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Recognizing Discrimination: Lessons from White Plaintiffs

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RECOGNIZING DISCRIMINATION: LESSONS FROM
WHITE PLAINTIFFS

*Wendy Parker**

Abstract

The Supreme Court has developed a robust equal protection jurisprudence to recognize the rights of whites complaining of race conscious governmental activity. This was particularly reflected in the Court’s opinion in *Parents Involved*, where the Roberts Court radically repositioned the meaning of *Brown v. Board of Education*. That opinion all but guarantees that eventually Abigail Noel Fisher will win her case against the University of Texas. In the meantime, however, the case also holds promise for minority plaintiffs. While many have lamented *Parents Involved* and its use of *Brown*, we have missed the promise of the Roberts Court’s “process-only discrimination” for minority plaintiffs. This Article argues that the Roberts Court adopted a version of color-blind jurisprudence so unconditional and absolute that it unintentionally, but unmistakably, offers great promise to nonwhite plaintiffs. By making unlawful any different treatment of an individual by race, regardless of whether it has substantive consequences, the Roberts Court expanded what is actionable under the Equal Protection Clause of the Fourteenth Amendment, not just for white plaintiffs but also for minority plaintiffs. This Article unpacks that promise, and attempts to hold Chief Justice John Roberts accountable for all the consequences of his absolute commitment to color-blind jurisprudence.

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INTRODUCTION

When will the law deem someone a victim of race discrimination? Traditionally, the answer was different treatment that caused substantive harm.¹ This Article calls this “substantive discrimination.” For example, the Supreme Court doomed the state statutes challenged in *Brown v. Board of Education (Brown I)* not only because they assigned the plaintiffs to schools because of their “Negro” race (a process harm), but also because that race-based assignment produced other harms (substantive ones).² The Warren Court contextualized the process harm in its substantive effects: the “feeling of inferiority” created by de jure segregation, the inequality inherent in separate education, and the importance of education, which is “perhaps the most important function of state and local governments.”³ The assignment based on race did not create the constitutional violation by

1. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 494–95 (1954).

2. *Id.*

3. *Id.* at 493–95.

itself; the Warren Court linked that procedure with substantive harms.⁴

The adoption of substantive discrimination was not unique to the liberal Warren Court. Justice Harlan, in his famous dissent in *Plessy v. Ferguson*, connected the harm of racially separate railroad cars with the creation of a caste system.⁵ The Rehnquist Court continued that tradition,⁶ even as it shifted the Court to a more color-blind interpretation of the Equal Protection Clause.⁷ It adopted color-blind principles for their association with positive individual and social values.⁸

The Roberts Court has changed, however, the meaning of discrimination in a series of cases with white plaintiffs claiming race discrimination. *Parents Involved*, a K-12 student assignment case, marked the start of this shift.⁹ The 2013 opinion in *Fisher*, an affirmative action in university admissions case, continued that evolution.¹⁰ In these cases and others, the Roberts Court continued to endorse the color blindness supported by the Rehnquist Court, but with one important variation. It is now possible for illegal discrimination to arise solely from the *process* of different treatment, without proof of any attending substantive harm. For example, the Roberts Court defined the harm to the white plaintiffs in

4. *Id.*

5. 163 U.S. 537, 560 (1896) (“[W]e have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.”); *id.* (recognizing that state laws that “proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens” perpetuate racial distrust and animosity and “[t]hat . . . is the real meaning of such legislation as was enacted in Louisiana”); see also T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 969 (“[W]hat was offensive about the statute was not its use of race per se, but that its motivation and effect were to establish and maintain a race-based caste system in which whites subjugated blacks.”).

6. See *infra* Subsection I.B.1.

7. This Article refers to “color-blind” as the belief that laws should be written and enforced as if all races are the same, regardless of any existing or resulting substantive differences; no racial classifications are permitted in the quest for formal equality. See Ian F. Haney López, “*A Nation Of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 992–1004 (2007) (detailing the history of the jurisprudence); *infra* Subsection I.B.1. See generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (tracing the Rehnquist Court’s adoption of color-blind jurisprudence).

8. See *infra* Subsection I.B.1.

9. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11 (2007) (holding that school districts impermissibly considered race in school assignments); see also Section I.A.

10. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415 (2013); *infra* Subsection I.C.1. In a decision invalidating part of the Voting Rights Act delivered the day after *Fisher*, Chief Justice Roberts again exhibited a quest to eradicate race conscious decision making—this time in the context of the U.S. Congress regulating voting rights. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013). There, Chief Justice Roberts faulted Congress for its continued reliance on an expansive coverage formula for parts of the Voting Rights Act, in part, because “things have changed dramatically.” *Id.* at 2625.

Parents Involved as only different treatment during the process of deciding school assignment.¹¹ In turn, this allowed Abigail Noel Fisher to sue the University of Texas for race discrimination, even if she would not have been admitted if a minority applicant.¹² This Article defines this as “process discrimination.”

I once joined with those lamenting the Supreme Court’s decision in *Parents Involved*.¹³ Now, however, a silver lining to the dark cloud of *Parents Involved* can be found. If any racial attentiveness in a challenged process alone violates the Equal Protection Clause, regardless of the lack of independent harm from that unequal procedure, traditional-discrimination plaintiffs benefit. Adopting a vigorous definition of color-blind can work to the advantage of plaintiffs of all races, and not just Ms. Fisher. This Article seeks to reveal that mutual advantage.

Consider a manager, working for a state, who fired a Latino worker with one single utterance negative to his Latino heritage.¹⁴ Any attending lawsuit would traditionally ask whether the worker was fired because of ethnicity. That single utterance would do little in demonstrating why the worker was fired. Instead, the issue would be whether the Latino worker deserved to be fired, or whether the plaintiff’s ethnicity caused the firing.

Parents Involved shifted the focus away from the firing issue to a process question: Did the manager treat the Latino worker differently than a non-Latino worker during the firing process? Would the manager have made the statement to a white worker? If not, then the manager was

11. See *infra* Subsection I.A.3.

12. See *infra* notes 140–45 and accompanying text.

13. See Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. MIAMI L. REV. 507, 509–10 (2009) (arguing that *Parents Involved* signals “a meaning of *Brown* advocated by early resisters to the change imposed by *Brown*”); see also Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 941 (2008) (lamenting that “*Parents Involved* stifles *Grutter*’s potential”); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 151 (2007) (“By jettisoning principles and methods of interpretation used in other cases, the Court appears to be reaching out to curtail a practice—integration—that it simply dislikes as a policy matter.”); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 592–607 (2008) (arguing that *Parents Involved* overruled *Brown* and sacrificed the interests of integration and racial minorities for the benefit of limited white interests); J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 162 (2007) (agreeing with the color-blind principle of *Parents Involved*, but suggesting that the Court’s opinion should have included “an acknowledgment of the tragic elements of the African American experience in this country and how that history can be reconciled with the Court’s present-day equal protection argument”).

14. For examples of cases in which terminated employees sued their public employers for race discrimination based on allegedly racist remarks, see *Metoyer v. Chassman*, 504 F.3d 919, 925, 930 (9th Cir. 2007); *Patterson v. County of Oneida*, 375 F.3d 206, 211–12 (2d Cir. 2004); *Tullo v. City of Mount Vernon*, 237 F. Supp. 2d 493, 494–96 (S.D.N.Y. 2002); *Aguilera v. Village of Hazel Crest*, 234 F. Supp. 2d 840, 843–44 (N.D. Ill. 2002); *Stephens v. City of Topeka*, 33 F. Supp. 2d 947, 953–54 (D. Kan. 1999), *aff’d*, 189 F.3d 478 (10th Cir. 1999); *Farasat v. Paulikas*, 32 F. Supp. 2d 249, 251–52 (D. Md. 1998), *aff’d*, 166 F.3d 1208 (4th Cir. 1998).

discriminatory under the reasoning of *Parents Involved*. Likewise, the question in *Fisher* is now whether Ms. Fisher was treated differently during the admissions process—not whether she would have been admitted if she were African-American or Latino.¹⁵

The Roberts Court was able to make this change to how it conceptualizes discrimination, in part, because *Parents Involved* is neither a school desegregation case nor an affirmative action case. It occupies a new space in our so-called post-racial society.¹⁶

The difficulty with the hypothetical Latino employee is causation and damages. What exactly are the damages caused by the ethnically hostile statement? This Article explores how the process discrimination recognized in *Parents Involved* affects these questions of causation and injury in traditional discrimination cases. This Article argues that the Court's adoption of process discrimination in reverse discrimination cases expands the definition of discriminatory injury, and that minority plaintiffs should use that definition—if the remedy is carefully crafted.

This argument proceeds in three parts. Part I reveals how the Supreme Court created process-only discrimination in *Parents Involved*. This Article argues that the Supreme Court devised an unconditional version of color-blind jurisprudence to expand constitutional injury to include *any* different treatment, including process-only claims. Part I ends with exploring how this enables white plaintiffs to win their reverse discrimination cases. Specifically, this Article predicts that Ms. Fisher will one day win her case against the University of Texas, *even if* she would not have been admitted if she were African-American or Latino.¹⁷

Part II turns to the effect of the expanded definition of constitutional injury on claims by minority plaintiffs. It focuses on the difficulty of proving discriminatory intent, which is a key component of any discrimination claim. The expanded definition of injury will make some aspects of discriminatory intent easier to prove for minority plaintiffs. Yet, even after *Parents Involved*, nonwhite plaintiffs will still struggle to demonstrate discriminatory intent.

Part III argues that the process discrimination found in *Parents Involved* is at odds with at least three principles concerning what counts as a discrimination injury—the racial harassment definition, stray remarks doctrine, and same decision defense. All three principles permit certain

15. See *infra* notes 140–45 and accompanying text.

16. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (defining “post-racialism” as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action”); *infra* notes 56–60 and accompanying text.

17. See *Fisher v. Univ. of Tex.*, 631 F.3d 213, 230 (5th Cir. 2011), *aff'g* 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009), *vacated and remanded*, 133 S. Ct. 2411, 2416–17 (2013); *infra* Subsection I.C.1.

instances of explicitly racial conduct and are inconsistent with *Parents Involved*'s command of absolute color blindness. Lastly, this Part recognizes that process-only injuries will likely result in more limited, but still valuable, remedies.

I. PARENTS INVOLVED'S DEFINITION OF DISCRIMINATION

This Part describes how *Parents Involved* reveals the Roberts Court's adoption of process-only discrimination.¹⁸ That approach differs from how the Rehnquist Court defined discrimination,¹⁹ and greatly eases the way for white plaintiffs to contest race-conscious governmental activity.²⁰ Lastly, this Article explains why Ms. Fisher should win her claim of race discrimination against the University of Texas and how the 2013 opinion in *Fisher* helps actualize *Parents Involved*'s concept of discrimination.

A. Parents Involved and Process Discrimination

Parents Involved addressed the constitutionality of student assignment policies at two school districts—one in Louisville, Kentucky and the other in Seattle, Washington.²¹ The litigation followed *Grutter v. Bollinger*, where the Supreme Court allowed race conscious student admissions to achieve student diversity in the higher education setting.²²

1. The Plans and Their Unconstitutionality

The two school districts voluntarily turned to a popular educational reform effort, parental choice, to redress an almost timeless situation—segregated schools.²³ The problem, declared the Supreme Court, was that the school districts controlled parental choice by a variety of factors, one of which was race.²⁴

Public schools in Jefferson County (Louisville), Kentucky required that parental applications for enrollment be processed so that all non-magnet schools would be between fifteen and fifty percent black in student population.²⁵ Seattle, Washington schools mandated that applications for ninth grade be granted so that student enrollment in all high schools would

18. *Fisher* and *Ricci* are certainly instructive as well, but this Article focuses on *Parents Involved* because of its significance. See *infra* notes 119–21 and accompanying text. This Article discusses how my interpretation of *Parents Involved* is consistent with *Fisher* and *Ricci*. See *infra* Subsections I.C.1–2.

19. See *infra* Subsection I.B.1.

20. See *infra* Section I.D.

21. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710 (2007).

22. 539 U.S. 306, 328, 343 (2003). For an in-depth examination of the story behind the case, see Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 83, 97 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

23. *Parents Involved*, 551 U.S. at 710–11, 716.

24. *Id.* at 710–11.

25. *Id.* at 716.

be within ten or fifteen percentage points of the school district's white and nonwhite high school population.²⁶

A five-Justice majority held the plans unconstitutional in an opinion by Chief Justice Roberts.²⁷ Justice Anthony Kennedy did not join two parts of Chief Justice Roberts' opinion, thereby making those portions a plurality opinion.²⁸ Justice Kennedy also wrote his own concurring opinion.²⁹

Critically, race was a factor in the plans, but not the *only* factor. Chief Justice Roberts overstated his case when he, in the opening paragraph of his majority opinion, wrote that student assignment for the plaintiffs was "solely because of their race."³⁰ The word "solely" would be fair in the context of the de jure segregation challenged in *Brown*, but not in twenty-first century Louisville and Seattle.

No student in *Parents Involved* was assigned solely because of race. Assignment was based on a variety of factors. Parental choice was given the most weight.³¹ Race was a deciding factor for a small percentage of students,³² but only after parental choice, sibling placement, and home address narrowed the options for the student.³³ Race was certainly part of the process, and a few times a tiebreaker, but race alone did not determine assignment like it did in de jure segregation.

The Court criticized both school districts' rough racial classifications.³⁴

26. *Id.* at 712.

27. *Id.* at 707.

