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The 2007 Roberts Court Education Law Cases: Reaffirmation or Cut-Back of Student Rights?

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I. INTRODUCTION

In late June 2007, the newly formed Roberts Supreme Court of the United States² issued two significant opinions: *Morse v. Frederick*,³ and *Parents Involved in Community Schools v. Seattle School District No. 1*.⁴ The *Morse* case involved a Juneau, Alaska, high-school student who was disciplined for unfurling the now-infamous “BONG HiTS 4 JESUS” banner during a school-sponsored event.⁵ The *Seattle School District* case concerned school districts in Seattle and Louisville that were using racial classifications to make pupil assignments in certain schools.⁶ Both decisions were narrowly decided and seemed to mark a shift in the constitutional law governing student speech and school desegregation.

This Article will discuss these two important Supreme Court opinions, how they might have veered from previous Supreme Court precedent, and what they

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2. See Oyez U.S. Supreme Court Media, Samuel A. Alito, Jr., U.S. Supreme Court Justice, http://www.oyez.org/justices/samuel_a_alito_jr (last visited Sept. 8, 2008); The White House, Judicial Nominations - Chief Justice John G. Roberts, Jr., <http://www.whitehouse.gov/infocus/judicialnominees/roberts.html> (last visited Sept. 8, 2008) (noting John Roberts appointed Chief Justice on September 29, 2005). Chief Justice John G. Roberts, Jr. replaced the Honorable Chief Justice William H. Rehnquist, who died on September 3, 2005. Oyez U.S. Supreme Court Media, William H. Rehnquist, U.S. Supreme Court Chief Justice, http://www.oyez.org/justices/william_h_rehnquist (last visited Sept. 8, 2008).

3. 127 S. Ct. 2618 (2007).

4. 127 S. Ct. 2738 (2007).

5. *Morse*, 127 S. Ct. at 2622 (summarizing facts of case).

6. See generally *Seattle*, 127 S. Ct. at 2746-50 (summarizing parents' cause of action against school districts).

might portend for subsequent Supreme Court opinions in these areas of law.⁷ In addition, this article will briefly discuss some newly decided cases which rely on *Morse* and *Seattle School District* to ascertain how these Supreme Court rulings are already influencing state and lower federal court judges.⁸

II. *MORSE V. FREDERICK*

Joseph Frederick, a senior at Juneau-Douglas High School in Alaska arrived late to school on the morning of January 24, 2002 because of a snowstorm.⁹ By the time he arrived at school, students had been allowed to leave class to watch the Olympic Torch Relay pass through the town.¹⁰ On the street, Frederick and his friends unfurled a banner saying “BONG HiTS 4 JESUS.”¹¹ High School Principal Morse, spying the banner, demanded that it be taken down and promptly suspended Frederick from school for ten days.¹²

Frederick brought suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Alaska, claiming that Principal Morse and the school board had violated his First Amendment rights.¹³ The district court ruled against him, finding qualified immunity for the defendants and no violations of Frederick’s free-speech rights.¹⁴ Interestingly, the United States Court of Appeals for the Ninth Circuit reversed both of the lower court’s findings.¹⁵

A. *Chief Justice Roberts’s Majority Opinion*

Chief Justice John Roberts penned the majority opinion, reversing both aspects of the Ninth Circuit’s ruling.¹⁶ In his decision, Justice Roberts emphasized that Frederick’s speech took place during school time at a school-sponsored activity and was thus “school speech.”¹⁷ Though Frederick claimed

7. See *infra* Parts II-IV (examining *Morse*, *Seattle School District*, and related Supreme Court education law opinions).

8. See *infra* Parts IID-E and IIID (discussing cases relying on *Morse* and *Seattle School District* opinions).

9. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (setting forth facts of case).

10. *Id.* (indicating Torch Relay was school-sanctioned and school-supervised event).

11. *Id.* (noting students unfurled banner as television camera crews passed by). Other students at the Torch Relay acted in a disruptive manner by throwing objects such as soda bottles and snow balls at each other. *Id.*

12. *Id.* (describing principal’s handling of situation). Although Frederick’s friends complied with the principal’s request to remove the banner, Frederick refused to do so. *Id.*

13. *Morse*, 127 S. Ct. at 2623 (setting forth procedural posture of case).

14. *Id.* at 2623 (announcing district court disposition).

15. *Morse v. Frederick*, 127 S. Ct. 2618, 2623-24 (2007) (reviewing Ninth Circuit’s treatment of case).

16. *Id.* at 2622 (reversing Ninth Circuit’s ruling). The Supreme Court’s grant of certiorari was based on two questions: “whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages.” *Id.* at 2624. Because the Court held that Frederick did not have a right to unfurl the banner, it did not address the second question. *Id.*

17. *Id.* at 2624 (justifying application of school speech standard). The Court considered several factors in

his banner was just “nonsense,” Justice Roberts concluded that the Principal reasonably interpreted the banner as meant to promote illegal drug use, namely the smoking of marijuana.¹⁸

While the Ninth Circuit supported Frederick because his activities had not caused “substantial disruption” as required by the 1969 case, *Tinker v. Des Moines Independent School District*,¹⁹ to punish student speech,²⁰ Justice Roberts instead focused on the “special needs” of the school setting to protect students from the dangers of drug use.²¹ Collapsing the Court’s recent rulings allowing widespread student drug testing in *Vernonia School District 47J v. Acton*²² and *Board of Education v. Earls*²³ into the heretofore separate area of student-speech rights, Justice Roberts announced a new limitation on students’ First Amendment rights: public schools may limit student speech that promotes illegal drug use.²⁴

