The intersection between education and race has long sparked emotional. Prior to the Civil War it was uncommon and in some places illegal to educate children who were not white. The Fourteenth Amendment (1868) requiring equal protection of the law for all citizens made it illegal to overtly deny children of color an education or to give them an expressly inferior one. However, the changes were more cosmetic that substantive. In many places, Jim Crow laws legalized accommodations that were supposedly “separate but equal,” but in reality were highly unequal. Blacks were the most numerous victims, but Asian Americans, Hispanics, and others also were relegated to second-class facilities and services. The Supreme Court upheld this fictitious equality in Plessy v. Ferguson (1896), a case that involved railroad car accommodations but also applied to schools and many other points of segregation.

That decision stood until the Supreme Court overturned it in Brown v. Board of Education (1954). Writing for the unanimous court, Chief Justice Earl Warren opined that in “public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

Over the years, the application Brown v. Board of Education slowly eliminated the overtly intentional school segregation, but, like the Fourteenth Amendment, there was a large gap between theoretical importance and practical impact. Two factors limited Brown. One was that some school districts build schools or drew district lines in ways that maintained or created schools that were de facto racially segregated. The second factor involved living patterns. Whites fled cities to the suburbs or sent their children to private schools to avoid racially integrated schools, and urban schools became more and more minority dominated. These population shifts also left cities with diminished tax bases, and the schools declined for want of adequate funding.

In response, the courts moved to a more proactive stance. In a case involving the region centered on Charlotte, North Carolina, where schools remained very segregated and the school board resisted moving to desegregate, a federal judge in 1965 found that the segregation was intentional, ordered that all 105 schools integrate, and specified that children be bussed between schools in necessary. The Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education (1971) unanimously backed
the lower court. Bussing was soon adopted by school boards or ordered by judges in a number of other cities. However, just three years later in Milliken v. Bradley (1974), the Supreme Court ruled narrowly (5 to 4) that court-ordered bussing between Detroit and suburban towns to promote integration was not constitutional because racial imbalances existed based on population patterns and on town lines rather than government decisions. Bussing continued in towns and districts, but not across borders.

Some schools systems and other educational institutions moved voluntarily to integrate. They were sometimes met with suits by parents opposed to sending their children to more distant and/or more integrated schools or by applicants who felt they had been unfairly rejected by a school in favor of a minority student with weaker credentials. In such cases, as with the larger area of affirmative action, the Supreme Court has been less than crystal clear. In one case a white applicant who had been denied admission to the University of California–Davis Medical School filed suit claiming that 16 positions had been set aside for minority students and that he had a better record than some of those 16 students. In Regents of the University of California v. Bakke (1978), the court found for Bakke, saying quotas were unacceptable. But the court’s opinion also noted that race could be a factor, although not the only factor, in admission decisions. The subtlety of this position again came to the fore in two decisions, both involving the University of Michigan. In Grutter v. Bollinger (2003) the court upheld the law school’s affirmative action plan which set a goal of improving diversity but left the specific steps vague. On the same day in Gratz v. Bollinger (2003), however, the court rejected the university’s undergraduate admission plan because it assigned a specific number of points to the application scores of minority students. The court said this approach was not “narrowly tailored” enough, leaving unsaid was exactly that meant.

These decisions set the stage for the debate here. In Seattle, Washington, all students apply to the school, from elementary up, that they wish to attend. If a school has more applicants than places, four criteria are used. The most important is whether a sibling goes to the school. Second is racial/ethnic balance; third is distance from home, and fourth is chance, with a lottery drawing used to determine any last placements. The parents of some students denied their first choice and sent to another school to achieve racial/ethnic balance sued the Seattle schools. The Washington State Supreme Court, the U.S. District Court, and the U.S. Court of Appeals for the Ninth Circuit all found for the school. The parents appealed to the Supreme Court, and it is from arguments in briefs to the court that the following debate is drawn.

**POINTS TO PONDER**

➢ If you were a Supreme Court justice, how would you rule in Parents Involved in Community Schools v. Seattle School District No. 1?
➢ Do you believe the government has a “compelling interest” in trying to achieve more integrated schools?
➢ If you agree that schools should be integrated, and disagree with Seattle’s plan, what would you do?
Assigning Students to Schools Based on Race: Justified

NATIONAL EDUCATION ASSOCIATION, ET AL.

The National Education Association (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations at the state and local levels, including the state and local education associations that have joined in this brief. One of NEA’s core principles is that “great public schools are a basic right for every child.” To implement this principle, the NEA Representative Assembly, which is NEA’s highest governing body, has adopted a resolution declaring that a “racially diverse student population is essential for all elementary/secondary schools” because it “promote[s] racial acceptance, improve[s] academic performance, and foster[s] a robust exchange of ideas.” These are likewise the views of the NEA affiliates that have joined in this brief.

