Civil Rights

No Big Surprise: A Review of the Seattle Schools Case

*By Harry J.F. Korrell**

On June 28, 2006, the Supreme Court issued its decision (along with several concurring and dissenting opinions) in *Parents Involved in Community Schools v. Seattle School District No. 1*.[1] This case has received widespread attention, and has been called one of the most significant equal protection cases in decades. This article provides a summary of the factual background and the complex procedural history of the Seattle litigation that led to the decision. It also examines some of the criticism of the Court's decision to review the case and the result. Contrary to the hyperbole from some quarters, a close review of the underlying Ninth Circuit opinion, the developing rift among courts (and among the judges of those courts) about the legality of racial balancing programs, and the holding and reasoning of the *Parents* decision, reveals (1) that review by the Supreme Court was necessary to resolve a split among lower courts on an issue of national importance; and (2) that the decision is a straight-forward application of long-established Equal Protection Clause jurisprudence. The decision to grant certiorari and the outcome are not surprising in light of the Court's earlier Equal Protection Clause cases.

I. Factual Background and Procedural History

Prior to the Supreme Court's decision in *Parents*, the Supreme Court had never decided whether a public school district could make admission decisions based on race, absent a need to remedy de jure segregation; that is, prior discrimination by that district. *Parents* presented an opportunity for the Court to answer this question and to clarify how the equal protection rights of public high school students were affected by the landmark decisions in *Grutter v. Bollinger*[2] and *Gratz v. Bollinger*.[3]

A. Seattle's Race-Based Admissions Plan and Parents' Suit

The racial composition of the students attending Seattle public schools is about 60% non-white and 40% white.[4] It was undisputed in the litigation that Seattle's public high schools were never intentionally racially segregated,[5] though the racial composition of individual schools varied across the district, with two schools enrolling student bodies that were 10% and 8% white, and three enrolling student bodies that were between 55% and 63% white (thus the "whitest" school in the district enrolled a student body that was about 37% non-white).

The schools also varied widely in the quality of education provided, measured by objective and subjective criteria, and in popularity. At the time suit was filed, the district operated ten regular high schools. Five were regarded by most families as providing significantly better educational opportunities than the others. At three of these popular schools, without use of the race preference, enrollment would have been predominantly white (between 55% and 63%) and predominantly non-white (53% and 80%), at two others.

Rather than assigning students to specific schools, as many districts do, the Seattle School District allowed students to select whatever school they desired to attend, and students completed forms ranking their preferred schools. This "open choice" assignment plan allowed families to vote with their feet. Due to the differing quality of the schools, 82% of all students selected one of the five better schools as their first choice, with the result that more students wanted to attend the popular schools than the schools were willing to enroll. In district parlance, these schools were "oversubscribed."

To allocate admissions to these popular schools, and in an effort to achieve a racial balance in these schools that approximated the district's 60% non-white to 40% white ratio, the district employed a series of preferences to determine admission. When a school was oversubscribed, the district first admitted siblings of enrolled students. The district next looked at a school's racial composition and used race to determine who would be admitted. If the ratio of non-white to white pupils in an oversubscribed school deviated by more than a set number of percentage points from the desired 60/40 balance, then a student whose race would have moved the school closer to the desired racial balance would have been admitted, and a student whose race would have moved the school away from the desired balance would have been denied.[6] In effect, seats at such a school were reserved for preferred-race students, and only after all preferred-race students were admitted would others be admitted. There was no individual consideration of applicants, and whenever race was considered it was the sole deciding factor.

In 2000-2001, the trigger for the operation of the race preference was a school's deviation from the preferred 60/40 balance by ten percentage points. That year, the district denied about 300 students admission to their first-choice schools solely because of race. About 210 students were denied their first choice (and many were denied their second and third choice) because they were white; about ninety were denied their first choice because they were non-white.

These race-based assignments imposed significant burdens on affected families, among them (1) denial of admission to a chosen school (in an otherwise open choice system), (2) imposition of cross-town commutes, and (3) the concomitant difficulty of parental involvement in the schools. While these assignments denied hundreds of students admission to chosen schools solely because of skin color, they had only a marginal effect on the racial balance of the schools: the district's data show that without the use of race, all the oversubscribed schools would enroll substantial numbers of white and non-white students. For example, *without using the race preference*, in 2000-01 Roosevelt High School would have enrolled a population that was 54.8% white and 45.2%

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non-white. The district's race-based assignments changed the racial balance at Roosevelt by less than four percentage points, increasing the minority enrollment from 45.2% to 48.9%. Similarly, using race changed the white/non-white percentages at other oversubscribed schools by only about two and a half to six percentage points.