This was certainly a new approach in Supreme Court student First Amendment constitutional doctrine. The Warren Court had strongly supported student speech rights in *Tinker*, as Justice Fortas ruled that neither “students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁵ Of course, the student in *Morse* was not at the gate but across the street, and in *Tinker* Justice Fortas also opined that “[a] student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinion, even on controversial subjects like the conflict in Vietnam”²⁶ It is not clear, therefore, that the Warren

its determination that the case is a school-speech case: the event occurred during school hours, it was sanctioned by the principal, and teachers and administrators sponsored the event. *Id.*

18. *Id.* at 2624-25 (indicating while Frederick characterized sign’s message as “nonsense meant to attract television cameras,” court adopted principal’s position it advocated use of drugs). The Court rejected Frederick’s argument that the banner was “nonsense” and instead reasoned that there was a “paucity of alternative meanings” of the phrase. *Id.* at 2625. Although the dissent agreed with Frederick that the banner was merely nonsense, Roberts rejected this view. *See id.* at 2644 (Stevens, J., dissenting) (accepting Frederick’s characterization of banner message); *id.* at 2625 (majority opinion) (rejecting Frederick’s and dissent’s view of message). “Gibberish is surely a possible interpretation of the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.” *Id.* at 2625.

19. 393 U.S. 503 (1969) (holding students wearing armbands to protest Vietnam War constitutionally protected absent substantial disruption in school).

20. *Morse*, 127 S. Ct. at 2644-45 (Stevens, J., dissenting) (citing *Tinker* opinion for “cardinal First Amendment principles”).

21. *Morse v. Frederick*, 127 S. Ct. 2618, 2628 (2007) (emphasizing importance of insulating students from messages designed to promote drug use).

22. 515 U.S. 646, 666 (1995) (declaring drug testing of student athletes constitutionally permissible); *see* VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY, 202-04 (2002).

23. 536 U.S. 822 (2002) (concluding drug testing of all students involved in extracurricular activities constitutionally permissible).

24. *Morse*, 127 S. Ct. at 2625-28 (justifying limitation on free speech rights).

25. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stressing availability of First Amendment rights in school environment).

26. *Id.* at 512-13 (developing school-speech standard).

Court would even have classified Frederick's banner as "school speech," and even if it had, because the banner caused no disruption, it is unlikely that Frederick's suspension would have been constitutionally permissible in the eyes of the Warren Court. Something new was afoot in *Morse* concerning student-speech rights.

B. *The Concurring Opinions*

The concurring opinions of Justices Thomas, Alito, and Breyer demonstrate their hopes and fears concerning student-speech rights.²⁷ Justice Thomas writes to explain his view that the *Tinker* decision "is without basis in the Constitution."²⁸ Historically, according to Justice Thomas, students never had speech rights.²⁹ Noting that the Supreme Court decisions of *Bethel School District No. 403 v. Fraser*³⁰ and *Hazelwood School District v. Kuhlmeier*³¹ created exceptions to the *Tinker* standards, Justice Thomas proclaims: "Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not."³²

As the author of the *Earls* opinion, a case involving student drug-testing, Justice Thomas must feel vindicated by its pivotal use in *Morse*.³³ He evidently also seeks to reproduce here the jurisprudential logic of Justice Kennedy in the 2003 *Lawrence v. Texas*³⁴ case overruling *Bowers v. Hardwick*.³⁵ In *Lawrence*, Justice Kennedy ruled that *Bowers* was improperly decided because it was based on incorrect factual history, the same methodology Justice Thomas uses

27. See *Morse v. Frederick*, 127 S. Ct. 2618, 2625-28 (2007) (Thomas, J., concurring) (opining *Tinker* without constitutional basis); *id.* at 2636-38 (Alito, J., concurring) (joining opinion because it does not hold public-school environment justifies other speech restrictions); *id.* at 2638-43 (Breyer, J., concurring) (asserting Court should bar student's claim on basis of qualified immunity).

28. *Id.* at 2630 (setting forth reason for concurring opinion).

29. *Id.* (tracing history of public schools and reasoning First Amendment does not cover student speech).

30. 478 U.S. 675 (1986) (declaring school districts may punish "offensive" student speech).

31. 484 U.S. 260, 273 (1988) (holding school may limit school newspaper speech for "legitimate pedagogical concerns").

32. *Morse*, 127 S. Ct. at 2634 (criticizing Court's divergence from *Tinker* holding). Cf. Victoria J. Dodd, *Student Rights: Can We Create Violence-Free Schools That Are Still Free?*, 34 NEW ENG. L. REV. 623, 631-32 (2000) (discussing *Bethel* and *Hazelwood* holdings). *Tinker* set forth a broad rule, which has been eroded by the *Bethel* and *Hazelwood* decisions; distinguishing *Bethel* and *Hazelwood* "as pertaining only to school-sponsored activities . . . could be used to cover virtually all speech activities on campus." *Id.* at 631-32.

33. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (noting Thomas authored *Earls* opinion); *Morse v. Frederick*, 127 S. Ct. 2618, 2627-28 (2007) (discussing *Earls* case).

34. 539 U.S. 558 (2003) (holding individuals possess a fundamental right of sexual orientation).

