



# Doubtful Jurisprudence

*Court offers schools little guidance*

BY JOSHUA DUNN AND MARTHA DERTHICK

The reconstituted Supreme Court of President Bush and Chief Justice John G. Roberts rendered two significant constitutional decisions about schools in its October 2006 term, one “for” and one “against” school administrators. Their common thread is a want of clarity and hence an invitation to more litigation.

The case that went in favor of a school administration was *Morse v. Frederick*, more engagingly known as “Bong Hits 4 Jesus.”

This was the legend on a 14-foot banner that Joseph Frederick, a high school student in Juneau, Alaska, unfurled in 2002 at a school-sponsored parade. Detecting a celebration of drug use—a bong is a marijuana water pipe—the school principal, Deborah Morse, ordered Mr. Frederick to lower the banner and suspended him for 10 days. He sued, claiming a violation of his First Amendment rights to free speech. A three-judge panel of the Ninth Circuit not only ruled for him, but also concluded that Ms. Morse was personally liable.

Robert’s opinion for the court, in which four other joined, did not go so far as to say that students have no First Amendment free-speech rights, as Justice Clarence Thomas wished. Thomas would have overruled *Tinker v. Des Moines Independent Community School District*, a Vietnam-era (1969) case involving students who wore black armbands in protest of the war. In *Tinker* the Court ruled for the students and famously said that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the school-house gate.” Nor did the Court duck the constitutional question altogether, as Justice Stephen Breyer wished. Breyer said that the Court need not decide the First Amendment issue on the merits, but should merely hold that Ms. Morse was immune to Frederick’s claim for monetary damages.

The majority ruled that students at school or a school function do not have a First Amendment right to promote illegal drugs. Breyer worried that, rather than being a help to teachers, this seeming victory would merely incite the nation’s adolescents to mount new challenges. What if a student flew a “Wine Sips 4 Jesus” banner, Justice John Paul Stevens mischievously asked. The good news for school administrators was that neither he nor any other member of the Court believed that Ms. Morse should be liable for damages.

The case that went against school administrators—really two cases, one from Seattle and a companion from Jefferson County,

**The jurisprudence produced by the early Roberts Court on schools is steeped in doubt.**

Kentucky—involved school districts’ classifying and assigning students by race in order to achieve racial balance. A majority opinion written by Chief Justice Roberts argued that the Constitution is colorblind and struck the plans down. But though Justice

Anthony Kennedy found defects in the two plans and therefore joined in the result, making a 5–4 majority possible, he did not embrace Roberts’s enunciation of the constitutional principle. The Constitution cannot be colorblind in the real world, he said, and school districts can adopt race-conscious measures as long as they don’t treat “each student in a different fashion solely on the basis of a systematic, individual typing by race.”

Justice Kennedy offered what he regarded as acceptable methods of considering race such as “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” But knowing the general demographics of neighborhoods or recruiting students and faculty in a targeted fashion would seem to require some systematic, individual typing by race. Such confusions led commentators on the Kennedy opinion to despair and will likely have the same effect on school administrators. Local districts are obliquely invited to construct affirmative action plans, with the knowledge that they may in time be scrutinized by a divided and inscrutable Court.

“Liberty finds no refuge in a jurisprudence of doubt,” the Court said in *Planned Parenthood v. Casey* (1992), in a rhetorical phrase commonly attributed to Kennedy. But the jurisprudence produced by the early Roberts Court on schools is steeped in doubt. The Court has taken a fresh plunge into the constitutional thicket, wherein it is the prerogative of judges to write and rewrite the maps.

*Joshua Dunn is assistant professor of political science at the University of Colorado—Colorado Springs. Martha Derthick is professor emerita of government at the University of Virginia.*