The petitioner at the Supreme Court, and the plaintiff below, was an association of families who were either affected or likely to be affected in the future by the district's race-based admissions plan. Parents Involved in Community Schools ("Parents"), formed as a Washington nonprofit corporation. Contrary to the impression left by some of the reports in the popular press, Parents included both white and non-white families. Parents filed suit in federal district court asserting claims under the Washington Civil Rights Act,[7] the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the federal Civil Rights Act of 1964.

After suit was filed, the district modified its admissions plan by changing the trigger for the race preference from a ten point deviation to a fifteen point deviation from the desired racial balance, limiting the use of race to ninth grade assignments (previously the race tie-breaker also applied to new assignments to upper grades), and installing a "thermostat," so that when a school reached the desired balance the use of race as a factor was stopped for that year (previously the preference applied to all assignments in a given year once it was triggered). The district rejected further narrowing proposals advocated by the superintendent of schools, such as changing the trigger to a twenty-point deviation and granting a preference for students who identified a school as a first choice on their rankings.

The district offered several justifications for seeking its preferred racial balance. These included the educational benefits argued to flow from racial diversity, increased racial and cultural understanding, and the desire to avoid racially "isolated" schools, which the district argued would result in the absence of race-based student assignments because of Seattle's housing patterns.

B. The District Court Granted Summary Judgment to the School District

On cross motions for summary judgment, the district court granted judgment in favor of the district.[8] The court found no violation of state law, the Equal Protection Clause, or the federal Civil Rights Act, holding that "achieving racial diversity and mitigating the effects of *de facto* residential segregation... are compelling government interests as a matter of law." Explicitly deferring to the district's judgment, the court concluded that the district had a "sufficient basis" for implementing the race preference, and that the race preference was narrowly tailored to achieve those objectives.

C. The Court of Appeals for the Ninth Circuit Reversed, Holding that the Plan Violated the Equal Protection Clause

On appeal to the Ninth Circuit, a three-judge panel unanimously found for Parents on the state law claim.[9] On Parents' motion (because a new round of assignments was to be made before the court would issue its mandate), the court enjoined the use of the race preference.[10] When the district sought rehearing, the panel withdrew its decision, vacated the injunction, and certified the state law issues to the Washington Supreme Court,[11] which decided those issues in favor of the district.[12]

While the federal claims were still pending in the Ninth Circuit, the U.S. Supreme Court decided *Grutter* and *Gratz.* Parents then rebriefed and reargued their Equal Protection claim in light of those decisions. The panel decided in favor of Parents, holding that the district's plan was not narrowly tailored because it "is virtually indistinguishable from a pure racial quota;"[13] it "fails virtually every one of the narrow tailoring requirements;"[14] and the record revealed "an unadulterated pursuit of racial proportionality that cannot possibly be squared with the demands of the Equal Protection Clause."[15] One judge dissented.[16]

D. A Sharply Divided En Banc Panel Affirmed the District Court, Holding that the Plan Was Constitutional

A rehearing en banc resulted in a decision in favor of the District by a vote of seven (including one concurrence) to four.[17] The en banc majority, relying on the observation in *Grutter* that "context matters," extended the reasoning in that decision in several ways. The majority held racial diversity, pursued for its "educational and social benefits," and to avoid "racially concentrated or isolated schools," can be a compelling governmental interest for high schools.[18] The majority also held that much of the rigorous narrow tailoring analysis of *Grutter* and *Gratz* does not apply in the high school context,[19] so that, inter alia, a mechanical race-based admissions scheme can satisfy the narrow tailoring prong of strict scrutiny when implemented to achieve a pre-determined racial balance. In reaching this conclusion, the majority deferred to the judgment of the local school board regarding the need for a race-based admissions plan.[20] It also adopted a theory of equal protection rights as group rights, holding that a racial classification scheme does not "unduly harm any students," so long as it does not "uniformly benefit any race or group of individuals to the detriment of another."[21]

Judge Kozinski concurred in the judgment.[22] He urged the Supreme Court to abandon strict scrutiny and adopt a "rational basis" standard for evaluating the constitutionality of race-based school assignment plans of the kind at issue.[23]

Judge Bea, joined by three others, dissented.[24] They rejected, as inconsistent with strict scrutiny, the majority's "relaxed," "deferential" standard of review;[25] its deference to the local school board;[26] and its group rights theory of the Equal Protection Clause.[27] The dissent concluded that when strict scrutiny is applied, the district's race preference violated the Equal Protection Clause because it sought to accomplish only a predetermined white/non-white racial balance (not "genuine" diversity);[28] because the plan operates as a quota system;[29] and because it does not satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*.[30]

Parents filed a petition for a writ of certiorari, granted on June 5, 2006. As noted above, the Court also agreed to review the *McFarland* case out of the Sixth Circuit, which raised similar issues in the context of elementary school assignments in a school district that had a history of de jure segregation and that had recently achieved unitary status.