28. *Id.*

29. *See id.* at 782. Justices Thomas, Stevens, and Breyer also wrote separately. *See id.* at 748, 798, 803.

30. *Id.* at 711.

31. *Id.* at 711, 716.

32. Specifically in Seattle, 307 students "were affected by the racial tiebreaker." *Id.* at 733. Yet, the Supreme Court concluded that "only 52 students . . . were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned." *Id.* at 734. The Court noted that in Jefferson County, "the racial guidelines account[ed] for only 3 percent of assignments." *Id.* Interestingly, the small number of students affected indicated the lack of necessity for the plans. *Id.* at 728. Justice Kennedy emphasized this as well in his concurring opinion. *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means.").

33. Seattle's plan included a preference for siblings, for geographic proximity between a student's home and school, and for geographic proximity to child care. *Id.* at 711–12 (majority opinion); *id.* at 812 (Breyer, J., dissenting); *see also* *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004) ("Prior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment."), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd and remanded sub nom. Parents Involved*, 551 U.S. 701.

34. *Parents Involved*, 551 U.S. at 723–24 ("[T]he plans here employ only a limited notion of diversity . . ."). The district court in the Louisville case largely accepted the classifications because the school district only had significant numbers of African-American and white students.

Louisville classified students as either black or nonblack, and Seattle designated students as white or nonwhite.³⁵ Perhaps the most damning fact was Seattle's policy that a high school with a half white and half Asian-American student population would meet its racial classifications, but not a school with roughly a quarter each of African-American, Asian-American, Latino, and white students.³⁶

In this respect, the school districts made it easy to criticize their programs for the lack of nuance present in the University of Michigan Law School program upheld in *Grutter*. Both school districts used race in a less sophisticated manner than a law school program devised by law professors who anticipated litigation.³⁷ In Louisville and Seattle, however, the lower courts upheld the constitutionality of the plans under *Grutter*.³⁸

2. *Grutter* and *Gratz*

Grutter and *Gratz* provide the starting point for evaluating the constitutionality of the school districts' student assignment plans in

McFarland, 330 F. Supp. 2d at 840 n.6.

35. *Parents Involved*, 551 U.S. at 723. The University of Michigan Law School, on the other hand, recognized at least seven categories: Native American, Black/African-American, Caucasian/White, Mexican-American, Other Hispanic, Asian-American, and Puerto Rican American. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001). The University of Michigan Law School particularly focused on three racial groups typically underrepresented in its student body: African-Americans, Hispanics, and Native Americans. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

36. *Parents Involved*, 551 U.S. at 724; see also *id.* at 786 (Kennedy, J., concurring in part and concurring in the judgment) (finding that the Seattle School District "has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as 'white,' it has employed the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions"). Overall, Seattle had 23.8% Asian-American, 23.1% African-American, and 10.3% Latino student populations. *Id.* at 712 n.2 (majority opinion). However, Justice Breyer noted in his dissent that Seattle was discontinuing this approach. *Id.* at 854 (Breyer, J., dissenting). The Court of Appeals found justification for the approach in Seattle's segregated housing patterns. *Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1 (Parents Involved VII)*, 426 F.3d 1162, 1187 (9th Cir. 2005) (en banc) ("The white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of [the] city and vice versa."), *rev'd and remanded*, 551 U.S. 701 (2007).

37. For example, the law school was careful not to attach any numbers to its plan, see *Grutter*, 539 U.S. at 316; was attentive to devising a broad definition of diversity that all racial groups could utilize, see *id.* at 337-38; and was able to argue that it never used race as a decisive factor, see *id.* at 337.

38. *McFarland*, 416 F.3d at 514 (per curium), *rev'd and remanded sub nom. Parents Involved*, 551 U.S. 701; *Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1 (Parents Involved I)*, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001) (granting the school district summary judgment), *aff'd*, 426 F.3d 1162, 1166, *rev'd and remanded*, 551 U.S. 701; *McFarland*, 330 F. Supp. 2d at 861 (holding in favor of the school district in all respects but one); see also *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 13, 23 (1st Cir. 2005) (upholding a race-conscious transfer program challenged by white plaintiffs).

Parents Involved.³⁹ The Supreme Court in *Gratz* declared that the University of Michigan undergraduate admissions system of awarding an additional twenty points to underrepresented minority applicants was unconstitutional.⁴⁰ That automatic, numerical approach was not narrowly tailored to the compelling governmental interest of diversity.⁴¹

Justice Sandra Day O'Connor agreed with the outcome in *Gratz*,⁴² but then switched sides to give the deciding fifth vote to uphold the University of Michigan Law School's more nuanced, flexible admissions system in *Grutter*.⁴³ She emphasized the individual review in the law school's practices and the absence of any fixed numerical goals in the law school's quest for a "critical mass" of underrepresented minority students.⁴⁴ Schools wishing to consider race in student admissions or assignment thus must create a system free of the fault of *Gratz* and consistent with the individual review in *Grutter*.

Yet, navigating the differences between *Grutter* and *Gratz* is difficult. Justice Antonin Scalia dissented in part from *Grutter* because of the ambiguity created by what he called the "split double header" of *Grutter* and *Gratz*.⁴⁵ Even more troubling, the dissenting Justices in *Grutter* found no meaningful difference between the law school's plan and the undergraduate's approach.⁴⁶ In practice, the dissenting Justices declared, *Grutter* was like *Gratz*.⁴⁷ The line separating the two Michigan cases is, at

39. *Grutter*, 539 U.S. 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003); see also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2416 (2013) (using *Grutter* and *Gratz* as starting points for evaluating the constitutionality of considering race in university admissions).

40. *Gratz*, 539 U.S. at 270, 275.

41. *Id.* at 271–75.

42. *Id.* at 276–80 (O'Connor, J., concurring).

43. *Grutter*, 539 U.S. at 340, 343 (O'Connor, J., writing for the majority).

44. *Id.* at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

45. *Id.* at 348 (Scalia, J., concurring in part and dissenting in part). A split double header occurs in baseball, when teams play each other in back to back games and each team wins one game.

46. The dissenting Justices argued that this lack of a meaningful difference was mainly indicated by the pattern of admitting about the same number of African-American, Hispanic, and Native American students each year and by defining the quest for critical mass differently for each minority group. *Id.* at 346–48 (agreeing with Chief Justice Rehnquist that "[t]he admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions"); *id.* at 385–86 (Rehnquist, C.J., dissenting) ("Indeed, the ostensibly flexible nature of the Law School's admissions program that the Court finds appealing appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applications from selected minority groups.") (citation omitted); *id.* at 392 (Kennedy, J., dissenting) (agreeing with Chief Justice Rehnquist and adding that "[t]he consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself").

47. Justices Scalia, Kennedy, and Thomas also argued that the law school's quest for diversity operated as a "quota." See *id.* at 347 (Scalia, J., concurring in part and dissenting in part) (joined by

best, murky.⁴⁸

What is clear, however, is that *Gratz* prohibits awarding specific points to some races but not others.⁴⁹ The plans under attack in *Parents Involved* avoided this pitfall. First, *all* races and ethnicities were subject to and affected by the mandated percentages⁵⁰—all races had applications granted and denied because of the school districts’ defined goals. Second, the school districts’ mandated percentages in *Parents Involved* were more like *Grutter*’s critical mass quest than *Gratz*’s automatic twenty-point scoring.⁵¹ The school districts in Louisville and Seattle adopted a mandated

Thomas, J.); *id.* at 390 (Kennedy, J., dissenting). Chief Justice Rehnquist provided original analysis of the numbers to argue the effect of a quota. He noted, for example, that of the minority students admitted between 1995 and 2000, “between 13 and 19 were Native American, between 91 and 108 were African-American, and between 47 and 56 were Hispanic.” *Id.* at 381 (Rehnquist, C.J., dissenting). In addition, Chief Justice Rehnquist argued, “[T]he correlation between the percentage of the Law School’s pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying ‘some attention to [the] numbers.’” *Id.* at 383 (alterations in original). He explains, “For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American.” *Id.* at 385.

48. Similarly, the plans in *Parents Involved* did not set aside a specific number of admission seats by race, which is prohibited by *Bakke*. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.); *see also Grutter*, 539 U.S. at 335 (“Properly understood, a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’”) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion)); *Parents Involved VII*, 426 F.3d 1162, 1185 (9th Cir. 2005) (en banc) (“[T]he number of white and nonwhite students in the high schools is flexible and varies from school to school and from year to year.”), *rev’d and remanded*, 551 U.S. 701 (2007); *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004) (“[T]he guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.”), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev’d and remanded sub nom. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1*, 551 U.S. 701 (2007).

49. *Gratz v. Bollinger*, 539 U.S. 244, 271, 275 (2003).

50. *Parents Involved VII*, 426 F.3d at 1192 (“[I]t is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another. At some schools, white students are given preference over nonwhite students, and, at other schools, nonwhite students are given preference over white students.”); *McFarland*, 330 F. Supp. 2d at 861 (“[T]he 2001 Plan uses race in a manner calculated not to harm any particular person because of his or her race. Certainly, no student is directly denied a benefit because of race so that another of a different race can receive that benefit. Rather, the Board uses race in a limited way to achieve benefits for all students through its integrated schools.”); *Parents Involved I*, 137 F. Supp. 2d 1224, 1231 (W.D. Wash. 2001) (“The program at issue here falls indiscriminately on whites and nonwhites alike, ensuring a racially integrated system for the benefit of the school district as a whole. Even while the program allows minority students access to Ballard and Hale, Seattle’s popular predominantly white schools, it also allows white students access to Franklin, the city’s popular predominantly minority school. It is in this sense, too, that the program is not a ‘preference.’” (emphasis omitted)), *aff’d*, 426 F.3d 1162 (9th Cir. 2005), *rev’d and remanded*, 551 U.S. 701 (2007).

51. *Compare Grutter*, 539 U.S. at 308 (“[T]he Law School defines its critical mass concept

percentage, but it was flexible—Louisville had a thirty-five percent band and Seattle had a twenty to thirty percent band.⁵² The numerical bands in *Parents Involved* thus were more like the law school’s quest for the enrollment of a critical mass of underrepresented minorities: an attention to numbers, but numbers devoid of any absolute quality.⁵³

An even more fundamental difference, however, exists. *Gratz* and *Grutter* involved traditional affirmative action plans, while *Parents Involved* did not. In *Gratz* and *Grutter*, identified races received a benefit in a merit-based system.⁵⁴ Contrarily, merit was completely absent from the student assignment plans in *Parents Involved*. Also, no race received a preference in the *Parents Involved* plans—all races were treated equally. The mandated percentages affected both whites and nonwhites.⁵⁵ Clearly, *Parents Involved* is not an affirmative action case.

Neither is *Parents Involved* a school desegregation case, despite Chief Justice Roberts’s efforts to equate the school districts’ plans with de jure segregation.⁵⁶ School segregation depends on the intent to create separate schools and creates a constitutional duty to desegregate.⁵⁷ The school districts in *Parents Involved* sought to promote racial diversity, not segregate. Thus, their use of race did not create a duty to desegregate, which is the most elemental part of school desegregation litigation.⁵⁸

Parents Involved is a post-school desegregation case that is not affirmative action in disguise. It occupies a different space.⁵⁹ That space created room for the Roberts Court to both restrict *Grutter* (after all, the *Grutter* dissenting Justices are now in the majority) and create a new concept of what it means to discriminate, what this Article calls “process

by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes.”), with *Gratz*, 539 U.S. at 270 (holding that assigning twenty points to all applicants from underrepresented minority groups is unconstitutional).

52. See *supra* notes 25–26 and accompanying text.

53. *Grutter*, 539 U.S. at 336 (“[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.” (alteration in original)).

54. *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 315–16.

55. See *supra* note 50 and accompanying text.

56. See *infra* Subsection I.A.4.

57. See Wendy Parker, *The Future of School Desegregation*, 94 NW. U.L. REV. 1157, 1161–62, 1165 (2000).

58. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 794 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

59. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring) (reasoning that a similar plan was “fundamentally different from almost anything that the Supreme Court has previously addressed”); Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 483–84 (2009) (contending that the *Parents Involved* Court “largely ignored the distinction between diversity and desegregation”).

discrimination.”⁶⁰

3. Process Discrimination

Defining discrimination solely by the process of considering race began in *Parents Involved*. As explained in this section, the Court focused entirely on the need for race-free individual treatment, with no attention to any independent substantive harm. Racial attentiveness in the student assignment process completed the constitutional injury.

Chief Justice Roberts began his analysis in *Parents Involved* by mischaracterizing the challenged plans as treating race as *the* factor driving assignment decisions.⁶¹ As explained earlier, race is clearly a factor, but it is unfair to describe the plans as akin to de jure segregation where race truly was the only factor in student assignment.⁶²

Chief Justice Roberts then faulted the plans for their lack of individual review,⁶³ when student assignment plans by definition are never about individual review.⁶⁴ Student assignment plans treat groups of students (those in particular attendance zones or those with siblings in the school, for example) the same. Yet, the lack of individual review drove all aspects of Chief Justice Roberts’s opinion.

To hold the policies unconstitutional, Chief Justice Roberts also had to reconfigure *Grutter*. He argued that “[t]he entire gist of . . . *Grutter* was that the admissions program . . . focused on each applicant as an individual.”⁶⁵ The facts of *Grutter* suggest otherwise. Barbara Grutter almost certainly would have been admitted if she were African-American, American Indian, or Hispanic, instead of white.⁶⁶ This is far from the type of individual treatment Chief Justice Roberts is advocating in *Parents Involved*.

