

Constitutional Law—Mechanical Race-Conscious Transfer Plan in Elementary and Secondary Public School System Held Constitutional—*Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005)

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person within its jurisdiction equal protection of the laws.¹ The Supreme Court has struck down inflexible race-conscious educational admissions programs because they deny individuals opportunities afforded under the Constitution.² In *Comfort v. Lynn School Committee*,³ the First Circuit Court of Appeals considered whether race-conscious transfer restrictions in elementary and secondary public schools violate students' equal protection rights.⁴ The court concluded that the particular plan in question was constitutional because it was "narrowly tailored" to a compelling state interest.⁵

In 1989, the Lynn School Committee (Committee) adopted the Voluntary Plan for School Improvement and the Elimination of Racial Isolation (Plan) to combat growing racial imbalance in its public schools.⁶ The Plan sought to achieve this goal by limiting transfers that exacerbated "racial isolation" or "racial imbalance."⁷ As a result of the Plan's implementation, Lynn's schools

1. U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection); *see also* *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (noting Fourteenth Amendment prohibits states from denying individuals equal protection); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (describing Equal Protection Clause as direction to treat similarly-circumstanced people alike).

2. *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003) (holding mechanical race-conscious admissions programs unconstitutional). *But see* *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding flexible race-conscious admissions programs constitutional).

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

4. *Id.* at 6 (introducing case issue).

5. *Id.* at 23 (indicating holding of case).

6. *Id.* at 7 (discussing development of Plan). Lynn's school system is "neighborhood centered," meaning students are entitled to attend their local schools. *Id.* at 6. Between 1980 and 2000, the city's racial demographics shifted from 93% Caucasian to 63% Caucasian. *Id.* at 7. Residential segregation by race also increased during this time, and because of Lynn's neighborhood school policy, its schools became increasingly racially segregated. *Id.* Predominantly nonwhite schools suffered disproportionately from discipline problems, overcrowding, resource shortages, and teacher apathy. *Id.* at 6. Prior to creating the Plan, the school committee created non-competitive magnet schools that were only modestly successful. *Id.* at 7. *See generally* Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1 (2000) (outlining history of voluntary measures to promote racially diverse student bodies); Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996) (identifying trend of "hypersegregation" of blacks away from well performing schools); John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749 (1996) (suggesting neighborhood school policies may increase segregation based on race); Derek Black, Comment, *The Case For New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923 (2002) (providing overview of cross-racial interaction benefits in K-12 context).

7. *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 59 (D. Mass. 2000) (describing generally limits on

experienced higher attendance rates, a safer environment, declining suspension rates, and improved test scores.⁸

In 2003, several parents, each representing a child denied a transfer partially on account of race, sued on the grounds that the Plan's racial consideration was unconstitutional.⁹ The district court found that the Plan was constitutional because it served compelling state interests and was narrowly tailored to achieve those interests.¹⁰ A panel of the First Circuit Court of Appeals reversed in part, holding that while achieving racial diversity in elementary and secondary schools was a compelling state interest, the Committee did not narrowly tailor the Plan to achieve that goal.¹¹ The First Circuit Court of Appeals granted review en banc and reversed the panel's decision, concluding that the Committee had a compelling interest in securing the educational benefits of racial diversity and that it narrowly tailored the Plan to achieve that interest.¹²

The Equal Protection Clause of the Fourteenth Amendment mandates that the government may treat individuals differently because of their race only for the most compelling reasons.¹³ The Supreme Court has held that race-

transfers). Under the Plan, a "racially balanced" school has a nonwhite population within a set range of the overall proportion of minorities in Lynn's schools: plus or minus fifteen percent for elementary schools, and plus or minus ten percent for other schools. *Id.* at 61. A school whose nonwhite population falls below this range is "racially isolated," whereas a school whose nonwhite population falls above the range is "racially imbalanced." *Id.* Merit-based competition is not a factor in the Plan. *Id.* at 61-62. Students of any race are allowed to freely transfer among "racially balanced" schools or to make "desegregative" transfers, but are not allowed, absent certain exceptions, to make "segregative" transfers (i.e., if the transfer would exacerbate the isolation or imbalance). *Id.* at 61. Exceptions to the rule include safety, medical needs, and hardships involving daycare or siblings attending different schools. *Id.*; *see also* 418 F.3d at 8 (noting roughly half of all transfer appeals granted by Committee).