II. The Decision to Grant the Petitions

The decision in *Parents* has been the subject of a great deal of discussion and criticism,[31] and that criticism has extended even to the decision to accept review. However, the Supreme Court does not appear to have jumped at the chance to review the Seattle case once Justice O'Connor was replaced by Justice Alito.[32] Such speculation overlooks the fact that after the Ninth Circuit decision in *Parents* there was a significant split among lower courts and judges of individual circuit courts about whether, absent the need to remedy past discrimination, the Equal Protection Clause allowed government schools below the university level to admit or deny students on the basis of race. The lower courts and school officials nationwide needed guidance from the Court.

Prior to the decision in *Parents,* the Supreme Court had not decided whether a school district may use race-based pupil assignments for any purpose other than remediation of the effects of past de jure segregation. Before the 2003 decisions in *Grutter* and *Gratz,* lower courts reviewing racial classifications by government applied the reasoning of Justice Powell's opinion in *Regents of Univ. of Calif. v. Bakke,*[33] and of subsequent Equal Protection decisions such as *Wygant v. Jackson Bd. of Educ.*,[34] *City of Richmond v. J .A. Croson Co.*,[35] *Freeman v. Pitts,*[36] and *Adarand Constructors Inc., v. Pena*.[37] Accordingly, the federal courts of appeal consistently struck down racial balancing schemes by government, including race-based admission and assignment plans of secondary and primary schools.[38]

In those cases, the First and Fourth Circuits, without deciding that diversity can be a compelling interest for secondary and primary schools, held that in the absence of de jure segregation plans designed to achieve a particular racial balance are unconstitutional, citing Justice's Powell's opinion in *Bakke* and subsequent equal protection cases applying strict scrutiny.[39] Similarly, the Ninth Circuit in *Ho* allowed racial quotas only to remove "vestiges of segregation."[40] Except for the Second Circuit in *Brewer*, prior to *Grutter* and *Gratz* there had been no federal court of appeals decision authorizing a plan of racial balancing even to remedy de facto segregation.

In 2003, the Supreme Court addressed equal protection challenges to the race-conscious admissions plans at the University of Michigan's law school,[41] and its undergraduate school.[42] In those cases, the Court explicitly endorsed Justice Powell's *Bakke* opinion and adopted its reasoning.[43] In *Grutter,* the Court affirmed that equal protection rights are "personal" rights, not group rights, and that strict scrutiny applies to all government racial classifications: the government must prove that the racial classification scheme is justified by a compelling interest and is narrowly tailored to achieve that goal.[44] The Court agreed with Justice Powell's *Bakke* opinion, and held that "genuine diversity" (distinguished from mere racial or ethnic diversity) in the student body could be a compelling interest for institutions of higher education.[45] The Court also expressly endorsed Justice Powell's view that an interest in assuring that a student body contained "some specified percentage of a particular group merely because of its race... would amount to outright racial balancing, which is patently unconstitutional."[46]

Grutter also set out the elements of the narrow tailoring prong of strict scrutiny: to pass muster, any race conscious plan must (1) provide for individualized consideration of applicants, (2) not operate as a quota system by imposing a fixed percentage that cannot be exceeded, (3) provide serious, good faith consideration of race-neutral alternatives, (4) not impose undue harm, and (5) have a logical end point.[47] Elaborating on these elements of the analysis, the Court stated that race must "be used in a flexible, nonmechanical way."[48] The plan cannot "make[] an applicant's race or ethnicity the defining feature of his or her application." It must "consider race or ethnicity only as a 'plus' in a particular applicant's file."[49] Applying those factors, the *Grutter* Court held that the law school plan was narrowly tailored, noting inter alia that it was flexible, provided serious individualized consideration to applicants, weighed many other diversity factors besides race, and did not operate mechanically such that race was always a determining factor when it was considered.[50]

In *Gratz*, the Court reiterated its endorsement of Justice Powell's view that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[51] Applying the standards articulated in *Grutter*, the Court held that the University of Michigan's undergraduate admissions plan was unconstitutional because it was not narrowly tailored: the plan did not provide for individualized consideration of an applicant's potential contributions to diversity (apart from his or her race), it was mechanical, and race was a decisive factor for virtually every minimally qualified minority applicant.[52]