The American Federation of Teachers (AFT) represents over 1.3 million members, the majority of whom work in our nation’s urban public schools. Dating back to the Court’s historic desegregation decision in Brown v. Board of Education (1954), in which the AFT filed an amicus curiae brief supporting the plaintiffs, the AFT has had an enduring commitment to educational equality for all, regardless of race. That interest continues in the present cases in which core questions of integration, and educational and economic opportunity are presented.

People For the American Way Foundation (People For) is a nonpartisan, education-oriented, citizens’ organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation’s heritage of tolerance, pluralism, and liberty. For now has more than 700,000 members and supporters nationwide. People For continues to seek to combat discrimination and its effects and to promote quality public education, including classroom diversity, through educational programs and participation in important litigation such as these cases.

I. A SCHOOL DISTRICT’S EDUCATIONAL POLICY JUDGMENT THAT TAKING RACE INTO ACCOUNT IN MAKING STUDENT ASSIGNMENTS IN ORDER TO ACHIEVE RACIALLY INTEGRATED PUBLIC ELEMENTARY/SECONDARY SCHOOLS, WILL ALLOW IT TO FULFILL ITS MISSION, SHOULD BE ACCORDED JUDICIAL DEFERENCE.

As this Court repeatedly has recognized, public elementary/secondary schools serve as the critical foundation for our democratic society, providing students with the education necessary…to participate effectively and intelligently in our political system, and teaching them how to be self-reliant and self-sufficient participants in society. The public schools not only instill in the 49 million students who attend them the values on which our society rests, but they provide those students with the skills and knowledge necessary to realize their full potential.

If a school district concludes that it cannot accomplish these two important interrelated objectives without racially integrated public elementary/secondary schools, and that it cannot achieve such schools without taking race into account in making student assignments, the federal courts should defer to that educational policy judgment.
Doing so would acknowledge that, under our federal system, the responsibility for providing public education rests primarily with states and school districts, and would accord with this Court's long-standing practice of giving deference to the educational policy judgment of school districts as to how best to fulfill their mission.

This Court's recognition [in *Swann v. Charlotte-Mecklenburg Board of Education* (1971)] that school districts have “broad power” “to formulate and implement educational policy”—including an educational policy that takes race into account in making student assignments in order to achieve racially integrated public elementary/secondary schools—rests on a firm foundation. Under our federal system, providing public education has always been primarily the responsibility of states and school districts—constituting “perhaps the most important function of state and local governments” [as this Court said in *Brown v. Board of Education* (1954)].

The educational systems that states and school districts have developed under this federal system are complex and varied. While every state constitution obligates the state legislature to provide a public education system, and state and local revenues provide the vast bulk of public education funding, the resulting state educational systems vary widely in their legal obligations, governance, and policies. State constitutions, for example, contain markedly different language regarding the type of public education that must be provided by the state, which has been interpreted to markedly different ends. Most to the point for present purposes, some states have interpreted their constitutional obligation to provide a public education system to encompass the duty to provide an integrated system by remedying not just de jure, but also de facto, racial segregation in the schools.

When states and school districts make the educational policy judgment that racially integrated public elementary/secondary schools are necessary for them to fulfill their mission, it is appropriate under our federal system for the federal courts to defer to that judgment. As this Court has advised, “federal courts should not ordinarily ‘intervene in the resolution of conflicts which arise in the daily operation of school systems.’” Such matters generally fall within “the comprehensive authority of the States and of school officials…to prescribe and control conduct in the schools.” Putting that presumption into practice, this Court has upheld various state and school district actions against constitutional challenges, even though the challenged conduct would have been unconstitutional if it had occurred outside the school context.

The same reasoning has led this Court to direct federal courts to terminate school desegregation decrees “at the earliest practicable date” in order to return schools “to the control of local authorities,” and thereby “restore their true accountability in our governmental system.” In doing so, this Court has made clear that the termination of such desegregation decrees does not mean “that the potential for discrimination and racial hostility” no longer exists, but that each state and school district should decide how to “ensure that such forces do not shape or control the policies of its school systems.”

These precedents counsel that when states and school districts decide, as a matter of educational policy, that racially integrated schools are a key component of the education that they seek to provide, the federal courts should be reluctant to second-guess that decision. In the words of this Court [in *San Antonio Independent School District v. Rodriguez* (1973),] “Education…presents a myriad of ‘intractable economic, social, and even philosophical problems.’” “The very complexity of the problems” involved “suggests that ‘there will be more than one constitutionally permissible method of solving them.’”
In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

II. A SUBSTANTIAL BODY OF EMPIRICAL EVIDENCE DEMONSTRATES THAT RACIALLY INTEGRATED PUBLIC ELEMENTARY/SECONDARY SCHOOLS SERVE A COMPELLING GOVERNMENTAL INTEREST BY PROVIDING SIGNIFICANT SOCIETAL AND EDUCATIONAL BENEFITS TO STUDENTS OF ALL RACES.

