by the Seattle and Louisville school boards of race-conscious criteria in their plans "passes even the strictest 'tailoring' test."[50] Breyer offers three main reasons for this conclusion: 1) "the race-conscious criteria at issue only help set the outer bounds of *broad* ranges"; 2) "broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored than other race-conscious restrictions this Court has previously approved"; and 3) "the manner in which the school boards developed these plans itself reflects 'narrow-tailoring.'"[51]

The Outlook for Race-Conscious Programs in Public Schools

Although *Seattle School District No. 1* makes integration programs more vulnerable to attack on constitutional grounds, and surely limits the ways in which racial classifications may be used to decide which school students attend, it does not completely prohibit the use of race-conscious measures in education. There are still avenues open by which narrowly tailored race-conscious measures may be used to further a compelling government interest, and, moreover, integrated schools may still be considered such a compelling interest. Because there was no majority holding, there is no clear delineation of what constitutes a permissible use of racial classifications. The Court's sharply divided opinions provide only a modicum of guidance to school districts and may well leave school districts that utilize race-conscious measures unsure of their constitutional standing. Districts not fully committed to racially balanced schools may well abandon their programs rather than risk litigation.

The closest thing to a road map for integration policies may well be Justice Kennedy's list of race-conscious techniques that he believes are sufficiently narrowly tailored to pass a strict scrutiny review.[52] Though Justice Breyer criticized this list of race-conscious techniques as impracticable and inefficient, he did not oppose them as insufficiently narrowly tailored to pass strict scrutiny review. Therefore, there may be a majority willing to allow racial diversity to be considered when deciding where to build a new school or in drawing attendance zones. Kennedy also indicates that he would be willing to consider the use of race in student assignments, as long as other factors were also taken into account. In practical terms this might well mean that race could be used as one of many factors in evaluating a high school applicant but not one for evaluating a kindergartner because teens applying to high school will have a rich variety of individual traits other than race – such as athletic ability, hobbies, and academic interests and achievement – on which to base such a decision, whereas the observable traits of a kindergartener might be significantly more limited.

> *"The plurality…in Seattle School District No. 1 has stated unequivocally that the government does not have a compelling state interest in achieving integration. Therefore, any program not directed to either of the two narrow goals endorsed by the plurality faces four sure 'no' votes."*

The plurality in *Seattle School District No. 1* has stated unequivocally that the government does not have a compelling state interest in achieving integration. Therefore, any program not directed to either of the two narrow goals endorsed by the plurality faces four sure "no" votes. While legal commentators may be willing to parse Justice Kennedy's opinion for means by which race-conscious criteria can continue being used to further integration, the real concern is that the message heard by school districts, and the larger public, is that the Constitution does not permit such programs. Already, in Lynn, Massachusetts, parents have renewed their calls to end the school district's race-based student-assignment policy. After *Seattle School District No. 1*, their lawyer told *The Boston Globe*, "You cannot use race as a compelling state interest to achieve diversity."[53] Even those school districts

devoted to their integration plans are steeling themselves for renewed litigation. The Berkeley school district, which has previously defended its plan against challengers, remains optimistic that it will pass even the heightened requirements signaled by *Seattle School District No. 1*.[54] The concern remains, however, that school districts that are not steadfast in their support for their integration plans will abandon them rather than risk litigation.