Despite the Court's express adoption of Justice Powell's *Bakke* rationale, and the *condemnation* of racial balancing in *Grutter* and *Gratz*, the court of appeals in *Parents* (in a sharply divided en banc decision) read *Grutter* and *Gratz* as an invitation to *approve* of racial balancing as a means for government to accomplish mere racial diversity.[53] The court of appeals also rejected most of the rigorous narrow tailoring requirements of *Grutter* and *Gratz* as inapplicable to the "context" of high school assignment plans and held that racial balancing could be a permissible means to accomplish the district's goals.[54]

Soon after the court of appeals' decision in *Parents*, the Sixth Circuit in *McFarland v. Jefferson Cty. Pub. Schs.*[55] affirmed per curium and adopted the opinion of the district court reported at 330 F.Supp.2d 834 (W.D. Ky. 2004). In that case, parents challenged racial guidelines that affected some admissions to some schools and that sought to avoid in any school a black population of less than 15% or greater than 50% in a system whose overall student population was 34% black, and which had operated under a desegregation decree until 2000.[56] Applying *Grutter* and *Gratz*, the lower court found a compelling interest in "maintaining integrated schools,"[57] and determined that the guidelines were narrowly tailored to achieve that objective,[58] except at one group of schools where white and black applicants were put on separate assignment tracks—there the guidelines were held to constitute an "illegal quota."[59]

A few days after the appellate decision in *McFarland,* another Sixth Circuit district court granted a temporary

restraining order prohibiting denial of a student request for hardship transfer where the denial was based solely on race pursuant to a racial balancing plan.[60] Some Sixth Circuit courts thus appeared to be following the pre-*Grutter* line of cases condemning racial balancing (listed in note 31 above).

Likewise in the Fifth Circuit, where *Cavalier v. Caddo Parish School Board* struck down a race-based magnet school admissions plan aimed at achieving a pre-determined racial balance.[61] The court held that the school board had no compelling interest for its use of race because, although the district had operated under a desegregation decree between 1981 and 1990, there was no evidence of either current segregation or vestiges of past segregation,[62] and that under the narrow tailoring analysis of *Grutter* the school board "cannot justify its outright racial balancing absent a showing of current effects of prior segregation, which it has not done."[63]

In summary, while *Grutter* and *Gratz* continued and developed the equal protection doctrine enunciated in *Bakke* and *Croson*, including the prohibition of racial balancing, the Ninth Circuit's decision in *Parents* moved the law in the opposite direction. By taking *Grutter* and *Gratz* as a license to approve racial balancing, the Ninth Circuit in *Parents* (joining the First Circuit in *Comfort*) opened wide the door to race-based school assignments (and by logical extension to other racial classifications claimed to promote racial diversity in other areas of government).

Not only was that decision a deviation from established equal protection jurisprudence (*see* note 31), it confirmed a new uncertainty in the courts about the legality of such plans. For example, counting the initial panel opinion and the en banc opinion in *Parents,* six judges of the Ninth Circuit concluded that Seattle's racial preference violated the Constitution, while eight judges concluded otherwise. The three-judge panel in the First Circuit struck down the race-balancing plan in *Comfort*, but the en banc panel divided three to two and upheld it. Among the circuits, racial balancing to increase diversity in public schools was condoned by post-*Grutter* decisions in the First and the Ninth Circuits and condemned by post-*Grutter* decisions in the Fifth and (apparently) the Sixth Circuits. Pre-*Grutter* decisions that condemn such racial balancing remained precedent in the Fourth Circuit. The situation in the Second Circuit was unclear, as the *Brewer* court held, pre-*Grutter,* only that racial balancing may be used to remedy de facto as well as de jure segregation.[64] If the Supreme Court had not accepted the Seattle and Louisville cases, substantial uncertainty would have plagued school systems and parents nationwide.

III. Did *Parents* "Roll Back" Civil Rights Protections?

The pundits who posit that the Court agreed to review the Ninth Circuit decision in *Parents* so as to roll back advances in civil rights protection also argue that this is exactly what has happened. An examination of the Supreme Court majority opinion reveals, however, a straight-forward application of well-established equal protection jurisprudence. What is most significant about the decision in *Parents* is not any new doctrine, but the fact that the Court once again rejected a call for a less strict scrutiny of government racial classifications.