In concluding that they could not adequately fulfill their mission without racially integrated public elementary/secondary schools, respondent school districts were on very firm ground. A substantial body of empirical evidence demonstrates that such schools provide significant societal and educational benefits to students of all races—and, accordingly, serve a compelling governmental interest. We survey that empirical evidence below.

A. The Societal Benefits of Racially Integrated Schools

Because public elementary/secondary schools are an important socializing institution, imparting those shared values through which social order and stability are maintained, racially integrated schools provide children of all races with the opportunity to interact with one another on equal terms. Such contact “teach[es] members of the racial majority ‘to live in harmony and mutual respect’ with children of minority heritage” and provides “minority children” with the opportunity to “learn to function in—and [be] fully accepted by—the larger community” [as this Court said in *Washington v. Seattle School District No. 1* (1982)].

In contrast, when children attend racially and ethnically isolated schools, these “shared values” are jeopardized. [As the New Jersey Supreme Court said in one case,] “If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society.”

The commonsense assessment that interracial contact reduces racial stereotypes and prejudice, reflected in these decisions, is supported by substantial empirical evidence.

1. The theory that interracial contact reduces racial stereotypes and prejudice was articulated by Gordon W. Allport in his seminal work, *The Nature of Prejudice*. Allport posited that racial isolation breeds stereotypes and prejudice, and that “equal status contact between majority and minority groups in the pursuit of common goals” is a critical ingredient in improving relations between members of those groups, especially if such contact “is of a sort that leads to the perception of common interests and common humanity between members of the two groups.”

Subsequent empirical research has repeatedly and consistently confirmed that interracial contact combats stereotypes and prejudice, and makes individuals more comfortable relating to members of other racial groups. This research makes plain, however, that the conditions of contact are critical to its impact.
In the first place, contact that occurs during key periods of personal development—most importantly during a child’s formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed. That is so because “[t]he early school years are crucial for the formation of the child’s own racial identity as well as an understanding of prejudice and fairness.” Once the destructive “habit” of “racial stereotyping” is learned, it is difficult to break, making it “more difficult to teach racial tolerance to college-age students” than to public elementary/secondary school students.

So too, contact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals of another race, because it forces people to “decategorize” those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group. While there clearly is no “magic number” of students of each racial subgroup required, to realize the greatest benefits of contact a school’s population should be within the range of the demographic breakdown of the school district as a whole, so as to prevent students in minority groups from becoming isolated and shut out of the school’s mainstream.

Finally, contact must be among individuals of equal status—e.g., between friends, teammates or classmates—lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.

Given these findings, it is not surprising that interracial cooperative contact among students of different races in public elementary/secondary schools—our most powerful agency for promoting cohesion among a heterogeneous democratic people—has repeatedly been linked with increased levels of tolerance for children of other races, and increased likelihood that children of different races will become and remain friends.

The foregoing evidence reflects the reality that stereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. The personal connections forged between students of disparate racial backgrounds challenge race-based assumptions they might otherwise develop about one another.

Illustrating that point in stark terms, three recent studies demonstrate a marked difference between the racial preconceptions of students educated in racially integrated schools versus those educated in racially homogenous schools. In each study, first and fourth graders were shown pictures of two children (one black and one white) in an ambiguous situation in which one could, but need not, attribute negative intentions to one of the children depicted (e.g., a child standing behind a swing could be viewed as having pushed the child in front of him to the ground or could be viewed as simply standing next to that child). The studies found that when white, black, Latino, and Asian children, who attended racially integrated schools, were asked what happened in these pictures their responses displayed no “implicit intergroup biases”; evidencing neither an “effect for the race of the transgressor” in the picture nor for the race of the study participant. In contrast, white students who attended schools in which over 85% of the students were white “displayed racial bias in their interpretations of [the same] ambiguous interracial encounters,” and that bias increased with age.

The fact of the matter is that one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum—confirming the view that without meaningful social contact, talk of tolerance and cooperation is nothing but an abstraction.
Where school districts are allowed to take the steps necessary to ensure that students of different races have a meaningful opportunity to interact in the schools, a remarkable transformation can take place, replacing racial stereotypes, hostility and tension with racial and ethnic tolerance and an emerging sense of community that crosses racial barriers. Such schools allow for the formation of “close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,” and which social scientists have long viewed “as one of most potent agents for ethnic change.”

As the foregoing review of the empirical evidence indicates, cooperative interracial contact reduces racial stereotypes and prejudice by teaching students that individuals hold a multitude of different viewpoints, experiences and attitudes, which cannot be meaningfully captured by reducing individuals to racial categories. By providing students with the opportunity to individualize others with whom they interact, schools also provide students with the opportunity to identify the concerns they share in common with students of other races.

In the end, this process—far from resulting in the racial balkanization that petitioners evoke—leads to precisely the opposite result. As one researcher explained, cooperative interaction between different groups “induces the members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from us and them to a more inclusive we.”

