

Comfort v. Lynn School Committee: Illustrating the Untapped Potential of an Explicit Link Between Voluntary Desegregation and Local Constitutionalism

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I. INTRODUCTION

In dissenting from the Supreme Court’s invalidation of the University of Michigan’s undergraduate admissions program, Justice Souter cautioned, “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”¹ Despite his warning, in some respects equal protection² jurisprudence has fallen into this trap. As Professor Post has stated, “[a]lthough transparency is ordinarily prized in the law, the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity.”³ Thus, in *Gratz v. Bollinger*, the Court held that it was unconstitutional for a higher education institution to give a systematic advantage to all candidates who self-identified as belonging to certain racial or ethnic groups.⁴ In contrast, in *Grutter v. Bollinger*,⁵ the Court permitted a race-conscious policy when obfuscated as part of a holistic “individualized consideration”

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¹ *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting). In this undergraduate admissions program, “[e]ach application received points based on high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.” *Id.* at 255. The University of Michigan also credited qualifying college applicants with twenty points for being members of an “underrepresented racial or ethnic minority”; students who earned a cumulative point total of one hundred or more were automatically granted admission to the school. *Id.* Justice Souter argued that the university’s “candor” should not be used against it. *Id.* at 297 (Souter, J., dissenting). *But cf.* Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 260 (2004) (“Michigan’s explicit point system was not frankly acknowledged; it was exposed through a freedom-of-information request by a member of the faculty, Carl Cohen, and by subsequent litigation.”).

² U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

³ Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74 (2003).

⁴ 539 U.S. at 255, 275, 279–80.

⁵ 539 U.S. 306 (2003).

of each applicant.⁶ *Grutter*'s rationale was substantially based on "the seemingly neutral blind of viewpoint diversity,"⁷ through which the Court found a "compelling interest in obtaining the educational benefits that flow from a diverse student body."⁸

While it is vital that public schools achieve and maintain diversity, including racial diversity, a significant problem emerges when the Supreme Court implicitly instructs educational institutions, states, and local governments to achieve this goal through a ruse. The Court allows race to matter, but requires that it be used subtly and politely.⁹ Issues of race have haunted this nation since its inception,¹⁰ and problems in this realm must be handled with frankness and clarity. Instead, what has developed, both prior to and after *Gratz* and *Grutter*, is a proliferation of facially "race-neutral" mechanisms with the underlying goal of diversifying the racial composition of schools. For example, in attacking the University of Michigan's affirmative action plans, the United States government filed an amicus brief in which it endorsed the Texas, Florida, and California methods of increasing minority representation, which guarantee state university admission to top students from all their public high schools.¹¹ These laws

⁶ *Id.* at 334. The policy upheld in *Grutter* was implemented by the university's law school: "[T]he Law School looks for individuals with 'substantial promise for success in law school' and 'a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.'" *Id.* at 313–14 (citation omitted). Justice O'Connor's majority opinion emphasized that even this program would not be perpetually immune from constitutional challenge, suggesting that racial preferences may no longer be necessary in twenty-five years. *See id.* at 341–43.

⁷ James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5, 11 (2005). The term "viewpoint diversity" does not lend itself to easy definition, but may be defined as follows:

The viewpoint function of diversity derives from a relationship between the identity of the speaker and what she is likely to say. People with different racial identities have different experiences and thus view the world differently. Different experiences and ideas help promote and sustain academic environments as robust marketplaces of ideas—marketplaces shaped by disagreement and debate. In an educational setting, disagreement and debate help remedy incorrect assumptions and generate new ideas. People with diverse backgrounds help facilitate such debate and shape the terms on which issues are discussed by drawing on their experiences and contributing their unique viewpoints.

Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1159–60 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)).

⁸ *Grutter*, 539 U.S. at 343.

⁹ Lino A. Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity"*, 78 TUL. L. REV. 2037, 2037 (2004) ("The result of *Grutter* and *Gratz* is to permit schools to do surreptitiously what the Court calls 'patently unconstitutional' if done openly.").

¹⁰ *See, e.g.*, U.S. CONST. art. I, § 2 (Three-Fifths Compromise); U.S. CONST. art. IV, § 2 (Fugitive Slave Clause).

¹¹ Brief for the United States as Amicus Curiae Supporting Petitioner at 14–18, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at <http://supreme.lp.findlaw>.

never overtly stated that their object was to open higher education institutions to more minority students, and thus the federal government labeled them “race-neutral.”¹² But because they apply to all public high schools in these states, including many consisting mostly of traditionally underrepresented minorities, state legislatures believed that a greater number of minority students would be admitted to these colleges as a result.¹³

“Race-neutral” plans are not limited to the affirmative action context, as they have also been employed to advance voluntary desegregation efforts.¹⁴ In *Anderson ex rel. Dowd v. City of Boston*,¹⁵ the Boston School Committee amended its system of school choice by limiting to 50% the spots guaranteed to those who live within a given school’s “walk zone.”¹⁶ The First Circuit had little trouble upholding the city’s “New Plan,” despite its stated goal of increasing diversity, because it was facially neutral.¹⁷ Such actions by the states and local school boards may be laudable, but as members of the Court are fond of saying in other contexts, the Court has required these policies to “exalt form over substance.”¹⁸

However, a recent case from the First Circuit promises an opportunity to articulate a more transparent jurisprudence. In *Comfort v. Lynn School Committee*,¹⁹ the court held in an *en banc* opinion that a local school board may deny racially segregative intradistrict transfers to and from schools that are “racially isolated” or “racially imbalanced.”²⁰

com/supreme_court/briefs/02-241/02-241.mer.ami.usa.pdf.

¹² *Id.* at 14.

¹³ For an in-depth description of the Texas “Ten Percent Plan’s” legislative history, see Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253–59 (1999) (“The sponsoring legislators hoped that because it targeted high schools highly segregated by race and class, the Ten Percent Plan would broaden the student applicant pool.”); see also V. Dion Haynes, *U. of California Alters its Policy on Admissions; Changes Aims to Increase Number of Minority Students*, CHI. TRIB., Mar. 20, 1999, at N1 (describing California’s top four percent plan); Sue Anne Pressley, *Florida Plan Aims to End Race-Based Preferences*, WASH. POST, Nov. 11, 1999, at A15 (describing the “One Florida Initiative”).

¹⁴ For a detailed history of the jurisprudential relationship between equal protection, affirmative action, and voluntary desegregation, see Michael J. Anderson, Comment, *Race as a Factor in K–12 Student Assignment Plans: Balancing the Promise of Brown with the Modern Realities of Strict Scrutiny*, 54 CATH. U. L. REV. 961 (2005). This history stopped just short of *Comfort’s* *en banc* opinion, and its implications, which this Comment addresses herein.

¹⁵ 375 F.3d 71 (1st Cir. 2004).

¹⁶ *Id.* at 76. “For elementary schools, the walk zone includes the geocodes, or smaller geographic units within each Attendance Zone, within a one-mile radius of the school. For middle schools, the walk zone radius increases to 1.5 miles.” *Id.* at 75 n.3.

¹⁷ See *id.* at 85–88. Concomitantly, when efforts to increase the presence of racial minorities can be cloaked as race-neutral, they have the added benefit of escaping a strict scrutiny analysis. *Id.* at 82–83.

¹⁸ E.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 693 n.5 (2002) (Souter, J., dissenting) (quoting *Wolman v. Walter*, 433 U.S. 229, 250 (1977)); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993); *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964).

¹⁹ 418 F.3d 1 (1st Cir. 2005) (*en banc*).

²⁰ *Id.* at 7–8, 23. See *infra* notes 33–38 and accompanying text for a detailed discussion of these terms.

After examining the case's procedural history and holding, this Comment will first argue that *Comfort* offers local school committees in Massachusetts a substantial increase in discretion in operating their school systems; consequently, their efforts to voluntarily desegregate will likely be more effective.²¹ Second, *Comfort*'s acceptance of the "racial diversity"²² interest for achieving desegregation enables the courts and public schools to engage in a more honest equal protection discussion than *Grutter*'s "viewpoint diversity" currently permits.²³ The rationale of "racial diversity" also promises to bridge a gap left by the Court, because its current embrace of "viewpoint diversity" in post-secondary schools offers an uncertain basis for integrating public primary and secondary schools.²⁴

However, *Comfort*'s significant extension beyond *Grutter* makes it difficult to know whether the Supreme Court will ultimately uphold it.²⁵ In the face of a legal challenge, proponents should advance the theory of local constitutionalism to buttress the constitutionality of the First Circuit's holding.²⁶ This theory explains that judicial acquiescence to local governments on some constitutional questions is not unprecedented.²⁷ Since local school boards are specially situated in educating their students, and because they are a vital part of local democratic decisionmaking, they should be granted a measure of deference when assigning students to schools in order to cultivate racial diversity. *Comfort*'s innovations might be upheld partly on this basis.

