Recognizing Discrimination: Lessons from White Plaintiffs

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RECOGNIZING DISCRIMINATION:
LESSONS FROM WHITE PLAINTIFFS

Wendy Parker†

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 re-positioned the meaning of Brown v. Board of Education. While many have lamented this 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 has adopted a version of colorblind jurisprudence so unconditional and absolute that it unintentionally, but unmistakably, offers great promise to non-white plaintiffs. By making unlawful any different treatment of an individual by race, whether it has substantive consequences or not, the Roberts Court has expanded what is actionable under the Equal Protection Clause of the Fourteenth Amendment, even for minority plaintiffs.

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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. I call this “substantive discrimination.” For example, the Supreme Court doomed the state statutes challenged in Brown v. Board of Education 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).1 The Warren Court contextualized the process harm in its substantive effects: the importance of education – “perhaps the most important function of state and local governments,” the “feeling of inferiority” created by de jure segregation, and the inequality inherent in separate education.2 The assignment based on race alone did not create the constitutional violation; the Warren Court linked that procedure with substantive harms.

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.3 The Rehnquist Court continued that tradition,4 even as it shifted the Court to a more colorblind interpretation of the Equal Protection Clause.5

The meaning of discrimination has changed, however, with John Roberts as Chief Justice. The Roberts Court recently considered the claims of white plaintiffs in two cases, Ricci, an employment discrimination case,6 and Parents

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2 Id. at 493-95.
3 Plessy v. Ferguson, 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. (questioning whether the laws “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? That . . . is the real meaning of such legislation as was enacted in Louisiana.”); T. Alexander Aleinikoff, Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom in, Anti-Racism, 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.”).
4 See infra Part I.B.1.
5 By colorblind, I mean 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 generally Ian F. Haney López, “A Nation Of Minorities”: Race, Ethnicity, And Reactionary Colorblindness, 59 STAN. L. REV. 985, 992-1002 (2007) (detailing the history of the jurisprudence); 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); see also notes and accompanying text.
6 Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (holding that an employer is not entitled to disregard promotional tests for hiring purposes “solely based on the racial disparity in the results”); see also notes and accompanying text.
In these two opinions, the Roberts Court continued to endorse the colorblindness supported by the Rehnquist Court, but with one important shift. In *Ricci* and *Parents Involved*, the harm to the white plaintiffs was only different treatment during the process of deciding their school assignment or work status. It became possible for discrimination to arise solely from the process of different treatment, without proof of any attending substantive harm. I call this “process discrimination.”

I once joined with those lamenting the Supreme Court’s decision in *Parents Involved*. Today, however, I think the Roberts Court in *Parents Involved* actually created opportunity for minority plaintiffs. A silver lining to the dark cloud of *Parents Involved* can be found. If any different treatment, any racial attentiveness in the challenged process by itself can violate the Equal Protection Clause – regardless of the lack of independent harm from that unequal procedure – that can help traditional discrimination plaintiffs.

Consider a manager, working for a state, who fired a Latino worker with one single utterance negative to his Latino heritage. 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.

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

8 See infra Part I.A.3.; notes 117-24 and accompanying text.

9 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 colorblind 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”).

10 For examples of cases in which a terminated employee sued his or her public employer for race discrimination based on allegedly racist remarks, see e.g., Metoyer v. Chassman, 504 F.3d 919 (9th Cir. 2007); Patterson v. Cnty. of Oneida, 375 F.3d 206 (2d Cir. 2004); Tullo v. City of Mount Vernon, 237 F. Supp. 2d 493 (S.D.N.Y. 2002); Aguilera v. Vill. of Hazel Crest, 234 F. Supp. 2d 840 (N.D. Ill. 2002); Stephens v. City of Topeka, 33 F. Supp. 2d 947 (D. Kan. 1999); Farasat v. Paulikas, 32 F. Supp. 2d 249 (D. Md. 1998).
Instead, the issue would be whether the Latino worker deserved to be fired, or whether instead plaintiff’s ethnicity caused the firing.

*Parents Involved* shifted the focus away from the firing issue to a process question: was the worker treated differently because of his ethnicity when he was fired. Would the manager have made the statement to a white worker? If not, then the worker was treated differently under the reasoning of *Parents Involved*. That is a consequence of the Roberts Court creating a process discrimination claim for white plaintiffs, once that right is equally afforded to the more traditional civil rights case. The Roberts Court was able to make this change, in part, because *Parents Involved* is a post-school desegregation case and not an affirmative action case. It occupies a new space in our so-called “post-racial” society.\(^\text{11}\)

The difficulty in this hypothetical 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. I argue that the Court’s adoption of process discrimination in reverse discrimination cases expands the definition of what we mean by discriminatory injury, and that definition should be of use to minority plaintiffs – if we carefully craft the remedy.

This argument proceeds in three parts. Part I reveals how the Supreme Court created process-only discrimination in *Parents Involved*. I argue that the Supreme Court has devised an unconditional version of colorblind jurisprudence to expand constitutional injury to include any different treatment, including process-only claims. That section ends with exploring how this greatly enhances the ability of white plaintiffs to win their reverse discrimination cases. I predict that Abigail Fisher will win her case against the University of Texas, even though she would not have gained admission if she had been African American or Latino.\(^\text{12}\)[N.B. This Article will be expeditiously updated in June after the Supreme Court’s opinion in *Fisher v. Texas* is issued, thereby making it one

\(^{11}\) 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”); *see infra* notes 46-49 and accompanying text.

\(^{12}\) See Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011); *affirming*, 647 F. Supp. 2d 587 (W.D. Tex. 2009), *cert. granted*, 132 S. Ct. 1536 (2012); *infra* Part I.D.2. The Roberts Court has also signaled that it will revisit Grutter in its *Fisher* review. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (upholding the use of race in law school admissions to achieve diversity); *see infra* notes 149-51 and accompanying text.
of the first published Articles to analyze what is predicted to be a seminal Supreme Court opinion.]

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, 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, non-white 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 allow the law to excuse explicitly racial conduct and are inconsistent with Parents Involved’s command of absolute colorblindness. Lastly, this Part recognizes that these injuries will likely result in more limited remedies.

PART I: PARENTS INVOLVED’S DEFINITION OF DISCRIMINATION

Here I describe how Parents Involved reveals the Roberts Court’s adoption of process-only discrimination.13 That approach differs from how the Rehnquist Court defined discrimination,14 and greatly eases the way for white plaintiffs to contest race conscious governmental activity.15

A. PARENTS INVOLVED & PROCESS DISCRIMINATION

Parents Involved addressed the constitutionality of student assignment policies at two school districts, one in Lexington, Kentucky and the other in Seattle, Washington.16 The litigation followed Grutter, where the Supreme Court

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13 Ricci is certainly instructive as well, but I focus on Parents Involved because of its significance. See infra Part I.D.1. I discuss how my interpretation of Parents Involved is consistent with Ricci. See infra notes 107-25 and accompanying text.
14 See infra Part I.B.1.
15 See infra Part I.D.
had allowed race conscious student admissions to achieve student diversity in the higher education setting.\textsuperscript{17}

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. The problem, declared the Supreme Court, was that the school districts controlled parental choice by a variety of factors and one of the factors was race.\textsuperscript{18}

Lexington, 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.\textsuperscript{19} Seattle mandated that applications for ninth grade be granted so that student enrollment in all high schools would be within ten or fifteen percentage points of the school district’s white and non-white high school population.\textsuperscript{20}

A five-Justice majority held the plans unconstitutional in an opinion by Chief Justice Roberts. Justice Kennedy did not join two parts of Chief Justice Roberts’ opinion, thereby making those portions a plurality opinion. Justice Kennedy also wrote his own concurring opinion.\textsuperscript{21}

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.”\textsuperscript{22} The word “sole” would be fair in the context of the \textit{de jure} segregation challenged in \textit{Brown}, but not in twenty-first century Lexington and Seattle.