A. The Supreme Court Majority in Parents Relied on Long-Established Equal Protection Clause Analysis

Justice Roberts wrote an opinion that was for the Court in most respects and for a plurality in others. In the parts of that opinion joined by Justice Kennedy (parts I, II, III-A and III-C), the Court held inter alia as follows:

(1) that strict scrutiny applies to the school districts' racial classification schemes (which denied students admission to chosen schools based solely on race);[65]

(2) that in the education context the Court has only acknowledged two compelling interests: remediation of past de jure segregation and—in the context of higher education—achievement of a broad notion of diversity of which race could be only one of many facets (the plans at issue pursue neither);[66]

(3) that, unlike the genuine or holistic diversity pursued in *Grutter,* racial balancing (except to remedy past de jure segregation) is not a compelling interest and is (still) patently unconstitutional;[67]

(4) that the plans at issue in *Parents* also fail the narrow tailoring prong of strict scrutiny because (a) they do not provide for any individualized review but instead rely on race in a mechanical way;[68] (b) the marginal alleged benefit of these plans did not outweigh the cost of subjecting hundreds of students to disparate treatment based solely on skin color;[69] and (c) the districts did not show that they had earnestly considered race-neutral alternatives to their racial classification schemes.[70]

Justice Kennedy joined these aspects of the Roberts opinion.[71] Writing separately, he made clear his view that the Constitution does not require complete color blindness: for example, in his view, the Constitution does not prohibit school officials' consideration of the effects on the racial composition of schools when making general administrative decisions, such as where to build a school or what magnet programs to fund.[72] But he reserved some of his most impassioned language for his repeated condemnation of government's classifying people by race and making decisions, such as school admissions decisions, based on a person's race.[73]

To anyone familiar with the Court's modern Equal Protection Clause jurisprudence, none of these holdings is remarkable. In *Parents,* the Court simply applied long-standing Equal Protection Clause analysis to yet another government racial classification scheme.

So what, then, is the doctrinal significance of the *Parents* decision? The case is most important not for any new analysis but for the Court's rejection of a new "diversity" jurisprudence being pressed by school districts and others committed to racial balancing efforts (*see, e.g.*, many of the more than fifty amicus briefs filed in support of the school districts in the two cases) and recently adopted by some lower courts: a less exacting, more deferential standard of review for so-called "benign" racial classifications. In the past, a similar analysis has been endorsed by some of the justices on the Court, including the dissenters in *Parents* and *Gratz,* but it has been unable to command a majority.[74]

B. The Ninth Circuit's Decision Was a Radical Departure from Established Equal Protection Jurisprudence

Although the court of appeals majority purported to apply *Grutter* and *Gratz* to the differing "context" of public high schools, as recognized by the en banc dissent and explained below, the Ninth Circuit deviated radically from established equal protection jurisprudence (1) by allowing public schools that were never segregated to engage in racial balancing, (2) by deferring to school officials on racial matters instead of conducting a genuinely strict scrutiny, and (3) by adopting the theory that Equal Protection rights belong to racial groups, not individuals.

1. The Ninth Circuit Found a Compelling Interest in Racial Diversity Defined as a Pre-determined Racial Balance Between White and Non-White Students And Thereby Eliminated Much of the Established Narrow Tailoring Inquiry

Seattle school officials defined racial diversity in a given high school as a ratio of white to non-white students that deviates by no more than a set percentage from its preferred 40/60 ratio of white to non-white students. Accepting this definition, the court of appeals allowed the use of a racial classification—the race preference—by which children were granted or denied admission to their preferred high schools according to a mechanical, arithmetic formula implemented by computer algorithm and based solely on race. The immediate purpose of the preference and its only effect was to move the racial composition of a few schools closer to a pre-determined racial balance. Yet it is just this process of racial balancing—the mechanical use of a racial classification to accomplish a pre-determined racial balance, whether of students, employees, or government contractors—that the Supreme Court had repeatedly condemned, beginning with *Bakke* and continuing through *Grutter* and *Gratz*. Therefore, by accepting diversity as a compelling interest, where diversity means achievement of a pre-determined racial balance, the en banc majority found a compelling governmental interest in doing exactly what the Supreme Court has repeatedly said the Constitution forbids.

Moreover, when racial balancing becomes a permissible government objective, few of the narrow tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which a student could contribute to diversity. The requirement that race not be a determining factor has no place. Likewise, the requirement that the plan not be a quota has no application if a particular racial balance is a permissible goal. Indeed, as the dissent from the en banc opinion pointed out, the court of appeals dispensed with much of the narrow tailoring inquiry as inapplicable in the high school "context."[75]

2. Instead of Applying "Strict Scrutiny," the Ninth Circuit Held that Courts should Defer to Local School Officials on Matters of Race

