

Grutter Goes Back to School: Revisiting Ho v. San Francisco Unified School District

Ted Jou
University of Virginia School of Law
June 2005

Introduction

When the University of Michigan affirmative action cases reached the Supreme Court in 2003, a vast array of organizations filed amici briefs. One of these groups was the National Asian Pacific American Legal Consortium, who filed a brief in support of the defendants. The NAPALC stance was endorsed by the Asian Law Caucus, the Asian Pacific American Legal Center, and more than twenty other APA organizations that supported affirmative action.¹ However, a small group of APA individuals, calling themselves the Asian American Legal Foundation, filed a brief for the plaintiffs, opposing affirmative action.²

The AALF brief was written by lawyers who had represented Chinese-American schoolchildren in an Equal Protection challenge against San Francisco public schools. In *Ho v. San Francisco Unified School District*, these lawyers were successful in ending the use of race in public school enrollment,³ and they likely sought to build on that success by making *Ho* the centerpiece of their amicus brief. At the beginning of their argument, they warn that “[a]ny decision upholding diversity as a compelling government interest justifying the use of race would have a chilling effect on individual rights ... the influence of such a decision would be felt all the way down to the elementary-school and kindergarten level.”⁴

In June 2005, this prediction came true when the First Circuit approved the use of race in a voluntary transfer policy in Lynn, Massachusetts.⁵ However, *Grutter* has not had quite the chilling effect predicted by the AALF. In fact, prior to *Lynn School Committee*, the only two Circuit Courts to consider the use of race at the K-12 level had struck down voluntary integration programs.⁶ This note will analyze these Circuit Court decisions and the diversity interest approved in *Grutter*. Part I will place the *Ho* decision in the context of voluntary integration cases before and after *Grutter*. Part II will argue that the decision in *Lynn School Committee*, upholding the limited use of race in public school enrollment, was the correct interpretation of *Grutter*. At the end of this note, the *Lynn* approach will be applied to the facts in *Ho*.

¹ Brief of Amici Curiae for National Asian Pacific American Legal Consortium et al., 17-24 (NAPALC Brief), *Grutter v. Bollinger*, 539 U.S. 306 (2003).

² Brief of Amicus Curiae for the Asian American Legal Foundation (AALF Brief), *Grutter*, 539 U.S. 306 (2003).

³ *Ho v. San Francisco Unified School District*, 147 F.3d 854 (9th Cir. 1998); *Ho*, 59 F.Supp. 2d 1021 (N.D.Cal. 1999) (approving settlement).

⁴ AALF Brief at 9.

⁵ *Comfort v. Lynn School Committee*, 2005 U.S.App. LEXIS 11755 (1st Cir. 2005).

⁶ *Parents Involved in Community Schools v. Seattle School District, No. 1*, 377 F.3d 949 (9th Cir. 2004); *Cavalier ex rel. Cavalier v. Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005).

I. Voluntary Integration Before and After *Grutter*

In the decades after *Brown v. Board of Education*, school districts across the country faced mandatory desegregation orders from federal courts. In more recent times, a vast majority of schools have been released from these court orders, but many districts have continued using desegregation policies to promote diversity and mitigate the effect of residential segregation. These voluntary integration policies are the modern-day legacies of *Brown*. In addition to creating residential zones that maximize diversity in schools, school districts have implemented transfer policies, created magnet schools, and implemented controlled choice and open enrollment policies that distribute students across multiple schools. In the years leading up to *Grutter*, voluntary integration policies that considered race explicitly were often struck down in federal courts.⁷ One of these cases was *Ho v. San Francisco Unified School District*.

A. *Ho v. San Francisco Unified School District*

In San Francisco Unified School District, the voluntary integration policy divided students into thirteen racial/ethnic categories: “American; American Indian; Chinese; Filipino; Hispanic/Latino; Japanese; Korean; White; Arabic; Samoan; Southeast Asian ; Middle Easterner; and Other Non-White.” The policy mandated that “[n]o school shall have fewer than four racial/ethnic groups represented in its student body [and] [n]o racial/ethnic group shall constitute more than 45% of the student enrollment at any regular school, nor more than 40% at any alternative school.”⁸