No student in \textit{Parents Involved} was assigned \textit{solely} because of race. Assignment was based on a variety of factors. Parental choice was given the most weight. Race was a deciding factor for a small percentage of students,\textsuperscript{23} but only

\begin{itemize}
\item \textsuperscript{18} \textit{Parents Involved}, 551 U.S. at 711.
\item \textsuperscript{19} \textit{Id.} at 716.
\item \textsuperscript{20} \textit{Id.} at 712.
\item \textsuperscript{21} Justices Thomas, Stevens, and Ginsburg also wrote separately.
\item \textsuperscript{22} \textit{Id.} at 711.
\item \textsuperscript{23} Specifically in Seattle, 307 students “were affected by the racial tiebreaker.” \textit{Id.} at 733. Yet, the Supreme Court concluded that “only [fifty-two] 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.” \textit{Id.} at 734. In Jefferson County, “the racial guidelines account for only 3 percent of assignments.” \textit{Id.} Interesting, the small number of students affected indicated the lack of necessity for the plans. \textit{Id.} at 728-29.
\end{itemize}
after parental choice, sibling placement, and home address narrowed the options for the student.\textsuperscript{24} Race was part of the process, and a few times a tiebreaker, but race alone did not determine assignment like it did in \textit{de jure} segregation.

The Court criticized both school districts’ rough racial classifications.\textsuperscript{25} Lexington classified students as either black or non-black, and Seattle designated students as white or non-white.\textsuperscript{26} 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 a quarter each of African-American, Asian-American, Latino, and white students.\textsuperscript{27}

In this respect, the school districts made it easy to criticize their programs for the lack of nuance present in the Michigan law school program upheld in \textit{Grutter}. Both school districts used race in a less sophisticated manner than a law school program devised by law professors, who expected future litigation.\textsuperscript{28} In
Recognizing Discrimination

Lexington and Seattle, however, the lower courts all upheld the constitutionality of the plans under *Grutter.*

2. *Grutter & Gratz.* *Grutter* and *Gratz* provide the starting point in evaluating the constitutionality of the school districts’ plans. The Supreme Court in *Gratz* had declared that the Michigan undergraduate admissions system erred in awarding an additional twenty points to underrepresented minority applicants. That automatic, numerical approach was not narrowly tailored to the compelling governmental interest of diversity. Justice O’Connor agreed with the outcome in *Gratz,* but switched sides to give the deciding fifth vote to uphold Michigan law school’s more nuanced, flexible admissions system in *Grutter.* She particularly emphasized the importance of 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 underpresented minority students.

Schools wishing to consider race in admissions 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 hard. Justice Scalia dissented from *Grutter,* in part, because of the ambiguity created by what he called the “split double header” of *Grutter* and *Gratz.* Even more troubling, the dissenting Justices in *Grutter* found no meaningful difference between the law school’s plan and the undergraduate’s approach. In practice, the dissenting...

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31 *Gratz,* 539 U.S. at 250.

32 Id. at 271-76.

33 Id. at 276-80 (O’Connor, J., concurring).

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

35 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.”).

36 Id. at 348 (Scalia, J., concurring in part and dissenting in part).

37 This was mainly indicated, the Justices argued, by the pattern of admitting about the same number of African America, Hispanic and Native American students each year and by defining the quest for critical mass differently for each racial/ethnic group. Id. at 347-48 (Scalia, J., concurring in part and dissenting in part) (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...
Justices declared, *Grutter* was like *Gratz*. That makes the demarcation between the two murky.

What is clear, however, is that the awarding of specific points to some races but not others is prohibited by *Gratz*, as is the setting aside of a specific number of admissions seats by race according to the 1978 case of *Bakke*. The plans under attack in *Parents Involved* avoided both of these pitfalls. The racial breakdowns were not tied to a fixed number of admission slots, but were more flexible. The school districts’ plans therefore fall outside of *Bakke*.

Nor did the school systems assign a particular number of points to some races as prohibited by *Gratz*. First, all races and ethnicities were subject to and affected by the mandated percentages. No one race received a “benefit” denied groups.”); 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”).

38 Justices Kennedy, Scalia, and Thomas also argued that the law school’s quest for diversity operated as a “quota.” See id. at 348 (Scalia, J., concurring in part and dissenting in part) (joined by 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-Americans, and between 47 and 56 were Hispanic.” Id. at 381 (Rehnquist, C.J., dissenting). In addition, Chief Justice Rehnquist argued, “the 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. He explains, “[f]or 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.


40 *Parents Involved* v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1185 (9th Cir. 2005) (en banc) (*Parents Involved VII*) (“[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 Cty. 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* v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); see also *Grutter*, 539 U.S. at 335 (majority opinion) (“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*, 488 U.S. 469, 496 (1989) (plurality opinion)).


42 *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.”); *Parents Involved* v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1231 (W.D. Wash. 2001) (*Parents Involved I*) (“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
to another race; nor did one race receive a penalty not applicable to another race. Instead, all races had applications granted and denied because of the defined goals.

Second, the school districts’ numbers were more like Grutter’s critical mass quest than Gratz’s automatic twenty-point scoring. The school districts in Lexington and Seattle adopted a number, but a flexible number – Lexington had a thirty-five percent band and Seattle had a twenty to thirty percent band. The numerical bands in Parents Involved in these respects were more like the law school’s quest for the enrollment of a “critical mass” of underrepresented minorities: an attention to numbers, but without numbers having an absolute quality to them.

Yet, comparing the plans in Parents Involved to Gratz or Grutter presents an even more fundamental problem. Gratz and Grutter involved traditional affirmative action plans: identified races got a benefit in a merit-based system. The challenged policies in Parents Involved are not affirmative action plans like those in Michigan. That makes them hard to compare to either Gratz or Grutter.

First, merit is completely absent from student admission in both Lexington and Seattle. No one in Lexington or Seattle was admitted, or denied admission, because of any sort of merit determination. Second, no race received a preference; all races were treated equally. Both whites and non-whites were affected by the numerical bands.

Neither is Parents Involved a classic school desegregation case, which depends on intentional segregation by race and creates a constitutional duty to desegregate. While Chief Justice Roberts tried to put the plans challenged in

students access to Franklin, the city's popular predominantly minority school. It is in this sense, too, that the program is not a ‘preference,’” aff’d, 426 F.3d 1162 (9th Cir. 2005), rev’d and remanded, 551 U.S. 701 (2007); 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.”).

43 Compare Grutter, 539 U.S. at 308 (“[T]he Law School defines its critical mass concept 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 250 (assigning twenty points to all applicants from underrepresented minority groups is unconstitutional).

44 See supra notes 19-20 and accompanying text.

45 Grutter, 539 U.S. at 336 (“[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”) (internal quotation marks and citations omitted).

46 See supra note 42 and accompanying text.

Parents Involved into the Brown school desegregation box, the plans simply won’t fit. The school districts in Parents Involved sought to integrate, not segregate, and their use of race did not create a duty to desegregate.

Parents Involved is a post-school desegregation case that is not affirmative action in disguise. It occupies a different space. That space created room for the Roberts Court to both restrict Grutter (after all, the Grutter dissenting Justices are now in the majority) but also to create a new right, what I call “process discrimination.”

3. Process Discrimination. The illegality held in Parents Involved was racial attentiveness in student assignment. The attention to race alone created the constitutional violation. That process created no independent substantive harms. Process discrimination arises because of the Court’s exclusive focus on individual rights, without providing any context for why the individual rights matter.

Chief Justice Roberts begins his analysis by mischaracterizing the challenged programs as treating race as “the factor” driving admissions decisions. As explained earlier, race is clearly a factor, but it is unfair to describe it as something akin to de jure segregation where race truly was the factor in student admissions. He then faults the programs for their lack of individual review, when student assignment plans by definition are not about individual review. Yet, the lack of individual review drives all aspects of the Roberts opinion.