In *Grutter*, the Court accorded deference to the judgment of officials at the University of Michigan Law School that genuine diversity in the classroom was essential to its educational mission and thus was a compelling interest.[76] This unusual deference was justified because of a university's academic freedom and "a constitutional dimension, grounded in the First Amendment, of educational autonomy," that includes the freedom of a university to select its student body.[77] The Court expressly limited this deference (to the school's determination of what interests are compelling) to the university context and the "expansive freedoms of speech and thought associated with the university environment... a special niche in our constitutional tradition."[78]

In *Parents*, the court of appeals improperly deferred to local school officials. For example, rather than scrutinize strictly whether a race-based plan was necessary and whether the district seriously considered and properly rejected race neutral alternatives to its race-based scheme, the en banc majority cited the deference accorded university officials in *Grutter* and deferred to the district's judgment that race-neutral alternatives would have been inadequate to obtain the benefits of a racially diverse student body.[79]

In *Parents*, the testimony of the Superintendent of Schools on these issues was plain. When asked whether the district "g[a]ve any serious consideration to the adoption of a plan... that did not use racial balancing as a factor or goal," he testified:

> *I think the general answer to that question is no*... I don't remember a significant body of work being done. I mean it's possible informally ideas were floated here or there, but I don't remember any significant staff work being done.[80]

Testimony by other school officials confirmed this admission.[81]

In light of this testimony, the court of appeals could find an earnest consideration by the district of race-neutral alternatives—an essential requirement of narrow tailoring—only by adopting a less exacting "rational basis" standard, which is exactly what the court did: according to the majority, the plan satisfied these aspects of narrow tailoring because "the record reflects that the district *reasonably concluded* that a race-neutral alternative would not meet its goals."[82]

The en banc majority's deference to the government and the resulting rational basis scrutiny was inconsistent with the rigorous analysis required by the Constitution.[83]

3. The Ninth Circuit Treated Equal Protection Rights as Belonging to Racial Groups Rather than to Individual Students

The race preference operated in some instances to deny white children their preferred assignments solely because they were white. In other instances it denied non-white children their preferred assignments solely because they were not white. Because equal protection rights are individual, personal rights,[84] each student affected by the operation of the preference suffered injury under traditional equal protection analysis: an infringement of her personal right to be free from race-based decision-making by government, and the denial of an otherwise generally available benefit (the opportunity to choose her high school) solely because of her race.

The en banc majority, however, abandoned this bedrock principle of constitutional law and treated equal protection rights as group rights. The majority held the district's plan

was narrowly tailored in part because the tie-breaker "does not uniformly benefit any race or group of individuals to the detriment of another," and thus does not "unduly harm any students in the District."[85]

This group rights analysis was contrary to the established understanding of the right to equal protection as a *personal* right.[86]

C. The Supreme Court Merely Rejected the Invitation to Change its Equal Protection Jurisprudence

Prior to *Parents*, the Court had never expressly held that racial balancing plans by local school boards were unconstitutional. It seems that many (relying on dicta in cases decided decades before the Court expressly adopted strict scrutiny) hoped the Court would recognize an exception to strict scrutiny for government "diversity" initiatives and other "benign" racial classifications. The Seattle School District, many of the amicus briefs filed in support of it, and the en banc majority at the Ninth Circuit advocated a less exacting standard by arguing that the court should *defer* to the judgment of school authorities and that racial classifications should be constitutional if they were *reasonable* efforts by government to address an honestly-perceived problem of racial imbalance in some schools. They sought implicitly what Judge Kozinski advocated expressly: adoption of a rational basis standard of review for racial classifications that appear to be benign and that do not uniformly work to the detriment of any particular racial group.[87]

The Supreme Court rejected this call for a new Equal Protection Clause jurisprudence. As noted above, the reasoning in the Court's opinion was straight-forward: the Court held (again) that racial balancing, except to remedy past discrimination, is unconstitutional, and that the appropriate standard of review for all racial classifications is strict scrutiny, even if the program under review is defended as a "diversity" measure. The Court rejected a plea for unprecedented deference to local school boards on racial matters, and it rejected the Ninth Circuit's group rights theory of the Equal Protection Clause. It also reiterated that, even when pursuing a compelling interest, school districts must prove that any racial classification scheme is really necessary and that school officials seriously considered and rejected alternatives to using race—something that was impossible for the Seattle School District to do in light of the testimony of school officials. None of this is remarkable or new, but it is very significant that the Court reiterated, in yet another context, that it will not retreat from its application of strict scrutiny to all governmental racial classifications.

CONCLUSION

The Supreme Court's decision in *Parents* was not surprising, though not because, as some complain, President Bush appointed Justices Roberts and Alito to the Court. The result was unsurprising because the admissions plans employed by the school districts were, in the words of the Seattle School District's superintendent, "blunt" instruments. They were employed to accomplish only the crudest kind of "diversity": a pre-determined white/non-white ratio (in Seattle) and a black/"other" ratio (in Louisville). The school districts did not seriously consider any alternatives to their racial classifications because they were committed to accomplishing racial balance, not the kind of "genuine" or "holistic" diversity sought by law schools such as the University of Michigan in *Grutter*.