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1. 127 S.Ct. 2738 (2007).
2. 347 U.S. 483 (1954).
3. 438 U.S. 265 (1978).
4. 539 U.S. 306 (2003).
5. In *Grutter*, the Court upheld an admissions policy at the University of Michigan Law School that used race only as "a plus." *Id.* at 309. Although the law school kept track of the racial and ethnic composition of its incoming class, it did so "to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body . . .not [] to admit any particular number or percentage of underrepresented minority students. *Id.* at 318.
6. *Id.* at 309 (noting that no factor in the admissions process is determinative and that the admissions policy is a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment").
7. 127 S.Ct. 2738, 2791.
8. *Id.* at 2798.
9. *Id.* at *2800-01.*
10. *Id.* at *2802.*
11. *Id.* at 2752-53 (Opinion of the Court) (explaining that while two compelling government interests, "remedying the effects of past intentional discrimination" and "the interest in diversity in higher education," have been recognized when evaluating race-based classification in the school context, neither was involved in the instant case because the Seattle schools were never found to be legally segregated and because the Jefferson County desegregation decree had been dissolved). While Justice Kennedy joined this portion of the opinion, he found that there could be a compelling interest in creating diverse schools. *See also id.* at 2793 (Kennedy, J., concurring in part and concurring in judgment) (explaining that "the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education").
12. *See id.* at 2752-53. (Opinion of the Court) (explaining that "the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that the Constitution is not violated by racial imbalance in the schools, without more") (internal quotations omitted).
13. *Id.*
14. *Id.* at 2753.
15. *Id.* (citing *Grutter*, 539 U.S. at 325).
16. *Id.* (emphasis in original).
17. *See id.* at 2768 (internal citation omitted).
18. *See id.* at 2759 (noting that while the school districts argued that their "individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective").
19. *See id.* at 2760.
20. *See id.* at 2768.
21. Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, *N.Y. Times*, June 29, 2007, at A1.
22. *Parents Involved in Cmty. Schools*, 127 S.Ct. at 2788.
23. *Id.* at 2791 (explaining that while the "axiom" of a color-blind Constitution "must command our assent[,] [i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle").
24. *Id. at 2823. De jure* segregation is "segregation by state action" whereas *de facto* segregation is the "racial imbalance caused by other factors." *Id.* at 2761.
25. *Id.* at 2791.

26. *Id.* This is not to say, however, that Kennedy rejects the distinction between *de facto* and *de jure* segregation. *See id.* at 2793. Rather, he finds that "[t]he distinction ought not to be altogether disregarded. . .[and] serves as a limit on the exercise of power that reaches to the very verge of constitutional authority." *Id.* at 2796. "[W]here there has been *de jure* segregation, there is cognizable legal wrong, and the courts and legislatures have broad power to remedy it," where there has been *de facto* discrimination "the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race." *Id.*
27. *See id.* at 2788.
28. *Id.* at 2792.
29. *Id.* at 2789.
30. Kennedy agrees with the plurality that any government use of racial classification must be subject to strict scrutiny, such that once a compelling interest has been identified, the policy furthering it must be narrowly tailored to that end. *See id.*
31. *Id.*
32. *Id.* at 2744.
33. *Id.* at 2790-91.
34. *Id.* at 2792.
35. *See id.* at 2835.
36. *See id.* at 2797.
37. *See id.*
38. *Id.* at 2800 (emphasis in original).
39. *See id.* at 2823-24 (explaining that "significant as the difference between *de jure* and *de facto* segregation may be to the question of what a school district must do, that distinction is not germane to the question of what a school district may do") (emphasis in original).
40. *Id.* at 2811.
41. *Id.* at 2802.
42. *Id.* at 2810.
43. *Id.* at 2813-15 (noting there has been widespread acceptance of the legal principle "that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so").
44. *Id.* at 2802; *see id.* at 2810 (explaining that numerous Southern school districts challenged as *de jure* segregated by the Government or private plaintiffs voluntarily desegregated and therefore "[a] court finding of *de jure* segregation cannot be the crucial variable").
45. *Id.* at 2815.
46. *Id.* at 2818.
47. *Id.* at 2819.
48. *Id.* at 2820.
49. *See id.* at 2830.
50. *Id.* at 2824.
51. *Id.* at 2824-26 (internal quotations omitted).
52. *See supra* note 35 and accompanying text.
53. Peter Schworm, *AG Urges Court to Uphold Lynn Plan – Sides with Effort at Racial Balance*, *Boston Globe*, July 18, 2007, at 4B.
54. Angela Rowan, *Panel Says City's Integration Strategy Will Withstand Federal Ruling*, *Berkeley Daily Planet*, July 31, 2007.

LIMITING THE RIGHTS OF STUDENTS: THE UNITED STATES SUPREME COURT'S 'BONG HITS 4 JESUS' CASE

Background

In *Morse v. Frederick*,[1] Deborah Morse, a high school principal attending the 2002 Olympic Torch Relay, a "school-sanctioned and school-supervised event," witnessed several of her students unfurl a 14-foot banner inscribed with the phrase "Bong Hits 4 Jesus" in full view of passing camera crews. She viewed the message as promoting illegal drug use, an act that would violate school policy prohibiting such messages at school events. Consequently, she ordered the students to take the banner down. One of the students, Joseph Frederick, refused. Ms. Morse then confiscated the banner and subsequently suspended Frederick for 10 days.