Lastly, Chief Justice Roberts reconfigures Grutter. He argues that “[t]he entire gist of . . . Grutter was that the admissions program . . . focused on each applicant as an individual.” That would certainly come as a surprise to Barbara

49 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”).
50 Judge Kozinski would use this space to apply a rational basis standard of review. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring) (en banc) (Parents Involved VII), rev’d and remanded, 551 U.S. 701 (2007).
52 See supra notes 22-24 and accompanying text.
53 Parents Involved, 551 U.S. at 723-25.
54 That is, the admissions had no merit component to it, unlike Grutter.
55 Parents Involved, 551 U.S. at 722 (emphasis added).
Recognizing Discrimination

Grutter, who almost certainly would have been admitted if she were African American, American Indian, or Hispanic instead of white.\(^{56}\)

*Grutter*, like other race opinions of the Rehnquist Court, emphasized a host of values other than treating individuals equally.\(^{57}\) As Professor Michelle Adams has recognized, the Rehnquist Court engaged in a “cost benefit” balancing that preference[d] the societal benefits of the law school’s program over the individual harm to Barbara Grutter.\(^{58}\) It found that the many benefits of the diversity policy were worth the costs of the explicit use of race in student admissions. Those values, however, received no mention in the *Parents Involved* opinion. Instead, it falsely reduced *Grutter* to being just about individual treatment.

In short, Chief Justice Roberts equates racial attentiveness in the process of student enrollment with a lack of individual review. That doomed the program for the Supreme Court. What is notable was the absence of *any* other harm. The opinion, evoking Ayn Rand’s John Galt, was all about the individual, and honoring individual choice.\(^{59}\)

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.\(^{60}\) Many would count this as equal protection of the laws.\(^{61}\) The Court refused, however, to equate that with equal treatment.

Second, the majority opinion was perfectly content that no plaintiff alleged *any* specific harm from having to attend their assigned school instead of

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\(^{56}\) The three minority applicants with scores similar to Mrs. Grutter’s were all offered admission. *Parker*, *supra* note 17, at 92.

\(^{57}\) The Fifth Circuit in *Fisher v. Texas* identified “three distinct educational objectives served by diversity [that Justice O’Connor] envisioned.” *See Fisher v. Texas*, 631 F.3d 213, 219 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). They were increased perspectives, professionalism, and civic engagement. *Id.* at 219-21. The *Grutter* Court also emphasized the necessity for educational diversity to meet the needs of American businesses and military, as reflected in their respective *amicus* briefs. *Grutter*, 539 U.S. at 330-31; *see also supra* Part I.A.2.

\(^{58}\) *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.”).

\(^{59}\) *AYN RAND*, ATLAS SHRUGGED (1957).

\(^{60}\) *See supra* note 42 and accompanying text.

\(^{61}\) *See*, *e.g.*, *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding the closing of a public swimming pool to avoid integration because all races were treated alike).
their preferred school. The Supreme Court in Brown faulted the inequality inherent in segregated education, but no one here was suggesting inequality. The presumption was that the schools are entirely equal, except that some of the schools are sometimes oversubscribed.

One parent (and only one) alleged that her son needed a particular program offered at an over-subscribed school. 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. In fact the opposite is true: local school districts have the right to require attendance at an assigned school. 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.”

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62. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring) (Parents Involved VII) (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).


67. 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”).

68. For an examination of the history of the importance of local control for the Supreme Court 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 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.
Third, nor does it appear that the plaintiffs actually suffered any harm other than racial attentiveness in a multi-faced student assignment process. The Roberts Court says nothing of damage to the hearts and minds of affected students. 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.

That leaves the injury solely the consideration of race in the process of student assignment. The consequences of recognizing this process-only harm are profound. In Parents Involved, it meant a minority group of white parents could 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, “Disappointed white parents, therefore, were sacrificing the inclusionary educational interests of minority school children in order to advance exclusionary educational interests of their own.”

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 opinion evidenced a concern with the continuing consideration of race; it sought to eradicate it completely from government decision making – no matter what the cost to society or other constitutional values such as local control over schools. A plurality of Justices – over the objection of Justice Kennedy and the

69 Parents Involved VII, 426 F.3d at 1182 (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, concurring) (“That a student is denied the school of his choice may be disappointment, 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 . . . .”).
70 Spann, supra note 9, at 603.
71 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.’”) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion of O’Connor, J.)) (internal quotation marks deleted).
dissenting Justices – go so far as to re-make the iconic *Brown v. Board of Education* in this image of racial neutrality, as the next section explores.

4. *Brown v. Board of Education*. The Roberts Court in *Parents Involved* did not stop with declaring the challenged policies unconstitutional, despite the absence of any substantive harm attending the process of racial attentiveness. A plurality of Justices was bold enough to declare the majority’s approach as required by *Brown v. Board of Education*.73

That is, according to the *Parents Involved* plurality, the Jefferson County and Seattle school districts were engaging in the *exact same harm* as the *Brown* defendants.74 The plurality asks: “What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?”75 The plurality then ended its opinion with the command of “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”76 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,77 few outside the 1960’s South have argued that *Brown* only required racial neutrality – that is, no one until Chief Justice Roberts.78 To say that *Brown* requires only racially neutral student assignment ignores the most memorable line from *Brown* that “[s]eparate educational facilities are inherently unequal.”79 Separate schools and any attending inequality are of *no* concern to the plurality. Not surprisingly, many have protested the plurality’s use of *Brown*.80

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73 *Parents Involved*, 551 U.S. at 746 (plurality opinion). Those joining the plurality opinion by Chief Justice Roberts were Justices Alito, Scalia, and Thomas.
74 Id.
75 Id. at 747.
76 Id. The language comes from Judge Bea’s dissenting opinion in the Seattle case. See *Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1*, 426 F.3d 1162, 1221 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (*Parents Involved VII*) (“The way to end 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.”).
80 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 799-800, 803 (Stevens, J., dissenting). Professor Charles Lawrence calls this “the rape of *Brown v. Board of Education* and the claim that she had consented.” See 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 9, at 151 (“[T]o detach the underlying goal – school integration
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 what is practicable, affirmed that the promise of Brown was more than ending racial barriers to enrollment, but also eliminating the lingering effects of past discrimination. The Rehnquist 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 race conscious measures, if practicable, to cure lingering disparate effects of the past discrimination.

5. Justice Kennedy Concurs. Justice Kennedy joined most of Chief Justice Robert’s opinion, but not all. He rejected the reaction of the plurality to the school district’s 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.” He also chastised the plurality for its treatment of Brown. Instead, Justice Kennedy was clear in his support for diversity in the classroom for both kindergartners and law students. He would allow “race-conscious measures to address the problem in a general way” such as where new schools are constructed and how student attendance zones are configured.

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81 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) (Jenkins III) (“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 original) (quoting Freeman v. Pitts, 503 U.S. 485, 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, 250 (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, extra-curricular activities and facilities.’”) (footnote omitted) (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)).

82 See Parker, supra note 68, at 1728-30.


84 Id.

85 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).

86 Parents Involved, 551 U.S. at 783 (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 9, at 136-39.
Justice Kennedy was not, however, faulting the majority for finding a violation only from the process of racial attentiveness, without any proof of other harm. He joined Chief Justice Roberts here. Individual treatment was of utmost concern to Justice Kennedy, even with his support for diversity. If the two cannot co-exist, Justice Kennedy will preference race neutral individual treatment over diversity, just as he did in *Ricci* and *Grutter.*

B. **A CHANGE IN DEFINING DISCRIMINATION**

Remarkably, *Parents Involved* re-conceptualized more than *Brown.* It also differs from the colorblind jurisprudence of the Rehnquist Court.

1. **The Rehnquist Court’s Colorblind 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. In doing so, it was moving the Court’s interpretation of the Equal Protection Clause toward a more colorblind jurisprudence. 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. Yet, the harm of considering race for the Rehnquist Court was also always connected with reasons for why considering race was harmful. Its concept of discrimination included a substantive component.

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87 See Ryan, supra note 9, at 155-55 (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”). The similarities between the majority and plurality opinions in *Parents Involved* and the majority opinion in *Ricci,* authored by Justice Kennedy, are discussed infra notes 107-25 and accompanying text. See also supra notes 37-38 and accompanying text (analyzing his opinion in *Grutter*).

88 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,* 509 U.S. 630, 647 (1993) (*Shaw I*).