It was risky for the school districts and their allies to rely on decades-old dicta and dissenting opinions. Nothing in the Court's modern equal protection decisions suggested that these plans could have survived strict scrutiny as that test has been repeatedly articulated and applied in numerous other contexts. What is significant about the decision is not so much the doctrine announced—the analysis was straight forward and predictable—but the rejection yet again of the call for a relaxed scrutiny of supposedly benign racial classification schemes. This should give pause to those who might be inclined to look for ways to work around the Constitution's prohibitions, even for what they are convinced are good reasons.

Endnotes

1 ___ U.S. ___ 127 S. Ct. 2378 (2007) ("*Parents*").

2 539 U.S. 306 (2003).

3 539 U.S. 244 (2003). By accepting review of the Sixth Circuit's per curiam decision in *McFarland v. Jefferson Cty. Bd. Of Educ.*, 416 F.2d 513, the Court was also able to address this issue for lower schools as well.

4 The city population is about 70% white and 30% non-white; the school age population—including children who attend private schools—is about 50% white and 50% non-white.

5 In the Sixth Circuit case under review at the same time, the school district had been segregated de jure, but it had recently achieved unitary status.

6 A student was deemed to be of the race specified in her registration materials (and if a parent declined to identify a child's race, the district assigned a race to the child based on a visual inspection of the student or parent).

7 Wash. Rev. Code § 49.60.400 (1999).

8 *Parents,* 137 F. Supp. 2d 1224 (2001).

9 *Parents,* 285 F.3d 1236 (2002)

10 *Parents,* 2002 WL 841345 (9th Cir. Apr. 26, 2002).

11 *Parents,* 294 F.3d 1085 (2002).

12 *See Parents,* 149 Wash. 2d 660, 72 P.3d 151 (2003).

13 *Parents,* 337 F.3d 949, 969 (2004).

14 *Id.*

15 *Id.* at 976.

16 *Id. a*t 989.

17 *Parents,* 426 F.3d 1162 (2005).

18 *See, e.g., id.* at 1179.

19 *See, e.g., id.* at 1184, 1186.

20 *See, e.g., id.* at 1188, 1190-91.

21 *Id.* at 1191-92.

22 *Id.* at 1193.

23 *Id.* at 1195.

24 *Id.* at 1196.

25 *Id.* at 1197, 1199.

26 *Id.* at 1207–09, 1214.

27 *Id.* at 1216-17.

28 *See, e.g., id.* at 1202-03, 1209, 1221.

29 *Id.* at 1212-14.

30 *Id.* at 1210, 1214-16, 1218-20.

31 That criticism seems not to be joined by most of the American public. *See* Aug. 16, 2007, Quinnipiac Univ. Poll, *available at* www.quinnipiac.edu/x1295.xml? Release ID=1093 ("By a 71-24 percent margin, American voters agree with a recent U.S. Supreme Court decision that public schools may not consider an individual's race when deciding which students are assigned to specific schools, according to a Quinnipiac University National Poll released today.").

32 Those making this argument point out that, shortly before Justice O'Connor retired, the Court denied review of a First Circuit case raising similar issues, *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied,* 126 S. Ct. 798 (2005). *See, e.g.,* Comments of Prof. Pamela Karlan at Am. Const. Law Society's Annual S. Ct. Review, 6/28/2004, *available at* www.acslaw.org/node/5088 (calling the decision to review these cases the "clearest example of an agenda—driven supreme court" after Justice O'Connor's retirement.) But as explained below, until the Ninth Circuit's en banc decision, *Comfort* was an outlier, reaching a decision contrary to the overwhelming weight of circuit court authority (including the decision of the Ninth Circuit's three-judge panel that struck down the district's plan).

33 438 U.S. 265 (1978).

34 476 U.S. 267 (1986).

35 488 U.S. 469 (1989).

36 503 U.S. 467 (1992).

37 515 U.S. 200 (1995).