8. 418 F.3d at 14; *see also* *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 376 (D. Mass. 2003) (acknowledging improvements in racial tension, tolerance, and sense of community), *aff'd*, 418 F.3d 1 (1st Cir. 2005).

9. *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 333 (D. Mass. 2003) (discussing allegations of unconstitutionality), *aff'd*, 418 F.3d 1 (1st Cir. 2005). The same district court made several other rulings prior to 2003 in this case, none of which determinatively affected the Equal Protection Clause claim. *See generally* *Comfort v. Lynn Sch. Comm.*, 150 F. Supp. 2d 285 (D. Mass. 2001) (finding adequate allegations of violated constitutional rights to support nominal damages); *Comfort v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000) (determining threshold for injunctive relief not satisfied).

10. *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 392 (D. Mass. 2003) (recognizing elimination of school segregation as compelling interest and race-conscious means as narrowly tailored), *aff'd*, 418 F.3d 1 (1st Cir. 2005). The court distinguished the Plan from competitive admissions programs that seek "viewpoint diversity," finding that though some students may not attend a particular school, no one school is superior to another and therefore no student is disadvantaged on the basis of race. *Id.* at 365.

11. *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *61 (1st Cir. Oct. 20, 2004) (discussing failure of narrow tailoring analysis), *rev'd en banc*, 418 F.3d 1 (1st Cir. 2005). The narrow tailoring requirement failed for four reasons: the mechanical use of race, a design focused more on achieving racial balancing than the "critical mass" necessary for true racial integration, the failure to consider race-neutral alternatives, and the absence of periodic review. *Id.* at *61.

12. 418 F.3d at 6 (granting review en banc); *see also infra* notes 26-33 and accompanying text (detailing court's holding and reasoning).

13. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (discussing requirements for

conscious governmental policies are unconstitutional when implemented merely to assure a certain percentage of a particular racial group within the whole.¹⁴ The Court applies a strict scrutiny standard to determine whether such race-conscious policies comply with equal protection guarantees.¹⁵

For a race-conscious governmental policy to survive strict scrutiny, it must serve or advance a compelling state interest.¹⁶ Furthermore, the government must narrowly tailor the use of race to achieve that interest.¹⁷ The narrow tailoring analysis must not exclude the context and distinct issues raised in a given case.¹⁸

governmental use of race); *see also* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (reiterating government-imposed racial classifications constitutional only if accomplishing permissible state objective).

14. *See* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (declaring mechanical race-conscious admissions policies patently unconstitutional); *see also* *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) (holding congressional redistricting based on race unconstitutional); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (forbidding racial balance if sought for its own sake); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (plurality opinion) (announcing apportionment of public contracting awards based on race unconstitutional); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding restriction to marry based solely on race unconstitutional). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 379, (2003) (Rehnquist, J., dissenting) (noting attempts to achieve racial “critical mass” often nothing more than unconstitutional racial balancing).

15. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (applying strict scrutiny to law school admissions policy); *see also* *Johnson v. California*, 543 U.S. 499, 505 (2005) (applying strict scrutiny to “benign” policies neither burdening nor favoring racial groups); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (requiring race-based governmental action subjected to detailed judicial inquiry to ensure equal protection rights not infringed); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (elucidating strict scrutiny applied to all racial classifications to “smoke out” illegitimate uses of race); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (noting racial classifications inherently suspect and calling for “most exacting judicial examination”). The *Grutter* court noted that, although all governmental uses of race are subject to strict scrutiny, not all uses are objectionable or invalidated by that standard. *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003).