89 See supra note 5 and accompanying text.


91 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.”).
For example, the Rehnquist Court often ruled against racial decision making because such an approach would foster harmful stereotypes.\(^{92}\) (Interestingly, the Rehnquist Court itself engaged in racial stereotyping at times.\(^{93}\)) It also expressed strong concern with racial preferences engendering racial hostility and separatism.\(^{94}\) In that sense, the Rehnquist Court’s movement toward colorblind equality was contextualized to recognize that other values validated the need for colorblindness equality. It adopted substantive discrimination in its colorblind jurisprudence.

The *Parents Involved* plurality opinion, however, was entirely divorced from the factors frequently mentioned by the Rehnquist Court on the harms of

\(^{92}\) 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 stereotypes.”); *Adarand*, 515 U.S. at 229 (“[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 (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.”); *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.”); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“Race cannot be a proxy for determining juror bias or competence.”).

\(^{93}\) 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.”).

\(^{94}\) 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. 485, 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.”).
considering race. This was true for the *Parents Involved* opinions by both Chief Justice Roberts and Justice Kennedy.

Further, the Rehnquist Court at times permitted the consideration of race, while the *Parents Involved* sought to eradicate all race-based decision making. The Rehnquist Court’s racial gerrymandering cases, for example, allowed the consideration of race, so long as it was not a predominant factor. This is arguably the situation presented in Lexington and Seattle. Parental choice was the predominant factor, with some consideration of race. *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 is the Rehnquist Court’s approval of Michigan Law School’s consideration of race in student admissions, a decision now called into question by the Roberts Court’s acceptance of review of *Fisher v. University of Texas*.

2. Justice Thomas. The difference between the colorblind equality of the Rehnquist and Roberts Courts is also reflected in the opinion by Justice Thomas in *Parents Involved*. 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 ‘provokes resentment. . .’” 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

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95 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 Broadcasting, 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 demeanes 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)). These isolated statements should not be read to be evidence that the plurality is concerned with something other than individual treatment. The plurality opinion, read in 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.

96 See supra notes 75-76 and accompanying text.

97 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, 546 (1999).

98 See supra notes 22-24 and accompanying text.


100 See infra Part I.D.2.

educational benefits, much less that integration is necessary to black achievement.\textsuperscript{102} Like the Rehnquist Court, Justice Thomas was concerned with more than the process of treating individuals with race in mind. His concern was with any race conscious activity because he strongly associated it with other harms.

\section*{C. PARENTS INVOLVED & ITS IMPORTANCE}

One could argue that I am making too much of one opinion. The most controversial aspects of \textit{Parents Involved} are found, after all, in a plurality opinion and not a majority opinion.\textsuperscript{103}

Yet, I remain convinced of the impact of \textit{Parents Involved}. The Roberts Court has written one of the central civil rights opinions of the twenty-first century by re-writing the central opinion of the twentieth century.\textsuperscript{104} Given \textit{Brown}'s iconic status in American jurisprudence, not just civil rights jurisprudence, any opinion that touches upon \textit{Brown}'s meaning at length (as \textit{Parents Involved} does) deserves significant attention. For that reason alone, \textit{Parents Involved}, even if involving in part a plurality opinion, deserves careful reading for how it defines race discrimination.

Further, the majority opinion was where the Court defined the injury suffered by the plaintiffs and where the Court created its process-only constitutional injury.\textsuperscript{105} Similarly, while Justice Kennedy took issue with the plurality’s use of \textit{Brown}, his concurring opinion was entirely consistent with process alone creating a constitutional injury.\textsuperscript{106}

In addition, my reading of \textit{Parents Involved} is consistent with Justice Kennedy’s majority opinion in \textit{Ricci}.\textsuperscript{107} That case was filed under Title VII and the Equal Protection Clause.\textsuperscript{108} Although the Court decided the case only under

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{102}] \textit{Parents Involved}, 551 U.S. at 761, 770 n.17; see also id. at 763 (noting the “outstanding educational results” of predominately African-American schools); \textit{id.} at 2787 n.29 (affirming historically black colleges); see also Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (\textit{Jenkins III}) (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).
  \item[\textsuperscript{103}] \textit{Parents Involved}, 551 U.S. at 747 (plurality opinion); see supra Part I.A.4.
  \item[\textsuperscript{104}] 347 U.S. 483 (1954) (\textit{Brown I}).
  \item[\textsuperscript{105}] See supra Part I.A.3.
  \item[\textsuperscript{106}] See supra Part I.A.5.
  \item[\textsuperscript{107}] \textit{Ricci} v. DeStefano, 557 U.S. 557 (2009).
  \item[\textsuperscript{108}] \textit{id.} at 563. The two are typically interpreted the same. See Michael Selmi, \textit{Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric}, 86 GEO. L.J. 279, 324 (1997).
\end{itemize}
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Title VII, the opinion is instructive on how Justice Kennedy and a majority of Justices of the Robert Court conceptualize antidiscrimination principles. The Supreme Court has consistently interpreted both Title VII and the Equal Protection Clause the same in how they define discrimination.109

At issue in Ricci was the relationship between two very different causes of action found under Title VII, disparate impact and disparate treatment.110 Specifically, the case examined when and how employers can address the disparate impact of a selection procedure or test and not be guilty of disparate treatment.111 The defendants had 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.112 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.113

The Court held that the employer needed a strong basis in evidence that the employer would be subject to Title VII liability for a disparate impact claim to disregard test results or discontinue a selection device.114 That evidence was absent in New Haven, and the Supreme Court held that the defendants violated Title VII’s disparate treatment prong when they refused to certify the test

(demonstrating that “the Court’s approach in the statutory and constitutional areas is, for all practical purposes, identical”).

109 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 Cty., 640 F.3d 754, 756-57 (7th. 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 205. One remedial difference arose after the 1991 Civil Rights Act allowed limited damages in the “same decision” situation. See infra notes 218-19 and accompanying text. These differences are not relevant, however, to how the Court decided Ricci.

110 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, sex, religion or national origin. Proof of discriminatory motive is critical . . . . [A] disparate impact claim[]. . . involves employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another . . . . Proof of discriminatory motive . . . is not required under a disparate impact theory.


111 Ricci, 557 U.S. at 580-81.
112 Id. at 581-82.
113 Id.at 578-79.
114 Id. at 584.
results.\textsuperscript{115} For the majority, the fire department had done so solely because of the racial impact of the test results, and this alone demonstrated discriminatory intent.\textsuperscript{116}

Like \textit{Parents Involved}, racial attentiveness in the decision making process indicated discriminatory intent and a constitutional injury.\textsuperscript{117} The injury arose from the process of considering race. Like the plurality decision in \textit{Parents Involved}, but not like Justice Kennedy’s concurring opinion in \textit{Parents Involved}, the majority opinion in \textit{Ricci} provided no context for why the New Haven defendants choose not to certify the racially disparate test results.\textsuperscript{118} Instead, the majority opinion focused on the lack of individual treatment because of racial attentiveness in the decision making process.

Granted, \textit{Ricci} and \textit{Parents Involved} concerned different types of constitutional injuries. The plaintiffs in \textit{Parents Involved} indicated no harm other than the process of considering race and the disappointment in not receiving a preferred school, which previously had no constitutional dimension or importance.\textsuperscript{119} The plaintiffs in \textit{Ricci} certainly claimed the additional harm of not

\textsuperscript{115}Id. at 593. Notably, the Court awarded the plaintiffs summary judgment on the issue. The district court had awarded summary judgment to the defendants.

\textsuperscript{116}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. \textit{See id.} at 609, 618 (Ginsburg, J., dissenting).

\textsuperscript{117}See Bradley A. Areheart, \textit{The Anticlassification Turn in Employment Discrimination Law}, 63 ALA. L. REV. 955, 993 (2012) (“The \textit{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.”); \textit{id.} at 228 (“That the \textit{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.”); Cheryl I. Harris & Kimberly West-Faulcon, \textit{Reading Ricci: Whitening Discrimination, Racing Test Fairness}, 59 UCLA L. REV. 73, 107-08 (2010) (\textit{Ricci} “imputes an illegitimate discriminatory motive into all inquiries regarding racial efforts or racial dynamics.”); Helen Norton, \textit{The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality}, 52 WM. & MARY L. REV. 197, 203 (2010) (“[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.”); \textit{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 the intent to discriminate against others, and thus sufficiently suspicious to demand justification.”).