Grutter, like other race opinions of the Rehnquist Court, was about more than individual treatment; it emphasized a host of values other than treating individuals equally.⁶⁷ As Professor Michelle Adams recognizes,

60. See *Parents Involved*, 551 U.S. at 743. Judge Kozinski would use this space to apply a rational basis standard of review. See *Parents Involved VII*, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring), *rev’d and remanded*, 551 U.S. 701 (2007).

61. *Parents Involved*, 551 U.S. at 711, 723.

62. See *supra* notes 31–33 and accompanying text.

63. See *Parents Involved*, 551 U.S. at 723.

64. That is, the assignment process had no merit component to it, unlike in *Grutter*. *Grutter v. Bollinger*, 539 U.S. 306, 370 (2003) (Thomas, J., concurring in part and dissenting in part).

65. *Parents Involved*, 551 U.S. at 722 (emphasis added).

66. The three minority applicants with scores similar to Mrs. Grutter’s were all offered admission. Parker, *supra* note 22, at 92.

67. In *Fisher v. Texas*, the Fifth Circuit identified “three distinct educational objectives served by diversity [that Justice O’Connor] . . . envisioned” in *Grutter*—namely increased perspectives, professionalism, and civic engagement. 631 F.3d 213, 219–20 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013). The *Grutter* Court also emphasized that

the Rehnquist Court engaged in a cost-benefit balancing that preferred the societal benefits of the law school's program over the individual harm to Ms. Grutter.⁶⁸ The Court in *Grutter* found that the many benefits of the diversity policy were worth the costs of the explicit use of race in student admissions. The Court did not mention, however, any of those values in its *Parents Involved* opinion. Instead, it falsely reduced *Grutter* to being just about individual treatment.

The opinion is also notable for what it ignores. First, the process did not affect any race differently; all races had applications denied and granted after the racial factor was applied.⁶⁹ Many would count this as equal protection under the laws.⁷⁰ The Roberts Court refused, however, to equate that with equal treatment.

Second, the majority was perfectly content that the plaintiffs did not allege *any* specific harm from having to attend their assigned school instead of their preferred school.⁷¹ The Supreme Court in *Brown* faulted the inequality inherent in segregated education, but none of the parties in *Parents Involved* even suggested inequality.⁷² The presumption was that the schools were entirely equal, except that some of the schools were sometimes oversubscribed.⁷³

One parent (and only one) alleged that her son needed a particular

educational diversity was necessary to meet the needs of American businesses and the American military, as reflected in their respective amici briefs. *Grutter*, 539 U.S. at 330–31.

68. See Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1949 (2004) (“This form of strict scrutiny allows affirmative action programs to go forward that serve general societal interests over individual ones where those interests are served in an appropriate manner; *neither* the rights of individual white applicants nor of individual minority group members are paramount from this perspective.”); *id.* at 1953 (“[T]here is a strong argument that the Court was more concerned with how the Law School’s application process actually appeared and the message that it sent to the public than with its impact on any particular white applicant.”).

69. See *supra* note 50 and accompanying text.

70. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) (upholding the closing of a public swimming pool to avoid integration because all races were treated alike).

71. *Parents Involved VII*, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring) (noting that the Seattle plan produces “no competition between the races, and no race is given a preference over another”), *rev’d and remanded*, 551 U.S. 701 (2007).

72. *Brown I*, 347 U.S. 483, 493 (1954) (holding that the segregation of public school students based solely on race deprives minority students of equal educational opportunities, even if the physical facilities and other “tangible” factors are equal).

73. *Parents Involved VII*, 426 F.3d at 1185 (quoting the manager of enrollment as testifying that “[e]verything happens when more people want the seats. And why they want the seats sometimes we don’t know”); *McFarland v. Jefferson Cty. Pub. Sch.*, 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004) (“[W]hen the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.”), *aff’d per curiam*, 416 F.3d 513, 514 (6th Cir. 2005), *rev’d and remanded sub nom. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1*, 551 U.S. 701 (2007).

program offered at an oversubscribed school.⁷⁴ Yet, no federal right to a particular educational program exists outside of special education or bilingual education; nor do students have the right to attend their nearest school.⁷⁵ In fact, the opposite is true: local school districts have the right to require attendance at an assigned school.⁷⁶ The school districts are not obligated to provide any choice at all. Instead, the Court has a long tradition of deferring to local educators in the name of “local control.”⁷⁷

Third, the plaintiffs actually suffered no harm other than racial attentiveness in a multifaceted student assignment process. The Roberts Court said nothing of damage to the hearts and minds of affected students.⁷⁸ Nor could it be said that any stigma attached to a non-merit-based decision. Parental disappointment in their children’s school assignment was only personal disappointment; the student assignment itself was not a constitutional injury. In short, the only constitutional injury was racial considerations in student assignment.

74. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713–14 (2007) (involving a special-needs student Andy Meeks who was accepted to a high school’s selective biotechnology program, but because of a racial tiebreaker, was denied assignment to the high school).

75. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012); *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (finding a statutory violation for English-language instruction to non-English speaking students). In fact, the U.S. Constitution provides a very limited right to any type of education. *See Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982) (holding that the state of Texas could not deny public K-12 education to undocumented children under the Equal Protection Clause); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 23–24 (1973) (holding that education is not a fundamental right, but leaving open the question of whether deprivation of a minimal level of education might violate a fundamental constitutional right); *see also Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question[] of whether a minimally adequate education is a fundamental right . . .”). Nor do children have any right to attend their nearest school. *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1382–83 (1978).

76. *See Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) (noting that “school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend”).

77. For an examination of the importance the Supreme Court has historically placed on local control in education cases, see Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1705–16 (2004). For example, the Supreme Court has allowed school districts leeway in determining their school desegregation remedies so as not to impose on local control. *Id.* at 1728–30 (discussing the importance of local control to the Rehnquist Court in its school desegregation opinions). *Parents Involved* placed no importance, however, on local control.

78. *Parents Involved VII*, 426 F.3d at 1181 (noting the absence of stigma because “no assignment to any of the District’s high schools is tethered to a student’s qualifications”); *id.* at 1194 (Kozinski, J., concurring) (“That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual’s aptitude or ability.”); *see also Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) (“Because transfers under the Lynn Plan are not tied to merit, the Plan’s use of race does not risk imposing stigmatic harm . . .”).

Consequently a minority group of white parents can trump the majority's will (as reflected in a popularly elected school board) on the distribution of public goods—without showing that denying the white parents their personal preference even resulted in a harmful distribution of public goods on an *individual* level. As Professor Girardeau A. Spann aptly described it, “[D]isappointed white parents, therefore, were sacrificing the inclusionary educational interests of minority school children in order to advance exclusionary educational interests of their own.”⁷⁹

The Roberts Court was willing to take this step because it wanted to scrub any and all race consciousness from government decision making. The majority evidenced a concern with the continuing consideration of race; it sought to eradicate it completely from government decision making⁸⁰—no matter what the cost to society or other constitutional values such as local control over schools.⁸¹ A plurality of Justices, over the objection of Justice Kennedy and the dissenting Justices, went so far as to remake the iconic *Brown v. Board of Education* in this image of racial neutrality, as the next subsection explores.

4. *Brown v. Board of Education*

The Roberts Court in *Parents Involved* did more than hold the challenged plans unconstitutional. A plurality of Justices was bold enough to declare that *Brown v. Board of Education* mandated that outcome.⁸²

That is, according to the *Parents Involved* plurality, the Louisville and Seattle school districts engaged in the exact same harm as the *Brown* defendants.⁸³ The plurality asked: “What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?”⁸⁴

79. Spann, *supra* note 13, at 603.

80. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (“Allowing racial balancing as a compelling end in itself would ‘effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race will never be achieved.’” (alteration in original) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (internal quotation marks omitted))).

81. *McFarland v. Jefferson Cty. Pub. Sch.*, 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) (“It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.”), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev’d and remanded sub nom. Parents Involved*, 551 U.S. 701, 748 (2007).

82. *Parents Involved*, 551 U.S. at 746–47 (plurality opinion). Those joining the plurality opinion by Chief Justice Roberts were Justices Scalia, Thomas, and Alito. *Id.* at 709. For a thorough and insightful examination of this issue, see generally Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts’s Reinterpretation of Brown*, 69 OHIO ST. L.J. 791 (2008).

83. *Parents Involved*, 551 U.S. at 746 (plurality opinion).

84. *Id.* at 747. Justice Thomas made a similar argument in his concurrence in *Fisher v. University of Texas*. See 133 S. Ct. 2411, 2424–25 (2013) (Thomas, J., concurring). Relying on briefs and arguments in the original *Brown* cases, he argued that considering race to achieve

At the end of its opinion, the plurality then declared, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁸⁵ In doing so, the *Parents Involved* plurality reduced *Brown* to one value: no race-based decision making.

While debates about the “true” meaning of *Brown* abound,⁸⁶ few outside the 1950s and 1960s South have argued that *Brown* only required racial neutrality—that is, no one until Chief Justice Roberts.⁸⁷ To say that *Brown* required only racially neutral student assignment ignores the most memorable line from *Brown* that “[s]eparate educational facilities are inherently unequal.”⁸⁸ It also ignores the long-standing constitutional duty to change racially explicit laws and desegregate schools “root and branch.”⁸⁹ Not surprisingly, many have protested the plurality’s use of *Brown*.⁹⁰

The plurality’s treatment of *Brown* is also quite different from that of its predecessor Court. The Rehnquist Court, while recognizing that school desegregation remedies must be tempered by practicality, affirmed that *Brown*’s promise was not just to end racial barriers to enrollment, but also to eliminate the lingering effects of past discrimination.⁹¹ The Rehnquist

diversity for the benefit of minority students mirrors segregationists’ previous arguments that segregation was used for the benefit of minority students. *See id.* at 2428 (“There is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertion that segregation yielded those same benefits.”).

85. *Parents Involved*, 551 U.S. at 748. The language comes from Judge Bea’s dissenting opinion in the Seattle case. *See Parents Involved VII*, 426 F.3d 1162, 1222 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“The way to end racial discrimination is to stop discriminating by race.”), *rev’d and remanded*, 551 U.S. 701 (2007); *see also id.* at 1191 n.34 (majority opinion) (“More properly stated, the way to end segregation is to stop separation of the races. The Seattle school district is attempting to do precisely that.”).

86. *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

87. *See Parker*, *supra* note 77, at 1708–13.

88. *Brown I*, 347 U.S. 483, 495 (1954).

89. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

90. Justice Stevens, arguing that no member of the Court he “joined in 1975 would have agreed with today’s decision,” declared that “[t]here is a cruel irony in the Chief Justice’s reliance on our decision in [*Brown*].” *Parents Involved*, 551 U.S. at 798–99, 803 (Stevens, J., dissenting). Professor Charles Lawrence calls this “the rape of *Brown v. Board of Education* and the claim that she had consented.” Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 934 (2008); *see also* Ryan, *supra* note 13, at 152 (“To detach the underlying goal—school integration—from the arguments made in advance of that goal is to distort history.”); Spann, *supra* note 13, at 566, 592 (contending that *Parents Involved* overruled *Brown* and is more consistent with the majority opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

91. The Rehnquist Court issued three school desegregation opinions in the 1990s. In all three, the Court required more than race-neutral student assignment plans to fulfill the mandate of *Brown*. *See* *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (“The ultimate inquiry is ‘whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree . . . and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.’” (alterations in

Court, unlike the Roberts Court, treated *Brown* as requiring more than simple racial neutrality in student assignment. Even more fundamentally, the Rehnquist Court recognized the need for practical race-conscious measures to cure the lingering disparate effects of past discrimination.⁹²

5. Justice Kennedy Concurrs

Justice Kennedy joined most of Chief Justice Roberts's opinion, but not all. He rejected the plurality's reaction to the school districts' racial justifications: "The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."⁹³ He also chastised the plurality for its treatment of *Brown*.⁹⁴ Instead, Justice Kennedy clearly supported diversity in the classroom for both kindergartners and law students.⁹⁵ He would allow "race-conscious measures to address the problem in a *general* way," such as by influencing where new schools are constructed and how student attendance zones are configured.⁹⁶

Justice Kennedy did not, however, fault the majority for finding discrimination only from the process of racial attentiveness without proof of any other harm. He joined Chief Justice Roberts in this regard. Justice Kennedy had the utmost concern for individual treatment, even with his support for diversity. If the two cannot coexist, Justice Kennedy would prefer race-neutral individual treatment over diversity, just as he did in *Ricci* and *Grutter*.⁹⁷ The same is also true of his opinion in *Fisher*, where he emphasized the need for rigorous narrow tailoring analysis.⁹⁸ Justice

original) (quoting *Freeman v. Pitts*, 503 U.S. 467, 492 (1992)); *Freeman*, 503 U.S. at 485 ("[T]he principal wrong of the de jure system [is] the injuries and stigma inflicted upon the race disfavored by the violation." (emphasis omitted)); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (holding that district courts must determine "whether the vestiges of past discrimination had been eliminated to the extent practicable. . . . [by] look[ing] not only at student assignments, but 'to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.'" (quoting *Green*, 391 U.S. at 435)).

92. See Parker, *supra* note 77, at 1728–30.

93. *Parents Involved*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

94. *Id.* at 788.

95. *Id.* at 783 ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."); *Grutter v. Bollinger*, 539 U.S. 306, 387–88 (2003) (Kennedy, J., dissenting) (acknowledging that diversity can be a compelling governmental reason in the higher education setting).