²¹ See *infra* Part III.A.

²² Contained in racial diversity is the "idea that a relationship exists between race and social experiences, on the one hand, and knowledge and practices, on the other. Central to racial diversity, then, is the notion that how we experience, think about, and conduct ourselves in society is shaped, though not determined, by our race." Carbado & Gulati, *supra* note 7, at 1153–54.

²³ See *infra* Part III.B.

²⁴ *Id.*

²⁵ Although the Supreme Court denied certiorari in this case, see *infra* note 89 and accompanying text, petitions for certiorari have been filed in two other voluntary desegregation cases, but the Court has not acted upon them as of this Comment's publication deadline. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc), *petition for cert. filed*, 74 U.S.L.W. 3245 (Jan. 18, 2006) (No. 05-908) (upholding *Comfort*'s racial diversity rationale when applied to Seattle's race-based assignment of students to its public high schools); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 852–55 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3437 (Jan. 18, 2006) (No. 05-915) (upholding school board's race-assignment plan on grounds similar to *Grutter*'s "viewpoint diversity" and *Comfort*'s "racial diversity").

²⁶ See *infra* Part IV.

²⁷ *Id.*

II. COMFORT'S PATH THROUGH THE COURTS

A. Facts and Procedural Hurdles

During the 1980s and 1990s, Lynn underwent a massive demographic shift in which the proportion of the city's white population dropped from 93% to 63%.²⁸ Residential segregation increased severely, and by 1987, seven of the city's eighteen elementary schools had a greater than 90% white enrollment.²⁹ The Lynn School Committee ("LSC") attempted to respond amidst mounting racial tension.³⁰ As described by local NAACP council Nadine Cohen, the LSC enacted a "voluntary school choice plan" with the goals of "both desegregation and diversity in the Lynn schools."³¹ As of the 2001-02 school year, there were 15,444 students in the Lynn public school system, with a nonwhite population of 58%.³² A public elementary school was defined as "racially balanced" if it was composed of between 43% and 73% nonwhite students (58% +/- 15%), while all other public schools would qualify if between 48% and 68% (58% +/- 10%).³³ Schools with nonwhite student populations above this range were defined as "racially imbalanced" while those below were defined as "racially isolated."³⁴

In the LSC's "neighborhood-school-centered paradigm," students may "attend their local schools as a matter of right."³⁵ Students are initially assigned to schools in their neighborhoods, and race becomes a factor only when they (or their parents) request a transfer from the students' area school.³⁶ All students are allowed to transfer as they like between racially balanced schools, and they can transfer to and from racially imbalanced or isolated schools when the transfer will have a "desegregative" effect.³⁷ However, a transfer is not permitted if it would further segregate the racially imbalanced or isolated schools.³⁸ Through this method, 6,000 Lynn students are assigned to non-neighborhood schools each year, and the roughly 100 annual appeals that ensue have about a 50% success rate.³⁹ Since its implementation, race relations improved, Lynn's schools per-

²⁸ *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005) (en banc).

²⁹ *Id.*

³⁰ Brenda J. Buote, *System on Racial Balance to Go On*, BOSTON GLOBE, Oct. 28, 2004, at 1.

³¹ Kathy McCabe, *New Party Supports Schools in Suit; Lynn Parents Back Desegregation Plan*, BOSTON GLOBE, Feb. 3, 2002, at 1.

³² *Comfort*, 418 F.3d at 7.

³³ *Id.* at 7-8.

³⁴ *Id.* at 8.

³⁵ *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *7 (1st Cir. Oct. 20, 2004).

³⁶ McCabe, *supra* note 31.

³⁷ *Comfort*, 418 F.3d at 8.

³⁸ *Id.*

³⁹ Buote, *supra* note 30. Appeals tend to be successful for "medical" or "programmatic" reasons. *Id.*

formed better academically, and the school district received a significant increase in funding under the state's Racial Imbalance Act.⁴⁰

In 1999, attorney Chester Darling filed suit in federal district court on behalf of parents with children in Lynn's public schools, asserting that the race-based transfer plan violated the Equal Protection Clause.⁴¹ The first three district court opinions published were limited to legal maneuvering, and did not substantively involve the equal protection claim. In the first opinion, the plaintiffs sought a temporary injunction against the LSC's transfer plan, but the motion was denied because they failed to show proof of irreparable harm.⁴² In the second and third opinions, the district court dismissed or limited various other claims on grounds including sovereign immunity.⁴³

B. Reaching the Equal Protection Claim on the Merits

In late 2003, Judge Gertner released her fourth and most significant opinion related to the parents' lawsuit, in which she granted defendants' motion to dismiss the case on its merits.⁴⁴ She noted that the analysis was difficult because "the Supreme Court has not yet heard a case dealing with the issues raised here—the use of race in a voluntary transfer program to maximize integrated learning in the K–12 grades."⁴⁵ Since the parties stipulated that no one school was better academically than the others in the school district, Judge Gertner reasoned that this case did not involve racial preferences in the context of "the distribution of limited resources," and thus, intermediate scrutiny should apply.⁴⁶ However, as both parties had briefed the case assuming strict scrutiny would be the standard employed, and perhaps because Judge Gertner anticipated that the First Circuit would do the same, she examined the policy under this higher level of scrutiny.⁴⁷

⁴⁰ *Id.*

⁴¹ See Cindy Rodriguez, *Suit Vs. Lynn May Extend to State*, BOSTON GLOBE, Oct. 31, 1999, at B4.

⁴² *Comfort ex rel. Neumyer v. Lynn Sch. Comm. (Comfort I)*, 100 F. Supp. 2d 57, 59–60 (D. Mass. 2000).

⁴³ See *Comfort ex rel. Neumyer v. Lynn Sch. Comm. (Comfort II)*, 131 F. Supp. 2d 253 (D. Mass. 2001); *Comfort v. Lynn Sch. Comm. (Comfort III)*, 150 F. Supp. 2d 285 (D. Mass. 2001).

⁴⁴ *Comfort ex rel. Neumyer v. Lynn Sch. Comm. (Comfort IV)*, 283 F. Supp. 2d 328 (D. Mass. 2003).

⁴⁵ *Id.* at 369. She stated that the Supreme Court's cases in this jurisprudential zone had focused on other factual contexts, such as affirmative action for higher education institutions. *Id.*

⁴⁶ *Id.* at 365. To support this view, Judge Gertner relied largely on two decisions from other circuits in which the race-based assignment of teachers to the classroom was found not to require strict scrutiny. *Id.* at 366 n.74 (citing *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102–03 (6th Cir. 1992); *Kromnick v. Sch. Dist.*, 739 F.2d 894, 903 (3d Cir. 1984)).

⁴⁷ *Id.* at 366. Additionally, the court rejected plaintiffs' attack on the facial validity of

Judge Gertner upheld the LSC's transfer policy, holding that there was a "compelling interest," which the plan was "narrowly tailored" to achieve. The LSC's various goals were divided into two categories: those that were proactive ("promoting racial and ethnic diversity, increasing educational opportunities for all students and improving the quality of education and ensuring student safety"), and those that were reactive ("reducing minority isolation and ensuring the safety of its public school students").⁴⁸ These interests were accepted as compelling.⁴⁹ As to the proactive interests, the plan was narrowly tailored because "[i]f the compelling goal of the Plan is [in part] to train citizens to function in a multiracial world, actual intergroup racial contact is essential."⁵⁰ As to the reactive interests, the LSC's range for defining racial isolation was "appropriately calibrated."⁵¹ Also, no race-neutral alternative was available that would be equally or less intrusive (especially because the LSC's current system enabled all parents to have their children attend their neighborhood schools, with race only playing a role in transfer requests).⁵² Whereas the *Grutter* majority held that it was permissible to have a "critical mass"⁵³ to ensure "viewpoint diversity," Judge Gertner upheld the LSC transfer policy because the "critical mass" it fostered for "racial diversity" was proper.⁵⁴ In distinguishing the two terms, she wrote, "The value of a diverse classroom

Massachusetts's Racial Imbalance Act, MASS. GEN. LAWS ch. 15, §§ 1I, 1J (2003), ch. 15, § 1K (repealed 1993), ch. 71, §§ 37C, 37D (2003), which encouraged the LSC's voluntary desegregation plan and provided it with financial assistance. *Comfort IV*, 283 F. Supp. 2d at 366–68. Judge Gertner held that the facial challenge was inapt because "racial imbalance" could be remedied in race-neutral ways, such as through Boston's "walk-zone" method, which was ultimately upheld by the First Circuit. *Id.* at 367–68 (citing *Boston's Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318, 327–28 (D. Mass. 2003), *aff'd sub nom.*, *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71 (1st Cir. 2004)).