35. 478 U.S. 186 (1986) (denying fundamental right of sexual orientation exists under equal protection clause).

in *Morse* to deride the *Tinker* ruling.³⁶ Justice Thomas seems to have increasingly found his judicial “voice” in recent Supreme Court opinions.

Justice Samuel Alito, joined by Justice Kennedy, concurs from an opposite viewpoint.³⁷ Instead of demeaning *Tinker*, he seeks to save it and joins “the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.”³⁸ Justice Alito attempts to hold the constitutional line.³⁹

Justice Alito replaced Justice Sandra Day O’Connor on the Court, and this attempt to limit the Court’s holding in *Morse* is classic O’Connor jurisprudence.⁴⁰ Alito’s concurrence in *Morse* is all the more interesting because when he sat on the Court of Appeals for the Third Circuit, he ruled in *Edwards v. California University of Pennsylvania*⁴¹ that a tenured professor did not have the freedom of expression to select college course materials.⁴²

Justice Breyer concurs in part and dissents in part, reasoning that the Court should readily give qualified immunity to Principal Morse, obviating the need to resolve “the fractious underlying constitutional question.”⁴³ He states that the precise coverage of the *Tinker* ruling is unclear, possibly because he is reluctant to carve more exceptions to *Tinker*, lest the opinion itself be overruled.⁴⁴ The more conservative majority of the Roberts Court, in comparison to the Justice O’Connor-dominated majority of the Rehnquist Court, seems to have nudged Justice Breyer closer to the dissenting camps, whereas in some Rehnquist Court opinions Justice Breyer was able to fit his disagreeing views within a pure concurrence.⁴⁵ Increasingly, Justice Breyer separates himself from the majority.

36. See *Lawrence*, 539 U.S. at 571-74 (reviewing and deeming insufficient historical references relied on in *Bowers*); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (discussing facts in record). “[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” *Tinker*, 393 U.S. at 514.

37. *Morse*, 127 S. Ct. at 2636-38 (Alito, J., concurring) (expressing understanding of, and limitations on, Court’s decision).

38. *Id.* at 2637 (maintaining restriction on free speech in schools must be based on characteristics of school setting).

39. *Morse v. Frederick*, 127 S. Ct. 2618, 2636-38 (2007) (emphasizing Court’s restriction on free speech is at “far reaches of what . . . First Amendment permits”).

40. See *Oyez U.S. Supreme Court Media*, Samuel A. Alito, Jr., U.S. Supreme Court Justice, http://www.oyez.org/justices/samuel_a_alito_jr (last visited Sept. 8, 2008) (indicating Justice Alito sworn in as Supreme Court Justice on January 31, 2006).

41. 156 F.3d 488 (3d Cir. 1998) (holding tenured professor does not have right to select course materials).

42. *Id.* at 492 (declaring university’s curriculum decisions trump professor’s choice of material).

43. *Morse*, 127 S. Ct. at 2640 (reasoning alternative approach of qualified immunity more appropriate).

44. See *id.* at 2641 (stating application and scope of *Tinker* unclear).

45. See *Clinton v. Jones*, 520 U.S. 681, 710-11 (Breyer, J., concurring) (arguing trial judge bound to honor President’s discharge of constitutional duties when scheduling trial matters).

C. *The Dissenters*

Justice Stevens authors the dissent in *Morse*, on behalf of himself and Justices Ginsberg and Souter. Understandably, he accuses the Court of “viewpoint discrimination,” which is a prohibited goal under traditional, First Amendment jurisprudence relative to adults.⁴⁶ He also questions whether a reasonable viewer would necessarily interpret Frederick’s banner as promoting drug use.⁴⁷ Courts are obligated, in Stevens’s view, to make an independent analysis of the factual situation to safeguard protected expression.⁴⁸

Justice Stevens and his fellow dissenters are clearly concerned that *Tinker* may soon be overruled, as is Justice Breyer.⁴⁹ But their concerns go beyond *Tinker*.⁵⁰ They seemingly fear that the alacrity with which the majority limits student speech rights may ultimately influence First Amendment jurisprudence concerning adults.⁵¹ Hence, Stevens’s dissent is laced with references to landmark speech opinions: Justice Holmes in *Gitlow v. New York*,⁵² Justice Brandeis in *Whitney v. California*,⁵³ and the *Brandenburg v. Ohio*⁵⁴ opinion.

The dissenters’ concerns may not be completely unfounded. *Tinker* has been substantially undermined by *Morse*,⁵⁵ and its overruling may be just one case, or one new justice, away. It is also plausible to imagine the expansion of the “special needs” exception in educational contexts to future adult search cases involving drugs or terrorism.

46. See *Morse v. Frederick*, 127 S. Ct. 2618, 2644 (2007) (criticizing majority for viewpoint discrimination).

47. *Id.* at 2646-49 (questioning message promoted by Frederick’s banner).

48. See *id.* at 2648 (arguing for independent factual analysis).

49. *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting) (criticizing Court’s decision that “trivializes the two cardinal principles upon which *Tinker* rests); *id.* at 2640 (Breyer, J., concurring in part and dissenting in part) (discussing importance of adhering to *Tinker*’s substantial disruption test).

50. See *id.* at 2645 (Stevens, J., dissenting) (recognizing danger and unconstitutionality in prescribing punishment where harm not deterred). “[P]unishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.” *Id.* (citation omitted).

51. See *id.* at 2643-50 (Stevens, J., dissenting) (criticizing Court’s broad decision).

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.