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (asserting strict scrutiny requires furthering of compelling government interest); *see also* *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 850 (W.D. Ky. 2004) (noting no particular interest categorically compelling), *aff’d per curiam* 416 F.3d 513 (6th Cir. 2005); *Drew S. Days, III, Fullilove*, 96 YALE L.J. 453, 485 (1987) (requiring more than good motives when race used to allocate governmental resources).

17. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (discussing narrow tailoring analysis); *see also* *Adarand Constructors Inc., v. Pena*, 515 U.S. 200, 227 (1995) (requiring narrowly tailored measures to accomplish compelling interest); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (noting narrow tailoring ensures use of race “fit[s]” compelling goal to prevent prejudice or stereotype); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (requiring government’s asserted purpose “be specifically and narrowly framed”).

18. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (noting context matters when reviewing race-based governmental action under Equal Protection Clause); *see also* *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) (noting constitutional interpretation must incorporate context of controlling facts); *cf.* *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (stating higher education cases serve as poor models for K-12 context because competition involved). *See generally* Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37 (2000) (arguing unique characteristics of K-12 public schools demand different analysis than other contexts); James Nial Robinson II, *Trying to Push a Square Peg Through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K-12 Admissions Programs*, 2004 BYU EDUC. & L.J. 51 (2004) (suggesting higher education and K-12 contexts require different analyses).

The Supreme Court has held that racial diversity in the educational context is a compelling state interest.¹⁹ The Court has employed a four-part narrow tailoring analysis to determine whether race-conscious admissions policies within the higher education context violate equal protection guarantees.²⁰ Though the Supreme Court has not considered the constitutionality of voluntary racial integration plans in the elementary and secondary school context, it has addressed the issue indirectly.²¹ Circuit and district courts are split as to whether local school authorities have the discretion to adopt voluntary plans to remedy the effects of de facto segregation.²² The Supreme Court has held,

19. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (determining educational benefits derived from diverse student body constitutes compelling state interest in higher education); see also Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729, 1780 (2001) (arguing states obligated to remedy racial disparities in education system); Bryan K. Fair, *Re(caste)ing Equality Theory: Will Grutter Survive Itself By 2028?*, 7 U. PA. J. CONST. L. 721, 760 (2005) (suggesting government owes affirmative duty to dismantle educational caste); Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843, 1861 (2004) (arguing government must do more to eliminate educational caste). See generally Plyler v. Doe, 457 U.S. 202, 221 (1982) (declaring education crucial to sustaining political and cultural heritage); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting education as "very foundation of good citizenship"). The *Grutter* Court cited cross-racial understanding, racial tolerance, and preparation for a diverse workplace as "substantial" benefits of "viewpoint" diversity in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). The Supreme Court also held that the proper comparison tool in determining whether racial discrimination exists is to compare the potentially maligned group to the racial composition of the relevant population. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (explaining racial composition of relevant labor market as method for determining racial discrimination against teachers).

20. *Grutter v. Bollinger*, 539 U.S. 306, 334-42 (2003) (applying four-part narrow tailoring analysis under equal protection challenge). First, a race-conscious program cannot use a quota system or favor one group of applicants over another strictly because of race. *Id.* at 334. Second, the body instituting such a plan must consider race-neutral alternatives, yet it is not required to exhaust every conceivable alternative. *Id.* at 339. Third, the plan must not "unduly harm members of any racial group" and must be subject to continual oversight. *Id.* at 341. And fourth, the plan must be limited in time. *Id.* at 342. The *Grutter* Court did not, however, give any indication of how or if courts should apply this test to schools in the elementary and secondary context. Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 755 (2004) (noting *Grutter* leaves open question of whether race-conscious policies permissible in K-12 context).