Frederick appealed his suspension administratively, but the Juneau School District Superintendent upheld Morse's decision, finding that Frederick, in violation of the school's anti-drug policy, promoted illegal drug use during school hours and at a school-sanctioned activity. Frederick filed suit in Federal District Court, alleging that the school board and principal had violated his First Amendment rights.

Case History

The United States District Court for the District of Alaska granted summary judgment for Morse and the school board, ruling that they were entitled to qualified immunity and had not infringed Frederick's First Amendment rights. The District Court found Morse's interpretation that the banner's message promoted illegal drug use was reasonable, and that under the circumstances, she had "the authority, if not the obligation, to stop such messages at a school-sanctioned activity."

Frederick appealed to the United States Court of Appeals for the Ninth Circuit, which reversed. The Court of Appeals found that although Frederick's actions were conducted during a school-authorized event and although the banner did express a "positive sentiment about marijuana use," Frederick's right to display his banner was "clearly established," and Morse should have recognized that her actions violated Frederick's First Amendment rights.

The Supreme Court granted *certiorari* to decide whether a high school principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.

The Supreme Court Decision

The Majority Opinion

In a majority opinion filed by Chief Justice John Roberts, the Supreme Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the case for further proceedings.

The Court viewed Morse's interpretation of the banner as reasonable, and found that Frederick's message could reasonably be construed as advocating or promoting marijuana use, or in the alternative, the celebration of drug use – in either case, a violation of the school's anti-drug policies, which justified Morse's disciplinary actions against Frederick.

Chief Justice Roberts pointed to three Supreme Court precedents: *Tinker v. Des Moines Independent Community School Dist.*, which held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[2] *Bethel School Dist. No. 403 v. Fraser*, which held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[3] and *Hazelwood School Dist. v. Kuhlmeier*, which held that constitutional rights of students must be "applied in light of the special characteristics of the school environment."[4]

Chief Justice Roberts concluded:

> Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

The Concurring Opinions

Justice Clarence Thomas and Justice Samuel Alito filed concurring opinions.

Justice Thomas explained that he filed his opinion "to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), is without basis in the Constitution." He joined the majority opinion "because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so."

Justice Alito stated that he joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"

Justice Alito concluded that because "illegal drug use presents a grave and in many ways unique threat to the physical safety of students" that "public schools may ban speech advocating illegal drug use." But he stressed that he viewed "such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension."

The Dissenting Opinions

Justice Stephen Breyer dissented in part, arguing that rather than deciding this case under a First Amendment analysis, the Court should have held that qualified immunity barred Frederick's claim for monetary damages. He observed that "speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws" and noted that "During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. *Cf. West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance during World War II). We should decline this opportunity today."[5]

Justice Stevens filed a dissent, joined by Justice Souter and Justice Ginsburg. He stressed that "the school's interest in protecting its students from exposure to speech 'reasonably regarded as promoting illegal drug use,'" did not justify Frederick's suspension for attempting "to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs." Justice Stevens concluded that "The First Amendment demands more, indeed, much more."

Implications of the Decision

Morse v. Frederick generated considerable interest from across the ideological spectrum. More than 20 organizations filed amicus briefs, ranging from the Drug Policy Alliance, to Students for Sensible Drug Policy, to so-called "Christian Right" groups such as The American Center for Law and Justice. Among the concerns was the imposition of restrictions on students expressing unpopular or controversial ideas in a school setting.

Steven R. Shapiro, ACLU National Legal Director, condemned the decision as imposing "new restrictions on student speech rights" and creating "a drug exception to the First Amendment." Mr. Shapiro

warned that "The decision purports to be narrow, and the Court rejected the most sweeping arguments for school censorship. But because the decision is based on the Court's view about the value of speech concerning drugs, it is difficult to know what its impact will be in other cases involving unpopular speech."

As noted by Mr. Shapiro, it is unclear how the Supreme Court's decision in *Morse v. Frederick* will affect student speech in contexts other than drug use. The question is whether courts will follow Justice Alito's admonition, and not use *Morse v. Frederick* as "support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."

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1. 551 U. S. ____ (2007).
2. 393 U.S. 503, 506 (1969).
3. 478 U.S. 675, 682 (1986).
4. 484 U.S. 260, 266 (1988) (quoting *Tinker, supra*, at 506).
5. 551 U.S. ____ (Justice Breyer's dissent).

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