Id. at 2650.

52. *Morse v. Frederick*, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting) (citing *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

53. *Id.* at 2646 (citing *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

54. *Id.* at 2645 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam)).

55. Compare *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (holding First Amendment speech protections available in school environment), with *Morse*, 127 S. Ct. at 2628-30 (discussing *Tinker* and why limitation appropriate). “The First Amendment does not require schools to tolerate at school events student expression that contributes to th[e] dangers” of illicit substance use. *Id.* at 2629.

D. Harper ex rel. Harper v. Poway

The Supreme Court has additionally muddied the student free-speech waters in another 2007 case, *Harper ex rel. Harper v. Poway Unified School District*.⁵⁶ The *Harper* case involved a controversy in a public school in which a student was prohibited from wearing a t-shirt with an anti-homosexual slogan.⁵⁷ The Gay-Straight Alliance at Poway High School in California organized a “Day of Silence” in 2003 to teach tolerance lessons, particularly those concerning sexual orientation.⁵⁸ During the days surrounding the 2003 “Day of Silence,” some anti-homosexual remarks and incidents occurred, and another student group organized its own “Straight-Pride Day.”⁵⁹ On the “Day of Silence” of the following year, Harper, a student, wore a t-shirt to school that day that read on the front, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,” and on the back, “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’”⁶⁰ Because Harper refused to remove the shirt, the principal confined him in a school conference room, where he spent the day doing his homework.⁶¹

Harper sued in the United States District Court for the Southern District of California for violations of his free speech rights, free exercise rights, the Establishment Clause, equal protection rights, due process rights, and a state-law claim.⁶² Other than the First Amendment challenges, none of the claims survived Poway’s motion to dismiss. As for the First Amendment claims, the district court denied Harper’s request for a preliminary injunction; Harper made an interlocutory appeal of that ruling to the Ninth Circuit.⁶³

Judge Reinhardt of the Ninth Circuit wrote a vigorous opinion defending the actions of the principal.⁶⁴ Relying on language in the *Tinker* case, he said that “the restriction was necessary to prevent either the violation of the rights of other students or substantial disruption of school activities.”⁶⁵ Judge Zozinski wrote an equally vigorous dissent, also relying on *Tinker*.⁶⁶

56. 127 S. Ct. 1484 (Mem.) (2007), *vacating as moot* Harper v. Poway, 445 F.3d 1166 (9th Cir. 2006).

57. See Harper v. Poway, 445 F.3d 1166, 1170-71 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (Mem.) (2007) (detailing facts of case and issue presented).

58. *Id.* at 1171 (describing purpose of “Day of Silence”).

59. *Id.* (describing tensions surrounding and heterosexual students’ response to “Day of Silence”). In one incident, the principal was required to separate two students physically. *Id.*

60. *Id.* (noting message on student’s t-shirt). Because of the conflicts that occurred during the “Day of Silence” in 2003, the high school required the Gay-Straight Alliance to meet with the principal to discuss ways to avoid physical altercations during the following year’s “Day of Silence.” *Id.*

61. Harper, 445 F.3d at 1172 (discussing principal’s manner of punishing student).

62. *Id.* at 1173 (detailing procedural history of case).

63. Harper v. Poway, 445 F.3d 1166, 1173 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (Mem.) (2007) (indicating results of lower court suit).

64. *Id.* at 1175-92 (condoning principal’s actions in responding to incident).

65. *Id.* at 1175 n.11 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)).

66. *Id.* at 1193-94 (Kozinski, J., dissenting) (arguing shirt neither substantially disruptive nor violative of other students’ rights). Zozinski argued that it was “more than a little ironic . . . to try to solve the problem of

Harper appealed to the United States Supreme Court, and his petition for certiorari was granted.⁶⁷ By this point, however, the district court had dismissed Harper's injunctive case as being moot, so the Supreme Court vacated the judgment and remanded it to the Ninth Circuit with directions to dismiss.⁶⁸ Judge Breyer dissented.⁶⁹

Although the meaning of the certiorari grant is unclear, it seems apparent that the *Harper* case could have been an excellent vehicle for the Court to discuss its view of *Tinker*, and possibly, to overrule it.⁷⁰ At a minimum, *Harper* certainly demonstrates that the Court was eager to hear another student speech case, even though it was already in the process of writing and issuing the *Morse* opinion at the time it received *Harper*.

E. Some Post-Morse Cases

The *Morse* case, although recent, has already made inroads into lower-court opinions, a few of which are particularly worth mentioning.⁷¹ *Morse* has been discussed in dozens of federal court decisions since it was decided.⁷² A very timely case is *Ponce v. Socorro Independent School District*.⁷³ In *Ponce*, a student made "Columbine-style" threats in his diary.⁷⁴ As a result, the school suspended him for three days and recommended he be placed in an alternative education program.⁷⁵ Relying heavily on Justice Alito's concurrence in *Morse*, the Fifth Circuit found no violation of the student's speech rights.⁷⁶

violent confrontations by gagging only those who oppose the Day of Silence." *Id.* at 1197.

67. *Harper*, 127 S. Ct. at 1484. The district court ultimately denied a subsequent motion for consideration by the plaintiff, citing *Morse*. *Harper v. Poway Unified Sch. Dist.*, 2008 WL 928118 (S.D. Cal. Feb. 11, 2008). The question the court of appeals addressed is whether "a public high school [may] prohibit students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation[.]" *Harper*, 445 F.3d at 1171.

