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Michael J. Zimmer

Loyola University Chicago, School of Law, mzimme4@luc.edu

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IS THE ANTIDISCRIMINATION PROJECT BEING ENDED?

MICHAEL J. ZIMMER*

With the election of an African-American President, there was, not surprisingly, discussion that the United States had finally gotten past our history of racial discrimination and had entered a so-called post-racial era.¹ There has been, of course, progress. Despite strained arguments that *Brown v. Board of Education*² has had little progressive effect,³ the end of de jure segregation has had significant impact in the public life of a major part of this country. Ending the “whites only” signs in public places has had a tremendous liberating effect for all Americans—black, white, or other. While our general social norms now find the explicit use of racist statements and actions to be unacceptable,⁴ discrimination is still a significant feature of how our society operates. Social science is increasingly discovering the extent to which racial bias continues to exist, implicitly if not explicitly,⁵ and has

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1 André Douglas Pond Cummings, *Post Racialism?*, 14 J. GENDER RACE & JUST. 601, 606 (2011); Michael Lwin, *The Numbers Game: Covering Asian Americans and Post-Racial America*, 15 ASIAN PAC. AM. L.J. 92, 93 (2010).

2 347 U.S. 483 (1954).

3 See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1993).

4 For background, see Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). See also *IMPLICIT RACIAL BIAS AND THE LAW* (Justin D. Levinson & Robert J. Smith eds., 2012).

5 See *IMPLICIT RACIAL BIAS AND THE LAW*, *supra* note 4.

demonstrated how that bias influences behavior.⁶ While the understanding of discrimination has deepened, the legal tools to address it have, at a minimum, not kept up with the science and have actually been significantly narrowed. What has happened is that the Supreme Court has not acted to achieve the color-blind society Justice Harlan articulated as the purpose of equal protection in his dissent to *Plessy v. Ferguson*.⁷ Instead, it has all but ended the antidiscrimination project that began with the ratification of the Civil War Amendments, *Brown's* ending of de jure segregation,⁸ and the enactment of the Civil Rights Act of 1964,⁹ as well as the Voting Rights Act of 1965.¹⁰

The thesis of this Article is that the national project to redress discrimination, which has waxed and waned through the decades since the enactment of the Civil War Amendments, is now being squeezed toward oblivion by important substantive and procedural decisions of the Roberts Supreme Court. While the procedural restrictions are based on new interpretations of the Federal Rules of Civil Procedure, the substantive restrictions, ironically, are primarily driven by a narrow vision of the purpose of the

6 See Kang et. al., *supra* note 4.

7 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting).

8 *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955), with its “all deliberate speed” limit on school desegregation was only the beginning. The 1974 decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), defined the scope of de jure discrimination so as not to reach beyond individual school districts, and meant that white flight to the suburbs would reopen the schools to segregation. The school desegregation project was ended with the Rehnquist Supreme Court’s decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

9 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

10 Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973 1973bb–1).

Constitution's Equal Protection Clause.¹¹ Now equal protection law has been turned upside down with more protection provided to the majority against governmental action aimed at redressing the present consequences of historic discrimination, while members of groups that have been its victims face increasingly difficult barriers to their attempts to redress the present discrimination they face.¹²

Part I will describe the procedural barriers the Roberts Supreme Court has erected to prevent discrimination claims from being decided on the merits in court. These barriers divert claims from court to arbitration, even if there is no actual consent to arbitrate by the claimant. Arbitration cuts off the right to a jury trial and may prevent bringing a class action. If arbitration is avoided, the Court has imposed a "plausibility" standard at the pleading stage of litigation which allows lawsuits to be dismissed before discovery takes place. Furthermore, the Court has limited the possibility of bringing class actions. Part II will show how the substantive law applied to discrimination claims has been narrowed for claims typically brought by women and people of color, while broadening claims brought by the white majority. Part III will look to the immediate future of the antidiscrimination project in the Supreme Court affirmative action case, *Fisher v. University of Texas*.¹³ Part IV will conclude.

11 U.S. CONST. amend. XIV, § 1.

12 See Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011).

13 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012).