2. These consequences of racial diversity in our public elementary/secondary schools offer enduring benefits to our multiracial, democratic society and its citizens. “As adults [students who learn to interact with individuals of other races in elementary/secondary school] more frequently live in desegregated neighborhoods, have children who attend desegregated schools, and have close friends of the other race[s] than do [o] adults...who had attended segregated schools.” They are also more likely as adults to interact and work with individuals of other races than are students educated in racially homogeneous schools.

Several comprehensive studies of the racial attitudes of high school students, who were educated in integrated schools, support these conclusions. These studies demonstrate that racially integrated schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences. For example, a survey of 242 high school graduates from the Class of 1980, reports that the graduates—even twenty years after the fact—viewed as “critically important” to their ability to interact cross-racially without fear or harmful preconceptions, their “daily exposure to people of other racial groups in their early years in K–12 education—at a time when they were forming their beliefs about the world.”

In sum, students who attend racially integrated public elementary/secondary schools are far more likely in later life to function effectively in a variety of contexts—including as members of a racially diverse and non-discriminatory workforce. Racially integrated public elementary/secondary schools produce these long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, this evidence demonstrates that by closing the door on racial diversity in the schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.
B. The Educational Benefits of Racially Integrated Schools

Teaching students to individualize the persons with whom they are dealing and identify common ground is of great consequence not only to the students’ development as citizens in a multiracial democratic society, but also to their intellectual development and academic success.

1. Social scientists have reported that heterogeneous groups—including groups that differ only in the participants’ races—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, and/or values. That research reflects the fact that due to the continuing corrosive effect of racism in our society, people of different races often have very different life experiences and viewpoints. Reflecting that reality, high school students who are asked whether or not racial integration has enhanced their educational experience respond in the affirmative in overwhelming numbers.

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous. The students were asked to describe what the boys had done and predict what each would do in various situations. White students who had had the opportunity for more interracial classroom contact

(1) described [the boys] in ways that were more differentiated, more integrated, and more multivalent; (2) made prediction of the future behavior of [the boys] that were less absolute; (3) inferred the presence of attributes in [the boys] with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[a]nt.

The white students’ greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the black boy but to their description of the white boy as well, “suggesting that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general.”

These studies corroborate the evidence credited by the court below in the Seattle School District No. 1 case, linking racial diversity in schools to “improved critical thinking skills—the ability to both understand and challenge views which are different from [one’s] own.”

2. Further support for the proposition that racial integration yields educational benefits is found in the voluminous social science literature analyzing the impact of school desegregation on student performance. Although not every study in this area has reached the same conclusion, once one accounts for methodological differences a broad consensus emerges that school desegregation has resulted in tangible and lasting improvements in black student academic achievement. As one of the definitive reviews of the literature concludes, desegregation has been positively linked to increases in black student achievement levels, generating gains on average of 0.3 of a grade year in student performance at the elementary/secondary school level, and gains on average of 0.57 of a grade year at the kindergarten level.
More recent studies also have demonstrated positive links between black students’ test achievement and their schools’ racial diversity, as well as between school desegregation and promotion and dropout rates, particularly for minority students. Additional evidence to the same effect is provided by school districts that have pursued voluntary integration efforts. In Lynn, Massachusetts, for example, the voluntary integration plan has resulted in “higher [school] attendance rates, declining suspension rates, a safer environment, and improved standardized test scores.”

There is also a small but robust group of studies linking black student enrollment in predominantly white schools to significant gains in those students’ long-term educational achievement. Black students enrolled in predominantly white high schools are more likely than black students enrolled in predominantly black high schools to graduate, more likely than those students to go on to higher education, and more likely when they do so to pursue higher-paying occupations that traditionally have been dominated by whites.

The sum of the matter is this: because racially integrated public elementary/secondary schools provide significant societal and educational benefits, federal courts should allow school districts some room to consider race in making student assignments when those school districts determine that doing so is necessary to achieve and/or maintain such schools. This is not an illegitimate use of race, but is amply justified by the compelling governmental interest in educating all of our children to function effectively in a multiracial, democratic society and realize their full intellectual and academic potential.
Assigning Students to Schools Based on Race: Unacceptable

ASIAN AMERICAN LEGAL FOUNDATION

STATEMENT OF INTEREST

The Asian American Legal Foundation (“AALF”), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans. Americans of Asian origin have a particular interest in use of race in K–12 school admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned “diversity” programs. Despite the advances our society has made with respect to racial equality, discriminatory treatment of Asian Americans finds resurgence in the racial balancing schemes at issue here which, even if inadvertently, are used to exclude Asian Americans from public schools. Students of Asian American descent living in Seattle are subject to the school districts’ racial balancing plans.

AALF’s constituents have also suffered from similar racial classification in the San Francisco, California public school system. In Ho v. San Francisco Unified School District [before the 9th Circuit Court of Appeals, 1998], San Francisco’s schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas in the San Francisco public school system. After five years of litigation, and after the court found [that the school district] had almost no chance of prevailing, [it] agreed to modify the consent decree and to cease the use of race.