96. *Parents Involved*, 551 U.S. at 788–89 (emphasis added). Given the ineffectiveness of race-neutral measures aimed at groups, Justice Kennedy is putting significant limits on the attainability of diversity in the classroom. See Ryan, *supra* note 13, at 136–39.

97. The similarities between the majority and plurality opinions in *Parents Involved* and the majority opinion in *Ricci*, authored by Justice Kennedy, are discussed *infra* Subsection I.C.2. See also *supra* note 46 and accompanying text (analyzing his opinion in *Grutter*).

98. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2418–20 (2013); see also *infra* notes 153–58 and accompanying text.

Kennedy apparently supports diversity in theory, but he finds it too distasteful in practice.⁹⁹ He has yet to find a race-conscious program he supports.

B. *A Change in Defining Discrimination*

Parents Involved reconceptualized more than the meaning of discrimination and *Brown*. It also advocated a more rigorous version of color-blind jurisprudence than the Rehnquist Court.

1. The Rehnquist Court's Color-Blind Jurisprudence

Defining race discrimination exclusively by the process of considering race, as reflected in the opinions of both Chief Justice Roberts and Justice Kennedy, signals a foundational shift in how discrimination is conceptualized. The Rehnquist Court, like the Roberts Court, also found whites to be discriminated on the basis of their race.¹⁰⁰ In doing so, it moved the Court's interpretation of the Equal Protection Clause toward a more color-blind jurisprudence.¹⁰¹ That is, the Rehnquist Court sought race neutrality over race-conscious behavior, and believed awarding benefits on the basis of race was just as wrong as withholding benefits on the basis of race.¹⁰² Yet, its concept of discrimination included a substantive component that identified societal and individual harms arising from different treatment.¹⁰³

For example, the Rehnquist Court often ruled against racial decision making because such an approach would foster harmful stereotypes.¹⁰⁴

99. See Ryan, *supra* note 13, at 154–55 (describing Justice Kennedy in *Parents Involved* as “accept[ing] the goal [of diversity] but hold[ing] his nose at the thought of how it might be achieved”).

100. Perhaps most notable was the creation of a new cause of action, racial gerrymandering, which allowed whites to challenge majority–minority voting districts. See *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 649 (1993).

101. See *supra* note 7 and accompanying text.

102. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all racial classifications).

103. See generally Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (“But under today’s affirmative action doctrine, strict scrutiny has become altogether different. It has become a cost-benefit test measuring whether a law that falls (according to the Court itself) squarely within the prohibition of the equal protection guarantee is justified by the specially important social gains that it will achieve.”).

104. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[T]he Law School’s admissions policy . . . helps to break down racial stereotypes”); *id.* at 333 (“To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”); *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion) (“But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.”); *id.* at 985 (“Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes.”); *Adarand*, 515 U.S. at 229

(Interestingly, the Rehnquist Court itself engaged in racial stereotyping at times.¹⁰⁵) It also expressed strong concern with racial preferences engendering racial hostility and separatism.¹⁰⁶ In that sense, the Rehnquist Court's movement toward color-blind equality recognized the importance of other values. It adopted substantive discrimination in its color-blind jurisprudence.

The *Parents Involved* plurality opinion, however, was entirely divorced from the Rehnquist Court's frequent mention of the specific harms of considering race.¹⁰⁷ This was true for the *Parents Involved* opinions by

("[A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980)) (Stevens, J., dissenting); *Shaw I*, 509 U.S. at 647 (stating that racial gerrymandering "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes"); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.").

105. See *Grutter*, 539 U.S. at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."); *id.* at 338 ("By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."); *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) ("[R]ace in this case correlates closely with political behavior."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (plurality opinion) ("Blacks may be disproportionately attracted to industries other than construction.").

106. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters" (quoting *Shaw I*, 509 U.S. at 657)); *Shaw I*, 509 U.S. at 643 (holding that racial gerrymandering "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated."); *Croson*, 488 U.S. at 493 (plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. . . . [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

107. The plurality opinion makes a passing mention of the harm of "racial blocs," "racial hostility," and racial stereotypes. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting)). It does so, however, in the context of the need for individual review. See *id.* ("[O]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)) (internal quotation marks omitted)). These isolated statements should not be read as evidence that the plurality is concerned with something other than individual treatment. The plurality opinion, read in

both Chief Justice Roberts and Justice Kennedy. Additionally, Justice Kennedy's majority opinion in *Fisher* did not discuss any specific substantive values attending any equal protection jurisprudence.¹⁰⁸

Further, the Rehnquist Court at times permitted the consideration of race, while the Roberts Court in *Parents Involved* sought to eradicate all race-based decision making.¹⁰⁹ The Rehnquist Court's racial gerrymandering cases, for example, allowed the consideration of race, so long as it was not a predominant factor.¹¹⁰ This was arguably the situation presented in Louisville and Seattle. Parental choice was the predominant factor, with some consideration of race.¹¹¹ *Parents Involved* strongly suggested, however, that any consideration of race in the districting process would treat voters differently because of their race and hence be unlawful. Perhaps even more notable was the Rehnquist Court's approval of the University of Michigan Law School's consideration of race in student admissions.¹¹² While the Roberts Court has not overruled *Grutter*'s allowance of diversity as a compelling governmental interest, its requirement of a more rigorous narrow tailoring analysis in *Fisher* limits the practical reach of *Grutter*.¹¹³

2. Justice Thomas

The opinion by Justice Clarence Thomas in *Parents Involved* also reflects the difference between the color-blind equality of the Rehnquist and Roberts Courts. Justice Thomas joined in its entirety the opinion by Chief Justice Roberts. But his concurring opinion reads more like one of the Rehnquist Court than the Roberts Court. Justice Thomas identified the harm of considering race in K-12 admissions: “[It] pits the races against one another, exacerbates racial tension, and ‘provoke[s]

its entirety, is clearly only interested in the impact race-conscious decision making has on individuals. The importance of individual treatment is what is driving the majority and plurality opinions—even though the challenged plans judged no applicant by merit.

108. The very brief majority opinion focused on reiterating the commands of *Bakke* and *Grutter*. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2417 (2013). Its main point was the importance the judiciary undertaking a vigorous narrow tailoring analysis. See *id.* at 2420–21. In discussing Justice Powell's opinion in *Bakke*, Justice Kennedy recognized that universities attach educational value to a diverse student body. See *id.* at 2417–18 (mentioning “enhanced classroom dialogue and the lessening of racial isolation and stereotypes”). Yet that recognition is quickly followed with the need for judicial narrow tailoring, and that analysis includes no mention of any substantive values associated with race-conscious activity. See *id.* at 2420–21.

109. See, e.g., *supra* notes 85–86 and accompanying text.

110. Strict scrutiny is only triggered in evaluating the constitutionality of majority–minority voting districts when race is the predominant factor in line drawing. *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999).

111. See *supra* notes 31–33 and accompanying text.

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

113. See *infra* note 166 and accompanying text.

resentment. . . .”¹¹⁴ He further attacked diversity on its own terms: “racial mixing does not always lead to harmony and understanding,” and “it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.”¹¹⁵ Likewise, his concurring opinion in *Fisher* faulted affirmative action for setting up African-American and Latino students for academic failure.¹¹⁶ Granted, Justice Thomas often makes more impassioned and detailed arguments than other conservative members of the Rehnquist or Roberts Courts. Yet, like the Rehnquist Court, Justice Thomas is concerned with more than the process of race-based differential treatment. He faults race-conscious activity for its association with other harms.

C. Parents Involved and Its Importance

One could argue that this Article makes too much of one opinion. The most controversial aspects of *Parents Involved* are found, after all, in a plurality opinion and not a majority opinion.¹¹⁷

The conceptual impact of *Parents Involved*, however, cannot be doubted. The Roberts Court authored one of the central civil rights opinions of the twenty-first century by rethinking the central civil rights opinion of the twentieth century.¹¹⁸ Given *Brown*'s iconic status in American jurisprudence, not just civil rights jurisprudence, any opinion that touches upon *Brown*'s meaning at length (as *Parents Involved* does) deserves significant attention. For that reason alone, *Parents Involved*, even if involving a plurality opinion, deserves careful reading for how it defines race discrimination.

Further, in the majority opinion, the Court defined the injury suffered

114. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring) (second alteration in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

115. *Id.* at 761, 769 n.17; *see also id.* at 763 (noting the “outstanding educational results” of predominately African-American schools); *id.* at 780 n.29 (affirming historically black colleges); *see also Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (“[B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”); *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (discussing the success of historically black institutions).

116. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2432 (2013). (Thomas, J., concurring) (“Although cloaked in good intentions, the University’s racial tinkering harms the very people it claims to be helping.”); *id.* at 2431 (“Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.”).

117. *Parents Involved*, 551 U.S. at 747 (plurality opinion); *see supra* Subsection I.A.4. Moreover, few school districts consider race in student assignment. *See Ryan, supra* note 13, at 144–45.

118. *Brown I*, 347 U.S. 483 (1954).

by the plaintiffs and created a process-only constitutional injury.¹¹⁹ Similarly, while Justice Kennedy took issue with the plurality's use of *Brown*, his concurring opinion was entirely consistent with creating a process-only constitutional injury.¹²⁰ In addition, this Article's reading of *Parents Involved* is consistent with Justice Kennedy's opinions for the Court in *Fisher*¹²¹ and *Ricci*.¹²²

1. *Fisher v. University of Texas*

Making the process of considering race a constitutional injury is consistent with the Supreme Court's 2013 opinion in *Fisher v. University of Texas*.¹²³ In that opinion, the Court remanded the case to the lower courts, which are presently reconsidering the merits of the case.

Abigail Rose Fisher sued the University of Texas (UT) and other state defendants for considering race as a factor in undergraduate admissions.¹²⁴ The defendants admit using race as a factor, and argued that their racial considerations were entirely consistent with *Grutter*.¹²⁵

Most UT undergraduates are admitted via the facially race-neutral "Top Ten Percent Plan," whereby Texans graduating in the top ten percent of their high school class are guaranteed admission to UT.¹²⁶ Those outside the top ten percent (or attending a private school without class rank) are eligible for admission through a "full file" review that results in an AI/PAI score.¹²⁷ The AI, or Academic Index score, predicts a student's expected GPA freshman year by analyzing standardized test scores and evaluating high school class rank.¹²⁸ The PAI, or Personal Achievement Index, includes race. Specifically, the PAI is composed of three factors: two scores from the student's two personal essays and a student's personal achievement score (PAS).¹²⁹ The PAS is determined by six factors, one of which is "special circumstances."¹³⁰ Six factors make up the "special circumstances" score, and one of the six factors is race.¹³¹ As described by the district court, race is "a factor of a factor of a factor of a factor."¹³²

The parties dispute the number of students who are admitted and

119. *See supra* Subsection I.A.3.

120. *See supra* Subsection I.A.5.

121. *Fisher*, 133 S. Ct. at 2414–22.

122. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

123. *Fisher*, 133 S. Ct. 2411.

124. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 217 (5th Cir. 2011).

125. *Id.* at 217–18.

126. *Id.* at 224.

127. *Id.* at 227.

128. *Id.*

129. *Id.* at 227–28.

130. *Id.* at 228.

131. *Id.*

132. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).

enrolled “because of” their race. The plaintiff places the number of minority students admitted because of race at a total of thirty-three, out of a class of over six thousand.¹³³ The defendants contend the exact number is unknowable because race is never a single decisive factor.¹³⁴ They argue that the full file review, however, is significant in increasing the diversity at the UT-Austin campus.¹³⁵ They point out that twenty percent of African-American admits and fifteen percent of Latino admits are offered admission after a full file review.¹³⁶

The Top Ten Percent Plan alone produces a great deal of student diversity. Before the PAS was changed to take into account race, African-Americans and Latino students comprised more than twenty percent of the entering freshman class at UT Austin.¹³⁷ While the minority enrollment has increased to slightly over twenty-five percent since race became an admissions factor, most of the increase is very likely due to demographic changes in the state population.¹³⁸ The defendants argue that additional measures are necessary to produce actual classroom diversity, particularly in small classes.¹³⁹

The plaintiff in this case presently is only seeking the return of (nonrefundable) application fees totaling \$100.¹⁴⁰ She has already graduated from Louisiana State University (LSU) and is not seeking any damages from attending LSU instead of UT.¹⁴¹ Even more interesting, no one is arguing that she would have been admitted if she were African-American or Latino. Even if she had gotten a perfect score on her PAS, UT claims she still would not have been admitted.¹⁴²

Fisher’s claim is entirely process oriented—like the plaintiff’s claim in *Parents Involved*. She argues that she suffered a constitutional injury from

133. See Brief for Petitioner at 9–10, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11–345).

134. See Brief for Respondents at 38, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11–345).

135. *Id.*

136. *Id.*

137. Brief for Petitioner, *supra* note 133, at 5 (noting that in 2004 the freshman class was 21.4% African-American and Hispanic).

138. See *id.* at 11 (reporting that in 2007 the freshman class was 5.8% African-American and 19.7% Hispanic).

139. See Brief for Respondents, *supra* note 134, at 10 (“[N]early 90% of undergraduate classes of the most common size at UT—sections with 10–24 students—enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one Hispanic student.”).

140. See Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* *Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 80–81 (2012).

141. *Id.* at 81.