I. THE PROCEDURAL RESTRICTIONS THAT SHRINK THE ANTIDISCRIMINATION PROJECT IN EMPLOYMENT¹⁴

The Supreme Court has promulgated new procedural laws that, as a practical matter, severely limit the ability of employees to challenge the employment discrimination they suffer. First, the Court has created a new arbitration law that diverts workers' claims of discrimination from the courts to arbitration without their actual consent. Second, for any case that escapes arbitration, the Court has heightened pleading standards to now allow for the dismissal of cases before discovery by motion to dismiss rather than by summary judgment after discovery is complete. Third, the Court has substantially narrowed the availability of class actions in discrimination cases. Looking at any single case or area alone, it may be easy to escape the judgment that the Court has ended the antidiscrimination project, but together, the antidiscrimination project has become so squeezed that soon it will, for all practical purposes, be brought to an end.

First, as to arbitration, the Supreme Court has taken major steps to "privatize" the resolution of employment disputes without the real consent of the claimants.¹⁵ Employers can now force their workers to sign these agreements as a condition of getting or keeping their jobs. Such "agreements" are enforceable even if the employee is at-will and the arbitration agreement stands as the sole written term of the contract. The story begins back

¹⁴ This paper will principally focus on issues of employment, but these procedural restrictions apply more broadly including, for example, consumer claims.

¹⁵ See Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535 (2005), for background on the development of the legal enforcement of adhesion contracts requiring workers and consumers to take their claims to arbitration rather than to court.

in 1974, when, in *Alexander v. Gardner-Denver Co.*,¹⁶ the Court held that, consistent with the prior law of arbitration pursuant to the Federal Arbitration Act,¹⁷ “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII,”¹⁸ because the “resolution of statutory or constitutional issues is a primary responsibility of courts.”¹⁹ The turn toward privatizing disputes through the use of arbitration began in 1983. The Court created, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁰ a very strong presumption of arbitrability.²¹ By 1985, the Court had expanded the scope of arbitrable issues beyond contract claims to include statutory claims such as antitrust claims.²² In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court applied the presumption to an employment case wherein registration, including an arbitration clause, was required by the New York Stock Exchange to work in the securities industry.²³ According to the Court, statutory claims, such as claims of age discrimination under the

16 415 U.S. 36 (1974).

17 9 U.S.C. §§ 1–16 (2006).

18 *Alexander*, 415 U.S. at 56.

19 *Id.* at 57.

20 460 U.S. 1 (1983).

21 “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* at 24–25.

22 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (enforcing arbitration clause providing for arbitration in Japan for Puerto Rican car dealership and requiring arbitration in Japan of U.S. antitrust claims raised by car dealership).

23 500 U.S. 20, 23 (1991). *Cf. Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding state laws to the contrary are preempted by federal law).

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Age Discrimination in Employment Act²⁴ that were included in an arbitration agreement, were enforceable pursuant to the Federal Arbitration Act.²⁵ In 2001 in *Circuit City Stores, Inc. v. Adams*,²⁶ the Court construed Section 1 of the Federal Arbitration Act that provided it shall *not* apply “to contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce.*”²⁷ Rather than construing this broad exclusion consistent with its actual terms and with the intent of Congress, the Court turned this general exclusion of most workers on its head to become a rule that includes most workers with the exclusion limited to minor exceptions.²⁸ Furthermore, in *14 Penn Plaza v. Pyett*,²⁹ the Court held that union and management could, in a collective bargaining agreement, require individuals to arbitrate their statutory antidiscrimination claims, which were again age discrimination claims, even though the workers had never agreed to do so.³⁰ Finally, in *AT&T Mobility v. Concepción*, the Supreme Court upheld an arbitration clause

24 29 U.S.C. § 621

25 *Gilmer*, 500 U.S. at 26.

26 532 U.S. 105 (2001).

27 9 U.S.C. § 1 (emphasis added). For more background on the Supreme Court’s interpretation of the Federal Arbitration Act see Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

28 *Adams*, 532 U.S. at 114–15, 119. See also Moses, *supra* note 27, at 146.

29 556 U.S. 247 (2009). See also Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825 (2010).