⁴⁸ *Comfort IV*, 283 F. Supp. 2d at 375.

⁴⁹ *See id.* at 375–76, 384–86.

⁵⁰ *Id.* at 376–77. The court went on to state:

No amount of *race-neutral* resource apportionment would accomplish this result. Second, intergroup contact cannot be achieved with only token numbers of minorities in a [sic] overwhelmingly white school (or *vice versa*). Third, there is a tipping point of 20% white or nonwhite students, well-recognized by experts in this field and dubbed the "critical mass," that is crucial to catalyzing positive intergroup contact.

Id. at 377.

⁵¹ *Id.* at 386.

⁵² *See id.* at 388 ("[I]t is hard to imagine how, given Lynn's existing pattern of residential segregation, the district could redraw its neighborhoods to desegregative effect without compromising the integrity of the neighborhood-school principle and, worse yet, initiating forced busing.").

⁵³ *Grutter v. Bollinger*, 539 U.S. 306, 335–36 (2003) ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota."). The university defined a "critical mass" as "meaningful representation," or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318.

⁵⁴ *Comfort IV*, 283 F. Supp. 2d at 369 (employing the term "racial diversity").

setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships.”⁵⁵

A panel of the First Circuit affirmed in part, reversed in part, and remanded the case to the district court.⁵⁶ Writing for the panel, Judge Selya⁵⁷ phrased the equal protection issue as deciding “the constitutionality of the use of race to restrict a student’s ability to transfer to a non-neighborhood public school,” and unsurprisingly determined that strict scrutiny was the proper level of analysis.⁵⁸ The panel disagreed with Judge Gertner’s division of interests into proactive and reactive categories, collapsing them into one interest that “all students—are better off in racially diverse schools.”⁵⁹ The opinion also noted that this was not a case in which “racial classification is aimed at remedying past segregation.”⁶⁰ Although the First Circuit had reserved the question a few years previously,⁶¹ the panel held that racial diversity could itself constitute a compelling interest and that the LSC had successfully proven its compelling nature here.⁶² However, it held that the transfer plan violated the Equal Protection Clause, based on *Gratz* and *Grutter*, because it was not “narrowly tailored.”⁶³ Apart from its appeals provision for cases of hardship, the plan allowed “no individualized consideration of a student’s qualifications” to transfer and was “even more mechanical and even less flexible than the collegiate admissions policy that the *Gratz* Court found wanting.”⁶⁴ Moreover, the transfer plan was aimed at forbidden “racial balanc[ing]” as opposed to achieving a “critical mass” of minority students, and the program was not sufficiently limited in duration.⁶⁵ Finally, although the panel conceded that the school committee had considered and rejected at least six race-neutral policies to attain a

⁵⁵ *Id.* at 381 n.90. Judge Gertner continued: “In this context a meaningful presence of racial minorities—and of whites at minority-dominated schools—is crucial not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.” *Id.*

⁵⁶ *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004). This opinion affirmed Judge Gertner’s rejection of the facial validity attack, principally on the grounds that the plaintiffs did not have standing to attack the provisions of the Racial Imbalance Act. *Id.* at *21–24.

⁵⁷ Judge Selya was joined in his opinion by Judge Howard and by Judge Dyk of the Federal Circuit, who was sitting by designation.

⁵⁸ *Comfort*, 2004 U.S. App. LEXIS 21791, at *25, *29.

⁵⁹ *Id.* at *35–37.

⁶⁰ *Id.* at *34 (citing *Comfort IV*, 283 F. Supp. 2d at 390 n.101).

⁶¹ *Id.* at *37 (citing *Wessmann v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998)).

⁶² *Id.* at *42–43 (“The short of it is that the defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body.”).

⁶³ *Id.* at *61–62.

⁶⁴ *Id.* at *47.

⁶⁵ *Id.* at *58–59. When the Supreme Court refers to unconstitutional “racial balancing,” it appears to be describing efforts “to achieve [racial] numerical goals indistinguishable from quotas.” *Grutter v. Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting).

“critical mass,” it held that the school committee should inquire into other race-neutral approaches, such as the one approved by the First Circuit for Boston earlier that year.⁶⁶

An en banc rehearing of the panel’s decision was granted.⁶⁷ Writing for the court, Judge Lipez⁶⁸ affirmed the district court’s decision to dismiss the plaintiffs’ equal protection claim against the LSC on its merits.⁶⁹ Like the panel, the court en banc held that “all racial classifications” must be analyzed under the strict scrutiny rubric, and that this “transfer policy expressly aim[ed] at attaining racial diversity in the city’s schools” did not have the goal of “remedying past segregation.”⁷⁰ With reference to *Grutter* and *Gratz*, the court held that the goal of “racial diversity” was just as capable of constituting a compelling interest in grades K–12 as “viewpoint diversity” was in higher education institutions.⁷¹

To be narrowly tailored, the LSC needed to demonstrate that the plan was (1) necessary, (2) proportional, and (3) no more burdensome on third parties than necessary.⁷² The court then agreed with the defendants’ claims that (1) the program was sufficiently limited because it only governed transfers (not initial school assignments), (2) the goal was proportional to the means required because students could still transfer between racially balanced schools, and (3) although parents and students did not personally believe that all intradistrict schools were interchangeable, the fact that they all provided an equal education diminished the resulting harm.⁷³

In determining that the transfer plan was narrowly tailored, the court considered four additional factors. First, the percentage range used to define whether a school is “racially balanced,” “racially imbalanced,” or “racially isolated” was a “sufficiently close ‘fit’” to the defendants’ compelling interest.⁷⁴ Second, narrow tailoring did not impose on the school district the requirement that a relatively proportional mix of all minority groups attend each school, meaning that its focus on a “white/nonwhite distinction” to define whether a school was racially balanced was permissible.⁷⁵ Third, the LSC’s use of periodic reviews demonstrated the necessary willingness to use the program only as long as necessary.⁷⁶ Fourth, the LSC

⁶⁶ *Comfort*, 2004 U.S. App. LEXIS 21791, at *56–59 (citing *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 74 (1st Cir. 2004)).

⁶⁷ *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (en banc).

⁶⁸ Judge Lipez’s en banc opinion was joined by Judges Torruella and Boudin.

⁶⁹ *Comfort*, 418 F.3d at 10. The en banc opinion also affirmed, on standing grounds, the district court’s dismissal of plaintiffs’ facial challenge against the state’s Racial Imbalance Act. *Id.* at 10–12.

⁷⁰ *Id.* at 13–15.

⁷¹ *Id.* at 16–18.

⁷² *Id.* at 16.

⁷³ *Id.* at 19–20.

⁷⁴ *Id.* at 20–21.

⁷⁵ *Id.* at 21–22.

⁷⁶ *Id.* at 22.

considered enough race-neutral alternatives based on the six plans it had rejected.⁷⁷

Finally, the court held that the LSC did not have to engage in an “individualized consideration” of each student requesting a transfer because no criteria other than race were relevant to achieving “racial diversity.”⁷⁸ The en banc opinion explained further the functional differences between *Grutter’s* viewpoint diversity and *Comfort’s* racial diversity, noting that “the Lynn Plan’s focus on racial diversity rather than viewpoint diversity is the result of contextual differences between higher education, where the emphasis is on the exchange of ideas, and primary education, where the emphasis is on fostering interracial cooperation.”⁷⁹

Chief Judge Boudin briefly concurred.⁸⁰ He stated that the case was difficult; race-based programs are generally unconstitutional, but at times may be necessary.⁸¹ He also noted that the “Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed.”⁸² Anticipating criticism from the dissent, he wrote that the majority’s opinion was justified because the “Supreme Court has not passed upon a plan anything like the one before us.”⁸³

Judge Selya, the author of the panel decision, now found himself in dissent.⁸⁴ This dissent largely restated his panel opinion,⁸⁵ particularly in its focus on the “mechanical use of race.”⁸⁶ He also argued that a more “flexible, race-conscious transfer program, creating a strong but non-determinative ‘plus’ factor for integrative transfers but permitting other transfers based on the strength of individual requests,” would be constitutional.⁸⁷ He roundly attacked his brethren in the majority for departing from what he saw as clear Supreme Court precedent, thereby acting in a manner “inconsistent with the role that an intermediate appellate court should play.”⁸⁸

⁷⁷ *Id.* at 22–23. The court specifically said it was not necessary for the LSC to inquire into the Boston “walk zone” plan. *Id.* at 23 (“While the record does not reflect whether Lynn has considered the Boston plan in depth, we note that the Boston plan is specific to the residential patterns in Boston, which differ from those in Lynn.”).