21. See generally *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, (1982) (upholding voluntary busing program to offset effects of housing patterns on racial representation in schools); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (Powell, J., dissenting) (advocating support for voluntary majority to minority transfer program); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (Powell, J., concurring) (noting nothing prevents local boards from exceeding minimal constitutional standards in promoting values of integration); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (suggesting local boards may conclude racial balance in schools desirable apart from constitutional requirements); 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) (discussing application of higher education equal protection precedent to K-12 context). In dicta, the *Swann* Court specifically noted that the power to implement voluntary integration programs was within the school board's traditional power to set educational policy. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

22. Compare *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906-07 (3d Cir. 1984) (upholding voluntary race-conscious teacher assignment program in response to de facto segregation), *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504, 516-17 (7th Cir. 1979) (holding local authorities may consider "white flight" in formulating voluntary programs to achieve integration), and *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004) (noting benefits recognized in *Grutter* also "accrue to students in

however, that absent clear constitutional violation, discretion as to the competing interests of social policies is left to legislatures and other governing bodies.²³

In *Comfort v. Lynn School Committee*, the First Circuit Court of Appeals reviewed the Committee's Plan to determine whether it violated equal protection guarantees.²⁴ Applying the strict scrutiny standard, the court relied on recent Supreme Court jurisprudence and held that the Plan advanced the compelling state interest of racial diversity in the educational context.²⁵ More specifically, the court rejected the notion that the Supreme Court's rationale in recognizing "viewpoint" diversity in higher education as a compelling interest was inapplicable to the elementary and secondary context.²⁶ As a result, the court concluded that racially diverse student bodies in the K-12 context reap significant educational benefits and that the Committee had a compelling interest in obtaining those benefits.²⁷

The court further concluded that much of the four-part narrow tailoring analysis utilized in the higher education context remained relevant, notwithstanding the fact that the Plan was non-competitive and governed transfers as opposed to initial assignments.²⁸ The court explained that the

racially integrated public schools"), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), with *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 377 F.3d 949, 969 (9th Cir. 2004) (holding voluntary transfer plan using computer-generated acceptable racial percentage range fails narrow tailoring), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005). One court distinguished "true diversity" ("viewpoint" diversity as addressed in *Bakke* and subsequently in *Grutter*), from the issue of ameliorating de facto segregation in elementary and secondary schools. *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000). The *Brewer* court held that if reducing racial isolation standing alone is a constitutionally compelling goal as they have held it is, then "there is no more effective means of achieving that goal than to base decisions on race." *Id.*

23. See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (stressing deference to governing bodies absent constitutional violation); cf. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing advantages federal system provides in allowing communities to devise specific solutions to problems).

24. 418 F.3d at 12 (considering challenge to Plan's constitutionality).

25. *Id.* at 15 (noting no absolute bar to pursuing racial diversity when not sought for its own sake). The court noted that the Committee's compelling interest did not include pursuing a "critical mass" of minority students for its own sake, but to obtain the educational benefits that flow from having a racially diverse student body. *Id.* The court cited the Committee's reliance on "intergroup contact theory" as proof of the educational benefits sought. *Id.* at 14-15. Intergroup contact theory posits that interaction between students of different races "promotes empathy, understanding, positive racial attitudes, and the disarming of stereotypes." *Id.* at 14 (quoting *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 356 (D. Mass. 2003), *aff'd*, 418 F.3d 1 (1st Cir. 2005)). The theory requires "opportunities for personalized contact with a sufficient number of children from different racial groups." 413 F.3d at 15.

26. 418 F.3d at 15-17 (noting applicability of higher education precedent to facts of case). Citing expert testimony in a lower court decision, the court stated that the benefits of a racially diverse school are more compelling at younger ages. *Id.* The court distinguished the differences between the benefits cited by the Supreme Court in *Grutter* and those of this case in reasoning that they are the "logical result of context." *Id.* at 16.

27. *Id.* at 16 (recognizing racial diversity as compelling interest).