Chinese Americans had become the largest identifiable ethnic group in San Francisco, and they were disproportionately burdened under the policy. In some heavily Chinese neighborhoods, young children were forced to attend schools far from their homes to satisfy the 45% requirement. The greatest controversy erupted at one of the district’s “alternative” high schools. Lowell High School, one of the best high schools in the country, admitted students through a competitive magnet admissions policy. Under the 40% cap, this policy became a quota for students of Chinese descent.⁹ This led the Ho plaintiffs, Chinese-American students that were turned away from their schools of choice, to challenge the policy. The litigation spanned five years until, on interlocutory appeal to the Ninth Circuit, the court placed the burden on the school district to prove a remedial interest.¹⁰ With the courts unwilling to recognize diversity as a compelling interest, the school district settled on the first day of trial, eliminating the use of race in

⁷ See, e.g. *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (rejected diversity and “racial isolation” as compelling interests); *Billings v. Madison Metropolitan School District*, 259 F.3d 807 (7th Cir. 2001) (struck down a race-based seating assignment); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999) (weighted lottery system struck down); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999) (transfer policy struck down); *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001) (magnet school admissions policy struck down). *But See Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2nd Cir. 2000) (interdistrict transfer not struck down); *Hunter v. The Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999) (teacher training school diversity policy upheld).

⁸ Ho, 147 F.3d at 856-58.

⁹ David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco’s Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER J. 39, 55-56, 61 (Spring 2000).

¹⁰ Ho, 147 F.3d at 865.

student placement.¹¹

The AALF brief place *Ho* in the context of the historical discrimination against Chinese Americans in San Francisco, arguing that “the goal of diversity became a tool of oppression wielded principally against Chinese American schoolchildren – members of a community that had suffered similar discrimination in the past.”¹² In their view, if the Supreme Court recognized diversity as a compelling interest, “school districts around the country would similarly subject millions of other schoolchildren to race-conscious policies.”¹³

B. Voluntary Integration After *Grutter*

Contrary to the warning in the AALF brief, the Supreme Court’s recognition of diversity as a compelling interest had little immediate affect on voluntary integration programs, at least not in the Ninth Circuit. In *Seattle School District No. 1*, the voluntary integration policy was a controlled choice program, where any student could choose to attend any one of the ten high schools in the district. Since some schools would be more popular than others, the district developed a policy of tiebreakers to determine the school assignment. The first tiebreaker went to students who had siblings attending their target high school, but the second tiebreaker used race. Schools with fewer than 45% minority enrollment preferred minorities over whites. Schools with more than 75% minority enrollment preferred whites over minorities.¹⁴

The Ninth Circuit accepted diversity as a compelling interest, writing that “we cannot identify a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities cannot similarly attach in high schools.” However, the policy was struck down because it failed “virtually every one of the narrow tailoring requirements.” There was no individualized review and the strict percentages resemble a mechanical quota. The Seattle school district did not earnestly consider race-neutral alternatives, such as a random lottery, socioeconomic diversity, or the creation of magnet schools. There was also no effort to minimize the impact on third parties. The policy did, however, satisfy the last narrow tailoring element requiring a time limit. The Ninth Circuit concluded that the policy “cannot possibly be squared with the demands of the Equal Protection Clause.”¹⁵

The next year, the Fifth Circuit decided *Caddo Parish School Board*, where a Louisiana magnet school had maintained its race-conscious admissions policy from a previous era of court-ordered desegregation. After meeting minimum academic requirements, the admissions policy for the Caddo Middle Magnet School, like the *Seattle School District* plan, gave priority to those with siblings in the school. The second priority went to Black students who would otherwise attend a school with over 90% Black enrollment. The policy then ranked Black and White students separately according to academic qualifications and filled the remaining seats to achieve “a racial mix of 50% white and 50% black, plus or minus 15 percentage points.”¹⁶

The school district attempted to justify its policy with a remedial interest from a

¹¹ *Ho*, 59 F.Supp.2d at 1024-25.

¹² AALF Brief at 18.

¹³ *Id.* at 15.

¹⁴ *Seattle School District*, 377 F.3d at 955-56, 969.

¹⁵ *Id.* at 964, 969-976.

¹⁶ *Caddo Parish School Board*, 403 F.3d at 248.