⁷⁸ *Id.* at 18.

⁷⁹ *Id.* at 18 n.9. It has been argued elsewhere that racial diversity may have its greatest impact on the youngest public school students. See Frank Kemerer, Book Review, 200 WEST’S EDUC. L. REP. 507, 511 (2005) (“If racial diversity is important at the graduate school level, it certainly is even more important in the early grades when students first begin to develop beliefs and attitudes about people different from themselves.”).

⁸⁰ *Comfort*, 418 F.3d at 27 (Boudin, C.J., concurring).

⁸¹ *Id.* at 28.

⁸² *Id.* at 29.

⁸³ *Id.*

⁸⁴ Judge Selya was joined by Judge Howard in dissent, who had also joined Judge Selya’s now-withdrawn panel opinion.

⁸⁵ Compare *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), with *Comfort*, 418 F.3d at 30–31 (Selya, J., dissenting).

⁸⁶ *Comfort*, 418 F.3d at 30–31.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 29–30.

The Supreme Court denied certiorari.⁸⁹ The Court's timing was notable because Justice O'Connor, who cast the deciding vote in *Grutter*,⁹⁰ was waiting to be replaced by then-Judge Alito.⁹¹

III. PRACTICAL AND CONSTITUTIONAL IMPLICATIONS OF *COMFORT*

A. *For the Massachusetts Public Schools—Past and Future*

1. *Comfort's Place in Massachusetts's Desegregation Saga*

The First Circuit's decision adds another turn to the tortuous history of public school desegregation in Massachusetts. The Racial Imbalance Act ("RIA"),⁹² which was passed in 1965, "authorized the withholding of state aid from any school system which refused to take appropriate steps to disperse minority students."⁹³ Not only was it "declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools,"⁹⁴ but if necessary action was not taken by de jure segregated school districts, students were given a statutory right to transfer.⁹⁵ Despite this law, the path to desegregation in Massachusetts has been beset by obstacles, especially in Boston.

⁸⁹ *Comfort v. Lynn Sch. Comm.*, 126 S. Ct. 798 (2005); see also Shelley Murphy, *High Court Won't Hear Lynn Plan for Schools*, BOSTON GLOBE, Dec. 6, 2005, at B2.

⁹⁰ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244, 276–80 (2003) (O'Connor, J., concurring); Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

⁹¹ See, e.g., Elisabeth Bumiller & Carl Hulse, *Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A1.

⁹² MASS. GEN. LAWS ch. 15, §§ 1I, 1J (2003), ch. 15, § 1K (repealed 1993), ch. 71, §§ 37C, 37D (2003).

⁹³ Jonathan L. Entin, *The Tragedy of the Common: Dilemmas of Public School Desegregation in Boston*, 62 NOTRE DAME L. REV. 796, 797 (1987) (reviewing J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985)); see also *Boston's Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318, 326 (D. Mass. 2003), *aff'd sub nom. Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71 (1st Cir. 2004) (noting that the RIA was "inspired by Title VI of the 1964 federal Civil Rights Act").

⁹⁴ MASS. GEN. LAWS ch. 71, § 37C (2003).

⁹⁵ *Id.* § 37D:

Any non-white pupil attending any public school in which racial imbalance exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial isolation exists in such other school; and any white pupil attending any public school in which racial isolation exists shall have the right to be transferred to and to attend any other school, except an exempt school, of his parents' or guardian's choice for his grade level and under the jurisdiction of the same school committee or regional district school committee if racial imbalance exists in such other school.

One might have expected that Boston, the “birthplace of abolitionism, where William Lloyd Garrison burned a copy of the Constitution to protest its failure to outlaw slavery,”⁹⁶ would have been eager to desegregate.⁹⁷ However, for nearly a decade after the RIA’s enactment, the Boston School Committee (“BSC”) refused to significantly integrate the city’s schools.⁹⁸ The BSC and the Massachusetts Board of Education battled each other in the courts, where the Supreme Judicial Court of Massachusetts upheld the RIA’s constitutionality.⁹⁹ For another six years the BSC refused to develop a plan that would meet the approval of the state board.¹⁰⁰ This intransigence finally resulted in a federally enforced, involuntary desegregation plan, authored by Judge W. Arthur Garrity on June 21, 1974,¹⁰¹ in which he held that a “dual school system” and a “systemic program of segregation” were intentionally perpetuated by Boston school officials.¹⁰² Many of the city’s white citizens proved even more resistant than the BSC; the busing of African American students into white neighborhoods led to “stone-throwing and . . . violent clashes.”¹⁰³ Rather than integrate, most of the white middle class fled to private schools.¹⁰⁴

The federal courts’ tone shifted in the 1990s, as they began restricting local power to integrate. Switching roles, the BSC now defended the use of racial preferences in its schools, especially the Boston Latin School, the district’s most prestigious school. First, a student denied admission to Boston Latin successfully challenged a 35% set-aside for African Americans and Hispanic students.¹⁰⁵ Then, an attempt to refashion the program by admitting 50% of the students based strictly on grades and test scores, while admitting the other 50% under a more “flexible” racial preference

⁹⁶ See Entin, *supra* note 93, at 796.

⁹⁷ For a comprehensive account of Boston’s desegregation saga, see LUKAS, *supra* note 93.

⁹⁸ RONALD P. FORMISANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S 44 (1991).

⁹⁹ Sch. Comm. v. Bd. of Educ., 227 N.E.2d 729, 733 (Mass. 1967) (“It would be the height of irony if the racial imbalance act [which includes Sections 37C and 37D], enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.” (footnote omitted)).

¹⁰⁰ STEVEN J. L. TAYLOR, DESEGREGATION IN BOSTON AND BUFFALO: THE INFLUENCE OF LOCAL LEADERS 42 (1998).

¹⁰¹ *Id.* at 48.

¹⁰² Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974). The city of Springfield was also forced to desegregate by order of the state Supreme Judicial Court. See Sch. Comm. v. Bd. of Educ., 319 N.E.2d 427, 428 (Mass. 1974).

¹⁰³ Maria Sacchetti, *Springfield to Revisit School Busing*, BOSTON GLOBE, Mar. 23, 2005, at B1. This is not to say that the BSC changed its ways “for the better” after the court desegregation order, as it actively took steps to frustrate Judge Garrity’s plan. See J. BRIAN SHEEHAN, THE BOSTON SCHOOL INTEGRATION DISPUTE: SOCIAL CHANGE AND LEGAL MANEUVERS 139–69 (1984).

¹⁰⁴ *Boston Considers Ending Forced Busing*, CNN ONLINE, Nov. 26, 2003, <http://www.cnn.com/2003/EDUCATION/11/26/boston.busing.ap/>.

¹⁰⁵ McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001 (D. Mass. 1996).

approach, was also held to violate the Equal Protection Clause.¹⁰⁶ Encouraged by these restrictive court rulings, several white parents filed suit to end the use of all race-based assignments in Boston's public schools.¹⁰⁷ Rather than fight what appeared to be another losing battle, the BSC voted to end these assignments and institute a facially race-neutral 50% "walk zone"¹⁰⁸ plan in which only half of a school's capacity would be guaranteed to individuals residing within this geographical area, with the other half open to individuals living in the rest of the city.¹⁰⁹

While the federal courts have limited the power of school districts to integrate under the Fourteenth Amendment, the RIA's permissive and mandatory commands to remedy racial imbalance and isolation remain intact. More than twenty voluntary plans for desegregation in Massachusetts, including the LSC's,¹¹⁰ must determine how to uphold the letter and spirit of state law while not offending seemingly conflicting federal law. As Judge Stearns has written, Massachusetts's local school committees have "found themselves caught between the Scylla of a federal court hostile to racial quotas, and the Charybdis of a state law which mandated the very practices they had sought to rescind."¹¹¹ Federal law apparently forbids school committees from engaging in "racial balancing,"¹¹² while the RIA supports "the promotion of racial balance."¹¹³ The tables have turned, but school committees are still trying to evade the reach of federal law—no longer to avoid desegregation, but to implement it.