\textsuperscript{118}See \textit{Ricci}, 557 U.S. at 630 n. 8 (“[A]s part of the story the 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 . . . decision.”) (citations omitted); Norton, supra note 117, 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.”); \textit{supra} note 83 and accompanying text.

\textsuperscript{119}See \textit{supra} notes 66-68 and accompanying text.
receiving promotions, which has long been accepted as a cognizable constitutional injury.  

Yet, the plaintiffs here were never entitled to a promotion; the test results entitling them to promotions would only be 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 had prepared for the test in reliance on the test being certified.  The reliance efforts in preparing for the test were a sufficient injury.

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

Finally, like Parents Involved, Ricci substantially undercut a foundational decision.  The Ricci Court’s treatment of the relationship between the disparate treatment and disparate impact sides of Title VII seriously called into question the continued viability of the disparate impact analysis devised in the 1971 opinion of Griggs v. Duke Power Company and codified by Congress in the Civil Rights Act of 1991.  In sum, like Parents Involved, Ricci was a stronger commitment to

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120 See, e.g., Aulicino v. N.Y.C. Dep’t of Homeless Servs., 580 F.3d 73, 80 (2d Cir. 2009).
121 Ricci, 557 U.S. at 583-84 (majority opinion) (“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.”).
122 Id. at 584; Norton, supra note 117, at 247-48 (“The Ricci majority’s heavy weighting of the reliance interests impaired by disappointed promotion expectations [indicates that the Court has] expanded its understanding of the costs to nonbeneficiaries that are sufficiently weighty to trump the benefits of achieving antisubordination ends.”).
123 Ricci, 557 U.S. at 578, 579, 585, 592, 593 (describing the injury entirely in terms of the impact on the individual); see also Areheart, supra note 117, at 995 (noting the majority’s focus on the individual and the dissent’s focus on the group).
124 See supra Part I.B.1.
125 Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A); 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 609 (Ginsburg, J., dissenting) (arguing that the majority “shows little attention to Congress’ design or to the Griggs line of cases Congress recognized as path marking”); Areheart, supra note 117, 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 117, 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 117, at 225-26 (“The majority’s premise that Title VII’s disparate treatment and separate impact provisions are potentially antagonistic thus departs dramatically from the assumptions of the Griggs Court and Congress that attention to employment
colorblind jurisprudence than seen previously 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, I would apply Parents Involved only to instances of race discrimination. And although statutory and constitutional claims are treated almost identically, I would confine the decision to the constitutional realm of discrimination law. That is, application of Parents Involved would require a state or federal actor to implicate its Equal Protection Clause jurisprudence.

D. PARENTS INVOLVED & WHITE PLAINTIFFS

This Part considers the implications of Parents Involved’s process-only constitutional injury, particularly on white plaintiffs.

1. The Victims When Discrimination Is Only Process. Making racial attentiveness in governmental procedures a constitutional injury expands greatly the potential plaintiffs. Parents Involved suggested that all students, of all races would have a cause of action against the school districts for their consideration of race. 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) received their preferred school so long as the defendants considered race in that process. This situation obviously would raise questions of jurisdictional mootness. The Supreme Court in Parents Involved reasoned, however, that this situation would still afford plaintiff’s standing: “[O]ne form of injury under the Equal Protection Clause is being forced to

practices’ racially disparate impact remains entirely consistent with and complementary to Title VII’s objective in ensuring equal employment opportunities for all.”).


127 See supra notes 109, 203 and accompanying text.

128 See, e.g., The Civil Rights Cases, United States v. Stanley, 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 Bollinger v. Sharpe, 347 U.S. 497 (1954).
compete in a race-based system that may prejudice the plaintiff.”¹²⁹ Thus, the possibility of a future injury satisfies standing.¹³⁰

Making the injury available to all racial groups, however, avoids the problem identified by Professors Cheryl Harris and Kimberly Fulcon-West in their analysis of *Ricci*. Professors Harris and Fulcon-West argued 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.¹³¹

Yet, instead of “whiten-ing” discrimination that Professors Harris and Fulcon-West observed 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 anti-discrimination command adopted in the aftermath of the Civil War, but consistent with the Roberts Court’s quest to erase race from decision making.¹³²

2. Fisher v. University of Texas. Making the process of considering race a constitutional injury is consistent with the Supreme Court’s acceptance of review of *Fisher v. University of Texas*.¹³³ Abigail Rose Fisher sued the University of Texas (UT) and other state defendants for the consideration of race in undergraduate admissions.¹³⁴ Defendants admitted to the use of race, and argued that their racial considerations were entirely consistent with *Grutter*.¹³⁵

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.¹³⁶ Those outside the top ten percent (or attending a private school without class rank) are eligible for admission


¹³⁰ Some of the plaintiffs in the Seattle case, for example, alleged the possibility of denial of a desired school in the future. Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001) (Parents Involved I), aff’d, 426 F.3d 1162 (9th Cir. 2005) (en banc) (Parents Involved VII), rev’d and remanded, 551 U.S. 701 (2007).


¹³² See supra notes 75-76 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”).


¹³⁴ *Fisher*, 631 F.3d at 217.

¹³⁵ *Id.* at 217-18.

¹³⁶ *Id.* at 224.
Recognizing Discrimination

through a “full file” review that will result in an AI/PAI score.\textsuperscript{137} The AI, or Academic Index score, reflects a student’s high school grade point average, standardized test score, and high school curriculum.\textsuperscript{138} The PAI, or Personal Achievement Index, includes race. Specifically, the PAI is composed of three factors, two scores from the application’s two personal essays and a student’s personal achievement score (PAS).\textsuperscript{139} The PAS score is determined by six factors, one of which is “special circumstances.”\textsuperscript{140} Seven factors make up the “special circumstances” score, and one of the seven factors is race.\textsuperscript{141} As described by the district court, race is “a factor of a factor of a factor of a factor.”\textsuperscript{142}

The number of students who are admitted and enrolled “because of” their race is in dispute. 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.\textsuperscript{143} Defendants contend the exact number is unknowable, because race is never a single decisive factor.\textsuperscript{144} They argue that the full file review, however, is significant in increasing the diversity at the UT-Austin campus. They point out that twenty percent of African Americans and fifteen percent of Latinos are admitted after a full file review.\textsuperscript{145}

The plaintiff in this case presently is only seeking the return of (non-refundable) application fees totaling $100.\textsuperscript{146} She has already graduated from Louisiana State University (LSU), and is not seeking any damages from attending LSU instead of UT. 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.\textsuperscript{147}

Fisher’s claim is entirely process-oriented – like the plaintiff’s claim in \textit{Parents Involved}. She argues that she suffered a constitutional injury from racial

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\item Id. at 227.
\item Id.
\item Id. at 227-28.
\item Id. at 228.
\item Id.
\item Id.
\item Fisher, 645 F. Supp. 2d at 608.
\item Brief for Petitioners at 10, Fisher v. Univ. of Tex., No. 11-345 (U.S., May 21, 2012).
\item Brief for Respondents at 38, Fisher v. Univ. of Tex., No. 11-345 (U.S., May 21, 2012) (hereinafter “Respondents Fisher Brief”).
\item Id.
\item Respondents Fisher Brief, supra note 144, at 15 (“\textquoteleft\textquoteleft\textit{P}etitioner would not have been admitted to the Fall 2008 freshman class even if she had received a perfect score of 6.\textquoteright\textquoteright”) (internal quotation marks and citation omitted).
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attentiveness in an admissions system. Her claim is actually weaker than that in *Parents Involved* because in that case the plaintiffs were arguing that they would have been admitted if they had been minority applicants. The district court and Fifth Circuit both rejected Fisher’s claim and upheld the UT plan as entirely consistent with *Grutter*. The Supreme Court, interestingly, decided to accept review of the case. Many have interpreted this as the chance for the Roberts Court to revisit the holding in *Grutter* given the departure of its author, Justice O’Connor. The Roberts opinion in *Parents Involved* certainly demonstrates strong sympathy with Fisher’s claims of race discrimination, which is consistent with the reports of the oral argument in *Fisher*. [N.B. This Article will be expeditiously updated in June after the Supreme Court’s opinion in *Fisher v. Texas* is issued, thereby making it one of the first published Articles to analyze what is predicted to be a seminal Supreme Court opinion.]