30 *14 Penn Plaza*, 556 U.S. at 274. Since the *Steelworkers Trilogy* cases that were decided in 1960, pre-dispute agreements to arbitrate contained in collective bargaining agreements have been enforceable because it is assumed that the union and the employer each possess sufficient bargaining power so that the agreement to arbitrate is actually consensual. See Katherine V.W. Stone, *The Steelworkers Trilogy and the Evolution of Labor Arbitration*, LABOR LAW STORIES (Laura Cooper & Catherine Fisk eds., 2005).

that cuts off a consumer's right to bring a class action.³¹ Two bills have been introduced in Congress to overturn some or all of the law of arbitration as promulgated by a majority of the Court, but it appears both bills died after being referred to the Senate Judiciary Committee.³²

Arbitration can be a useful and efficient way to resolve disputes if, in fact, the agreement is consensual. In the employment context, as in many other kinds of situations, post-dispute arbitration gives the parties to the dispute the option of customizing the way their dispute will be resolved. In commercial situations, pre-dispute arbitration can also be valuable because the parties are usually more-or-less equal in bargaining power.³³ Pre-dispute agreements to arbitrate employment disputes, especially if that is the sole term of the contract, are almost always contracts of adhesion. If an applicant wants to get or keep a job and the employer demands that she sign an arbitration agreement, then this creates a take-it-or-leave-it situation because of the unequal bargaining power between the parties. It is counterfactual to describe these agreements as consensual. Thus, the arbitration law the Supreme Court has created undermines the notion that arbitration is justified because both parties have voluntarily agreed to it.³⁴ The last fig leaf that consent is the basis of arbitration

31 131 S. Ct. 1740, 1753 (2011) (holding that California law prohibiting arbitration provisions waiving class actions is preempted by the Federal Arbitration Act).

32 See Arbitration Fairness Act, S 987, 112th Cong. (2011), the related Arbitration Fairness Act, H.R. 1873, 112th Cong. (2011), and Fair Arbitration Act, S 1186, 112th Cong. (2011).

33 See generally MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2012).

34 See Moses, *supra* note 15, at 537.

has been shredded if a union can waive a worker's individual right to take statutory claims to court.³⁵

An employee whose statutory claim is diverted to arbitration loses her right to her day in court, as well as the right to a jury trial provided by antidiscrimination statutes and the Constitution. While class actions can be brought to enforce employment discrimination statutes,³⁶ such as Title VII of the Civil Rights Act of 1964,³⁷ arbitration provisions redirecting all statutory claims of employees to arbitration cut off all statutory class actions, just as the consumer class action claims were cut off in *Concepción*.³⁸ The Supreme Court claims the arbitration law it has created out of whole cloth is not inconsistent with the provisions of these antidiscrimination statutes that provide access to courts because the rights to go to court, to get a jury trial, and to bring class actions are only procedural and not substantive. This is a distinction without a difference because procedural rights are integral to the substantive rights these procedures are supposed to serve. The right to a jury trial may be procedural, but it is a long cherished right that has been shown to be more accurate than

35 By supporting or joining a union, employees are not in any way consenting to send their statutory claims to arbitration rather than allowing them to go to court. Employees represented by unions with collective bargaining agreements may not even support the union that represents them. They have not consented to the union in any sense, including the union's waiver of their right to take statutory claims to court. *See Moses, supra* note 29, at 827. *See generally*, Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513 (2001).

36 *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

37 42 U.S.C. §§ 2000e–2000e-17 (2006).

38 *See Concepción*, 131 S. Ct. at 1753. Since workers are consumers, this decision cuts off their claims that would only be economically viable if aggregated with the claims of other consumers with similar claims.

other forms of dispute resolution.³⁹ Denying the right to bring a class action means that some good claims will never be brought because of their small economic value. Those workers will be completely denied any real chance to have their substantive rights vindicated.

Those employees with federal statutory claims, who somehow escape arbitration and who can file actions in federal court, are now faced with new and difficult procedural barriers that the Supreme Court has erected that substantially reduce their chances to take those cases to trial. Under the longstanding “notice pleading” rules of Rule 8(a)(2) of the Federal Rules of Civil Procedure that a complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief,”⁴⁰ Rule 12(b)(6) motions to dismiss based on the complaint alone were rare because the defendant typically had been given sufficient notice of what the claim was about.⁴¹ Typically if cases were dismissed, it would be after an answer was filed or a motion to dismiss had been denied, which would be by a Rule 56 Summary Judgment Motion⁴² after discovery was complete.⁴³

39 See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

40 FED. R. CIV. P. 8(a)(2).

41 FED. R. CIV. P. 12(b)(6). For an example of how simple factual pleading sufficed see *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). A unanimous Supreme Court held that the notice pleading standard of Fed. R. Civ. P. 8(a) was met by allegations that plaintiff had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. Few complaints, therefore, were subject to motions to dismiss.