2. What Does Comfort Mean for the Future of Massachusetts Public Schools?

Until the First Circuit's ruling in *Comfort*, it appeared possible that all a school district could do to follow the RIA was create a facially race-neutral assignment plan, such as Boston's 50% "walk zone." Presumably,

¹⁰⁶ *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

¹⁰⁷ Beth Daley, *Hub Panel OK's School Placement Proposal*, BOSTON GLOBE, Nov. 11, 1999, at B3.

¹⁰⁸ See *supra* note 16.

¹⁰⁹ Daley, *supra* note 107. For a description of the Supreme Court's "implied" acquiescence to voluntary desegregation plans, see Anderson, *supra* note 14, at 967–69.

¹¹⁰ See Megan Tench, *Parents to Test Racial Policy; Lynn Desegregation Heading to Court*, BOSTON GLOBE, June 3, 2002, at B1.

¹¹¹ *Boston's Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318, 326 (D. Mass. 2003), *aff'd sub nom. Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71 (1st Cir. 2004). In *The Odyssey*, Odysseus and his crew navigated a narrow channel fraught with mortal danger—the "cave monster" Scylla lay on one side while on the other was Charybdis, the "whirlpool monster." See HOMER, *THE ODYSSEY* 173–74 (Edward McCrorie trans., 2004). They could not avoid one danger without falling prey to the other, and ultimately six of Odysseus' men were captured and killed by Scylla. *Id.* at 177.

¹¹² *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("That would amount to outright racial balancing, which is patently unconstitutional."); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998).

¹¹³ MASS. GEN. LAWS ch. 71, § 37C (2003).

because 50% of every public school was open to outsiders, it would likely result in some modest increase in integration that would otherwise not occur. Under a 100% “walk zone” policy, popular schools would be entirely filled by nearby residents, which would replicate the segregation found in Boston’s neighborhoods. Even the 50% policy was challenged because of its goal to increase diversity, although the First Circuit upheld it.¹¹⁴

Comfort should benefit Massachusetts schools seeking to integrate. First, *Comfort* provides some much-needed guidance to Massachusetts’s local school committees about the methods and discretion they may employ to obtain the benefits of a racially diverse student body. Prior to this decision, it was uncertain whether school committees could use only facially race-neutral plans, *Grutter*-style “individualized consideration” plans to increase “viewpoint diversity,” or some other alternative. School committees now know that they may sometimes openly set racial composition targets in order to foster racial diversity. Although these plans must be narrowly tailored, it appears that school committees will have a degree of discretion in determining the necessary racial composition of their schools.¹¹⁵ They would not always have to hide behind *Grutter*’s screen of “individualized consideration.” Yet, because a school committee may be required to demonstrate to a court that there are no effective race-neutral plans at its disposal, future court interpretations of *Comfort* could make it substantially more difficult for school districts to institute these types of permissible race-based plans.¹¹⁶ At the very least, though, school committees know that it is *possible* to implement a race-conscious plan to desegregate in order to further the goals of the RIA.

Second, race-based plans are more likely to be effective. There is a higher likelihood that a race-neutral plan would fail to achieve its goals, and the potential need to retool such a plan repeatedly would threaten the stability of students in the school district. For example, a “walk zone” plan might increase racial diversity temporarily, but if residential demographics shift, its integrative effect might dissipate or even reinforce segregation. Should that occur, a school district still interested in fostering integration would have to concoct a new race-neutral plan, which could then cause a reshuffling of the student population that would be jarring to students and parents. Race-based plans are more efficient because transfers would only be granted where they directly promote desegregation.

¹¹⁴ *Anderson*, 375 F.3d 95–96.

¹¹⁵ *See Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 20–21 (1st Cir. 2005) (en banc).

¹¹⁶ *See infra* notes 125–127 and accompanying text.

*B. For Equal Protection**1. The Theoretical Clarity of "Racial Diversity"*

Not only does *Comfort* give local school committees some flexibility, but it also provides an opportunity for an honest discussion of what is permitted under the Equal Protection Clause, which may then prompt a judicial expansion of permissible integrative actions. When it comes to matters of race, judges should aim to make the law as clear as possible and not to relegate it to a system "camouflaged by an opaque process."¹¹⁷ Take for example Judge Selya's suggestion, in dissent, of what he would consider an appropriate alternative to the LSC's transfer plan. His system of "individualized consideration" would consist of having race count as a strong (not dispositive) "plus" for integrative transfers, but would also permit other students to be considered for segregative transfers based on the merits of individual circumstances.¹¹⁸ However, this system is strikingly similar to the one the LSC currently practices, which Judge Selya assails for its "unflinching use of race."¹¹⁹ The only actual difference between the LSC's current plan and Judge Selya's is that, in the latter, the LSC would secretly decide the desired racial composition of its schools (as public disclosure could result in a successful legal challenge) rather than doing so openly. Further, the LSC already provides for appeals (frequently successful in fact) that are based on "medical and safety concerns, daycare issues, and other types of hardship."¹²⁰ Judge Selya's plan is highly analogous to the plan approved in *Grutter*, in which race preferences are permitted because their overt nature is hidden behind a bureaucratic veil. Rather than declaring race as the primary purpose for the policy, the *Grutter* plan, on its face, "took into account racial and ethnic background as one of several 'soft variables,'"¹²¹ much as Judge Selya's plan would. Thus, the use of "racial diversity" plays a clarifying role in equal protection jurisprudence, while a "viewpoint diversity" analog in the desegregation context would likely keep race-based actions covert. Under the LSC's "racial diversity" program it is appropriate to disclose publicly the racial composition the school committee thinks is necessary to achieve integration, while under "viewpoint diversity" these desired proportions would be confidential. Both rationales lead to the same practical result, but "viewpoint" is designed to divert attention from the actual use of race.

The obfuscation resulting from "viewpoint diversity" cannot be beneficial. One might counter this by arguing that, similar to the affirmative action context, "silence is golden here [because] opacity about racial pref-

¹¹⁷ Post, *supra* note 3, at 74.

¹¹⁸ *Comfort*, 418 F.3d at 31–32 (Selya, J., dissenting).

¹¹⁹ *Id.* at 32.

¹²⁰ *Id.* at 8 (majority opinion).

¹²¹ *Id.* at 13 (citing *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003)).

erences minimizes social disputes over abstract, irreconcilable principles and sustains desirable social myths.”¹²² However, “suspicion already abound[s]” when these kinds of racial choices are made, as people “assume that preferences are even more widespread than they actually are.”¹²³ Minimizing and neutralizing the role of race under the banner of “viewpoint diversity,” despite its purported objective, can also have a stigmatizing effect in that certain racial groups may internalize the view that racial issues are not worth including in the public discourse.¹²⁴ Moreover, a clear delineation of a school’s integrative policies permits a robust public discussion by eliminating the murky application of an “individualized consideration” plan. In opening itself to a public dialogue, it is more likely that a school district will identify an effective and palatable race-based plan for its particular needs. Overall, *Comfort*’s reasoning helps to make public discussions about race more straightforward.

2. Practical Usefulness of “Racial Diversity”

Despite its advantages, *Comfort*’s analysis was cautious in at least one respect, which could greatly limit its application. The LSC had already analyzed six race-neutral alternatives that it found insufficient for its goals.¹²⁵ However, the *Comfort* majority indicated that “if there were[] a race-neutral way to achieve the benefits of diversity and reduced racial isolation, the use of race would be unnecessary and therefore not narrowly tailored.”¹²⁶ This requirement stands as an ominous obstacle to a school district that wishes not to spend months (or longer) considering an array of options before it can proceed to its preferred plan. School districts may also fear that a decision to implement a race-based plan to increase racial diversity, even after reviewing other possibilities, will nonetheless lead to expensive litigation in which parents will argue that other race-neutral alternatives were not adequately contemplated. The *Comfort* majority claims that a school committee “need not prove the impracticability of every [race-neutral] model for racial integration,”¹²⁷ but future courts could still require the consideration of an inordinate number of race-neutral plans first. *Comfort*’s position in this respect is also flawed because it perpetuates

¹²² See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 196 (2003).

¹²³ *Id.*

¹²⁴ See Michael Boucai, *Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws*, 18 NAT’L BLACK L.J. 239, 265–66 (2005) (“Neutrality is from this perspective a suppression, an institutionalization of *psychic* taboos as much as segregation was the institutionalization of *physical* boundaries.”) (quoting Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2140 (1989)) (internal quotation marks omitted).