68. *Harper*, 127 S. Ct. at 1484 (summarizing procedural history of case).

69. *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 127 S. Ct. 1484, 1484 (Mem.) (2007), *vacating as moot Harper v. Poway*, 445 F.3d 1166 (9th Cir. 2006) (Breyer, J., dissenting) (dissenting without providing reason for disagreement with Court's decision).

70. See generally *Harper*, 445 F.3d 1166 (discussing *Tinker* at length). Because the court of appeals addressed the *Tinker* decision at length, it seems plausible that the Supreme Court could have used the case to address—and perhaps overrule—*Tinker*.

71. See, e.g., *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 766 (5th Cir. 2007) (holding student speech threatening school attack not protected by First Amendment); *Lowery v. Euverard*, 497 F.3d 584, 601-02 (6th Cir. 2007) (permitting removal of football players for circulating petition deriding team coach); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 983 (11th Cir. 2007) (upholding suspension of student following revelation of story about killing teacher).

72. See, e.g., *Ponce*, 508 F.3d at 766; *Lowery*, 497 F.3d at 601-02; *Boim*, 494 F.3d at 983 (citing *Morse v. Frederick*, 127 S. Ct. 2618 (2007)).

73. 508 F.3d 765 (5th Cir. 2007).

74. *Id.* at 766 (setting forth facts of case and issue on appeal). The court addressed "the question of whether student speech that threatens a Columbine-style attack on a school is protected by the First Amendment." *Id.*

75. *Id.* at 766-67 (detailing principal's response to "terroristic threat").

76. *Id.* at 770-72 (citing *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring)). Although the majority opinion

The *Morse* decision is certainly being utilized by lower federal court judges. The Eleventh Circuit upheld the ten-day suspension of a student who had written about her dream of shooting her teacher.⁷⁷ The Second Circuit also utilized Alito's concurrence in *Morse* in upholding the suspension of a student for drawing a picture implying that a teacher should be killed.⁷⁸ In addition, Justice Alito's concurrence played a role in a Massachusetts district court case supporting students' rights to display posters advertising a conservative club and its Web site.⁷⁹

III. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1

The *Seattle School District*⁸⁰ case aroused even greater public interest than the *Morse* case, which was also issued in late June 2007. Because of a complicated line-up of Justices in the plurality and concurring opinions, the exact meaning of the *Seattle School District* ruling was not completely obvious and much commentary was sought.⁸¹

The *Seattle School District* case involved two separate cases regarding the use of racial classifications to make some student school assignments in public schools in Seattle and in Louisville, Kentucky.⁸² The Seattle school district had never been found to have illegally segregated schools and had never operated under a court-mandated desegregation decree.⁸³ If a school was "oversubscribed," the district used three serial tiebreakers to select students: the presence of a sibling in the school, then race, and then the closeness of the

in *Morse* did not necessarily justify further limitations on the First Amendment or the rule set forth in *Tinker*, "Alito's concurring opinion goes on to expound with further clarity why some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary." *Id.* at 770.

77. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (relying on *Morse* in finding no violation of students' First Amendment rights). As in *Ponce*, the court opinion refers to the attacks on Columbine High School to describe the student's threatening speech that is in question. See *Ponce*, 508 F.3d at 766; *Boim*, 494 F.3d at 981.

78. *Wisniewski v. Bd. of Educ.*, 494 F.3d 37, 40 (2d Cir. 2007) (comparing facts with *Morse* in justifying upholding student's suspension).

79. *Bowler v. Hudson*, 514 F. Supp. 2d 168, 177 (D. Mass. 2007) (citing *Morse* concurrence to support view that political or social issues can be expressed freely in schools).

80. 127 S. Ct. 2738 (2007).

81. See *Seattle Sch. Dist.*, 127 S. Ct. at 2746 (giving background and explaining both cases have same "underlying legal question"); Monica Brady-Myerov, *MA Impact of Race Ruling* (WBUR radio broadcast June 29, 2007), available at http://www.wbur.org/news/2007/68287_20070629.asp (including commentary by Professor Victoria Dodd highlighting ambiguity in decision).

82. *Seattle Sch. Dist.*, 127 S. Ct. at 2746 (setting forth question presented). "Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments." *Id.*

83. *Id.* at 2747 (explaining history of Seattle School District's racial policies).

school to a student's home.⁸⁴ Moreover, race was only used as a second tiebreaker if the school was "not within 10 percentage points of the district's overall white/nonwhite racial balance"⁸⁵

The Louisville situation was different because federal courts had previously found the district to have been operating an intentionally segregated school system.⁸⁶ The consent decree governing that situation, however, was terminated in 2000 when the district was found to have achieved "unitary status."⁸⁷ Despite this history, Louisville continued to use the race of students in both school assignments and transfers to assure that schools had a minimum of fifteen percent and a maximum of fifty percent African-American enrollment.⁸⁸

The lower-court procedures in the *Seattle School District* case were quite complicated. The district court and the Washington Supreme Court ruled upon the plan numerous times, but ultimately the Ninth Circuit Court of Appeals ruled that the Seattle school district's plan survived strict scrutiny.⁸⁹ The Seattle school district also claimed at the Supreme Court that it no longer used race as a tie-breaker, but the Court refused to dismiss the case as moot.⁹⁰ In the Louisville case, the district court upheld the plan using a strict-scrutiny analysis, and the Sixth Circuit affirmed that decision in a per curiam opinion.⁹¹

A. Chief Justice Roberts's Opinion

Chief Justice Roberts authored the *Seattle School District* plurality opinion, fully joined by Justices Alito, Scalia, and Thomas.⁹² Justice Kennedy concurred, declining to join in two portions of the opinion.⁹³ Four Justices dissented, with both Justice Stevens and Breyer writing separate dissents.⁹⁴ The complex structure of the decision elevates the importance of Justice

84. *Id.* (outlining factors of tiebreaker system). This plan was in place because incoming high-school students were allowed to rank the district's high school in order of preference. *Id.* Because some schools were more popular than others, the district used a tiebreaker system to determine which students would be given spots in the more popular schools.