28. *Id.* at 17-18 (discussing relevance of narrow tailoring analysis in K-12 context). The court noted that the weight given to each factor may vary slightly given the contextual differences, but that each factor nevertheless remained applicable. *Id.* at 17.

mechanical use of race and lack of individualized consideration beyond a student's race was permissible because the Committee designed the Plan to achieve racial diversity and not "viewpoint" diversity.²⁹ The court further explained that the Plan was necessary because it had seriously considered, and plausibly rejected, a number of race-neutral alternatives.³⁰ The court reasoned that the risk of harm to members of any particular racial group was insignificant because all of the schools at issue were stipulated to provide an equally comparable education.³¹ Finally, the court explained that the Plan satisfied the durational requirement because it was subject to periodic review.³² The court concluded the Plan was narrowly tailored to the Committee's compelling interest in obtaining the benefits of racial diversity.³³

The court was correct to apply the strict scrutiny standard.³⁴ Considering that recent equal protection jurisprudence had not settled the issue of whether

29. *Id.* at 18 (discussing how context affects racial diversity as compelling interest). The court also reasoned that because transfers under the Plan were not related to merit, the Plan's use of race did not risk imposing stigmatic harm by fueling the stereotype that certain groups are unable to achieve absent special treatment. *Id.* Moreover, the court explained that the mechanical use of race in the K-12 context did not risk perpetuating the stereotype that certain groups think alike, but rather, by encouraging racial integration the Plan sought the exact opposite result, namely, to "preempt racial stereotypes through intergroup contact." *Id.* Lastly, the court explained that the Plan's mechanical use of race would not breed cross-racial tension, but would, as it already had, foster intergroup contact and produce positive results. *Id.* at 18-19. *But see Comfort*, 418 F.3d at 31 (Selya, J., dissenting) (criticizing mechanical use of race and noting "laudable goals must be attained in constitutional ways").

30. 418 F.3d at 22-23 (considering necessity of Plan). These alternatives included a no-transfer policy, a policy of unrestricted transfers, a redrawing of district lines, forced busing, a lottery system, and a plan conditioning transfers on socioeconomic status. *Id.* The court also noted that the Committee need not prove the impracticability of every conceivable means of racial integration, but only that it demonstrate a good-faith effort to consider feasible race-neutral alternatives, which it had done. *Id.* at 23.

31. *Id.* at 20 (noting context affects risk of harm to particular racial groups). The court distinguished the K-12 context from the university context, stating that the denial of a transfer under the Plan is "markedly different from the denial of a spot at a unique or selective educational institution." *Id.* The court also acknowledged that a transfer denial may involve some harm, but that the stipulated comparable education available, coupled with the availability of an appeals process, relegated such potential harm to insignificance. *Id.* Lastly, the court noted that the Plan's goal of a "critical mass" of minority students for purposes of intergroup contact theory did not impose undue harm because "gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increase." *Id.* at 20-21 (quoting *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 357 (2003)).

32. 418 F.3d at 22 (noting Committee's efforts to limit duration of Plan). The court noted that the demographics of the schools are continuously monitored using data on racial composition and transfers. *Id.* Furthermore, the court noted that the Plan has durational limits built into its structure in that transfer limits are suspended when a school becomes racially balanced. *Id.* The court noted that this feature is "not merely theoretical" because students were able to transfer freely between the three racially balanced high schools. *Id.*

33. 418 F.3d at 23 (stating ultimate holding of constitutionality of Plan); *cf. id.* at 28 (Boudin, J., concurring) (noting appellate court exercises own judgment where outcome in Supreme Court uncertain given differing contexts). *But see id.* at 30-31 (Selya, J., dissenting) (exhorting mechanical use of race counteracts "ultimate goal of relegating racial distinctions to irrelevance").

34. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (applying strict scrutiny to "benign" policies neither burdening nor favoring racial groups). The fact that the Plan allegedly affects whites and nonwhites equally is therefore legally irrelevant with respect to the standard of review. *See id.* at 505-06.

racial diversity is a compelling interest at the elementary and secondary levels, the majority was within its powers to exercise its discretion in determining that it was.³⁵ As Justice Boudin noted in his concurring opinion, an appellate court must exercise its own judgment where an outcome in the Supreme Court is uncertain and past pronouncements relate to different contexts than the one currently at hand.³⁶ The majority's holding that the reasoning of recent equal protection jurisprudence relating to higher education applies to the K-12 context was procedurally proficient and therefore permissible.³⁷

In finding that the Plan was narrowly tailored, the majority correctly contextualized its analysis with the unique facts at hand.³⁸ The court was therefore justified in concluding that the inherent differences between the higher education and K-12 contexts are significant enough to allow for the mechanical use of race and lack of individualized consideration.³⁹ Because it was within the court's power to determine that reducing de facto segregation is a constitutionally compelling goal in itself, the court was justified in its approval of the Plan's use of race.⁴⁰

Had Justice Selya's dissent prevailed, the court would have supported the argument that mechanical uses of race are unconstitutional regardless of context.⁴¹ While stringently following equal protection precedent within the higher education context, this line of reasoning ignores the unique impressionability of elementary and secondary students.⁴² Absent relevant

35. See *supra* note 21 and accompanying text (discussing appellate court discretion given absence of Supreme Court decision).

36. 418 F.3d at 28 (Boudin, J., concurring) (noting appellate court exercises own judgment where outcome in Supreme Court uncertain given differing contexts).

37. See *supra* notes 21, 36 and accompanying text (discussing acceptability of appellate court discretion in novel or undecided contexts).

38. See *supra* note 18 and accompanying text (discussing importance of considering context of controlling facts and calibration to issues of case).

39. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (distinguishing equal protection jurisprudence regarding higher education context from K-12 context). *But see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 377 F.3d 949, 969 (9th Cir. 2004) (holding voluntary transfer plan using computer-generated acceptable racial percentage range fails narrow tailoring), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005). The contextualization of the facts unique to the K-12 context explains the difference in the holdings of the Second and Ninth Circuits. Anderson, *supra* note 21, at 995 (noting Ninth Circuit failed to adequately consider differing circumstances between K-12 and higher education settings). An appellate court is justified in exercising its own judgment when deciding an issue with no controlling authority. 418 F.3d at 28 (Boudin, J., concurring) (noting appellate court exercises own judgment where Supreme Court outcome uncertain given differing contexts).

40. See *supra* note 23 and accompanying text (discussing authority of local officials to implement voluntary programs to ameliorate de facto segregation). The court's approval of the Plan's methodology utilized in determining racial balance also comports with Supreme Court precedent. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (articulating racial composition of relevant population pool as method for determining racial discrimination against group).

41. 418 F.3d at 29-32 (Selya, J., dissenting) (alleging mechanical use of race always unconstitutional).

42. *Id.* at 15-16 (affirming benefits of racially diverse schools more compelling at younger ages); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379-80 (W.D. Ky. 2000) (noting higher education cases poor models for K-12 public schools because competition involved); Brown, *supra* note 18, at

controlling authority, the majority was correct in holding that the Committee had the discretion and authority to use race to obtain the benefits of racial diversity.⁴³

In *Comfort v. Lynn School Committee*, the First Circuit Court of Appeals considered whether race-conscious transfer restrictions in elementary and secondary public schools violate students' equal protection rights. By considering the unique facts related to elementary and secondary education, and parting from strict adherence to precedent decided in dissimilar contexts, the court was able to satisfy the rigors of strict scrutiny while honoring the spirit of equal protection jurisprudence. In the end, the court's opinion upheld the equal protection of the laws.

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71 (arguing unique characteristics of K-12 public schools demand different analysis than other contexts).

43. See *supra* notes 23-25 and accompanying text (discussing courts' deference to school board's authority to enact voluntary race-based programs).