¹²⁵ *Comfort*, 418 F.3d at 22–23.

¹²⁶ *Id.* at 17.

¹²⁷ *Id.* at 23.

the view that race-neutrality is different in kind from race-based plans, even though their actual divergence is often difficult to identify.

Despite this, *Comfort's* "racial diversity" component remains significant because it may be difficult for courts to accept that "viewpoint diversity" for K–12 students can constitute a compelling interest. As Judge Gertner argued in dismissing the plaintiffs' equal protection claim, "[t]he value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions."¹²⁸ This statement hints that "viewpoint diversity" should not be the sole interest that the LSC and other school committees assert when defending race-based integration, because the Supreme Court is unlikely to uphold it. For example, kindergarten students may not be capable of exposing each other, in Justice O'Connor's words, to "widely diverse . . . ideas[] and viewpoints."¹²⁹ *Comfort's* acceptance of the "racial diversity" rationale promises a way around the potentially limited application of viewpoint diversity.

Still, one should not simply ignore the argument that "viewpoint diversity" can play a compelling role in a student's education. As one recent article noted in a somewhat different context, "[v]iewpoint diversity is crucial in higher education due to the emphasis on exchanging ideas, but there is no reason to believe it is less important in charter schools Younger students may be more open minded, more willing to learn racial tolerance, and better able to establish interracial relationships."¹³⁰ This argument has substantial merit. "Racial diversity" can improve racial tolerance by increasing student *exposure* to other races, but "viewpoint diversity" could also do the same for young children through *discussion* of ideas with students of different races. Good teachers should be able to explore student viewpoints, even those of young children, and demonstrate to their classes that there are many ways of experiencing the world. But if Judge Gertner's stance on "viewpoint diversity" is generally shared by federal judges, it is unlikely that this rationale would be accepted for the youngest elementary school children. Ultimately, even if the Supreme Court accepted that "viewpoint diversity" could extend to a race-based plan underneath the "higher education line," at some point an arbitrary floor would probably be set. This floor would not only be intellectually unsatisfying, but it could impose the undesirable administrative burden of forcing a local school board to apply two different policies for the same

¹²⁸ *Comfort IV*, 283 F. Supp. 2d 328, 381 n.90 (D. Mass. 2003).

¹²⁹ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

¹³⁰ Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 173–74 (2006). "Charter schools are nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools." U.S. Charter Schools, *Overview*, http://www.uscharterschools.org/lpt/uscs_docs/311 (last visited Apr. 18, 2006). Thus, Gajendragadkar's argument that charter school students could benefit from viewpoint diversity should apply, to the extent the argument is valid, to students in traditional public schools.

district: a “viewpoint diversity” plan for those above the floor and a facially “race-neutral” plan for those below. On the contrary, the “racial diversity” argument should apply with equal force to all students in grades K–12, enabling the school committee to apply a uniform policy throughout the district.

Consequently, *Comfort* would help bridge a gap left by *Grutter* by providing a more reliable mechanism through which primary and secondary public schools can use a race-based policy for desegregation purposes. The Supreme Court has never held that “viewpoint diversity” is a proper reason for instituting race-based plans at primary and secondary public schools, and Judge Gertner’s discussion indicates that the Court is unlikely to approve of it for voluntary desegregation. Without “racial diversity” as an additional basis for acting, race-based plans at this level may be held unconstitutional. But if the Court accepts *Comfort*’s rationale, it must consider another important question: except for the fact that the Supreme Court seems to have acted otherwise in *Grutter*, if “racial diversity” is a proper basis for assuring a “critical mass” of students in public high schools and below, why can it not also apply above to college and professional schools? “Racial diversity’s” potential, in the abstract, is thus unlimited and could permit broader efforts to combat segregation’s harms. In this respect *Comfort* has already had some impact. The Ninth Circuit has relied on *Comfort* to uphold Seattle’s “open choice” assignment plan, which utilized a “racial tiebreaker”¹³¹ to achieve greater racial diversity in its public high schools.¹³² The case expands on *Comfort*, as the Ninth Circuit opinion upheld initial school assignments based on race,¹³³ while the LSC used race only when students sought to transfer from their neighborhood school.

3. Will *Comfort* Survive the Test of Time?

Ultimately, it is *Comfort*’s strengths—its general openness and its acceptance of “racial diversity”—that could contribute to its downfall. With the recent addition of Justice Alito, the Court may prove significantly

¹³¹ See generally Keith Ervin et al., *Seattle Schools’ Racial Tiebreakers Upheld by State Supreme Court*, SEATTLE TIMES, June 27, 2003, at A1.

¹³² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1174–77 (9th Cir. 2005) (en banc) (citing *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 15–16 (1st Cir. 2005) (en banc)). Five of the city’s ten high schools were widely viewed by the local public as being superior to the others. *Id.* at 1169. The school district did not involve itself in the high school assignments except for those seeking to attend one of the oversubscribed schools, which then led to the use of multiple tiebreakers. *Id.* The four tiebreakers were employed in the following order: (1) attending a school where a sibling already attends, (2) improving a school’s racial balance if overly segregated, (3) admitting students to the school closest to their residence, and (4) using a lottery to fill the remaining seats. *Id.* at 1169–71.

¹³³ See *id.* at 1166.

more conservative¹³⁴ and thus less amenable even to race-conscious schemes based on *Grutter*'s rationale. In *Grutter*, there were already four justices who argued that the "Law School's program [was] . . . a naked effort to achieve racial balancing."¹³⁵ If this view is now shared by a majority, then the newly minted "racial diversity" interest put forth by *Comfort* may have little chance of success, even if *Grutter* is never explicitly overruled. A majority must simply rule that "viewpoint diversity" is the sole reason that one can use a race-based plan without offending the dictates of equal protection. The racial diversity argument, which does not attempt to minimize the role of race in the LSC's transfer policy, could then be struck down by the Court through the claim that "[r]acial classifications raise special fears that they are motivated by an invidious purpose,"¹³⁶ even though this point was made to strike down efforts to segregate on the basis of race¹³⁷ rather than to desegregate.

Additionally, the LSC's plan can be easily distinguished from *Grutter* and equated with *Gratz*'s unconstitutional plan. Because the majority in *Comfort* refused to accept Judge Selya's gambit of requiring "individualized consideration" for transfers, the Court could strike down similarly "mechanical" plans by replicating the arguments from Judge Selya's dissent. The Court could assert, as Judge Selya did, that "[i]n one sense . . . , this plan is . . . more harmful than the racially inflexible program struck down in *Gratz*" because the University of Michigan did not reject applicants solely based on their race.¹³⁸

Of course, determining whether plans like the LSC's are closer to *Grutter* or *Gratz* depends on how the issue is framed. If one emphasizes the "mechanical" nature of the transfer plan, then Judge Selya's opinion would likely appear more convincing. However, one could instead emphasize that because the transfers are "non-competitive" and "are not tied to merit, the Plan's use of race does not risk imposing stigmatic harm."¹³⁹ From this vantage point, a court inclined to allow localities to voluntarily integrate their schools could find a way around the "mechanical" aspects of their plan.

The most difficult issue that *Comfort*'s rationale must confront is how to convince other jurists that the LSC was not engaged in prohibited "racial balancing," and that it did not establish an unconstitutional "quota"

¹³⁴ See David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82*, N.Y. TIMES, Jan. 30, 2006, at A1 (detailing the view that Samuel Alito's expected confirmation would be "a watershed for the conservative movement"); see also Adam Liptak, *Alito Vote May Be Decisive in Marquee Cases This Term*, N.Y. TIMES, Feb. 1, 2006, at A1 (noting that Alito is "expected to join three justices considered conservative—Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas").

¹³⁵ *Grutter v. Bollinger*, 539 U.S. 306, 379 (2003) (Rehnquist, C.J., dissenting).

¹³⁶ *Johnson v. California*, 543 U.S. 499, 505 (2005).

¹³⁷ See *id.* at 502.

¹³⁸ *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 31 (1st Cir. 2005) (Selya, J., dissenting).