142. Brief for Respondents, *supra* note 134, at 15 (“[P]etitioner would not have been admitted to the Fall 2008 freshman class even if she had received a perfect PAI score of 6.” (internal quotation marks omitted)).

racial attentiveness in an admissions system.¹⁴³ Her claim is actually weaker than that in *Parents Involved* because in that case the plaintiffs argued that they would have been admitted if they were minority students.¹⁴⁴ Ms. Fisher, on the other hand, is not making that argument. The district court and Fifth Circuit rejected Ms. Fisher's claim and upheld the UT plan as entirely consistent with *Grutter*.¹⁴⁵

The Supreme Court accepted review of the case.¹⁴⁶ Many predicted the Roberts Court would revisit (and likely revise) the holding in *Grutter* given the departure of its author, Justice O'Connor.¹⁴⁷ After months of speculation, the 7–1 opinion instead took a decidedly moderate approach.

Writing for the majority, Justice Kennedy vacated the Fifth Circuit's opinion upholding the UT admissions decisions.¹⁴⁸ The majority did not consider *Grutter*'s approval of diversity as a compelling governmental interest because Ms. Fisher did not specifically challenge it.¹⁴⁹ Instead, the Court determined that the Fifth Circuit had been too deferential to the defendants when holding that the consideration of race was narrowly tailored to the quest for diversity. Specifically, the Court counseled that the judiciary itself must make a searching inquiry into whether “available, workable race-neutral alternatives” would provide the educational benefits of diversity.¹⁵⁰ A school must use race-neutral means if they work “about as well and at tolerable administrative expense.”¹⁵¹

Fisher was far from groundbreaking; it relied heavily on precedent and

143. Brief for Petitioner, *supra* note 134, at 24.

144. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–11, 713–14, 717 (2007).

145. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 247 (5th Cir. 2011); *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 609 (W.D. Tex. 2009).

146. *Fisher v. Univ. of Tex.*, 132 S. Ct. 1536, 1536 (2012).

147. See, e.g., Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 45 (2012) (“There is no reason for the Supreme Court to have granted certiorari in *Fisher v. University of Texas at Austin*. Unless, of course, the Court plans to overrule *Grutter v. Bollinger* . . .” (footnote omitted)); Robert Barnes, *Supreme Court Divided Over Affirmative Action in College Admissions*, WASH. POST (Oct. 10, 2012), http://www.washingtonpost.com/politics/decision2012/supreme-court-divided-over-affirmative-action-in-college-admissions/2012/10/10/152ace2a-125e-11e2-be82-c3411b7680a9_story.html (“At the end of a lengthy oral argument over admissions policies at the University of Texas, it seemed highly unlikely that a majority of the justices would announce a ringing endorsement of racial preferences.”); Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012, at A1, available at <http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html> (“By the conclusion of the argument, it seemed tolerably clear that the four members of the court’s conservative wing were ready to act now to revise the *Grutter* decision.”).

148. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2422 (2013).

149. *Id.* at 2421 (“[T]he parties do not challenge, and the Court therefore does not consider, the correctness of [*Grutter*].”)

150. *Id.* at 2420.

151. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (internal quotation marks omitted).

announced no new rules.¹⁵² It still, however, represents movement away from *Grutter*.

Grutter was notable for its deference to educators and its cost-benefit analysis¹⁵³ when it determined that diversity could be a compelling governmental interest and approved the law school's admission policies.¹⁵⁴ *Fisher* instead required no deference to educators.¹⁵⁵ In fact, *Fisher* is similar to Justice Kennedy's dissent in *Grutter* where he criticized the majority for its lack of rigor in its strict scrutiny analysis.¹⁵⁶ In *Fisher*, he was able to undercut those parts of *Grutter* that counseled deference and approved the actual mechanics of a plan.¹⁵⁷ Diversity remains, but with the proviso that Justice Kennedy made in his *Grutter* dissent: narrow tailoring should mean something—a searching inquiry is necessary.¹⁵⁸

The shift away from deference to educational defendants makes judicial acceptance of an affirmative plan far less likely. The UT defendants will have a difficult time proving that race is “‘necessary’ . . . to achieve the educational benefits of diversity.”¹⁵⁹ The Top Ten Percent Plan already produces significant diversity, albeit not at numbers reflecting graduating Texas seniors.¹⁶⁰ Yet the plan likely works “about as well” and is “available.”¹⁶¹ Further, the small number of minority students admitted through the race-conscious program indicates that the race factor is not necessary for diversity,¹⁶² particularly given *Parents Involved*'s reasoning that the small numbers affected in that case indicated a lack of need.¹⁶³

Grutter's deference to the university defendants was also inconsistent with *Parents Involved*'s command to eradicate racial attentiveness in government decision making.¹⁶⁴ By definition, a true color-blind approach mandates careful narrow tailoring—it is part of the formula to limiting the

152. *Id.* at 2417.

153. Parker, *supra* note 22, at 98–99; *supra* notes 68–69 and accompanying text.

154. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

155. *Fisher*, 133 S. Ct. at 2419–21.

156. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (“The Court, however, does not apply strict scrutiny.”); *see id.* at 388 (“The Court confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”).

157. *See Fisher*, 133 S. Ct. at 2419–21.

158. *Grutter*, 539 U.S. at 394–95 (Kennedy, J., dissenting).

159. *Fisher*, 133 S. Ct. at 2414 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

160. *See supra* notes 138–39 and accompanying text.

161. *Fisher*, 133 S. Ct. at 2420 (internal quotation marks omitted).

162. *See supra* notes 133–34 and accompanying text.

163. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007) (“While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”).

164. *See id.* at 730.

role of race in government decision making.¹⁶⁵ *Fisher*'s command of rigorous narrow tailoring, thus, is compelled by the strict color-blind approach of *Parents Involved*. In sum, while Justice Kennedy believes strict scrutiny should not be "fatal in fact" nor "feeble in fact," he is certainly making race-conscious decision making more difficult to justify—similar to *Parents Involved*.¹⁶⁶

2. *Ricci v. DeStefano*

This Article's reading of *Parents Involved* is also consistent with the Court's decision in *Ricci v. DeStefano*, a case filed under Title VII of the 1964 Civil Rights Act and the Equal Protection Clause.¹⁶⁷ Although Justice Kennedy, writing for the Court, decided the case only under Title VII, the opinion is instructive on how Justice Kennedy and a majority of Justices of the Roberts Court conceptualize antidiscrimination principles.¹⁶⁸ The Supreme Court has consistently interpreted both Title VII and the Equal Protection Clause the same in how they define discrimination.¹⁶⁹

At issue in *Ricci* was the relationship between two very different causes of action found under Title VII: disparate impact and disparate treatment.¹⁷⁰ Specifically, the case examined when and how employers can

165. *See id.* at 780–82 (Thomas, J., concurring).

166. *Fisher*, 133 S. Ct. at 2421.

167. 557 U.S. 557, 563 (2009). The two are typically interpreted the same. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 324 (1997) (demonstrating that "the Court's approach in the statutory and constitutional areas is, for all practical purposes, identical").

168. *See Ricci*, 557 U.S. at 563.

169. Equal Protection Clause claims are filed under 42 U.S.C. § 1983, and the courts have long treated Title VII and § 1983 as having identical substantive standards for disparate treatment claims. *See, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993); *Radentz v. Marion Cnty.*, 640 F.3d 754, 756–57 (7th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004). Section 1983 and Title VII's disparate treatment claims differ primarily in their respective procedures and § 1983's immunity principles. *See infra* note 252. One remedial difference arose after the 1991 Civil Rights Act allowed limited damages in the "same decision" situation. *See infra* notes 268–69 and accompanying text. These differences are not relevant, however, to how the Court decided *Ricci*.

170. *Ricci*, 557 U.S. at 580. With disparate treatment,

[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . [A disparate impact claim] involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977). Disparate impact claims are rare and unavailable under the Equal Protection Clause. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343, 1386 (2010); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702, 728, 746 (2006).

address the disparate impact of a selection procedure or test and not be guilty of disparate treatment.¹⁷¹ The defendants refused to certify test results for promotions within the New Haven Fire Department, in part out of a fear of a disparate impact suit given the racially disparate test results.¹⁷² The plaintiffs in turn sued the defendants for disparate treatment, arguing they were treated differently because of their race when the defendants refused to certify the test results.¹⁷³

The Court held that an employer needed a strong basis in evidence that it would be subject to liability for a disparate impact claim to avoid being subject to a disparate treatment claim for disregarding test results or discontinuing a selection device.¹⁷⁴ That evidence was absent in *Ricci*. The city instead had only the racial impact of the test results, which did little to prove potential disparate impact liability.¹⁷⁵ Thus, the Supreme Court held that the defendants violated Title VII's disparate treatment prong when they refused to certify the test results.¹⁷⁶

Like *Parents Involved*, racial attentiveness in the decision-making process indicated discriminatory intent and a constitutional injury.¹⁷⁷ The injury arose from the process of considering race. Like the plurality decision in *Parents Involved*, but unlike Justice Kennedy's concurring opinion in *Parents Involved*, the majority in *Ricci* provided no context for why the New Haven defendants chose not to certify the racially disparate test results.¹⁷⁸ Instead, the majority focused on the lack of individual

171. *Ricci*, 557 U.S. at 580–81.

172. *Id.* at 562, 574.

173. *Id.* at 578–79.

174. *Id.* at 584.

175. *Id.* at 579–80. The dissent disagreed, arguing that the decision not to certify the results was not merely because of the racial impact certification would have, but also out of concern with the validity of the test. *See id.* at 608–09, 618 (Ginsburg, J., dissenting).

176. *Id.* at 593. Notably, the Court awarded the plaintiffs summary judgment on the issue. The district court had awarded summary judgment to the defendants.

177. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 993 (2012) (“The *Ricci* case held, for the first time, that an employer’s attention to disparate impact against some may in fact be evidence of its disparate treatment of others.”); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 107–08 (2010) (arguing that *Ricci* “imputes an illegitimate discriminatory motive into all inquiries regarding racial effects or racial dynamics”); Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 228 (2010) (“That the *Ricci* majority worked so hard to reach its result suggests that the racial trigger for the tests’ reconsideration doomed that action in its eyes, regardless of the legitimacy of the city’s concerns about the tests’ validity.”); *id.* at 203 (“[T]he Court for the first time characterized a public employer’s attention to its practices’ racially disparate impact as evidence of its discriminatory, and thus unlawful, intent.”); *id.* at 229 (“The Court now, however, appears to treat a decision maker’s attention to the disparities experienced by members of traditionally subordinated racial groups . . . as inextricable from an intent to discriminate against others, and thus sufficiently suspicious to demand justification.”).

178. *See Ricci*, 557 U.S. at 630 n.8 (Ginsburg, J., dissenting) (“[A]s the part of the story the

treatment because of racial attentiveness to the disparate test results in the decision-making process.¹⁷⁹

Granted, *Ricci* and *Parents Involved* concerned different types of constitutional injuries. The plaintiffs in *Parents Involved* indicated no harm other than the process of considering race and the disappointment of being denied enrollment at a preferred school, which previously had no constitutional dimension or importance.¹⁸⁰ The plaintiffs in *Ricci* claimed the additional harm of not receiving promotions, which has long been accepted as a cognizable constitutional injury.¹⁸¹

Yet *Ricci* is technically not a promotion case. The plaintiffs were never entitled to a promotion; the test results making them eligible for promotions were only valid if certified, and the defendants had refused to certify the results. Rather than decide that the plaintiffs lost their promotion rights, the majority argued that the plaintiffs prepared for the test in reliance on the test being certified.¹⁸² The reliance efforts in preparing for the test were a sufficient injury.¹⁸³

Both *Ricci* and *Parents Involved* strongly adopted a color-blind approach to discrimination law out of an exclusive concern with individual rights. Like *Parents Involved*, *Ricci* relied on the impact that racial attentiveness had on individual rights,¹⁸⁴ without balancing those concerns with other values as the Rehnquist Court did in its race discrimination jurisprudence.¹⁸⁵

Finally, like *Parents Involved*, *Ricci* substantially undercut a

Court leaves out so plainly shows—the long history of rank discrimination against African-Americans in the firefighting profession, the multiple flaws in New Haven’s test for promotions—‘sole reliance’ on statistics certainly is not descriptive of the [city’s] decision.” (citations omitted)); Norton, *supra* note 177, at 218 (“The various opinions in the Supreme Court offer strikingly different narratives that provide a particularly powerful illustration of the Court’s continuing divide over the extent to which the United States has successfully achieved post-racial status.”); *supra* note 82 and accompanying text.

179. See *Ricci*, 557 U.S. at 579–80.

180. See *supra* notes 75–77 and accompanying text.

181. See, e.g., *Aulicino v. N.Y.C. Dep’t of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009) (recognizing that the plaintiff successfully established a failure to promote a claim cognizable under Title VII).

182. *Ricci*, 557 U.S. at 583–84 (“Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests.”).

183. *Id.* at 584; Norton, *supra* note 177, at 247–48 (“The *Ricci* majority’s heavy weighting of the reliance interests impaired by disappointed promotion expectations [indicates that the Court may have] expanded its understanding of the costs to nonbeneficiaries that are sufficiently weighty to trump the benefits of achieving antisubordination ends.”).

184. *Ricci*, 557 U.S. at 578–79, 585, 592–93 (describing the injury entirely in terms of the impact on the individual); see also *Areheart*, *supra* note 177, at 995 (noting the majority’s focus on the individual and the dissent’s focus on the group).