AALF members organized and supported the Ho litigation from the outset. Many of the same issues are presently before this Court in [this case]. As in Ho, the Seattle school districts is engaged in racial balancing to prevent “racial isolation.” [It is] similarly denying schoolchildren access to public schools and programs solely because of their race.

Significantly, in the courts below, [Seattle has] relied on the Ninth Circuit Court of Appeals’ rulings in Ho to argue that the racial assignment schemes at issue here are illegal. A decision by this Court upholding the use of race in the Seattle school district would have implications for schoolchildren in all of the nation’s public schools. It would endanger the relief secured in Ho and could erase the judicial benchmark against K–12 racial balancing schemes established by the Ho litigation.

AALF submits that the long and tragic history of discrimination against Chinese Americans in this country, the Chinese American experience in the Ho case, and present, ongoing discrimination faced by members of this historically oppressed group, provide this Court with compelling reasons why it should not allow the equal protection rights of individuals, especially innocent schoolchildren, to be eroded in the name of diversity or social engineering.

ARGUMENT

I. USE OF RACE IS ODIOUS AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE, NOT TRAMMEL RIGHTS.

A. A decision allowing school officials to classify students by race would encourage renewed discrimination against San Francisco’s Chinese American schoolchildren.
This Court has repeatedly warned [in various decisions], “Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality” [and that] use of race “threatens to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.”

The Seattle school district’s use of race in admissions is dangerously unbounded by any remedial purpose, instead resting on the school officials’ notion of proper racial balance. [Seattle school officials] argue the racial mix they seek will provide benefits that justify the sacrifices of those injured by their use of race. Whatever the benefits of this skin-deep diversity, it comes at too heavy a price. Any decision allowing K–12 school officials to classify students by race at their whim would have a far-reaching and chilling effect on individual rights in schools across the nation.

In particular, in a relevant case that AALF respectfully brings to the Court’s attention, such a decision would likely result in San Francisco’s schoolchildren of Chinese descent again facing race-based discrimination in the city’s public school system.

In \textit{Ho v. San Francisco Unified School District}, which began in 1994, San Francisco’s Chinese American schoolchildren were forced to turn to the courts for redress of their rights, in order to halt the school district’s policy of classifying and assigning them to the city’s K–12 schools on the basis of their race.

Similar to the objectives of the Seattle plan, the San Francisco school district’s plan sought “to eliminate racial/ethnic segregation or identifiability in any school, classroom, or program, and to achieve throughout the system the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population.” This was supposed to produce “academic excellence.”

Under the admissions program, nine ethnic groups were arbitrarily defined, including “Chinese.” Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. The promotion of racial diversity, and not the remediation of past racial discrimination, was the only real purpose. As described by the district court, “This plan is designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group.”

By the time of the \textit{Ho} challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. Nevertheless, despite the numerous racial categories, no provision was made for the growing number of children of mixed race or for those children who preferred not to declare their race. They were not given the option of refusal [to choose a racial classification].

B. The experiences of the plaintiffs and class in \textit{Ho} demonstrate that mandated diversity harms individuals, even members of groups that have historically suffered discrimination.

In \textit{Ho}, as in the instant cases, the school district’s racial balancing plan affected students of different races in different ways. However, as previously stated, in San Francisco, the burden fell heaviest on students identified as “Chinese.” With a long history in San Francisco, over the years, Chinese Americans had come to constitute the city’s largest identifiable ethnic group. See Levine, supra, at 55–56. Accordingly, in the San Francisco school district’s student assignment process, a child identified as Chinese
was most likely to be “capped out”—that is, barred because the child’s racial quota was exceeded—at desired schools and forced to attend a non-chosen school, often far from his or her neighborhood.

At Lowell High School, an academic “alternative” high school that admitted students from middle and junior high schools based on a numerical index derived from a combination of grades and standardized test results, the school district’s mandated diversity was maintained by requiring Chinese applicants to achieve numerically higher index scores compared to applicants of all other racial or ethnic groups, including White, Japanese, and Korean, in order to gain admission. Also, even where preferences were not required to maintain the district’s racial caps, the district nevertheless adopted a policy of granting preferences to applicants classified as “Hispanic” or “African American.”

The parents of affected children and other concerned Chinese Americans, including officials of the Chinese American Democratic Club, sought relief from the school district, but the unlawful discrimination continued. Chinese American parents’ frustration mounted as their children were turned away from schools for no other reason than that there were too many Chinese.

On July 11, 1994, the *Ho* class action was filed by three Chinese American schoolchildren denied admission to city schools because of their race, suing on behalf of themselves and all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to attend public schools of the school district.

The named plaintiffs’ situations amply illustrate the discrimination meted out to Chinese American schoolchildren by school officials:

- **Brian Ho** was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of “Chinese” schoolchildren. He was assigned to a school in another neighborhood.