85. *Id.* (showing limitation on use of race in Seattle tiebreaker system).

86. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749 (2007) (outlining history of desegregation in Louisville school system).

87. *Id.* at 2749 (noting 1973 federal court decision regarding Louisville's policies); *see also* *Newburg Area Council, Inc. v. Bd. of Educ.*, 489 F.2d 925, 932 (6th Cir. 1974) (holding "all vestiges of state-imposed segregation must be eliminated within each school district in the county").

88. *Seattle Sch. Dist.*, 127 S. Ct. at 2749 (explaining Louisville policy after dissolution of decree).

89. *See id.* at 2748-49 (discussing lower court's rulings).

90. *Id.* at 2751 (holding voluntary cessation inadequate to moot case or controversy).

91. *Id.* at 2750 (highlighting district court's finding of narrowly tailored plan to achieve compelling interest).

92. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2745 (2007) (naming author of opinion).

93. *Id.* (noting Kennedy's concurrence in part).

94. *Id.* (noting Stevens' dissent and Breyer's dissent, joined by Stevens, Souter, and Ginsberg).

Kennedy's concurrence and makes the decision somewhat akin to the university affirmative-action case of *Regents of the University of California v. Bakke*,⁹⁵ from which Justice Powell's concurrence became the governing doctrine.

Chief Justice Roberts points out that the Court has found only two state interests to justify the use of racial classifications in schools: remedying the effects of past discrimination and Justice Powell's notion of diversity in *Bakke*, which the Court affirmed in *Grutter v. Bollinger* in 2003.⁹⁶ Chief Justice Roberts states that the first justification, to remedy past discrimination, is not present in the Seattle public schools⁹⁷ and that in both Louisville and Seattle, race was being nakedly used rather than just as one factor among many in an admissions decision.⁹⁸ He therefore compares the situation to the "nonindividualized" admissions decision struck down by the Court in *Gratz v. Bollinger*.⁹⁹ Importantly, Chief Justice Roberts goes on to state that the instant cases are not controlled by *Grutter* because only higher education can claim the "unique" connection to "broad-based diversity" concerns.¹⁰⁰ Instead, Chief Justice Roberts finds that both districts were only using racial classifications to achieve "racial balance," which is not a compelling state interest.¹⁰¹

Chief Justice Roberts also finds fault with the school districts' use of race through a means-end analysis.¹⁰² Because very few students were actually moved from their home districts pursuant to either plan, he found that the means (i.e., racial classifications) may not have been "necessary" to achieve the ends, another fatal flaw under strict-scrutiny analysis.¹⁰³ Similarly, he found that non-racial alternatives should have been explored, another unmet requirement for passing strict-scrutiny analysis.¹⁰⁴ He spends the rest of the

95. 438 U.S. 265 (1978). Justice Powell used strict scrutiny to strike down the race-based admissions plan at Davis Medical School, but allowed the use of "race as only one factor" in college admission to serve the compelling state interest of promoting diversity in a student body. *Id.* at 318.

96. See *Seattle Sch. Dist.*, 127 S. Ct. at 2741-42 (discussing interests warranting use of racial classifications in schools); see also *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (affirming *Bakke* and holding student body diversity compelling interest); *Bakke*, 438 U.S. at 314 (finding compelling interest of diversity in university admissions).

97. *Seattle Sch. Dist.*, 127 S. Ct. at 2752 (indicating absence of adjudicated segregation in *Seattle School District*).

98. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753-54 (2007) (noting "mechanical" use of race and "limited notion of diversity" used by Seattle and Louisville).

99. 539 U.S. 244, 280 (2003) (O'Connor, J., concurring) (declaring "nonindividualized" admissions decision including race-based component unconstitutional).

100. *Seattle Sch. Dist.*, 127 S. Ct. at 2754 (declining application of *Grutter* reasoning).

101. *Id.* at 2757 (rejecting racial balancing as "patently unconstitutional").

102. See *id.* at 2743 (deeming school district's plan unconstitutional). "In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate." *Id.* at 2755.

103. *Id.* at 2760 (suggesting minimal impact of plan indicates lack of necessity).

104. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2760 (2007) (explaining exploration of race-neutral alternatives required to show means narrowly tailored).

opinion critiquing Justice Breyer's dissent, which discusses in some detail the importance of preventing resegregation in public schools.¹⁰⁵

B. *The Concurrences*

Justice Thomas writes his concurrence solely to address Justice Breyer's theories about the importance of preventing resegregation.¹⁰⁶ Both Justice Thomas and Chief Justice Roberts are acutely concerned that the use of racial classifications in schools be limited only to combat de jure discrimination, a very limited goal in light of changing times.¹⁰⁷ Justice Thomas also challenges whether any educational benefits or "democratic" effects are promoted by integrated schools, as posited in another theory championed by Justice Breyer.¹⁰⁸

Although public and critical attention has focused on Justice Kennedy's concurrence, it is Justice Thomas's that is the more startling. By criticizing the goal of integrated schools, Justice Thomas casts some doubt on the main constitutional rationale of *Brown v. Board of Education*:¹⁰⁹ that racially segregated schools are "inherently unequal."¹¹⁰ Further, because many post-*Brown* cases also clearly supported the goal of integrated, as opposed to merely desegregated, schools,¹¹¹ Justice Thomas seeks to rewrite the history of Supreme Court equal-protection jurisprudence. He even equates the actions of these modern school boards with those of the evil school boards in *Brown*.¹¹² Finally, Justice Thomas views the *Grutter* holding as allowing diversity as a compelling interest in its most narrow way: that such diversity is compelling in

105. *See id.* at 2761-68 (addressing Justice Breyer's dissent point by point). Roberts criticizes Breyer's dissent because "it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies [the Court's] well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of [the] decision." *Id.* at 2761.

106. *Id.* at 2768 (Thomas, J., concurring) (writing separately to comment on Breyer's dissent). Thomas argued that neither school district would be required, or even constitutionally permitted, to adopt racial classification in student assignment plans for sole purpose of achieving racial diversity. *Id.*

107. *See id.* (explaining fear of resegregation misplaced in instant case where not occurring).

108. Compare *Seattle Sch. Dist.*, 127 S. Ct. at 2776-79 (disputing educational benefits), and *id.* at 2779-81 (disputing democratic element of reflecting "pluralistic society"), with *id.* at 2820 (Breyer, J., dissenting) (discussing three essential elements of compelling interest at stake). Breyer argues that there is a historical/remedial element, an educational element, and a democratic element: "an interest in setting right the consequences of prior conditions of segregation"; "an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools"; and "an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live." *Id.* at 2820-21.

109. 347 U.S. 483 (1954).

110. *Id.* at 494-95 (describing adverse effects of segregated schools on African-American children).

111. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (approving variety of methods, including prescribing ratios to integrate schools).

112. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2786, n.27 (2007) (Thomas, J., concurring) (refusing to distinguish case's racial classification from that in *Brown*).

law school or university admissions but certainly not in the public school context.¹¹³ As in *Morse*, Justice Thomas has strongly developed his own constitutional voice and seeks to turn back the constitutional clock.

Justice Kennedy, like Justice Alito in *Morse*, seeks to soften the hard edges of the Chief Justice's and Justice Thomas's opinions. Tellingly, he does not join in Part IV of Chief Justice Roberts's opinion, the section dealing with Justice Breyer's dissent.¹¹⁴ He also fails to join in Part III.B, where Chief Justice Roberts discusses that the school districts' plans are merely ones used to reach a certain racial balance.¹¹⁵ Justice Kennedy describes the unjoined portions of Chief Justice Roberts's opinion as "inconsistent in both [their] approach and [their] implications with the history, meaning, and reach of the Equal Protection Clause."¹¹⁶

Justice Kennedy's main point is that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."¹¹⁷ In his mind, the school districts' plans are not "narrowly tailored" because they do not explain how and why "crude" racial classifications further various non-racial goals.¹¹⁸ Close to reading like a dissent, Justice Kennedy revivifies *Brown* and *Grutter*. On the other hand, he is also concerned that the ideas in Justice Breyer's dissent could be used to justify the use of racial classifications in any de facto situation.¹¹⁹ Ultimately, Justice Kennedy finds that "avoiding racial isolation" and *Bakke/Grutter*-type "race-as-a-factor-in-diversity" can qualify as compelling state interests.¹²⁰

We can assume that Justice O'Connor and her mentor Justice Powell would be quite pleased by most of Justice Kennedy's reasoning. Indeed, at least one commentator has suggested that if Justice O'Connor were still on the Court, the opinion would have gone the other way.¹²¹ That Justice Kennedy does not dissent indicates how much the Court has moved to the right since her departure; Justice Kennedy sits in the middle now, and it is the Court that has shifted, not so much Justice Kennedy. Seemingly, a school may use race in assignment decisions if it satisfies Justice Kennedy's requirements, just as universities followed Justice Powell's lead in *Bakke*. Further case law, however, will be necessary to clearly define the precise meaning of Justice

113. *Id.* at 2781 (declining to extend *Grutter* holding to elementary and secondary school environments).

114. *Id.* at 2789 (indicating explicit refusal to join Part IV of opinion).

115. *Id.* (noting refusal to join Part III.B of opinion).

116. *Seattle Sch. Dist.*, 127 S. Ct. at 2788 (criticizing Justice Roberts's opinion in part).

117. *Id.* at 2789 (suggesting compelling interest presented by school districts in this case).

118. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2790-91 (2007) (explaining flaw in school districts' plans).

119. *Id.* at 2794 (noting importance of de facto and de jure segregation in analyzing race-based classifications).

120. *Id.* at 2797 (articulating compelling interests).

121. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (suggesting shift in conservativeness of Supreme Court after Roberts's first term).

Kennedy's words in practice.