185. See *supra* Subsection I.B.1.

foundational decision. The *Ricci* Court's treatment of the relationship between the disparate treatment and disparate impact claims in Title VII seriously called into question the continued viability of the disparate impact analysis devised in the 1971 opinion of *Griggs v. Duke Power Co.* and codified by Congress in the Civil Rights Act of 1991.¹⁸⁶ In sum, like *Parents Involved*, *Ricci* was a stronger commitment to color-blind jurisprudence than previously seen and that commitment arose out of exclusive concern with individual rights. It, too, signals a shift.

Despite its importance, *Parents Involved* should be restricted to its holding: applying the Equal Protection Clause's strict scrutiny to claims of race discrimination. Given the different levels of review afforded to sex and other discrimination claims, *Parents Involved* should only be applied to instances of race discrimination.¹⁸⁷ And although statutory and constitutional claims are treated almost identically, the Court should confine the *Parents Involved* decision to the constitutional realm of discrimination law.¹⁸⁸ That is, a case would require a state or federal actor to implicate *Parents Involved*'s Equal Protection Clause jurisprudence.¹⁸⁹

D. Parents Involved and White Plaintiffs

This section considers the implications of *Parents Involved*'s process-only constitutional injury, particularly on white plaintiffs.

186. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (2012); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (creating a disparate impact standard for Title VII); *see also Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring) (predicting that “the war between disparate impact and equal protection will be waged sooner or later”); *id.* at 625 (Ginsburg, J., dissenting) (arguing that the majority “shows little attention to Congress’ design or to the *Griggs* line of cases Congress recognized as pathmarking”); Areheart, *supra* note 177, at 993 (“The *Ricci* case held, for the first time, that an employer’s attention to disparate impact against some may in fact be evidence of its disparate treatment of others.”); Harris & West-Faulcon, *supra* note 177, at 107 (“Treating the City’s racially attentive analysis under disparate impact law as a form of intentional discrimination per se not only represented a departure from Title VII law but rewrote antidiscrimination law in an unequal way.”); Norton, *supra* note 177, at 225–26 (“The majority’s premise that Title VII’s disparate treatment and disparate impact provisions are potentially antagonistic thus departs dramatically from the assumptions of the *Griggs* Court and Congress that attention to employment practices’ racially disparate impact remains entirely consistent with and complementary to Title VII’s objective in ensuring equal employment opportunities for all.”).

187. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (applying a heightened form of rational basis review to discrimination based on sexual orientation); *United States v. Virginia*, 518 U.S. 515, 555–556 (1996) (applying intermediate scrutiny to discrimination based on sex).

188. *See supra* note 169 and *infra* note 252 and accompanying text.

189. *See, e.g., The Civil Rights Cases*, 109 U.S. 3, 11–12, 24–25 (1883) (“[The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws . . .”). The federal government, of course, is bound by the Equal Protection Clause as well, under the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954).

1. The Victims When Discrimination Is Only Process

Making racial attentiveness in governmental procedures a constitutional injury greatly expands the field of potential plaintiffs. *Parents Involved* suggested that all students of all races would have a cause of action against the school districts for schools' consideration of race.¹⁹⁰ All students were subjected to a racialized student assignment process, and this is the extent of the constitutional injury.

Moreover, *Parents Involved* strongly implied a cognizable injury exists even if students (of any race) were admitted to their preferred school so long as the defendants considered race in that process.¹⁹¹ This situation obviously would raise questions of jurisdictional standing. The Supreme Court in *Parents Involved* reasoned, however, that a plaintiff would still have standing in this situation: “[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff”¹⁹² Thus, the possibility of a future injury satisfies standing.¹⁹³

Making the injury available to all racial groups, however, avoids the problem identified by Professors Cheryl I. Harris and Kimberly West-Faulcon in their analysis of *Ricci*. Professors Harris and West-Faulcon argue that the *Ricci* Court created an injury available only to whites, who in that case were complaining that the fire department did not certify the results of a promotion test.¹⁹⁴

Yet instead of “whitening” discrimination, which Professors Harris and West-Faulcon observe in *Ricci*, perhaps the Roberts Court in *Parents Involved* was erasing any racial component from discrimination. In theory, that would mean discrimination would have no racial content at all. This is an ironic result for an antidiscrimination command adopted in the aftermath of the Civil War, but consistent with the Roberts Court’s quest to erase race from decision making.¹⁹⁵

190. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

191. *Id.* at 718–19.

192. *Id.* (emphasis added). See generally Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995) (discussing the issue of standing in the context of discrimination actions).

193. Some of the plaintiffs in the Seattle case, for example, alleged the possibility of denial of a desired school in the future. *Parents Involved I*, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001), *aff’d*, *Parents Involved VII*, 426 F.3d 1162 (9th Cir. 2005) (en banc), *rev’d and remanded*, 551 U.S. 701 (2007).

194. *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009); Harris & West-Faulcon, *supra* note 177, at 102–11.

195. See *supra* notes 85–86 and accompanying text. See generally Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 432 (2009) (characterizing *Parents Involved* as “doctrinally so bizarre that it is difficult to view the decision as having emanated from any genuine constitutional principle”).

2. Future White Plaintiffs

After *Fisher*, *Ricci*, and *Parents Involved*, white plaintiffs will have an easier time proving illegal discrimination in their reverse discrimination cases. By definition, all race-conscious decision making includes race in its process; that makes intent a nonissue. Further, strict scrutiny is not very forgiving of any race-conscious activity. What counts as a compelling governmental interest has always been quite limited, and *Fisher* bolstered the strength of the narrow tailoring analysis. Racial attentiveness by government actors will be relatively easy to attack through the legal process. That is certainly the intended result of *Fisher*, *Ricci*, and *Parents Involved*. In this sense the opinions accomplished what they intended.

Do the opinions, however, have unintended consequences for nonwhite plaintiffs? The difficulty with applying *Parents Involved* to traditional discrimination claims is determining discriminatory intent, which is the topic of the next Part.

II. DISCRIMINATORY INTENT AFTER *PARENTS INVOLVED*

This Part turns to the impact of *Parents Involved* on minority plaintiffs claiming race discrimination. Specifically, this Part reveals how *Parents Involved*'s process-only injury makes it slightly easier for these plaintiffs to prove discriminatory intent.

A. *Discriminatory Intent*

All Equal Protection Clause claims require proof of discriminatory intent.¹⁹⁶ A state worker contesting her firing under the Equal Protection Clause, for example, must prove that the defendant's discriminatory intent motivated the termination.

1. Defining Discriminatory Intent

Discriminatory intent means that the defendant took action "because of" the plaintiff's race or other protected status.¹⁹⁷ In the context of white plaintiffs complaining of race-conscious government action, the connection between a defendant's action and a plaintiff's race is rarely at issue. The defendant usually admits race consciousness, and defends on the ground of

196. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 352, 265 (1977).

197. ROY L. BROOKS ET AL., *THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES* 484 (2011) ("The phrase 'because of' is the causal link between an employee's unfavorable treatment and the employer's impermissible motivation."); Selmi, *supra* note 167, at 289 ("[T]he key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states."). *But see* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1710 (2002) ("In discrimination cases, the relationship between the defendant's action and harm to the plaintiff is usually not in controversy. . . . [C]ausation in discrimination cases asks whether the harm to the plaintiff was discriminatory in nature.").

compliance with the strict scrutiny standard. For example, the defendants in *Parents Involved* acknowledged that their policies had a racial component and defended (unsuccessfully) the policies on the grounds that their pursuit of diversity was constitutional.¹⁹⁸

Minority plaintiffs challenging ostensibly race-neutral standards face an entirely different situation. A fired state employee, for example, would claim she lost her job because of a supervisor's discriminatory intent, despite the state's racially neutral standards for continued employment. Few defendants, if any, would respond by admitting a connection between their actions and a plaintiff's race. Instead they typically respond by contending race did not motivate the firing and the plaintiff deserved to be fired for legitimate, nondiscriminatory reasons. That response puts plaintiffs in the position of proving that the defendants actually did have discriminatory intent, despite their protestations to the contrary.

At its most fundamental level, discriminatory intent means acting with "[a] purpose to discriminate"¹⁹⁹ and not merely the disparate impact of a practice or policy.²⁰⁰ Discriminatory intent is more than an awareness of consequences, but instead acting with desire to cause the results.²⁰¹

Yet, and with some contradiction, animus or some sort of bad motive is unnecessary.²⁰² Discriminatory intent may be subtle²⁰³ or unconscious²⁰⁴

198. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 n.12 (2007).

199. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (quoting *Akins v. Texas*, 325 U.S. 398, 403–04 (1945)); see also *Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

200. *Washington*, 426 U.S. at 240–41. While the Equal Protection Clause does not protect against disparate effects, Title VII does. See *supra* note 169 and accompanying text.

201. *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citations omitted)).

202. This Article uses "motive" differently from Professor Charles Lawrence, who has deemed *Washington v. Davis* wrong in its motive-based inquiry. Lawrence, *supra* note 90, at 944 ("I wanted to demonstrate that *Davis*'s motive-centered inquiry, its requirement that we identify a perpetrator, a bad guy wearing a white sheet and hood, made no sense if equality was our goal."). The law today certainly requires a determinable defendant, a person whose actions can be deemed unlawful. In that sense, the law has yet to accept Professor Lawrence's argument that "the harm resided in the continued existence of a widely shared belief in white supremacy and not in the motivation of the individual actor or actors charged with discrimination." *Id.* at 951.

203. As early as 1973, the Supreme Court noted that discrimination was rarely obvious. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[W]omen still face pervasive, although at times more subtle, discrimination . . ."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise."); see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (noting "the problem of subconscious stereotypes and prejudices"); Selmi, *supra* note 167, at 290 ("[S]ince the early 1970s the Court has consistently acknowledged the increasingly subtle nature of discrimination and stated that its task is to remain vigilant in identifying even the most subtle acts of discrimination.").

and still be actionable.²⁰⁵ Thus, a fired plaintiff can prove that the firing was motivated by her race, even if the defendant did not realize it was firing her because of race and did not consciously want to discriminate.²⁰⁶

Discrimination need not be the main or only intention behind the challenged action. Instead, the protected status must at least be “a motivating factor” for the defendant’s actions.²⁰⁷ Thus, an employee states an actionable Equal Protection Clause case (called a “mixed-motive” claim) when a legitimate factor such as tardiness motivated the firing, but so did the worker’s race. If tardiness were the sole reason, however, the firing would not be because of the employee’s race.

Professor Martin J. Katz criticizes the motivating factor standard as requiring too small a causal connection.²⁰⁸ Yet the recognition of a motivating factor as sufficient proof is more of a normative decision than a causal one. The standard recognizes that discriminatory and nondiscriminatory impulses can (and often) coexist, and that the discriminatory impulse should still be actionable even if legitimate reasons exist as well.²⁰⁹

204. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 620 (2009) (Ginsberg, J., dissenting) (recognizing that after Title VII was enacted, “[m]ore subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions”); see also Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLAL. REV. 465, 468–70 (2010).

205. The current definition of discriminatory intent appears to capture implicit bias, which is the attitudes or perceptions toward personal characteristics, such as race, that a person is unwilling or unable to reveal. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1920–22 (2009); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 749–50 (2005); Selmi, *supra* note 167, at 287 (asserting that the Supreme Court’s “definition of intentional discrimination is broad enough to encompass most forms of subtle or unintentional discrimination”); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1150–52 (1999).

206. How a plaintiff might prove that motivation is the topic of the next Part. See *infra* Subsection II.A.2.

207. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (adopting and applying a motivating factor test); see also 42 U.S.C. § 2000e-2(m) (2012) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). Yet claims of retaliation are not included in the statutory definition of when “a motivating factor” is sufficient. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528–31 (2013). These claims require “but-for” causation. *Id.* at 2533.

208. But-for causation tells us whether a particular fact is necessary for the plaintiff’s injury. See Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 496, 501 (2006). Professor Katz defines a motivating factor as less than necessary, but sufficient. See *id.* at 505–07; see also Hart, *supra* note 205, at 760 (“[I]f a plaintiff provides sufficient evidence to suggest that race or gender bias contributed to the decision, the plaintiff has met her burden, even if the court also believes the ‘truth’ of the employer’s proffered reason.”).

209. Hart, *supra* note 205, at 760 (“[E]ven if other factors motivate a decision, when prohibited discrimination forms any part of the decision, the law has been violated.”).

Further, the law limits the available remedies when the plaintiff proves that discriminatory intent was a motivating factor for the action but the defendant proves that they would have still made the same decision regardless of the plaintiff's race. For example, the defendant found to have fired a worker both because of race and tardiness can defend on the ground that the tardiness alone would have resulted in firing. In that situation, no remedies are available under the Constitution,²¹⁰ and Title VII only allows injunctive relief and attorney's fees.²¹¹

2. Proving Discriminatory Intent

Proving the discriminatory intent of a facially neutral employment practice has rarely been simple.²¹² One reason is access to proof. Defendants have unique access to their states of mind—and can easily hide that information. Defendants rarely admit, “I am firing you because of race.”²¹³ Government actors and employers quickly learned to hide their intentions behind race-neutral justifications. In addition, defendants may not even be aware of their “true” intentions.²¹⁴ As a result, plaintiffs typically lack direct evidence of discriminatory intent.

Given the paucity of direct evidence, most plaintiffs rely on circumstantial proof.²¹⁵ The most common practice in employment discrimination cases is comparing how similarly situated persons were treated.²¹⁶ For example, were white workers fired for being late, or only the tardy African-American employees? The problem with comparators is not

210. See, e.g., *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1084 n.5 (11th Cir. 1996); see also *infra* Subsection III.A.3 (discussing potential limits to this remedial rule after *Parents Involved*).

211. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B); see also *infra* Subsection III.A.3 (criticizing the principle as inconsistent with *Parents Involved*'s concept of color blindness).

212. See, e.g., *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985) (“Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.”).

213. See, e.g., *Slack v. Havens*, 522 F.2d 1091, 1093 (9th Cir. 1975) (noting that a supervisor only assigned African-American women to heavy cleaning because, in the supervisor's words, “colored people are hired to clean because they clean better”).

214. See Hart, *supra* note 205, at 757–58 (“[T]here is no necessary legal difference between discrimination that a decisionmaker is truly unaware of, and discriminatory attitudes that the decisionmaker simply never expresses out loud.”).

215. The Court in *Arlington Heights* delineated several factors to consider as circumstantial evidence of intent to discriminate. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The factors included the “historical background of the decision,” a “specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” “[s]ubstantive departures,” and “legislative or administrative history.” *Id.* at 267–68; Selmi, *supra* note 167, at 304 (noting that “the *Arlington Heights* factors are relevant because they provide indicia of discrimination; these factors are relevant because our experience suggests they are likely indicative of discriminatory acts”).

216. Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011).

the theory, but the reality. Professor Suzanne B. Goldberg thoroughly documents that the workplace seldom has the necessary comparators.²¹⁷

In practice, the judiciary is far from willing to conclude that circumstantial evidence in fact proves discriminatory intent.²¹⁸ This is consistent with psychological studies documenting people's hesitance to label actions as discriminatory.²¹⁹ Professor Michael Selmi makes a compelling argument that "the Court consistently fails to find discrimination unless it is overt; subtle discrimination continues to elude the Court's understanding of intentional discrimination."²²⁰ The lack of direct evidence and the treatment of circumstantial evidence leave most plaintiffs challenging race-neutral practices unable to prove discriminatory intent.²²¹

B. Parents Involved and Discriminatory Intent

Earlier this Article argued that *Parents Involved* expanded the definition of constitutional injury.²²² After *Parents Involved*, racial attentiveness in the decision-making process is a constitutional injury itself, without proof of any substantive harm. This section explores how that change in conceptualizing discrimination affects the meaning of discriminatory intent.²²³

217. *Id.* ("[T]he most traditional and widely used heuristic—comparators, who are similar to the complainant in all respects but for the protected characteristic—is barely functional in today's economy and is largely unresponsive to updated understandings of discrimination.").

218. Selmi, *supra* note 167, at 283–85. Professor Selmi argues that the Supreme Court has "repeatedly demonstrated" its unwillingness "to draw inferences of discrimination based on circumstantial evidence." *Id.* at 285.

219. See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 ("[M]ost people, in most factual circumstances, are unwilling to make robust attributions to discrimination.").

220. Selmi, *supra* note 167, at 334; see also *id.* ("The Court's reluctance to draw inferences of discrimination is evidenced by the fact that the Court has never invalidated a statute or practice based on the factors articulated in its *Arlington Heights* decision.").

221. Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1095 (2009) ("[T]he hurdle of proving discriminatory purpose is so daunting that virtually no claim will surmount it."). For a good review of the literature of proposals to redress the difficulty of demonstrating discriminatory intent, see Bartlett, *supra* note 205, at 1898–99. For a good overview of the history and meaning of discriminatory intent, see Derek W. Black, *Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge*, 43 CONN. L. REV. 503, 510–18 (2010).

222. See *supra* Subsection I.A.3.

223. Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 676 (2006) ("In order to make any causal inquiry, the inquiry must be framed. That framing requires identifying the act or event that is of interest as a potential cause . . ." (footnote omitted)).

1. Expanding the Definition of Discriminatory Intent

Discriminatory intent requires, of course, attention to what will and will not count as discrimination. *Parents Involved* thus changed not only what is meant by discrimination. It also changed discriminatory intent. Courts must now also recognize disparate treatment in any processes when examining discriminatory intent. In other words, a court must adjust the definition of discriminatory intent to capture any racial attentiveness in the process of decision making. Only then will courts achieve *Parents Involved*'s goal of eliminating all instances of different treatment based on race.²²⁴

Thus, the issue of intent after *Parents Involved* is not just whether the worker was fired because of race, a significant evidentiary hurdle for plaintiffs.²²⁵ The question now must also capture whether the process of firing differed by race. The impact of this expanded definition on defining constitutional injury and the attending remedy is discussed below.²²⁶

The definition of discrimination after *Parents Involved* does not, however, cure the substantial problems of proving a defendant's discriminatory state of mind, even with the opinion's definition of process-only discrimination. The absence of direct evidence of discriminatory intent and the limitations of the available circumstantial evidence remain.

2. Coexistence of Discrimination and Nondiscrimination

Parents Involved signifies a second shift in discriminatory intent: discrimination and nondiscrimination can, and do, coexist.²²⁷ In reverse discrimination cases, the Court has found discrimination, even if nondiscriminatory motivations were present as well.²²⁸ In both *Ricci* and

224. See *supra* notes 84–85 and accompanying text.

225. The exceedingly low win rates of employment discrimination plaintiffs have been amply demonstrated. See generally Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 896–920 (2006) (demonstrating by empirical study that the chances of the plaintiff winning in employment discrimination litigation is significantly lower than in other types of litigation). Plaintiffs lose before both district courts and courts of appeals. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 105–06 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 441 (2004).

226. See *infra* Section III.A (examining how *Parents Involved* affects racial harassment claims, the stray remarks doctrine, and the same decision defense); *infra* Section III.B (recognizing the damage implications of this definition).

227. Professor Hart argues persuasively in the Title VII context that the law should not deem discrimination as an “either-or” proposition. See Hart, *supra* note 205, at 743.

228. The exception to that, of course, is the University of Michigan School of Law's denial of admission to Barbara Grutter. See *supra* note 66 and accompanying text. There was strong evidence that the law school treated her differently because of her race (white), but the Court, in a controversial opinion by Justice O'Connor, put that question aside for other constitutional values. See *supra* Subsection I.A.2. The continued viability of that case is, however, under serious attack

Parents Involved, the defendants considered legitimate, nondiscriminatory factors in their decision-making process.²²⁹ In *Ricci*, the defendants were also concerned about the validity of the promotion test and the need for effective leadership.²³⁰ In *Parents Involved*, the defendants valued parental choice and school capacity.²³¹ The Court did not allow the nondiscriminatory impulses in either case to excuse or invalidate the discriminatory impulses.²³²

Yet the opposite often occurs in the facially race-neutral context. Here, differing versions of why something happened compete with each other at the proof stage—one causal set of discriminatory reasons versus another causal set of legitimate reasons. This happens because the absence of legitimate factors often proves the intent to discriminate.²³³

As explained earlier, plaintiffs usually only have access to circumstantial evidence to prove discriminatory intent.²³⁴ The reason for a defendant's actions and their connection to the plaintiff's status is rarely proved, however, with direct inferences. The law is rarely able to infer from circumstantial evidence *X*, *Y*, and *Z* that the defendant discriminated, as the law can infer from skid marks the speed of a car's travels.

Rather, a defendant is frequently unable to prove a legitimate reason applied in a nondiscriminatory way. When that occurs, the law allows a finding of discriminatory intent.²³⁵ Thus, discriminatory intent is frequently demonstrated by the absence of legitimate reasons for the decision. Excluding all legitimate reasons to prove the illegitimate one is obviously a difficult evidentiary hurdle for plaintiffs.

Another difficulty for plaintiffs is that the presence of a defendant's legitimate reason is often taken as excusing the presence of an illegitimate reason. This is most notable in employment discrimination cases. The *McDonnell Douglas* prima facie case,²³⁶ used in both Title VII and Equal Protection Clause claims, at the outset eliminates two nondiscriminatory reasons for an adverse employment action—the plaintiff was unqualified,

and confinement. *See supra* Subsection I.C.1.

229. *Ricci v. DeStefano*, 557 U.S. 557, 592–93 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711–12 (2007).

230. *Ricci*, 557 U.S. at 592–93; *see also supra* note 175 and accompanying text.

231. *Id.* at 711–12; *see also supra* notes 32–33 and accompanying text.

232. *Parents Involved*, 551 U.S. at 793.

233. *See supra* Subsection II.A.2.

234. *See id.*

235. *See Banks & Ford, supra* note 221, at 1075 (“[I]ntent is not a thing to be discovered, but rather is revealed by an absence—the lack of any other credible reason for the adverse employment action leaves intentional discrimination as the only acceptable inference.”).

236. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The test includes four elements: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Id.*

or the position was closed.²³⁷ This in turn creates a presumption of discrimination,²³⁸ which the defendant can rebut with evidence of a legitimate, nondiscriminatory reason.²³⁹ If the fact finder does not believe the defendant's proffered reason for the adverse employment action, the fact finder may, but need not, conclude that the true reason is the plaintiff's protected status.²⁴⁰

Framing the proof as a legitimate reason or illegitimate reason (proven by the absence of legitimate reasons) reduces discrimination to a binary question: was a legitimate factor present or not? This happens even in mixed-motive cases, where the plaintiff is allowed to prevail by proving that race is a motivating factor even though other legitimate reasons were also at play.²⁴¹ If discrimination is proved by the absence of other legitimate reasons, then it becomes an either-or question to prove, even in mixed-motive cases. A plaintiff still has to prove the illegitimate reason by proving the absence of a legitimate reason on that point in the decision making.²⁴² Only when the plaintiff has direct evidence of discriminatory intent will she be able to avoid this difficulty, and that situation is exceedingly rare.²⁴³

However, the question of discrimination cannot be so simply reduced to an "either-or" question, as Professor Melissa Hart aptly describes this problem.²⁴⁴ If we are to be truly color-blind—meaning that a protected status is to have no impact—then the question should not be binary but instead more attuned to *any* racial conduct. That is also true when evaluating what counts as an injury after *Parents Involved*, the topic of the next Part.

III. INJURY AFTER *PARENTS INVOLVED*

This Part turns to the injury element of discrimination claims, to examine how *Parents Involved* affects specific injury issues often faced by nonwhite plaintiffs. The federal judiciary has adopted at least three rules that excuse race consciousness from legal consequences—the racial harassment definition, the stray remarks doctrine, and the same decision defense.²⁴⁵ All three are inconsistent with *Parents Involved*'s command of

237. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

238. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

239. *McDonnell Douglas*, 411 U.S. at 802.

240. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

241. *See supra* notes 207–12 and accompanying text.

242. *See* Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes*, 32 *BERKELEY J. EMP. & LAB. L.* 513, 520 (2011).

243. *See id.*

244. *See* Hart, *supra* note 205, at 743.

245. *See infra* Subsections III.A.1–3.

absolute color blindness.²⁴⁶ This Part also recognizes, however, that these injuries will likely result in more limited remedies.²⁴⁷

A. *A Truly Color-Blind Concept of Injury*

At times, plaintiffs produce evidence of explicitly racial conduct, and the law excuses it. After *Parents Involved*, however, that must change. Chief Justice Robert's concept of color blindness—his command that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”—compels a prohibition of all racial actions.²⁴⁸ The Court's concept of discriminatory injury must therefore now recognize the illegality of all racial actions.

1. Racial Harassment

Racial harassment claims often arise in the workplace, and such cases are typically decided under Title VII's prohibition against different treatment.²⁴⁹ If the claim involves state action, the plaintiff may also file suit under § 1983 for the Equal Protection Clause claim.²⁵⁰ Apart from the state action requirement for § 1983, the substantive standards are the

246. *See infra* Section III.A.

247. *See infra* Section III.B.

248. *See supra* notes 84–85 and accompanying text.

249. 42 U.S.C. § 2000e-2(a)(1) (2012). For a look at the continued prevalence of racial harassment cases, see Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 98–100 fig.4 (2006). Racial harassment cases in the workplace are also filed under 42 U.S.C. §§ 1981, 1983. *Id.* at 80 tbl.11, 93 tbl.17, 108 (providing statistical evidence of the continued relevance of §§ 1981 and 1983 claims).

250. For examples of cases in which public employees produced evidence of racial comments and other harassing conduct by their public employers but failed to establish that the conduct was sufficiently severe or pervasive to make a successful claim, see *Baloch v. Kempthorne*, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (holding that allegedly racist comments by supervisors were too sporadic to be considered pervasive); *Arraleh v. County of Ramsey*, 461 F.3d 967, 979 (8th Cir. 2006) (concluding that coworker comments had only a tenuous connection to the plaintiff's race and national origin and were not sufficiently severe to establish a Title VII claim); *Caver v. City of Trenton*, 420 F.3d 243, 263 (3d Cir. 2005) (determining that allegedly racist supervisor comments were not sufficiently severe or pervasive because they were not made directly to plaintiff, but rather heard secondhand); *Smith v. Northeastern Illinois University*, 388 F.3d 559, 566–67 (7th Cir. 2004) (finding that the plaintiff failed to establish that her work environment was objectively hostile within the meaning of Title VII because supervisor remarks, while clearly racist, were not directed at her); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 643–44 (9th Cir. 2003) (concluding that two allegedly racist supervisor comments, made more than six months apart, were not sufficiently severe or pervasive to establish a Title VII claim); and *Ramsey v. Henderson*, 286 F.3d 264, 268–70 (5th Cir. 2002) (finding that supervisor and coworker comments were too vague to establish an objectively hostile work environment). Professors Pat Chew and Robert Kelley found that plaintiffs win less than half of their cases. *See* Chew & Kelley, *supra* note 249, at 87 (finding a 33.3% success rate “when defendants use ostensibly race-linked physical objects (such as nooses or Ku Klux Klan-associated attire)” and a 25.9% success rate with “race-obvious verbal harassment (such as the use of [n- - - -]).”).

same.²⁵¹ The racial harassment must be unwelcome and either pervasive or offensive (both of which are judged by an objective and a subjective viewpoint).²⁵² It can include both obviously racist treatment and more subtle racist treatment.²⁵³

The current racial harassment standard thus excuses employers from any responsibility for racial slurs and racist objects in the workplace if they are welcomed or not severe or pervasive from either an objective or subjective viewpoint. That approach permits racial attentiveness to continue—racial slurs and racist objects are often “allowed” because they do not rise to the level of actionable racial harassment.