¹³⁹ *Id.* at 18 (majority opinion).

system.¹⁴⁰ The LSC's decision whether to allow or deny a requested transfer is entirely based on the goal of controlling the proportion of nonwhite students at its schools: public elementary schools are to be between 43% and 73% nonwhite, while all other public schools must range from 48% to 68% nonwhite.¹⁴¹ The LSC could argue, and in fact Judge Gertner agreed, that this does not involve true "balancing," but merely ensures the necessary "critical mass" that *Grutter* permits.¹⁴² However, with the recent changes to the Court's composition, it is uncertain what a majority would hold. There is a distinct possibility that the majority would echo *Grutter*'s dissent in the voluntary desegregation context, and conclude that "[s]tripped of its 'critical mass' veil, the . . . program is revealed as a naked effort to achieve racial balancing."¹⁴³ Thus, only time will tell what *Comfort*'s fate will be.

IV. RECASTING EQUAL PROTECTION JURISPRUDENCE: LOCAL CONSTITUTIONALISM AND THE DEFENSE OF LIMITED DEFERENCE

A. *Locating Local Constitutionalism*

With *Comfort*'s legacy in doubt, the final fate of voluntary desegregation programs may depend on how well proponents are able to respond to certain underlying concerns. For instance, why should local school boards, whose predecessors supported de jure segregation as evidenced by *Brown*,¹⁴⁴ be trusted with the dangerous power to install "racial diversity" through the intrusive method of selecting a desired racial mix of students at their schools? Also, why should any faith be placed in local governing institutions when they have so frequently harmed minorities and the poor?¹⁴⁵ A coherent theoretical structure that can assuage such concerns would help shore up *Comfort*'s constitutionality.

Much has changed since *Brown*, as localities across the nation are acting through the processes of local democracy to desegregate because they believe it is beneficial to do so.¹⁴⁶ It is true that claims of localism

¹⁴⁰ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–20 (1978) (Powell, J., opinion of the Court).

¹⁴¹ See *supra* notes 32–33 and accompanying text.

¹⁴² *Comfort IV*, 283 F. Supp. 2d 328, 387 (D. Mass. 2003). *But see* *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003) (detailing the University of Michigan's claim that "there [was] no number, percentage, or range of numbers or percentages that constitute critical mass").

¹⁴³ See *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

¹⁴⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954).

¹⁴⁵ For an example of this view, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) ("Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole.").

¹⁴⁶ See Sean Pager, *Is Busing Preferential? An Interpretive Analysis of Proposition 209*, 21 WHITTIER L. REV. 3, 8 (1999) (estimating that as of 1999 there were "roughly fifty school districts in California practic[ing] some form of voluntary desegregation"); Ander-

have often been made to “reinforce existing distributions of crime, municipal resources, and social, economic, and symbolic capital.”¹⁴⁷ Still, the LSC example demonstrates that local control can have positive results: during the integrative transfer plan, racial tensions within the city declined significantly and student academic performance greatly increased on the whole.¹⁴⁸ These benefits will be lost if the school committee is stripped of its power to assign transfers on the basis of race.

Despite the historical treatment of local political institutions as powerless entities¹⁴⁹ that are not to be trusted,¹⁵⁰ in recent years Professor Barron has articulated an implicit constitutional role for them—in effect, “local constitutionalism.”¹⁵¹ By sifting through a number of Supreme Court cases, Professor Barron has been able to identify a localist thread in several opinions indicating that, although the “text of the Constitution does not mention local governments,”¹⁵² the Court has from time to time deferred to localities when facing constitutional questions.¹⁵³ In explaining how an image of local power can be squared with the Constitution’s commands, Professor Barron has crafted a two-part analysis that delineates local constitu-

son, *supra* note 14, at 961 (noting that “many school districts have implemented voluntary integration plans”); Tench, *supra* note 110 (noting that there are more than twenty voluntary desegregation plans in Massachusetts, as well as “others throughout the country”).

¹⁴⁷ Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 471 (2001).

¹⁴⁸ Buote, *supra* note 30. It is true that the RIA is still in effect in Massachusetts, and that its distribution of funds to school committees acting in a desegregative manner likely influences their decisions. However, some school committees would probably integrate regardless of the state’s assistance in order to realize the other goals cited.

¹⁴⁹ It has long been accepted by the Supreme Court that states can impose upon cities and other local government entities in whatever manner they wish. *See, e.g.*, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.”).

¹⁵⁰ David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 610–11 (1999) (commenting that “current doctrine . . . tends to [characterize] local governments [as] uniquely liable for the commission of constitutional wrongs”).

¹⁵¹ *See generally id.* For something of an originalist argument that lends support to local constitutionalism, one should consider what functions cities had prior to the Constitution’s ratification. For example, in the Massachusetts colonial period, “as settlement spread increasingly beyond the possibility of close surveillance from the center” there came a realization that “the public peace could not be entrusted to Boston, but would have to be separately secured in each town in the province.” MICHAEL ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* 18 (1970). The towns had representatives in the General Court, but controlled them effectively by requiring yearly elections of representatives, paying their representatives’ salaries directly (as opposed to the state government), and having a “town mandate” that required town representatives to vote a certain way on various issues. *Id.* at 21–28. Although the Revolutionary War catalyzed a period of decline in local autonomy, *id.* at 220–21, it is difficult to believe that Massachusetts (and likely other states) ratifying the Constitution shortly thereafter would have imagined that they were agreeing to a system in which their cities had *absolutely* no protected function.

¹⁵² *See Barron, supra* note 150, at 487.

¹⁵³ *See id.* at 560–94.

tionalism's scope: a local government cannot (1) "violate a federal constitutional norm prescribed by the Supreme Court," but (2) "local governmental sovereignty . . . merits federal constitutional protection when such recognition would serve some independent substantive constitutional value."¹⁵⁴ In expanding from this premise, Professor Schragger has argued that increased local authority would better serve the constitutional design of the Religion Clauses, partly because the "dispersal of political authority" would prevent any one government institution from overreaching on religious issues; additionally, local governments could act as a more effective check against the zealous actions of local private religious groups than the state or federal government.¹⁵⁵ Furthermore, Professor Schragger has read *Romer v. Evans*¹⁵⁶ from a localist perspective to suggest that "the Court's equal protection doctrine might require that local governments be permitted to make marriage eligibility determinations, at least with regard to gays and lesbians."¹⁵⁷ Given this developing landscape, the next two Sections will describe why and how local constitutionalism should be applied to voluntary desegregation.

B. Why Deference Is Important—Local Democracy and Local Expertise

The future of desegregation is at a crossroads, because "[a]s many school systems escape the mandate of desegregation decrees, they face for the first time a choice of direction."¹⁵⁸ Generally speaking, "Americans consider the education of their children a matter of intense personal and local concern."¹⁵⁹ Entrusting local governments with the power to determine whether and how to continue desegregation would provide citizens with an incentive for engaging themselves politically; they would have some ability to decide democratically the character of their local community. As Professor Frug has observed, local democracy is also often the only way in which the vast majority of Americans can access the political realm:

Unlike central governments, cities can provide the kind of personal, day-to-day contact among citizens and between citizens and their elected officials that community building requires. Only at the local level can people participate in the fundamental democratic experience of working with strangers—with people with whom one disagrees, with people with whom one feels nothing in

¹⁵⁴ *Id.* at 600–01; see also Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1892 (2004) ("Taking local governments seriously does not entail blinding oneself to their weaknesses.").

¹⁵⁵ See Schragger, *supra* note 154, at 1815.

¹⁵⁶ 517 U.S. 620 (1996).

¹⁵⁷ Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147 (2005).

¹⁵⁸ *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004).

¹⁵⁹ *Id.* at 850.

common, with people who make one uncomfortable—to find solutions to common problems.¹⁶⁰

Thus, permitting localities a role in deciding whether to desegregate could significantly add to the vibrancy of citizens' democratic experience.

Perhaps with these, or similar reasons in mind, the Court has at times been reluctant to overrule local decisions. The starting point arises from an unexpected location: *Milliken v. Bradley*.¹⁶¹ In invalidating a court-ordered multi-district desegregation plan for the Detroit metropolitan region, the Court stated that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."¹⁶² This sentiment was repeated years later, when the Court, in *Seattle School District No. 1*, invalidated Washington's attempt to prohibit Seattle's voluntary desegregation program.¹⁶³ The majority chided the state for removing this educational choice from the local and "lodging decisionmaking authority over the question at a new and remote level of government."¹⁶⁴

These cases are not necessarily affirmative declarations of local constitutional sovereignty. *Milliken*, among other cases, has been strongly criticized as employing "local sovereignty language" to "support creation of an internal limit on the coverage of the fourteenth amendment."¹⁶⁵ Thus, the Court's appeal to localism prevented more effective desegregation efforts that would have come from allowing such plans to cross city lines.¹⁶⁶ Nonetheless, these two cases possess a potentially transformative power when resurrected in light of voluntary desegregation plans. When Justice O'Connor applied strict scrutiny to the affirmative action program in *Grutter*, she held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."¹⁶⁷ Justice Thomas¹⁶⁸ and others¹⁶⁹ have argued that this deference is incompati-

¹⁶⁰ Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 37 (1998).