42 FED. R. CIV. P. 56.

In *Ashcroft v. Iqbal*,⁴⁴ however, the Court moved the real possibility of dismissal to the earlier pleading stage before discovery. The Court has amended on its own motion the notice pleading rule by now requiring a plaintiff to “state a claim to relief that is *plausible* on its face.”⁴⁵ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.⁴⁶ Deciding whether a claim is “plausible,” the Court said, involves “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁴⁷ If nothing else, by moving the risk of dismissal earlier in the case, the Court has reduced the settlement value of the claims from what that value would be at the summary judgment stage, thereby making it more difficult for workers to bring their cases in the first instance and to have their rights vindicated.⁴⁸

43 See Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 3 (2008), <http://ssrn.com/abstract=1138373> (explaining that after standards for summary judgment were made easier by the Supreme Court in 1986, the rate of summary judgments in employment discrimination cases went up by 25%).

44 556 U.S. 662 (2009).

45 *Id.* at 678. (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

46 *Id.* See also *Bell Atlantic Corp.*, 550 U.S. 544 (new plausibility standard for Rule 12(b)(6) established in a consumer antitrust case).

47 *Id.* at 679. Given the skepticism of the federal judiciary about the continuing existence of discrimination, while plausible to many, may not be plausible to many federal judges.

48 Yasutora Watanabe, *Learning and Bargaining in Dispute Resolution: Theory and Evidence from Medical Malpractice Litigation* 3 (Univ. of Penn., Job Market Paper, 2004) (“As new information is revealed during bargaining, learning takes place and the negotiating parties update their expectations of obtaining a favorable verdict. I allow the rate of arrival of information to differ in the pre-litigation and the litigation phases, for example because of the ‘discovery process’ which follows the filing of a lawsuit. Learning has the effect of drawing the plaintiff and defendant’s expectations of the trial results closer to each other, which in turn increases the probability of agreement.”).

A key question of fact in most statutory claims of discrimination is whether or not the employer acted with intent to discriminate. Whether or not this intent element actually involves a question of the employer's state of mind, the evidence for why the employer acted is for the employer to know. While the employer may announce a reason, discovery is useful and typically necessary to probe for explanations other than that "official" reason. Thus, dismissing a discrimination case before discovery can foreclose the right of employees who have been discriminated against to have any real chance to prove it. *Iqbal* is not merely a theoretical threat to the antidiscrimination project. In fact, preliminary evidence shows that plaintiffs' cases have been increasingly dismissed at the pleading stage.

Iqbal [has] negatively affected plaintiffs in at least 15% to 21% of cases that faced Rule 12(b)(6) motions in the post-*Iqbal* data window. [D]epending on the nature of the suit, these figures represent between one-fourth and two-fifths of the cases that fail to reach discovery on at least some claims in the post-*Iqbal* data window.⁴⁹

If a claim manages to survive a motion to dismiss, then the next issue is whether or not the claim satisfies the prerequisites for Rule 23 class actions.⁵⁰ Class actions can be an effective way to challenge employment discrimination since many are of low economic value, making individual claim litigation prohibitively expensive. Class actions are a way to aggregate these individual claims so that the underlying claims are resolved and not just

49 Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012). No doubt a good number of the dismissed cases were not likely to advance to trial after discovery because they would be disposed of at the summary judgment stage. But, presumably, some of these would prove to be good plaintiffs' cases if they had been allowed to advance to discovery and trial.