3. **Other White Plaintiffs.** After *Ricci* and *Parents Involved*, white plaintiffs in reverse discrimination cases will have an easier time proving injury. By definition, all race consciousness decision making includes race in its process. That leaves white plaintiffs complaining of race conscious activity with only one issue typically in dispute: proving the absence of a compelling governmental interest narrowly tailored to the challenged program. Given the limitations of what counts as a compelling governmental interest, white plaintiffs should have a relatively easy time proving their claims. Racial attentiveness by government actors will be relatively easy to attack through the legal process. That is certainly the intended result of *Ricci* and *Parents Involved*. In this sense the opinions do what they intend to do.

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150 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).
151 See Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012 at A1 (“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.”); Robert Barnes, *Supreme Court Divided Over Affirmative Action in College Admissions*, WASH. POST, Oct. 10, 2012 at A1 (“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.”).
Recognizing Discrimination

Do the opinions, however, have unintended consequences for non-white plaintiffs? The tricky part to translating Parents Involved to the traditional discrimination claims is discriminatory intent, the topic of the next Part.

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 gives these plaintiffs a slightly easier time of proving discriminatory intent.

A. DISCRIMINATORY INTENT

All Equal Protection Clause claims require proof of discriminatory intent. A state worker contesting her firing under the Equal Protection Clause, for example, must prove 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. In the context of white plaintiffs complaining of race conscious government action, the connection between defendant’s action and plaintiff’s race is rarely at issue. The defendant usually admits race consciousness, and defends on the ground of compliance with the strict scrutiny standard. For example, the defendants in Parents Involved acknowledged that their policies had a racial component and defended (unsuccessfully) on the grounds that their pursuit of diversity was constitutional.

Minority plaintiffs challenging ostensibly race neutral standards face an entirely different situation. A fired state employee, for example, would claim she lost a job because of a supervisor’s discriminatory intent, despite the state’s racially neutral standards for continued employment. Few defendants, if any,

153 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 108, 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.”).
154 Shaw v. Reno, 509 U.S. 630, 642 (1993) (Shaw I) (“No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”).
155 See Parents Involved, 551 U.S. at 725.
would respond by admitting a connection between their actions and plaintiffs’ race. Instead they typically respond by contending race did not motivate the firing and plaintiff deserved for be fired for legitimate, nondiscriminatory reasons. That 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”\textsuperscript{156} and not merely the disparate impact of a practice or policy.\textsuperscript{157} Discriminatory intent is more than an awareness of consequences, but instead acting with desire to cause the results.\textsuperscript{158} The fired state worker, therefore, must prove the supervisor’s state of mind included at least an awareness of different treatment based on race.

Yet, and with some contradiction, animus or some sort of bad motive is unnecessary.\textsuperscript{159} Discriminatory intent may be subtle\textsuperscript{160} or unconscious\textsuperscript{161} and still be actionable.\textsuperscript{162} Thus, a fired plaintiff can prove that the firing was motivated by

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  \item \textsuperscript{157} Washington, 426 U.S. at 240-41. While the Equal Protection Clause does not protect against disparate effects, Title VII does. See supra note 110 and accompanying text.
  \item \textsuperscript{158} Pers. Admin. v. Feehey, 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).
  \item \textsuperscript{159} Here I use "motive" differently from Professor Lawrence, who has deemed \textit{Washington v. Davis} wrong in its motive-based inquiry. Lawrence, supra note 80, at 944 (“I wanted to demonstrate that \textit{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.” \textit{Id.} at 951.
  \item \textsuperscript{160} 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 108, at 290 (“[S]ince the early 1970s the Court has consistently acknowledged the increasingly subtle nature of discrimination and states that its task is to remain vigilant in identifying even the most subtle acts of discrimination.”).
  \item \textsuperscript{162} I agree with others that implicit bias – the attitudes or perceptions toward personal characteristics such as race that a person is unwilling or unable to reveal – is captured by the current definition of discriminatory intent. See, e.g., Katharine T. Bartlett, \textit{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, \textit{Subjective Decisionmaking and Unconscious Discrimination}, 56 ALA. L. REV. 741, 749-50 (2005); Jerry Kang & Kristin Lane, \textit{Seeing Through}
her race, even if the defendant did not realize it was firing her because of race and did not consciously want to discriminate. 163

The purpose to discriminate 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. 164 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 Katz has criticized “a motivating factor” standard as requiring too small a causal connection. 165 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 non-discriminatory impulses can (and often) co-exist, and that the discriminatory impulse should still be actionable even if legitimate reasons exist as well. 166

Further, the law limits the available remedies when plaintiff proves that discriminatory intent was a motivating factor for the action but defendant proves that the same decision would have still been made. 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

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163 How a plaintiff might prove that motivation is the topic of the next part. See infra Part II.A.2.

164 Vill. of Arlington Heights v. Metropolitan 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) (“[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.”).

165 But for causation tells us whether a particular fact is necessary for the plaintiff’s injury. Professor Katz defines motivating factor as less than necessary, but sufficient. See Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 Geo. L.J. 489, 496 (2006); see also Hart, supra note 162, at 760 (“[I]f a plaintiff proves 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.”).

166 Hart, supra note 162, at 760 (“[E]ven if other factors motivate a decision, when prohibited discrimination forms any part of the decision, the law has been violated.”).
remedies are available under the Constitution,\textsuperscript{167} and Title VII only allows injunctive relief and attorneys’ fees.\textsuperscript{168}

2. \textit{Proving Discriminatory Intent}. Proving discriminatory intent in the facially race-neutral setting has rarely been simple.\textsuperscript{169} 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.”\textsuperscript{170} Governments and employers quickly learned to hide their intentions behind race neutral justifications. In addition, defendants may not even be aware of their “true” intentions.\textsuperscript{171} As a result, plaintiffs typically lack direct evidence of discriminatory intent.

Given the paucity of direct evidence, most plaintiffs rely on circumstantial proof.\textsuperscript{172} The most common in employment discrimination cases is comparing how similarly situated persons were treated.\textsuperscript{173} For example, were white workers fired for being late, or only the tardy African American employees? The problem with comparators is not the theory, but the reality. Professor Suzanne B. Goldberg has documented well that the workplace seldom provides enough employees equal in all respects except race to make informative comparisons.\textsuperscript{174}

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\footnote{167 See, e.g., Pennington v. City of Huntsville, 26 F.3d 1262, 1269 (11th Cir. 2001); Hayden v. Cty. of Nassau, 180 F.3d 42, 53 (2d Cir. 1999); Harris v. Shelby Cty. Bd. of Educ., 99 F.3d 1078, 1084 n.5 (11th Cir. 1996); see also infra Part III.A.3. (discussing potential limits to this remedial rule after Parents Involved).}
\footnote{168 See 42 U.S.C. §§ 2000e-2(m), 2003-5(g)(2)(B); see also infra Part III.A.3. (criticizing the principle as inconsistent with Parents Involved’s concept of colorblindness).}
\footnote{169 See, e.g., Thornbrough v. Columbus & Greeneville R.R., 460 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.”).}
\footnote{170 See, e.g., Slack v. Havens, 1973 WL 339, at *5 (S.D. Cal. 1973) (noting that supervisor only assigned African American women to heavy cleaning because “colored folks were hired to clean because they clean better”), aff’d as modified, 522 F.2d 1091 (9th Cir. 1975).}
\footnote{171 See Hart, supra note 162, at 758 (“[T]here is no necessary legal difference between discrimination that a decisionmaker is truly unaware of, and discriminatory attitudes that the decisionmaking simply never expresses out loud.”).}
\footnote{172 The Court in Arlington Heights delineated several factors to consider as circumstantial evidence of intent to discriminate. 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 sequences,” “[s]ubstantive departures,” and “legislative or administrative history.” Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977); Selmi, supra note 108, 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”).}
\footnote{173 Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 728, 731 (2011).}
\footnote{174 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.”).}
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In practice, the judiciary is far from willing to conclude that circumstantial evidence in fact proves discriminatory intent.\textsuperscript{175} This is consistent with psychological studies documenting people’s hesitance to label actions as discriminatory.\textsuperscript{176} Professor Mike Selmi has made 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.”\textsuperscript{177} The lack of direct evidence and the treatment of circumstantial evidence leave most plaintiffs challenging race neutral practices unable to prove discriminatory intent.\textsuperscript{178}