1981 court order, but judicial supervision of the school had been withdrawn in 1990, and the court found “no evidence in the record of current segregation ... or vestiges of past discrimination.” The court rejected the evidence of single-race schools and test score gaps because they were not “traceable to past segregation.” The court did not decide whether the policy could survive under a compelling interest in diversity but noted that such a claim would likely fail in the secondary school context. The Fifth Circuit labeled the policy a “quota” and found that it failed the narrow tailoring requirements of *Grutter*. Like the controlled choice program in *Seattle School District*, the *Caddo Parish* magnet school admissions policy was declared unconstitutional.¹⁷

A few months later, the First Circuit reversed this trend by upholding a voluntary transfer program in Lynn, Massachusetts. In *Comfort v. Lynn School Committee*, the school district created non-competitive magnet schools and a voluntary transfer policy. Every student was entitled to attend his/her neighborhood school with the option of transferring to another school. Transfers were restricted according to the racial composition of the schools, which were categorized with a range of percentages similar to the controlled choice program in *Seattle School District*. Elementary schools with between 43% and 73% minority students were considered “racially balanced,” with a smaller range for middle schools and high schools. Schools with higher minority populations were “racially isolated” and schools with lower minority populations were “racially imbalanced.” Students in racially balanced schools were free to transfer in or out, but transfers between other schools were restricted. At racially isolated schools, only minority students could transfer out and only white students could transfer in. At racially imbalanced schools, only white students could transfer out and only minority students could transfer in.¹⁸

An en banc panel of the First Circuit approved the Lynn plan because it produced “many of the same benefits cited by the *Grutter* Court: disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society.” The court took an expansive interpretation of *Grutter*’s diversity: “There is no reason to believe that these interests are advanced by viewpoint diversity but not racial diversity.” Where *Seattle School District* and *Caddo Parish* failed under narrow tailoring, the First Circuit concluded that the potential side effects of the Lynn plan were minimal: “Because transfers under the Lynn Plan are not tied to merit, the Plan’s use of race does not risk imposing stigmatic harm ... There is also little chance that a plan concerned strictly with racial diversity creates the unwarranted presumption that race is a proxy for viewpoint.” Recognizing that “the Plan strives ... to preempt stereotypes through intergroup contact,” the court realized the power of integration to combat racism.¹⁹

II. Interpreting *Grutter*’s Diversity

Although prompted by the AALF amicus brief, the Supreme Court did not consider voluntary integration policies explicitly when it decided *Grutter* and *Gratz*. In many ways, the law school and undergraduate policies are poor models for the K-12 context. For competitive admissions magnet schools like Lowell High School in San

¹⁷ *Id.* at 258-260.

¹⁸ *Lynn School Committee*, 2005 U.S.App. LEXIS 11755 at 7, 9-11.

¹⁹ *Id.* at 31, 34, 43.

Francisco or Caddo Middle Magnet in Louisiana, there are some parallels. However, in school systems like Seattle and Lynn, Massachusetts, “every school provides a comparable education.”²⁰ The Ninth Circuit mechanically applied the Supreme Court’s narrowly tailoring factors in *Seattle School District*, which proved fatal to the controlled choice policy. The First Circuit looked to the policy considerations underlying *Grutter*’s diversity and upheld the *Lynn School Committee* voluntary transfer policy. It is likely that future courts will also split on this issue, but a careful consideration of the compelling interest in *Grutter* reveals that the First Circuit’s approach is closer to the diversity recognized by the Supreme Court.

A. Deconstructing Diversity

Grutter resolved a longstanding conflict in the Circuits by recognizing that diversity can be a compelling interest for race-based affirmative action.²¹ This was a breakthrough for affirmative action proponents, because it stands broadly for the principle that race-conscious policies can be legal when pursuing diversity. However, the meaning of diversity in this context can be elusive.²² The compelling interest recognized by the Court may not be best understood as a monolithic diversity but as a bundle of interests. One of these is the viewpoint diversity recognized by Justice Powell in *Bakke*,²³ but the other interests are new inventions of the *Grutter* majority: “disarming racial stereotypes” and “increasing racial tolerance” as cited by the First Circuit.²⁴ Deconstructing diversity into these component interests may be the best way to apply *Grutter*’s compelling interest to other situations.