C. *The Dissents*

Justice Breyer dissents in rather strong and elaborate terms. His basic arguments have been explained above.¹²² Justice Breyer also disputes the historical description of the two cases offered by Chief Justice Roberts.¹²³ He describes *Seattle School District* as a case that addressed a school segregation lawsuit.¹²⁴ Justice Breyer emphasizes that the Louisville districts were once segregated by law similar to the pre-*Brown* state laws.¹²⁵ He spends numerous pages detailing the racial discrimination and segregation in these districts over a forty-year period to present a more nuanced view of the distinction between de jure and de facto segregation. He then summarizes the post-*Brown* jurisprudence dismissed by the plurality to establish that “context matters when analyzing state action based on race.”¹²⁶ Under his view,

If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand students' choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.¹²⁷

Without wanting to appear too pollyannaish, Justice Breyer's dissent might be close to what Justice O'Connor or perhaps even Justice Kennedy would have written if the facts and histories of these underlying cases had been believed, understood, or litigated in a different way. One may sense that Justice Breyer is writing about the case that Justice Kennedy would perhaps like to see; both Justices disagree on what the instant cases actually present. Justice Breyer's dissent is therefore almost a “how-to” manual for litigants seeking to possibly meet the criteria that would satisfy Justice Kennedy, or that

122. See *supra* notes 105–106, 108, and accompanying text (outlining Justice Breyer's arguments).

123. *Seattle Sch. Dist.*, 127 S. Ct. at 2800-01 (arguing plurality mischaracterized cases). “The historical and factual context in which these cases arise is critical.” *Id.* at 2801. Breyer sets forth the historical and factual context of this case to emphasize:

First, the school districts' plans serve ‘compelling interests’ and are ‘narrowly tailored’ on any reasonable definition of those terms. Second, the distinction between de jure segregation (caused by school systems) and de facto segregation (caused, e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local effort to use means that are ‘conscious’ of the race of individuals.

124. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2802-03 (2007).

125. *Id.* at 2802 (describing racial composition of Louisville district).

126. *Id.* at 2817 (emphasizing importance of viewing desegregation in light of all circumstances).

127. *Id.* at 2818 (examining race-based school plan's history).

would have pleased Justice O'Connor. Justice Breyer gives us the facts and context, and Justice Kennedy gives us the law, but if one puts both together, it may be possible for school districts to sparingly use race-conscious remedies. A main pitfall of Justice Breyer's approach, however, is his argument that "less than strict scrutiny" is constitutionally permissible.¹²⁸ That is a constitutional standard that the Rehnquist Court, and even Justice O'Connor, would never have agreed with.

D. Some Pre- and Post-Seattle School District Cases

The *Comfort v. Lynn School Committee*¹²⁹ case involved a voluntary desegregation plan "for school improvement and the elimination of minority isolation."¹³⁰ In general, the plan allowed student transfers if they would not exacerbate racially imbalanced schools and any students denied transfer were afforded the right to appeal the denial.¹³¹

After the *Seattle School District* decision, the plaintiffs moved for relief from the final judgment.¹³² The district court judge denied the motion, suggesting that "the appropriate way to litigate these issues [would be] to file a new and related complaint, challenging the *Lynn* school assignment case *as it now exists* in 2008 . . ." It is not clear whether the current plan will survive scrutiny under the new *Seattle School District* holding.

A second case discussing *Seattle School District* is *Fisher v. United States*,¹³³ concerning whether the Tucson School District had achieved "unitary status." The district court used the *Seattle School District* standard to strike down a race-based transfer policy.¹³⁴ The *Seattle School District* case will certainly cause school districts to more carefully scrutinize their admission and transfer policies.

IV. CONCLUSION

By looking intently at these two Supreme Court opinions, we can see that the Roberts Court jurisprudence is changing in the area of education law. The Rehnquist Court might very well have decided the *Seattle School District* case differently, and made us less concerned about the viability of *Bakke*, *Grutter*, and other *Brown* progeny. Although the Rehnquist Court might well have reached the same result in *Morse*, *Tinker* seems to be facing a hastened death at

128. *Seattle Sch. Dist.*, 127 S. Ct. at 2819 (adopting less strict standard of scrutiny from Ninth Circuit analysis).

129. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 546 U.S. 1061 (2005).

130. *Id.* at 7 (describing Lynn's integration plan).

131. *Id.* at 10-11 (discussing elements of school district's desegregation plan).

132. *See id.* (moving for relief pursuant to Fed. R. Civ. P. 60(b)(5)); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2796 (2007) (citing *Comfort*, 418 F.3d 27-29).

133. Nos. CV 74-90 TUC DCB, CV 74-204 TUC DCB, 2007 WL 2410351 (D. Ariz. Aug. 21, 2007).

134. *Id.* at *15 (striking down race-based plan based on holding in *Seattle School District*).

the hands of the Roberts Court. Certainly the appointment of a net-conservative or net-liberal Justice on the Court would alter the constitutional rules in these cases, particularly concerning the use of race-conscious remedies in education. The Roberts Court is teetering on the cusp of reversing years of what some scholars consider to be legal progress in the pursuit of a more perfect and civilized society. The views of all of the Roberts's Court Justices, whatever their predilections, have become heightened and obvious. Thus, it may be possible to predict the outcomes of many Supreme Court cases. The biggest unknown may be Justice Samuel Alito. Given his very thoughtful views in *Morse*, it will be interesting to see if he continues to bond with Justice Kennedy in other controversial cases. That trend would continue to mark Justice Kennedy as the new "Justice O'Connor," but it could also identify Justice Alito as the new "Justice Kennedy." And that could be a very good thing.