- **Patrick Wong**, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because such schools had also accepted the maximum number of schoolchildren of Chinese descent. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were “filled” even though spaces for applicants of other racial or ethnic groups were still available.

- The family of **Hillary Chen**, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of Chinese American schoolchildren.

C. A settlement ending racial balancing was reached in *Ho* only because the law was clear that the school district’s goal of diversity could not justify its use of race.

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city’s schools and
(ii) end the mandatory requirement of self-classification by race on student enrollment forms.

Beyond question, settlement in *Ho* would never have been reached if the district court and the Ninth Circuit had not emphasized to [San Francisco] that (1) under this Court’s decisions, the school district’s goal of diversity did not justify its use of race in accepting students to K–12 schools, and (2) at trial the school district would have to prove a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry.

Thus, key to the *Ho* plaintiffs’ vindication of their constitutional rights was the recognition by the district court, and ultimately the school district, that, under the strict scrutiny required by this Court’s precedents, racial balancing could not be used to justify the district’s use of race, no matter how well-intentioned the district’s goals.

If this Court, in deciding [this case], allows Seattle to continue to classify K–12 students by race, there is a very real danger that the San Francisco Unified School District will again try to implement a race-based student assignment program, in spite of the *Ho* settlement and in spite of a new state law prohibiting use of race. Indeed, San Francisco school officials have already announced they will move ahead with plans to reintroduce race as a factor in enrollments.

If the Seattle racial balancing scheme is upheld, it is likely that other school districts around the country will similarly subject millions of other schoolchildren to race-balancing programs. While racial balancing plans would victimize schoolchildren of all races, their impact on the members of ethnic groups historically victimized by state-mandated discrimination would be a dark stain on American jurisprudence. If Seattle’s policies are upheld, the doctrine of “different but equal” at the heart of Seattle’s arguments will not be viewed by future generations any more favorably than is today the notion of “separate but equal” finally rejected by this Court in *Brown v. Board of Education* (1954).

II. HISTORICALLY, THE STATE’S DISCRETIONARY USE OF RACE HAS NEVER BEEN JUSTIFIED BY A COMPPELLING GOVERNMENT PURPOSE.

A. The experience of Chinese Americans amply illustrates that, whatever the excuse of the times, history will find that it was wrong to treat individuals as faceless members of a “race.”

The experience of Chinese Americans in this country illustrates that, whatever the justification given by state officials at the time, history will in the end find that group identity should never be elevated above individual rights. The struggle by Chinese American schoolchildren in *Ho* against race-based treatment was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, particularly in San Francisco.

Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers solely because of their race. Time and again, Chinese Americans received equal treatment only after appealing to the federal judiciary for the protections guaranteed individuals by the United States Constitution.

For example, in 1879 a district court invalidated San Francisco’s infamous “Queue Ordinance” on equal protection grounds. In 1880, the court declared unconstitutional
a provision of California’s 1879 constitution that forbade corporations and municipalities from hiring Chinese. [And in 1886], this Court ruled that Chinese were “persons” under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.

Chinese American schoolchildren were long denied access to the public schools. In 1885, [a federal district] court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to “Mongolian” children. In response, the California legislature authorized separate “Chinese” schools to which Chinese American schoolchildren were restricted by law until well into the twentieth century. [Thus,] even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of “separate but equal” jurisprudence as it related to education.

In all the historical instances in which the state used race to classify Chinese Americans, the state officials articulated reasons—exactly as they do here—why such use of race was necessary or advanced legitimate societal goals. In every instance, the racial classification scheme was later acknowledged to have been wrong and an impermissible infringement of individual rights.

B. Seattle’s classification of schoolchildren by race is unlikely to produce benefits but is certain to cause harm.

The school district’s classification of children by race teaches them precisely the wrong lessons, and can only cause harm. As this Court has explained, “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities.”

In Ho, as here, the school officials claimed that classifying students by race saved them from “racial isolation,” and would bring them educational benefits. The decree’s two goals were to “eliminate racial or ethnic segregation” and to “achieve academic excellence” throughout the school district, by which it meant “raising the academic performance of black and Hispanic students.”

After the filing of the Ho case, however, even proponents of San Francisco’s racial balancing scheme were forced to admit that no discernable benefits had been produced. One of the more telling indictments was issued by a grand jury convened to investigate the success of the program. After extensive investigation, including analysis of collected data and reports by Professor Gary Orfield, a court-appointed education expert, the grand jury concluded that racial balancing had achieved nothing but racial balancing. [The grand jury found,] “Fourteen years of experience [with the city’s school plan] have established that while it has met its goal of de facto desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups.” The grand jury in particular found that racial balancing had not worked for Hispanic and African American students, whose academic scores were “lower than those of comparable students around the country [and, therefore the program] is not working, at least for the substantial African American and Hispanic groups.”