¹⁶¹ 418 U.S. 717 (1974).

¹⁶² *Id.* at 741–42.

¹⁶³ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

¹⁶⁴ *Id.* at 483.

¹⁶⁵ Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 109–10 (1986).

¹⁶⁶ See *Milliken*, 418 U.S. at 735 ("[T]he Court of Appeals concluded that 'the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan.'" (quoting *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973)).

¹⁶⁷ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹⁶⁸ *Id.* at 350 (Thomas, J., concurring and dissenting) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'").

¹⁶⁹ See, e.g., Jack M. Balkin, Plessy, Brown, and *Grutter*: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1724 (2005) ("The fact that the Court engages in this sort of deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims.").

ble with a strict scrutiny analysis. However, these criticisms assume that the Court not only has the institutional capacity to define the law school's appropriate educational mission, but also is the sole entity capable of doing so. While the University of Michigan's law school is state-run and not locally controlled, Justice O'Connor's willingness to defer in this instance might also carry over to local institutions in the voluntary desegregation effort. This implication is at least facially consistent with the Court's language in *Milliken* and *Seattle School District No. 1*.

Further, the case for deferring to local government race-based plans is stronger than that for deferring to a law school admissions committee—from a democratic perspective. Local government entities are “important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society.’”¹⁷⁰ Identifying the democratic interest that is satisfied in allowing admissions committees to decide these thorny matters of race for themselves is far more difficult and tenuous.¹⁷¹

Second, local school boards have an expertise in deciding educational matters that should be respected. It is important to remember that “[f]ederal courts are not school boards and they lack the expertise to substitute their judgment for that of educators.”¹⁷² The Court implicitly agreed with this principle in *San Antonio Independent School District v. Rodriguez*,¹⁷³ in which the majority discredited its own institutional competence in ruling on local educational matters. In rejecting an equal protection challenge to Texas's school-financing structure, the Court stated that “the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”¹⁷⁴ The Court has even asserted that local school boards are in the best position to decide the racial composition of their schools. In *North Carolina State Board of Education v. Swann*,¹⁷⁵ the Court declared that “[s]chool authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”¹⁷⁶

¹⁷⁰ Barron, *supra* note 150, at 490 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

¹⁷¹ See *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 850 (W.D. Ky. 2004) (“The historical importance of the deference accorded to local school boards goes to the very heart of our democratic form of government. It is conceptually different—though perhaps more accepted—than the deference discussed in *Grutter* and *Bakke*.”).

¹⁷² Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 95 n.47 (1998).

¹⁷³ 411 U.S. 1 (1973).

¹⁷⁴ *Id.* at 41.

¹⁷⁵ 402 U.S. 43 (1971).

¹⁷⁶ *Id.* at 45. It should be noted that this statement came in the context of remedying de jure segregation. *Id.*; see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to pre-

Thus, when a locality acts to desegregate, its decision to do so should be given due weight because of its educational expertise.

C. Applying Local Constitutionalism to Comfort

If one accepts that local constitutionalism constitutes a desirable structure, the final step is to determine how Professor Barron's two-part analytical frame can be reconciled with the Equal Protection Clause and *Brown*. As required by Professor Barron's first prong, permitting local school boards some deference does not mean that localities would have a "free pass" to violate a "norm prescribed by the Supreme Court."¹⁷⁷ A school could not initiate plans to increase segregation, as this action would directly violate *Brown*'s prohibition of de jure segregation.¹⁷⁸ But just as *Rodriguez* and *Milliken* were used by the Court to create an "internal limit" on the Equal Protection Clause,¹⁷⁹ they could now support a modest relaxation of strict scrutiny when local school boards determine that a race-conscious program is necessary to achieve compelling educational and social goals. Because the judicial inquiry may appear less searching as a result, it could be described as intermediate scrutiny.¹⁸⁰ However, if the Court denies this deference categorically, and forever bars racial diversity as a rationale for desegregation, it would be declaring that the Justices *always* know better than those "on the ground" whether "racial diversity" is a compelling interest for public education. It is significant to note that Judge Selya, who felt that the transfer plan could not be sustained under the current state of equal protection law, stated that the LSC's "motives here were noble."¹⁸¹ This lack of an "invidious purpose"¹⁸² also supports the argument that it is reasonable to accord some deference to these educational decisions. The Supreme Court and the inferior federal courts can still serve their constitutional roles by monitoring the progress of such plans.¹⁸³

pare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.').

¹⁷⁷ See *supra* note 154 and accompanying text.

¹⁷⁸ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷⁹ See *Williams*, *supra* note 165, at 109–10.

¹⁸⁰ Intermediate scrutiny was the level of review that Judge Gertner had wanted to apply. *Comfort IV*, 283 F. Supp. 2d 328, 365–66 (D. Mass. 2003).

¹⁸¹ *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *61 (1st Cir. Oct. 20, 2004). Additionally, Chief Judge Boudin, concurring in the en banc opinion, also noted that "the Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed." *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring).

¹⁸² *Johnson v. California*, 543 U.S. 499, 505 (2005).

¹⁸³ For example, if strict scrutiny is applied, they might ensure that the plans are narrowly tailored to meet their ends, and require that they exist for the time necessary to achieve the compelling goals sought, so long as these oversight methods do not make it practically impossible to implement a voluntary desegregation plan.

Furthermore, this deference would conform to local constitutionalism's second requirement that local authority be protected where it would "serve some independent substantive constitutional value."¹⁸⁴ As Judge Gertner wrote, while the LSC's plan was not "*compelled by Brown*, . . . they surely have an interest in fulfilling the *promise of Brown*."¹⁸⁵ As she continued, "*Brown* and its progeny, quite apart from their mandatory elements, also have a powerful hortatory significance aimed at eventually uprooting school segregation 'root and branch.'"¹⁸⁶ This promise has not nearly been fulfilled. More than fifty years after *Brown* was decided, "the halls of the nation's classrooms are marked by the legacy of Jim Crow segregation and haunted by the ghost of *Brown's* promise of integration. Public schools today are still racially segregated to a dramatic degree. Many are just as segregated as were schools under Jim Crow."¹⁸⁷

Numerous local government entities, such as the LSC, have shown that they can play an essential and independent role in securing this constitutional goal through voluntary desegregation plans. The intentions of these school administrators have not been disputed. By further implementing the promise of *Brown*, "[l]ocal governments, the political structures that govern our lives on a daily basis, may be the means through which we discover our constitutional rights."¹⁸⁸ From this outlook, upholding *Comfort* can allow local governments a more fulfilling and proactive role in their communities.

V. CONCLUSION: BUILDING THE COALITION WITH LOCAL CONSTITUTIONALISM

Though not perfect, *Comfort* is a valuable precedent that takes the equal protection discussion into relatively unexplored territory and specifically mitigates the growing obstacle that federal law has posed to public schools. *Comfort* may also foster a more honest discussion of constitutional principles, because the "racial diversity" rationale does not shy away from its true motivation. The Supreme Court has never ruled on this interest, but the theory of local constitutionalism affirms the long-established role of local democracy in educational policy-making. It demonstrates that localities can be given a limited power to secure constitutional values without simultaneously allowing them to trample on our constitutional rights. Unit-

¹⁸⁴ Barron, *supra* note 150, at 600.

¹⁸⁵ *Comfort IV*, 283 F. Supp. 2d at 389.

¹⁸⁶ *Id.* at 390 (quoting *Green v. City Sch. Bd.*, 391 U.S. 430, 437–38 (1968)). A federal judge in Kentucky has upheld a race-based assignment plan, noting that "*Brown's* original moral and constitutional declaration has survived to become a mainstream value of American education and . . . the Board's interests are entirely consistent with these traditional American values." *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004).

¹⁸⁷ Richard T. Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1306 (2004).

¹⁸⁸ Barron, *supra* note 150, at 612.

ing local constitutionalism with “racial diversity” helps explain why a locality’s decision to achieve desegregation with a race-conscious program should be respected. However, if this connection is not made explicitly, the Court may be more inclined to overrule *Comfort’s* holding. Should this occur, voluntary desegregation plans might be limited to facially race-neutral alternatives, or perhaps *Grutter*-style “individualized consideration,” that fail to answer Justice Souter’s call for a transparent equal protection jurisprudence.