50 FED. R. CIV. P. 23.

dropped for reasons unconnected with their merits.⁵¹ The Supreme Court, however, has made bringing class actions claiming discrimination much more difficult because of its decision in *Wal-Mart Stores, Inc. v. Dukes*.⁵² In *Wal-Mart*, the Court narrowed the availability of class actions by its interpretation of both Rule 23(a)(2) and 23(b)(2) of the Federal Rules of Civil Procedure.⁵³ Rule 23(a)(2) requires a party seeking class certification to prove that there are “questions of law or fact common to the class.”⁵⁴ To satisfy Rule 23(a)(2), the lawsuit must resolve an issue that all the class members share. In *Wal-Mart*, the issue underlying the claims of all members of the class was whether Wal-Mart’s policy of granting each store manager unstructured and unreviewed discretion to make pay and promotion decisions created a substantial risk of discrimination for all the women working in all the stores.⁵⁵ Without directly addressing that issue, the Court held that there was no common question of “law or fact.”⁵⁶ As a result, the class could not be certified because it could not meet the requirements of Rule 23(a). Essentially, the Court claimed to rely on

51 It is especially true that workers at the bottom of the compensation scale are disproportionately impacted by the cutting of class actions. It is also true that women and people of color are likely to be near the bottom of the wage scale.

52 131 S. Ct. 2541 (2011) (holding that a nationwide class action by women employees at Wal-Mart stores is not certifiable as a class action).

53 FED. R. CIV. P. 23.

54 FED. R. CIV. P. 23(a)(2).

55 *Wal-Mart*, 131 S. Ct. at 2547. Where a policy of discrimination is alleged, the plaintiff need not show that she was actually adversely affected. *See* *Ne. Fla Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993) (holding that contractors who could not show that they would have won contracts if the defendant had relied on an affirmative action plan nevertheless can challenge the plan because of their risk of being discriminated against).

56 *Wal-Mart*, 131 S. Ct. at 2554–58.

precedent,⁵⁷ *General Telephone Co. of Southwest v. Falcon*.⁵⁸ *Falcon* had rejected lower court authority that if there was a common question of law or fact as to one claim, then the class could be expanded to attack defendant's discrimination "across the board" even if the other claims were completely different.⁵⁹ *Falcon* involved the quite different claims of discrimination in hiring and in promotions, and so the Court found that they shared no common issues. In *Wal-Mart* plaintiffs challenged pay and promotion decisions, but those decisions were closely linked since promotions strongly influenced pay and each store manager made both decisions.⁶⁰ *Falcon* was not on point so in effect the Court created new law significantly limiting class action certification where one claim is brought that could satisfy the common question requirement.⁶¹ Since the opinion by Justice Scalia is rather opaque as to its application to the case itself because he does not address the underlying claim, the extent of its impact is as of yet unclear. But, in light of *Wal-Mart*, the Ninth Circuit has already denied certification of a class in a case similar to *Wal-Mart*.⁶²

⁵⁷ *Id.* at 2550.

⁵⁸ 457 U.S. 147 (1982) (holding that a class action for hiring discrimination cannot extend to promotion discrimination).

⁵⁹ *Gen. Tel. Co. of Sw.*, 457 U.S. 147.

⁶⁰ *Wal-Mart* is an example of an instance where a class action would work because plaintiffs were all low wage workers whose individual claims probably were too expensive to litigate individually.

⁶¹ See Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229 (2012); Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepción*, 7 DUKE J. CONST. L. & PUB. POL'Y 73 (2011); Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights By Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012); Daniel D. DeVougas, Note, *Without a Leg to Stand On? Class Representatives, Federal Courts, and Standing Desiderata*, 97 CORNELL L. REV. 627 (2012).

⁶² See *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 975 (2011).

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While the Rule 23(a) holding decided the case, the Supreme Court went ahead and held that plaintiffs' "claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2) . . . where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."⁶³ Any claims for backpay brought under Rule 23(b)(3) would be more onerous for the class representative since in 23(b)(3), but not 23(b)(2), class members must be given notice and the opportunity to opt out before the case can proceed.⁶⁴ The combination of reading common questions of law or fact very narrowly and then requiring that all members of the putative class be given notice and the opportunity to opt out of the action will minimize the possibility of bringing class actions involving employment unless the class is small in number and narrow in scope.⁶⁵

Allowing employers to cut off class actions in arbitration agreements and cutting off class actions in those disputes that are allowed in court leaves the claims of individual workers to the challenges imposed by *Iqbal*. That heightens the already substantial barriers

⁶³ *Wal-Mart*, 131 S. Ct. at 2557.