Parents Involved suggests a different analysis when state actors are sued for racial harassment involving blatantly racist activity by either supervisors or coworkers. Then the line of inquiry would not be welcome-ness, pervasiveness, or offensiveness, but instead whether plaintiff at any point was treated differently as an *individual* because of race.²⁵⁴ Under *Parents Involved*, the degree of pervasiveness and offensiveness is a question of damages and not a question of liability.

Racial slurs and racist objects, even if not pervasive or offensive, would entail the different individual treatment prohibited by *Parents Involved*. That is, would the defendant have called the plaintiff a racist term if the plaintiff had been of a different race? Different individual treatment would

251. See, e.g., *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004); *Busby v. City of Orlando*, 931 F.2d 764, 776–77, 782 (11th Cir. 1991) (per curiam).

252. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (sexual harassment case); *EEOC v. Xerxes Corp.*, 639 F.3d 658, 668 (4th Cir. 2011) (racial harassment case); *Patterson*, 375 F.3d at 227 (racial harassment claim). While Equal Protection Clause claims do not include the disparate impact challenges available under Title VII, racial harassment addresses disparate treatment. Disparate treatment claims under Title VII share the same substantive standards as Equal Protection Clause claims. See *id.* at 225; *supra* note 169 and accompanying text.

Title VII and Equal Protection Clause claims do differ in their procedural requirements and potential defendants. Title VII claims must be first filed with Equal Employment Opportunity Commission or an appropriate state agency. See *Patterson*, 375 F.3d at 220. Title VII suits are filed against employers, not individuals. *Id.* at 226. Section 1983 suits, on the other hand, can be filed against both employers and individuals (sued in their personal capacity) who are state actors. *Id.* Individuals sued under § 1983 are also entitled to qualified immunity. See *Pearson v. Callahan*, 555 U.S. 223, 227, 231, 243–44 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Yet when the employer is a municipality, the plaintiff must prove the existence of a policy or custom of allowing the challenged action to state a § 1983 claim. *Patterson*, 375 F.3d at 226.

The suits also differ in terms of the doctrine of respondeat superior. None exist for § 1983 claims. *Id.* Under Title VII, an employer can assert an affirmative defense that the employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and [] that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). That defense is not applicable in cases involving a tangible employment action. See *id.* at 760–61.

253. See *Chew & Kelley*, *supra* note 249, at 72–75.

254. See *supra* notes 85–86 and accompanying text.

very likely occur if the racial slurs or racist objects were directed toward someone of the race or affiliated with the race the slur or object seeks to demean.²⁵⁵ For example, a white man would very unlikely be targeted with the term “Boy” to demean his race, while the opposite would likely be true for an African-American man.²⁵⁶ The same applies with racially charged objects such as nooses. Racial slurs and objects involving a perpetrator and victim of the same race would count as well.

This application of *Parents Involved* to racial harassment claims is contrary to the idea that employment discrimination law should not establish a “civility code” in the workplace.²⁵⁷ Yet that is the consequence of *Parents Involved* when it sought to scrub racial attentiveness completely from government decision making. By equating the actions of the Seattle and Louisville school districts with de jure segregation, it created a standard that all state actors should always treat all persons without regard to race.²⁵⁸ Chief Justice Roberts established a strict version of color-blind treatment and thereby compelled that a workplace be completely free from treating individuals differently because of their race. No racial statements or objects would ever be allowed; if they were, different treatment based on race would be permitted.

Note, however, that the question of employer liability for the racial harassment actions by employees remains after *Parents Involved*.²⁵⁹ Employers can still defend on the grounds that they took reasonable remedial steps in response to harassment the employer knew or should have known about.²⁶⁰ That is an issue of vicarious liability—not injury,

255. For example, calling a white woman romantically involved with an African-American person a “n- - - - lover,” would be treating that white woman differently because of her race. Using the “n-word” toward any person of color would very likely be because of race as well.

256. See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (“Although it is true [that the word “boy”] will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”).

257. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (“[S]tandards for judging hostility are sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–82 (1998) (explaining that Title VII “forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment”).

258. See *supra* notes 85–86 and accompanying text.

259. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (providing an affirmative defense to negate vicarious liability for harassment by supervisors that does not result in a tangible employment action); *May v. Chrysler Grp., LLC*, 716 F.3d 963, 971–72 (7th Cir. 2013) (examining the reasonableness of the employer’s response to coworker harassment).

260. For a discussion of the contradiction between the reporting requirement and actual employment practices, see Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 373–80 (2004). For a statistical analysis of the affirmative defense and a critical examination of its effects, see generally David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual*

which is the topic of *Parents Involved*.

2. Stray Remarks Doctrine

Closely related to the definition of racial harassment is the stray remarks doctrine. Under this principle, the judiciary has excused explicitly racial comments as too insignificant to indicate discrimination motivated by an adverse employment action.²⁶¹ For example, a Puerto Rican doctor had her jury verdict set aside, in part, because her supervisor's facially discriminatory statement was too remote to indicate a discriminatory intent in not renewing her contract.²⁶²

While the statement may be inadequate proof of discriminatory intent in the decision not to renew a contract, the statement still indicated different individual treatment because of ethnicity. The supervisor was quoted as saying that "Dominican doctors were better than the other physicians who were . . . Puerto Rican."²⁶³ That statement treated the Puerto Rican plaintiff differently as an individual because of her ethnicity—it classified her as an inferior doctor because she was Puerto Rican instead of Dominican. Yet the stray remarks doctrine allowed supervisor to make the statement without any legal consequences.

Excusing these explicitly racial comments is inconsistent with *Parents Involved* for the same reasons racial harassment exists even when not pervasive or severe, as discussed in the previous section.²⁶⁴ Explicitly racial comments treat people differently because of their race, contrary to the command of *Parents Involved* that individuals always deserve race-neutral treatment.

3. Same Decision Defense

Parents Involved also restricts the impact of the same decision defense.²⁶⁵ The principle applies in employment discrimination cases when the defendant proves that the plaintiff would have suffered the same injury

Harassment Charges, 69 FORDHAM L. REV. 1265 (2001).

261. Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 158–60 (2012). Professor Kerri Lynn Stone documents the increased frequency of the principle and creates a useful way to classify its use. *Id.* at 151.

262. *Alvarado-Santos v. Dep't of Health*, 619 F.3d 126, 128, 133 (1st Cir. 2010). The court explained: "In addition, [the plaintiff] offered no evidence that [the decision maker's] isolated remark about Dominican doctors was close in time to the decision not to renew her employment contract, was related to her, or was otherwise related to the employment decision." *Id.* at 133 (footnote omitted). This case and others are collected in Stone, *supra* note 261, at 149–50, 159–68.

263. *Alvarado-Santos*, 619 F.3d at 128 (internal quotation marks omitted).

264. *See supra* Subsection III.A.1.

265. For citations to earlier scholarship criticizing this rule, see Katz, *supra* note 208, at 517 n.109.

in the absence of the defendant's discriminatory intent.²⁶⁶ For example, a defendant found to have fired an employee because of race can defend on the ground that the defendant would have fired the employee for tardiness anyway. In this case, the employee would have suffered the same adverse employment action regardless of the impermissible discriminatory intent.

The same decision defense precludes the award of any compensatory damages.²⁶⁷ A plaintiff can still recover injunctive relief and attorney's fees under the Civil Rights Act of 1991 for a Title VII violation.²⁶⁸ No remedy is available for constitutional claims filed under § 1983, however, because the Court has declared that the defense indicates the absence of a constitutional injury.²⁶⁹ Thus, the doctrine completely absolves the defendant from any constitutional consequences of discriminatory intent.²⁷⁰

The defense, however, is at odds with the core principle of *Parents Involved*—prohibiting any individual from being treated differently on account of race. It allows racial processes to continue in the workforce, so long as the employee still deserved the adverse employment action. Yet the person fired for her race (but also legitimately fired for tardiness) has still suffered a different process in firing. *Parents Involved* prohibited all racially discriminatory conduct, not just ones that result in substantive harm.

Moreover, the fired worker who learns of the discriminatory intent will possibly suffer psychological damages. Even more fundamentally, the complete denial of constitutional damages allows discrimination to exist without constitutional consequences. It encourages employers not to take responsibility for their discrimination, but instead to find another reason to

266. The defense applies to both Title VII and Equal Protection Clause claims. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95, 101 (2003) (explaining that both the same decision defense and a limit on compensatory damages apply when evidence of discriminatory intent is direct or circumstantial); *Texas v. Lesage*, 528 U.S. 18, 20–21 (1999) (“[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration.”); see also 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

267. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (providing the court shall not award damages when a respondent demonstrates that the same action would have been taken in the absence of the impermissible motivating factor).

268. See 42 U.S.C. § 2000e-5(2)(B)(i) (providing that the court may grant declaratory relief, injunctive relief, and attorney's fees and costs when a respondent demonstrates that the same action would have been taken in the absence of the impermissible motivating factor).

269. See *Lesage*, 528 U.S. at 20–21.

270. As Professor Martin Katz has previously argued, full compensatory damage recovery in this instance would be a windfall to the plaintiff. See Katz, *supra* note 208, at 512 (“[T]he plaintiff is placed in a better position than she would have been in absent the defendant's actions.”). Professor Katz would allow, however, “punitive/deterrent sanctions” to create adequate punishment and deterrence. *Id.* at 515, 539. He would also allow attorney's fees and perhaps a “bounty” amount to plaintiffs to “provide better incentives for plaintiffs in minimal causation cases to act as private attorneys general.” *Id.* at 540.

fire the worker. This separate injury of a different process deserves a remedy, as explored in the next section.

B. *Limitation on Remedies*

Arguing that *Parents Involved* expanded the constitutional definition of discrimination leaves unanswered the question of the attending remedy. In many cases, immunity issues may preclude any compensatory damage.²⁷¹ Even when available, however, the injury of racial attentiveness by itself may be worth little in terms of compensatory damages.

The fundamental rule of compensatory damages is that the scope of the injury determines the scope of the remedy and that remedies should be designed to place the plaintiff in the position she would have been in but for the violation.²⁷² Compensatory damages are rarely presumed. Instead, courts will require proof of the specific injuries suffered.²⁷³

Injuries arising from different treatment can include more than economic damages arising from a lost job. Stigma and dignitary harms often attend racial treatment.²⁷⁴ Plaintiffs should be permitted to prove the emotional harms common to discrimination, and defendants should be financially responsible for those injuries. If no injury other than the process of different treatment is proven, however, the plaintiff would only be entitled to nominal damages.²⁷⁵

Other types of relief can and should be awarded. A court may issue an injunction prohibiting the conduct in the future.²⁷⁶ Prevailing plaintiffs can receive reasonable attorney's fees.²⁷⁷ Punitive damages against individual defendants are available as well.²⁷⁸

Lastly, in these times of denying race consciousness, the power of a judicial declaration of the existence of discrimination carries significant

271. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 208–09 (4th ed. 2011); see also Cheryl L. Anderson, “Nothing Personal:” *Individual Liability Under 42 U.S.C. § 1983 for Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 83–92 (1998) (discussing immunity restrictions emanating from the “state actors” who act “under color of law” framework established by § 1983).

272. See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 14 (4th ed. 2010).

273. See *Carey v. Phipus*, 435 U.S. 247, 255 (1978). Under *Carey*, damages for constitutional violations are not presumed. *Id.* at 255, 261–64. A plaintiff unable to prove specific injury from the constitutional violation is awarded nominal damages. *Id.* at 266–67.

274. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 836–48 (2004) (discussing the consequences of racial stigma).

275. See *supra* note 273.

276. See BROOKS ET AL., *supra* note 197, at 954.

277. 42 U.S.C. § 1988(b) (2012); *Carey*, 435 U.S. at 257 n.11.

278. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding punitive damages may be assessed in an action under § 1983 if the defendant’s conduct is shown to be motivated by “evil motive or intent,” or when the defendant’s conduct involves reckless indifference to federally protected rights of others).

meaning.²⁷⁹ The Supreme Court has proved willing and able to declare whites the victims of discrimination, in the name of color-blind justice. Judicial recognition that minorities still suffer from different treatment as well presents a more accurate picture of the presence of race-conscious activity.

CONCLUSION

The Roberts Court's commitment to color-blind jurisprudence is stronger than any previous Court's, including the Rehnquist Court. It has defined white plaintiffs as victims of race discrimination when the process of decision making treated them differently because of their race, apart from any other attending substantive injury. That expanded definition of injury should have important consequences for minority plaintiffs as well. While it eases a bit the high burden nonwhite plaintiffs have of proving discriminatory intent, *Parents Involved* should provide additional constitutional protections in proving injury.

279. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086–87 (1984) (“But when one sees injustices that cry out for correction . . . the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayal of our deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition.”).