B. PARENTS INVOLVED AND DISCRIMINATORY INTENT

1. Expanding the Definition of Discriminatory Intent. Earlier I argued that Parents Involved expanded the definition of constitutional injury.\textsuperscript{179} After Parents Involved, racial attentiveness in the decision-making process is a constitutional injury itself, without any proof of substantive harm. That process-only discrimination should impact what we mean by discriminatory intent.\textsuperscript{180}

Process, and not just outcome, must be recognized as part of cognizable different treatment when defining discriminatory intent. The question of intent after Parents Involved is not just whether the worker was fired because of race, which has proven to be a significant hurdle for plaintiffs.\textsuperscript{181} The question now

\textsuperscript{175} Selmi, \textit{supra} note 108, at 283. Professor Selmi argues that the Supreme Court has “repeatedly demonstrated” its unwillingness “to draw inferences of discrimination based on circumstantial evidence.” \textit{Id.} at 285.

\textsuperscript{176} See Katie R. Eyer, \textit{That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law}, 96 \textit{MINN. L. REV.} 1275, 1278 (“[M]ost people, in most factual circumstances, are unwilling to make robust attributions to discrimination.”).

\textsuperscript{177} Selmi, \textit{supra} note 108, at 334; see also \textit{id.} (“The Court’s reluctance to draw inferences of discrimination is evidenced by the fact that the Court has never invalidated a statute or practices based on the factors articulated in its Arlington Heights decision.”).


\textsuperscript{179} See \textit{supra} Part I.A.3.

\textsuperscript{180} Michael D. Green, \textit{The Intersection of Factual Causation and Damages}, 55 \textit{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. . . .”).

\textsuperscript{181} The exceedingly low win rates of employment discrimination plaintiffs have been amply demonstrated. See Wendy Parker, \textit{Lessons in Losing: Race Discrimination in Employment}, 81 \textit{NOTRE DAME L. REV.} 889 (2006). Plaintiffs lose before both district courts and courts of appeals. See Kevin M. Clermont & Stewart J. Schwab, \textit{Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?}, 3 \textit{HARV. L. & POL’Y REV.} 103 (2009); Kevin M. Clermont & Stewart
must capture whether the process of firing differed by race. Only then will Chief Justice Roberts achieve his goal of eliminating all different treatment based on race.\textsuperscript{182} The impact of having race infect the decision-making process would certainly affect the extent of plaintiff’s injury and hence damages, but discriminatory intent would still be present.\textsuperscript{183} In sum, the definition of discriminatory intent will need to be adjusted to capture any racial attentiveness in the process of decision making.

2. \textit{Remaining Difficulties of Proving Discriminatory Intent}. \textit{Parents Involved} does not cure the substantial problems of proving defendant’s discriminatory state of mind, even with its process-only discrimination. The absence of direct evidence of discriminatory intent and the limitations of the available circumstantial evidence remain. The struggles of demonstrating discriminatory intent for a challenged outcome remain true for a challenged process, with three exceptions discussed below.\textsuperscript{184}

3. \textit{Co-existence of Discrimination and Non-Discrimination}. What should change after \textit{Parents Involved}, however, is a stronger recognition that illegality exists when discrimination and non-discrimination co-exist.\textsuperscript{185} In reverse discrimination cases, the Court has held unconstitutionality in the presence of non-discriminatory motivations.\textsuperscript{186} In both \textit{Ricci} and \textit{Parents Involved}, the defendants took action not just to treat plaintiffs differently because of their race. In \textit{Ricci}, the defendants were also concerned about the validity of the test and the need for effective leadership.\textsuperscript{187} In \textit{Parents Involved}, student assignment was not just based on race, as it was in the days of \textit{de jure} segregation. The school districts considered other factors as well.\textsuperscript{188} The Court did not allow the non-discriminatory impulses to excuse or invalidate the discriminatory impulses.

\textsuperscript{182} See supra notes 75-76 and accompanying text.
\textsuperscript{183} See infra Part III. B. (recognizing the damage implications of this definition).
\textsuperscript{184} See infra Part III.A. (examining how \textit{Parents Involved} affects racial harassment claims, the stray remarks doctrine, and the same decision defense).
\textsuperscript{185} 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 162, at 743.
\textsuperscript{186} The exception to that of course is the University of Michigan School of Law’s denial of admission to Barbara Grutter. See supra note 56 and accompany text. The evidence was strong that she was treated 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 Part I.A.2. The continued viability of that case is, however, under serious attack and confinement. See supra notes 150-51 and accompany text.
\textsuperscript{187} See supra note 116 and accompanying text.
\textsuperscript{188} See supra notes 23-24 and accompanying text.
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 intent to discriminate is often proven by the absence of legitimate factors.

As explained earlier, circumstantial evidence plays a large role in demonstrating discriminatory intent.\(^ {189} \) The reason for defendant’s actions and its connection to the plaintiff’s status is rarely proven, 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.

Much more frequent is a defendant unable to prove a legitimate reason applied in a nondiscriminatory way. When that occurs, the law allows a finding of discriminatory intent.\(^ {190} \) 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.

Even more difficult is that the presence of a legitimate reason is often taken as excusing the presence of a non-legitimate reason. This is most notable in employment discrimination cases. The \textit{McDonnell Douglas} prima facie case,\(^ {191} \) used in both Title VII and Equal Protection Clause claims, at the outset eliminates two non-discriminatory reasons for an adverse employment action – the plaintiff was unqualified or the position was closed.\(^ {192} \) This in turn creates a presumption of discrimination,\(^ {193} \) which the defendant can rebut with evidence of a legitimate, nondiscriminatory reason.\(^ {194} \) If defendant’s proffered reason for the adverse employment action is not believed, the fact finder may, but need not, conclude that the true reason is the plaintiff’s protected status.\(^ {195} \)

\(^ {189} \) See supra Part II.A.2.

\(^ {190} \) See Banks & Ford, supra note 178, at 1095 (“[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.”).

\(^ {191} \) McDonnell Douglas v. Green, 411 U.S. 792, 802-04 (1973). The test includes four elements: “(i) that he belongs to a racial minority; (ii) that he applied for 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.” \textit{Id.}


\(^ {193} \) Tx. Dep’t of Comm’y Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

\(^ {194} \) \textit{McDonnell Douglas}, 411 U.S. at 802.

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.\textsuperscript{196} If discrimination is proven by the absence of other legitimate reasons, then it becomes an either/or question to prove, even in mixed-motive cases. Plaintiff still has to prove the illegitimate by proving the absence of legitimate on that point in the decision making. Only when plaintiff has direct evidence of discriminatory intent will she be able to avoid this difficulty, and that situation is exceedingly rare.\textsuperscript{197}

Yet, the question of discrimination cannot be so simply reduced to an “either or” question, as Professor Melissa Hart aptly describes this problem.\textsuperscript{198} If we are to be truly colorblind – 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.