1. From Bakke to Grutter: Viewpoint Diversity

Diversity was first identified as a compelling interest for affirmative action by Justice Powell in *Regents of the University of California v. Bakke*. The Medical School sought to admit students that would contribute most to the “robust exchange of ideas,” and Justice Powell felt this constituted a compelling interest. He believed that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.” This academic freedom right thus invoked the First Amendment, which gave Constitutional force to the university’s pursuit of diversity to counterbalance the Equal Protection claim. Although backed by this compelling interest, the Medical School’s policy failed the narrow tailoring prong of strict scrutiny because it “focused solely on ethnic diversity ... rather than further attainment of genuine diversity.” In Powell’s view, race could “tip the balance” or be a “plus” in an applicant’s file, but it could not “insulate the individual from comparison with all other candidates for the available seats.”²⁵

Powell was the only Justice in *Bakke* to cite a compelling interest in student body diversity, so the Court was not bound by precedent to recognize such an interest when it

²⁰ *Id.* at 48.

²¹ *Grutter*, 539 U.S. at 328.

²² See, e.g. James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL’Y REV. 5,5 (2005) (“I find most conceptualizations of diversity so empirically implausible that I can’t tell whether those who advocate them really believe them”).

²³ *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978).

²⁴ *Lynn School Committee*, 2005 U.S.App. LEXIS 11755 at 31.

²⁵ *Bakke*, 438 U.S. at 312, 315-17.

considered *Grutter*. Conducting its own independent review, the *Grutter* Court held that “the Law School has a compelling interest in attaining a diverse student body.”²⁶ *Grutter* also affirmed Powell’s narrow tailoring constraints, emphasizing that “individualized consideration in the context of a race-conscious admissions program is paramount.”²⁷

Justice Powell’s diversity, adopted in *Grutter*, can be more specifically characterized as *viewpoint diversity*. Viewpoint diversity is the idea that a “student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring . . . experiences, outlooks, and ideas that enrich the training of [the] student body.”²⁸ This is the kind diversity that most universities chose to pursue after *Bakke*, including the University of Michigan, which aspires to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”²⁹ Racial classifications are a necessary element of viewpoint diversity because of the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” Racial classifications thus promote an educational goal through viewpoint diversity, so the *Grutter* Court follows Powell’s lead in deferring to the academic freedom of the university, relying on the Law School’s “experience and expertise” in determining that affirmative action “is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”³⁰

Although the Court purports to simply uphold Justice Powell’s viewpoint diversity, a close reading of the majority opinion reveals that *Grutter*’s diversity includes something more. Writing for the Court, Justice O’Connor touted a long list of benefits attributed to diversity: Diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”³¹ The Court noted that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”³² This is not mere dicta, and a careful reading of the *Grutter* opinion reveals that they are essential to the holding. If these statements are to be taken seriously, they broaden the definition of diversity and provide a basis for applying *Grutter* to the K-12 context.

2. What Makes Diversity Compelling?

In his article analyzing *Grutter*, Professor Lackland H. Bloom notes that the majority conducted “little if any independent judicial review” on the question of diversity as compelling state interest.³³ The only explicit answer given by the majority is Justice Powell’s deference to academic freedom, concluding that “a diverse student body is at the heart of the Law School’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”³⁴ Professor Bloom argues

²⁶ *Grutter*, 539 U.S. at 325, 328.

²⁷ *Id.* at 337.

²⁸ *Bakke*, 438 U.S. at 314.

²⁹ *Grutter*, 539 U.S. at 315 quoting App. 111.

³⁰ *Id.* at 333.

³¹ *Id.* at 330 quoting App. to Pet. for Cert. 246a.

³² *Id.* quoting Brief for American Educational Research Association et al. as *Amici Curiae* 3.

³³ Lackland H. Bloom, *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 479 (2004).

³⁴ *Grutter*, 539 U.S. at 329 quoting *Bakke*, 438 U.S. at 318-319.

that academic freedom can not be the sole justification for diversity, because this would allow future defendants to claim that “whatever interest they may happen to be trying to promote is compelling.” In his view, “there needs to be some objective legal means by which the Court can distinguish true compelling interests from pretenders.”³⁵ One such objective test was developed by Goodwin Liu, whom in 1998 correctly predicted that the Supreme Court would recognize diversity as a compelling interest while *Grutter* was still in District Court.³⁶

Liu creates his analytic framework by identifying the factors that make the remedial interest compelling, starting with a policy judgment on moral and Constitutional foundations. The remedial interest is “compelling” because it rests on a moral foundation of compensatory justice, with “particularized discrimination” or “passive participation” necessary to satisfy the tort-like causation requirement. Liu argues that diversity rests on its own moral imperative to combat “the evils of private prejudice.” The remedial interest also rests on Constitutional foundations in the Fourteenth Amendment duty to eradicate the vestiges of prior discrimination. Liu claims a similar Constitutional interest for diversity because “[e]fforts to combat prejudice are ... vital to the maintenance of democracy.”³⁷