The grand jury found that what was needed was, not more racial diversity, but rather more family involvement. The grand jury’s findings are consistent with the long-standing consensus of experts on the subject: “The legendary Coleman Report of the 1960s found that after the influence of the family, the socioeconomic status of a school is the single most important determinant of a student’s academic success.”
While mandated racial balancing in San Francisco’s schools did not produce discernable benefits, it caused obvious harm. San Francisco schoolchildren were stigmatized by the school district’s use of race. Newspapers widely reported the stigmatization felt by children targeted by the racial quotas. As stated by the parent of one “Chinese” youth turned away because of his ethnicity, “He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son’s hopes denied in this way at the age of 14?”

Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong. Thus, in San Francisco, mandated diversity in K–12 schools produced no educational benefits. Instead, it taught schoolchildren that they were categorized and limited by their race. There is no reason to suppose that in Seattle the result could be any less damaging.

C. The argument that students are not really burdened because their “race” is already “overrepresented” and they are placed in school somewhere is a modern-day perversion of the “separate but equal” doctrine.

There is no merit to the suggestion that students in Seattle are somehow not really burdened because their “race” is “overrepresented” in their chosen school and, in the end, they are assigned to a comparable school somewhere in the district.

First, the record shows that the schools at issue are not equal, but vary widely in desirability. [Second,] underlying the arguments of those who favor racial balancing is the mistaken assumption that it is moral to turn away an individual because that person’s “group” is already “overrepresented.” This kind of thinking invariably is used to oppress individuals, diminishing them as persons in proportion to the perceived numbers of their “group.” It also invariably insures that the burden will fall heaviest on the poorer or weaker members of the disfavored group.

In one cautionary example from higher education, in the 1920s, Harvard College and other prominent universities reacted to the perceived “over-representation” of Jews in their student bodies by setting up informal quotas that persisted through the 1950s.

These institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. “Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a ‘benign’ cap, which would help the University get beyond race.” In *Ho*, a similar sentiment was voiced—that Chinese schoolchildren already had “enough” places in the cities’ schools, and that individuals who were turned away had no right to complain.

Unfortunately, the same arguments are again used today to condone turning away Asian American individuals from the nation’s universities. [One news report indicated] that former President Clinton commented favorably on race-based admissions, saying that otherwise, “there are universities in California that could fill their entire freshman classes with nothing but Asian Americans.”

As history shows, artificial attempts to mandate a racially diverse student body invariably lead to oppression. Here, as in *Ho*, the Seattle school district oppresses individuals by requiring them to be viewed and treated only as faceless members of the racial groups into which they are classified. Such classification of schoolchildren by definition causes injury.
D. Particularly suspect are declarations by experts and other luminaries that social agendas or national necessity require classifying citizens by race.

The Court should be wary of Seattle’s attempt to do an end run around its need for a compelling state interest to justify use of race by proffering statements by government officials, experts and other luminaries that classification by race is necessary to advance societal and other goals. Where such self-serving statements have in the past been accepted by courts, they have consistently failed to pass the test of time.

In Plessy v. Ferguson (1896) the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of “distinctions based upon color.” The lone dissenter, Justice John Harlan, wrote: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”

In Brown v. Board of Education (1954), this Court properly rejected arguments by state officials that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding “psychological knowledge” made in Plessy v. Ferguson, the Court found that use of race produces a “sense of inferiority.” “We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place.”

Today, it is universally acknowledged that the [President Franklin D.] Roosevelt administration and military authorities infringed the constitutional rights of Japanese Americans when, during World War II, the government placed them under curfew, then removed them from their West Coast homes and placed them in internment camps. Yet, at the time, when the affected citizens pled with the courts to uphold their constitutional rights, the courts passively accepted statements by administration and military officials that such use of race was necessary in the national interest. [For example,] in Korematsu v. United States (1944), this Court upheld the conviction of an American citizen of Japanese descent, who had violated an exclusion order by remaining in his San Leandro, California home, rather than go to an internment camp. The courts at all levels deferred to declarations by military authorities that such discrimination by race was necessary to advance compelling government interests.

Much later, of course, it was discovered that government and military figures had misled the courts; and that the government had known that there was no national necessity requiring the use of race. The 1980 [U.S.] Commission on Wartime Relocation and Internment of Civilians found that the curfew and exclusion orders had been motivated by “racism” and “hysteria” and not “military necessity.”

Here, also, this Court should be wary of the attempts by Seattle and those who defend it—no matter how illustrious their credentials or purportedly noble their goals—to manufacture a compelling state interest to excuse the use of race. If history teaches any lessons, it is that generally, proffered justifications for the state’s use of race will, in the end, be found to be hollow.

E. Seattle schools impermissibly use race as the sole determinant of “diversity.”

Seattle’s admissions programs are unconstitutional because they use race as the sole measure of diversity, and thus cannot be narrowly tailored. As this Court’s precedents teach, race-neutral alternatives must be used, if available. As Justice Lewis F. Powell stated in Regents of the University of California v. Bakke (1978), “Preferring members of any
one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” As this Court explained in Grutter v. Bollinger (2003), if an admissions plan assures some specified percentage of a particular group merely because of its race, that “would amount to outright racial balancing, which is patently unconstitutional.”