\section*{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 non-white plaintiffs. The federal judiciary has adopted at least three rules that excuse race consciousness from legal consequences – the racial harassment definition, stray remarks doctrine, and the same decision defense. All three are inconsistent with Parents Involved’s command of absolute colorblindness.\textsuperscript{199} Yet, this Part also recognizes that these injuries will likely result in more limited remedies.\textsuperscript{200}

\subsection{A TRULY COLORBLIND 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 colorblindness – his commend that “the way to stop discrimination on the basis of race is to stop discrimination on the basis of race” –

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\textsuperscript{196} See supra notes 164-68 and accompanying notes.
\textsuperscript{198} See Hart, supra note 162, at 743.
\textsuperscript{199} See infra Part III.A.
\textsuperscript{200} See infra Part III.B.
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Recognizing Discrimination

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compels a prohibition of all racial actions. Our 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. If the claim involves state action, plaintiff may also file suit under § 1983 for the Equal Protection Clause claim. Apart from the state action requirement for § 1983, the substantive standards are the same. The racial harassment must be unwelcome and either pervasive or offensive (both of which are judged by an objective and a subjective viewpoint).

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201 See supra notes 75-76 and accompanying text.
203 For examples of cases in which a public employee produced evidence of racial comments and other harassing conduct by his or her public employer 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 (D.C. Cir. 2008) (allegedly racist comments by supervisors were too sporadic to be considered pervasive); Arraleh v. Cnty. of Ramsey, 461 F.3d 967 (8th Cir. 2006) (co-worker comments had only a tenuous connection to plaintiff’s race and national origin and were not sufficiently severe to establish Title VII claim); Caver v. City of Trenton, 420 F.3d 243 (3d Cir. 2006) (allegedly racist supervisor comments were not sufficiently severe or pervasive because they were not made directly to plaintiff, but rather heard second-hand); Smith v. Ne. Ill. Univ., 388 F.3d 559 (7th Cir. 2004) (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. Cnty. of L.A., 349 F.3d 634 (9th Cir. 2003) (two allegedly racist supervisor comments, made more than six months apart, were not sufficiently severe or pervasive to establish Title VII claim); Ramsey v. Henderson, 286 F.3d 264 (5th Cir. 2002) (supervisor and co-worker 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 200, 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***’)”).
204 See, e.g., Patterson v. Cnty. of Oneida, 375 F.3d 206, 211 (2d Cir. 2004); Busby v. City of Orlando, 931 F.2d 764, 770 (11th Cir. 1991) (per curiam).
205 Harris v. Forklift, 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 Patterson, 375 F.3d at 225; supra note 109 and accompanying text.

Title VII and Equal Protection 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 id at 225. 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. Individual sued under § 1983 are also entitled to qualified immunity. See Pearson v. California, 555 U.S. 223, 231 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Yet, when the
both obviously racist treatment and more subtle racist treatment.\textsuperscript{206} The current racial harassment standard thus excuses employers from any responsibility for racial slurs and racist objects in the workplace if they are welcome 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.

\textit{Parents Involved} suggests a different analysis when state actors are sued for racial harassment involving blatantly racist activity by either supervisors or co-workers. 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 \textit{individual} because of race. Under \textit{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 individual different treatment prohibited by \textit{Parents Involved}. That is, would the defendant have called plaintiff a racist term if the plaintiff had been of a different race? Different individual treatment would very likely occur if the racial slurs or racists objects were directed toward someone of the race or affiliated with the race the slur or object seeks to demean.\textsuperscript{207} 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.\textsuperscript{208} 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 \textit{Parents Involved} to racial harassment claims is contrary to the idea that employment discrimination law should not establish a
“civility code” in the workplace. Yet, Parents Involved sought to scrub racial attentiveness completely from government decision making. By equating the actions of the Seattle and Lexington school districts with de jure segregation, it created a standard that all state actors should always treat all persons without regard to race. Chief Justice Roberts established a strict version of colorblind treatment and thereby compelled a work place 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. Parents Involved should not change the affirmative defense available to employers who undertake reasonable remedial steps in response to harassment the employer knew or should have known about. That is an issue of vicarious liability, not injury, 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 an adverse employment action. For example, a Puerto Rican doctor had her jury verdict set aside, in part, because the decision maker’s facially discriminatory statement was too remote to indicate a discriminatory intent in not renewing her contract.

That may be true, but the statement was still treating an individual differently because of her ethnicity. The supervisor was quoted as saying that “Dominican doctors were better’ than ‘the other physicians who were . . . Puerto

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210 See supra notes 75-76 and accompanying text.


212 Professor Kerri Lynn Stone has documented the increased frequency of the principle and has created a useful way to classify its use. See Kerri Lynn Stone, Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law, 77 MO. L. REV. 149 (2012).

213 Alvarado-Santos v. Dep’t of Health, 619 F.3d 126, 128 (1st Cir. 2010). The court explained: “In addition, [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. This case and others are collected in Stone, supra note 210, at 149-50, 159-68.
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 the statement to be made 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. 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. The principle applies in employment discrimination cases when the defendant proves that the plaintiff would have suffered the same injury in the absence of the defendant’s discriminatory intent. For example, a defendant found to have fired an employee because of race can defend on the ground that the employee would have been fired anyway for tardiness. Then the employee would have suffered the same adverse employment action regardless of the impermissible discriminatory intent.

The defense precludes the award of any compensatory damages. Plaintiff can still recover injunctive relief and attorneys’ fees under the Civil Rights of 1991 for a Title VII violation. No remedy is available for constitutional claims filed under § 1983, however, because the Court has declared the defense indicates the absence of a constitutional injury. Thus, the doctrine completely absolves the defendant from any constitutional consequences of discriminatory intent.

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214 Alvarado-Santos, 619 F.3d at 128.
215 See supra Part III.A.1.
216 For citations to earlier scholarship criticizing this rule, see Katz, supra note 165, at 517 n.109.
217 The defense applies to both Title VII and Equal Protection Clause claims. Desert Palace Inc. v. Costa, 539 U.S. 90, 95–96 (2003) (allowing that statutory defense and limit on compensatory damages applies when evidence of discriminatory 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).
218 See 42 U.S.C. 2000e-5(g)(2)(B) (providing if that plaintiff proves that a protected status was a “motivating factor” in the adverse decision, defendant can avoid compensatory damages by showing that it “would have taken the same action in the absence of the impermissible motivating factor”).
219 See Lesage, 528 U.S. at 20-21.
220 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 165, at 512 (“[T]he plaintiff is placed in a better position than she would have been in absent the defendant’s
The defense, however, is at odds with the core principle of *Parents Involved* – prohibiting any individual from being treated differently by 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. She still has been discriminated against in the process of being fired. *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 fire the worker. This separate injury of a different process deserves a remedy, as explored in the next Part.

**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.\(^{221}\) 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.\(^{222}\) Compensatory damages are rarely presumed. Instead, courts will require proof of the specific injuries suffered.\(^{223}\)

Injuries arising from different treatment can include more than economic damages arising from a lost job. Stigma and dignitary harms certainly often

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\(^{222}\) See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 14 (4th ed. 2010).

\(^{223}\) See Carey v. Piphus, 435 U.S. 247, 255 (1978). Under Carey, damages for constitutional violations are not presumed. *Id.* A plaintiff unable to prove specific injury from the constitutional violation is awarded nominal damages. *Id.* at 266-67.
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.\textsuperscript{225}

Other type of relief can be awarded. A court may issue an injunction prohibiting the conduct in the future.\textsuperscript{226} Prevailing plaintiffs can receive reasonable attorney’s fees.\textsuperscript{227} Finally, punitive damages against individual defendants are available as well.\textsuperscript{228}

Further, in these times of denying race consciousness, the power of a judicial declaration of the existence of discrimination carries significant meaning.\textsuperscript{229} This should not just happen for white plaintiffs, as the direction of the Supreme Court currently and incorrectly suggests.

\textbf{CONCLUSION}

The Roberts Court’s commitment to colorblind jurisprudence is stronger than any previous Court, 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 non-white plaintiffs have of proving discriminatory intent, \textit{Parents Involved} should provide additional constitutional protections in proving injury.

\textsuperscript{225} See supra note 221.
\textsuperscript{226} See BROOKS, supra note 153, at 954.
\textsuperscript{227} 42 U.S.C. § 1988(b); Carey, 435 U.S. 257 n.11.
\textsuperscript{228} Smith v. Wade, 461 U.S. 30, 56 (1983).
\textsuperscript{229} Owen M. Fiss, \textit{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.”).