The second part of Liu’s analytic framework considers a “substantive policy judgment about the proper balance between benefits and burdens.” This balancing rejects “societal discrimination” as a remedial interest, but Liu concludes that the diversity rationale passes the balancing test. The burden on non-minorities is no greater than under approved remediation, the burden on minorities is lessened with consideration of additional diversity factors, and the logical stopping point for diversity is no different from that for remediation.³⁸ The final part of Liu’s framework requires that the interest be supported with “a strong basis in evidence.” This is the requirement of “particularized findings of past discrimination” from *Wygant*,³⁹ and Liu believes that empirical evidence of the positive effects of diversity should be sufficient to satisfy this standard.

Although the Court did not adopt an explicit framework to determine whether or not diversity is compelling, each element of Liu’s analysis appears in the *Grutter* majority opinion. The moral foundations for diversity are in the first three benefits the Court attributes to diversity: “cross-racial understanding,” “break[ing] down racial stereotypes,” and “enabl[ing] students to better understand persons of different races.” Although the Court cites these as educational benefits, they are strikingly similar to Liu’s moral imperative in reducing prejudice. Liu’s Constitutional interest in maintaining democracy finds support in the Court’s desire to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.” The Court almost endorses this democratic interest directly in writing that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁴⁰

Liu’s balancing of benefits and burdens is considered in the Court’s narrow

³⁵ Bloom, *supra* note 33 at 478.

³⁶ Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998).

³⁷ *Id.* at 401-415, 422.

³⁸ *Id.* at 422-428.

³⁹ *Id.* at 498 quoting *Wygant*, 476 U.S. at 276.

⁴⁰ *Grutter*, 539 U.S. at 330-31.

tailoring analysis. Finally, Liu's empirical evidence requirement is satisfied by "numerous studies" and *amici* that show the "educational benefits that flow from student body diversity."⁴¹ The reality of this evidence is not that diversity improves academic achievement for all students.⁴² What social scientists have found is an improvement in minority student achievement and a clear positive impact on interracial and intercultural relations.⁴³ This evidence is most compelling not for the educational benefits of Powell's viewpoint diversity but for Liu's social and political benefits of reducing prejudice.

The diversity interest is compelling not because of mere educational benefits associated with viewpoint diversity. Justice Thomas may be correct in his dissent, where he concludes that "marginal improvements in legal education do not qualify as a compelling state interest."⁴⁴ However, *Grutter's* diversity provides broader benefits in business and national security,⁴⁵ and diversity-based affirmative action has a moral imperative in reducing prejudice and a Constitutional interest in maintaining democracy. The only way to justify diversity as a compelling interest is to recognize that it means much more than simply providing additional viewpoints.

3. *The Underlying Interests of Narrow Tailoring*

The Ninth Circuit identified six distinct elements of narrow tailoring in *Grutter* and *Gratz*.⁴⁶ The Fifth Circuit identified a slightly different set of elements.⁴⁷ Rather than trying to break down the Supreme Court's opinion into distinct elements, the First Circuit looked at the policy goals underlying *Grutter's* narrow tailoring analysis.⁴⁸ These policy goals can be summarized as a desire to mitigate the stigmatizing side effects of affirmative action. The prohibition on quotas and emphasis on flexibility minimizes stigmatization by ensuring that the policy does not make "an applicant's race or ethnicity the defining feature of his or her application." Narrow tailoring also requires consideration of race-neutral alternatives, which would avoid racial stigmatization altogether. Minimizing the burden on non-beneficiaries minimizes the resentment that may lead to stigmatization. Although not explicitly described as mitigating the effect of stigmas, these components of narrow tailoring analysis speak directly to Justice Thomas's concerns.

⁴¹ *Id.* at 331.

⁴² Barbara Lauriat, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L.REV. 1171, 1185 (2003) citing Harry J. Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483, 553 (2000).

⁴³ Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 Cornell L. Rev. 463, 488-92 (2005) citing William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 51, 256-58 (1998).

⁴⁴ *Grutter*, 537 U.S. at 357 (Thomas, J., dissenting).

⁴⁵ *Id.* at 330-331 citing Brief for 3M et al. as *Amicus Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3-4; Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27 ("American business has made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience, "a highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.")