There are many sound reasons for foregoing the uneasy proxy of race in determining diversity. Even where generalizations can be made for a group—always a dangerous practice—common sense tells us they are never true of all individuals in the group. Race-conscious programs foster unfortunate stereotypes, detrimental even to members of those ethnic groups favored by the program.

In Grutter, this Court held that an institution using race must demonstrate operation of an admission program that evaluates an applicant as “an individual,” without race as the “defining” feature. This Court found the Michigan law school plan constitutional only because, rather than considering race alone in evaluating “diversity,” the law school “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” Applying that rule in Gratz v. Bollinger (2003), the Court found the college admission plan at issue there unconstitutional because, instead of considering the totality of the diversity the applicant had to offer, it assigned automatic points for race.

The Seattle [schools] have failed to show that they review applicants holistically. Instead, they openly use race as the sole criterion of diversity. [Seattle officials] completely ignore all other measures of diversity they could have used. Exactly as did the San Francisco school district in Ho, Seattle blindly seeks nothing more than racial “percentages” reflecting their view of diversity. Thus, because Seattle schools classify students by race but have failed to implement programs that consider the totality of the person and not just race, the admission programs at issue cannot be narrowly tailored, and are unconstitutional.

CONCLUSION

The Seattle school district’s use of race is merely the latest chapter in the long history of state attempts to use race in the public school system. Until recently, many states did not allow “Black” and “Yellow” schoolchildren to attend “White” schools. In the 19th century, children of Chinese descent were denied access to San Francisco’s schools. A hundred years later, in the Ho case, Chinese Americans were again singled out for unequal treatment. Now, school officials in Seattle and Jefferson County seek to turn the clock back so that, once again, schoolchildren will be denied access to educational opportunities solely because of their race or ethnicity.

If nothing else, these experiences demonstrate the continuing danger of allowing the state to use race except in the most limited circumstances. There simply can be no compelling interest present in K–12 schools—schools that American children are compelled by law to attend—to justify the use of racial classifications. The desire for a “diverse” student body cannot provide such a compelling interest—and certainly not when, as here, diversity is measured only by race.

Any discretionary use of race by K–12 school officials inevitably results, as in Ho and the instant cases, in the stigmatization of children. And, as such use of race is unbounded by any fixed, remedial goal with respect to scope and time, it will, if permitted, continue without end, to the detriment of our society.
Therefore, Seattle’s race-conscious admissions programs further no compelling government interest, are not narrowly tailored, and should be found to violate the petitioners’ Fourteenth Amendment right to the equal protection of the laws.
THE CONTINUING DEBATE:
Assigning Students to Schools Based on Race

What Is New
In 2007, the Supreme Court overturned the decision of the district and appeals courts and rule against Seattle’s plan by a narrow 5 to 4 vote. When asked whether they agreed with the court’s decision, 71% of Americans said that they did. Although the decision was a blow to those who believe that it is vital to achieve racially integrated schools whatever the cause of imbalances may be. Nevertheless, the court’s decision almost certainly did not end the controversy because while 5 justices found against Seattle, only four joined Chief Justice John Roberts’ opinion that Seattle had failed to show that achieving racial diversity in its schools was a compelling interest. Four other justices dissented that it was a compelling interest, while the fifth and deciding judge, Anthony Kennedy, voted against the Seattle plan as too mechanistic. He also rejected the chief justice’s opinion as “an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.” Kennedy went on to write, “To the extent the [chief justice’s] opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.” The implication is that a different approach to diversity might win Kennedy’s vote and shift the 5 to 4 vote in the opposite direction.

Where to Find More
A good source of data is the National Center of Education Statistics at nces.ed.gov. Gary Orfield, a professor of education and social policy at Harvard University is mentioned in the readings as an expert in the field. More on him and his work can be found at www.harvardscience.harvard.edu/directory/researchers/gary-orefield. Among other works, consult Orfield’s and Chungmei Lee’s, Why Segregation Matters: Poverty and Educational Inequality (Civil Right Project, Harvard University, 2005). For a study suggesting that school integration alone is likely to have only a limited impact on student achievement is Russell Rumberger and Gregory J. Palardy, “Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School,” The Teachers College Record (2005). A study of the contest over busing is M. Stephen Weatherford, “The Politics of School Bussing: Contextual Effects and Community Polarization,” Journal of Politics (2010).

What More to Do
Start with data from the National Center of Education Statistics that indicate that about one-third of all pubic schools are “minority-majority,” those in which minority students account for more than 50% of enrollment. These schools include 70% of black students and 37% of Latino students. The percentages are growing. Moreover, half all minority students go to schools considered poor, where as only 18% of white students go to these schools. Debate whether this pattern is acceptable and what, if anything, to do about it.