38 *See*, *e.g.*, Johnson v. Board of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (university admissions); Smith v. Univ.of Wash., 233 F.3d 1188 (9th Cir. 2000) (applying *Bakke* to law school admissions); Eisenberg v. Montgomery Cty. Pub. Schs, 197 F.3d 123 (4th Cir. 1999) (transfers to magnet school); Tuttle v. Arlington Cty. Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (admissions to oversubscribed school); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (admission to Boston Latin School); Ho v. San Fran. Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998) (racial quotas for schools); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (radio station hiring); Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) (public contracting); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (college scholarships); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994) (hiring quotas); Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431 (10th Cir. 1990) (employment). Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000), *superseded on other grounds as stated in Zervos v. Verizon N.Y., Inc.,* 252 F.3d 163, 171 n.7 (2d Cir. 2001), held that racial balancing may be used to remedy *de facto* as well as de jure segregation of schools and remanded for trial. *Cf.* Hunter v. Regents of Univ. of Calif., 190 F.3d 1061 (9th Cir. 1999) (allowing racial balancing for research purposes in university laboratory school).

39 *See Wessman; Eisenberg; Tuttle, id.*

40 147 F.3d at 865.

41 *Grutter,* 539 U.S. 306.

42 *Gratz,* 539 U.S. 244.

43 *See, e.g., Grutter*, 539 U.S. at 325; *Gratz,* 539 U.S. at 270-71.

44 539 U.S. at 326-27.

45 *Id.* at 328-30.

46 *Id.* at 329-30 (internal quotation marks and citations omitted).

47 *Id.* at 334-42.

48 *Id.* at 334.

49 *Id.*

50 *Id.* at 336-38.

51 539 U.S. at 270.

52 *Id.* at 271-76.

53 *Parents,* 426 F.3d at 1174-79.

54 *Id.* at 1180-93.

55 416 F.3d 513 (6th Cir. 2005).

56 *Id.* at 840-42.

57 *Id.* at 849-55.

58 *Id.* at 855-62.

59 *Id.* at 862-4.

60 Tharp v. Board of Educ. of N.W. Local Sch. Dist., 2005 WL 2086022 (S.D. Ohio 2005) (citing *Grutter* and the Fourth Circuit's decision in *Eisenberg*, 197 F.3d 123).

61 403 F.3d 246 (5th Cir. 2005).

62 *Id.* at 285-60.

63 *Id.* at 260-61.

64 212 F.3d 738.

65 *Parents,* 127 S. Ct. at 2751-52.

66 *Id.* at 2752-53

67 *Id.* at 2753-54.

68 *Id.*

69 *Id.* at 2759-60.

70 *Id.* at 2760.

71 *Id.* at 2788.

72 *Id.* at 2792-93. Of course, the sorts of general administrative decisions Justice Kennedy was concerned about appear not to involve racial classifications of the kind at issue in the litigation, and no such decisions were before the Court in *Parents*. Any comment by the Court on the legality of such facially race-neutral (but race-conscious) decisions would have been dicta, as *Parents* involved explicit racial classifications by which individual students were admitted or denied admission to a preferred school solely because of skin color, not decisions about where to place a school or what programs to fund.

73 *See, e.g.*, *id.* at 2796-98.

74 *See, Parents,* 127 S. Ct. at 2764 (collecting cases).

75 *Parents,* 426 F.3d at 1216, n. 25.

76 *Grutter,* 539 U.S. at 328-29.

77 *Id.* at 329.

78 *Id.*

79 *See Parents,* 426 F.3d at 1188 ("Implicit in the [*Grutter*] Court's analysis was a measure of deference..."); *id.* at n.33 ("The Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy.")

80 *See id.* at 1214 (emphasis added).

81 *Id.; Parents,* 377 F.3d at 970 n.23.

82 *Parents,* 426 F.3d at 1188 (emphasis added).

83 *See* Johnson v. California, 543 U.S. 499, 125 S. Ct. 1141, 1146 n.1 (2005) ("deference [by the courts in applying strict scrutiny] is fundamentally at odds with our equal protection jurisprudence"); *id.* at 1150 (the Supreme Court "has refused to defer to state officials' judgments on race... where those officials traditionally exercise substantial discretion"); Goss v. Lopez, 419 U.S. 565, 574 (1975) (the "Fourteenth Amendment... protects citizens against the State itself and all of its creatures—Boards of Education not excepted").

84 *See, e.g., Grutter,* 539 U.S. at 326 ("the Fourteenth Amendment 'protect[s] *persons,* not *groups*'") (emphasis in original, quoting *Adarand*, 515 U.S. at 227).

85 *Parents,* 426 F.3d at 1192.

86 *See, e.g., Grutter,* 539 U.S. at 326; Miller v. Johnson, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class." (internal quotation marks omitted)); *Adarand*, 515 U.S. at 230 ("any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."); Loving v. Virginia, 388 U.S. 1 (1967) ("the fact of equal application [of a miscegenation statute] does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.")

87 *See* 426 F.3d at 1195 (Kozinzki, J., concurring).