⁴⁶ *Seattle School District No. 1*, 377 F.3d at 969.

⁴⁷ *Caddo Parish School Board*, 403 F.3d at 260.

⁴⁸ *Lynn School Committee*, 2005 U.S.App. LEXIS 11755 at 43.

While there is no explicit discussion of stigmatization, the majority does write about one side effect of affirmative action. Rather than use a quota or a point system, the Law School sought to enroll a “critical mass” of minority students. The University claimed that a critical mass would prevent minorities from being stereotyped as holding a “characteristic minority viewpoint.” The majority finds that “diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.” Although the Court defers to the Law School in determining that critical mass “is necessary to further its compelling interest in securing the educational benefits of a diverse student body,”⁴⁹ critical mass is another point where *Grutter*’s diversity differs from viewpoint diversity. Avoiding a “characteristic minority viewpoint” does not detract from the educational benefits of multiple viewpoints; critical mass only makes sense as a prophylactic measure against the stigmatizing side effects of affirmative action. Focusing on mitigating these side effects rather than a literal interpretation may be the most logical way to read the narrow tailoring elements in situations that are not directly analogous to the facts in *Grutter* and *Gratz*.

Grutter’s diversity is not *Bakke*’s viewpoint diversity. As developed in this note and interpreted by the First Circuit, *Grutter*’s diversity is defined by a broad imperative to reduce racism promoting cross-racial understanding and breaking down racial stereotypes. The narrow tailoring that accompanies this compelling interest is also built on these same principles. Quotas run the risk of imposing stigmatic harm. Minimizing burdens keeps side effects to a minimum. A policy must mitigate the creation of new prejudice to effectively reduce racism.

B. Applying *Grutter*’s Diversity to *Ho*

Contrary to the AALF’s belief that recognizing diversity as a compelling interest would vindicate the San Francisco Unified School District policy, it is likely that even under the theory of diversity developed in this note, the policy in *Ho* would still be struck down. Although there is a broad license to pursue policies that reduce racism, *Grutter*’s diversity still places significant limits on affirmative action.

If litigated today, the San Francisco Unified School District would be permitted to claim diversity as a compelling interest. However, the plan would fail in the narrow tailoring analysis. Where Lynn had narrowly tailored its policy to the goal of reducing racism, the San Francisco policy, with its arbitrary racial categories, looks much more like racial balancing for its own sake. The Lynn plan tailored its racial percentages to the overall racial composition of the district, while San Francisco set an arbitrary quota of 40%. Lynn guaranteed attendance at neighborhood schools, minimizing the burden on students, but San Francisco’s policy had no such guarantee. Where Lynn’s schools all provide a comparable education, San Francisco operated competitive magnet schools that offered specialized programs. The policy at issue in *Ho* was less flexible, more burdensome, and more likely to stigmatize than the policy approved in *Lynn School Committee*. Under any reasonable standard, the San Francisco plan would have to be struck down.

⁴⁹ *Grutter*, 539 U.S. at 333.

Conclusion

Two amicus briefs were filed for *Grutter* on behalf of APA's. The NAPALC brief argued that diversity benefited APA students and that APA's should be beneficiaries of affirmative action when appropriate. The AALF brief argued that overachieving APA schoolchildren should not be victims of diversity. Two years after *Grutter*, it appears that both sides were successful. *Grutter*'s diversity creates benefits for people of all races through the educational benefits of viewpoint diversity and the sociopolitical benefits of intergroup contact. *Grutter*'s narrow tailoring also protects individuals from discriminatory abuse of diversity by limiting policies that stigmatize minorities. After *Grutter* and *Gratz*, affirmative action survives, but the ruling in *Ho v. San Francisco Unified School District* still stands.

For the APA interests represented by amici, *Grutter* struck a compromise. The ruling also did more, as recently affirmed by *Lynn School Committee*, *Grutter*'s diversity opens the door for a new wave of affirmative action and voluntary integration policies. Well-designed policies will not aspire to an amorphous diversity but will target the roots of racism: "disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society."⁵⁰ For a half-century, desegregation and remedial affirmative action have worked to undo the effects of past discrimination. In the coming decades, voluntary integration can target prejudice where it forms, taking affirmative action to eliminate racism itself.

⁵⁰ *Lynn School Committee*, 2005 U.S.App. LEXIS 11755 at 31.