⁶⁴ FED. R. CIV. P. 23(b)(3), 23(b)(2).

⁶⁵ Since the public enforcement of Title VII by the Equal Employment Opportunity Committee (EEOC) does not depend on Rule 23 class actions, *Wal-Mart* adds importance to the present systemic enforcement policy of the EEOC.

that litigation imposes on individual workers.⁶⁶ Many claims that may well be good ones on the merits but have only the potential of a small recovery will never be brought because the expense of litigation makes them prohibitive.⁶⁷ While plaintiffs can reduce their costs of litigation by bringing their individual claims pro se, the success rate of pro se cases is very poor, especially given the complexity of the law and the lack of sophistication of all but the rarest of claimants.⁶⁸ Thus, this fundamental failure of our litigation system to provide legal

66 See, e.g., Ellen Berrey, Steve G. Hoffman, & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1 (2012). The piece illuminates the way in which neutral legal rules and cultural frameworks based on the assumption that the parties are equally-endowed obscures the structural disadvantages plaintiffs face. Moreover, whatever burdens employers have in litigation are considered simply a cost of doing business while employees shoulder these burdens in ways that are expensive but also emotionally crushing. The study is based on 100 in-depth interviews with defendant's representatives, plaintiffs, and lawyers based on 1788 cases filed between 1988–2003.

67 This is true even though a prevailing party can recover attorney fees in discrimination cases. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006).

68 Of course, many pro se cases may be without merit. There no doubt are, however, cases that would be successful if the plaintiff was represented by counsel but that have virtually no chance of success when attempted to be litigated by someone without legal expertise. See, e.g., Alan Feuer, *Lawyering by Laymen: More Litigants Are Taking a Do-It-Yourself Tack*, N.Y. TIMES, Jan. 22, 2001, <http://www.nytimes.com/2001/01/22/nyregion/lawyering-by-laymen-more-litigants-are-taking-a-do-it-yourself-tack.html?pagewanted=all&src=pm>.

Most courts in the city and across the country do not keep statistics on pro se litigation, though court watchers say there is plenty of anecdotal evidence that they are on an upswing. The increase has been attributed to the abundance of court programs on television and to the popularity of the do-it-yourself movement as a whole. But the most prevalent reason still is not being able to afford hundreds to thousands of dollars in lawyers' fees.

Id. See also Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J., 305, 305–06, (2002).

Lost in the world of legal procedure and substantive case law, the pro se litigant often finds herself confused and overwhelmed, if not frustrated and bitter. Throughout their litigation, pro se litigants are confronted with numerous difficulties including complying with procedural rules, understanding substantive legal concepts, articulating relevant factual allegations, and simply knowing how to proceed with their action. Despite the liberal reading granted to pro se litigant pleadings, pro se litigants are almost unanimously ill equipped to encounter the complexities of the judicial system.

Id.

services to low-income and middle-income claimants means that these workers most in need of protection and most likely to be victims of discrimination are denied a chance to have their cases decided on the merits in federal court.⁶⁹

These procedural maneuvers by the Supreme Court do not absolutely prevent discrimination cases from being fairly decided, but their net result is to narrow dramatically the ability of the victims of employment discrimination to have their day in court.⁷⁰ The following section looks at decisions about substantive antidiscrimination law that have also narrowed that law to the disadvantage of the historic victims of discrimination.

69 One consequence of diminishing federal protections for workers is that workers are left to their remedies under state laws. While many states provide protections against discrimination that are broader and more amenable to enforcement than federal laws, some states have failed to provide any greater protection than is now available in federal court. See MARK A. ROTHSTEIN, *EMPLOYMENT LAW* 295 (3rd ed. 2005). This consequence of our federal system therefore seems to mean that there can be considerable differences in protection depending on where workers live and work. In other words, there is unequal protection of laws that are supposed to provide equal treatment.

70 Forcing discrimination claims into arbitration does deny the worker her day in court, her right to a jury trial, and her right to initiate a class action where appropriate. It is, as of yet, not clear whether “mandatory” arbitration gives the worker as good a chance or a worse chance of winning. See Paul B. Marrow, *Determining if Mandatory Arbitration is “Fair”: Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks*, 54 N.Y.L. SCH. L. REV. 187, 227 (2009–2010) (comparing 125 litigated cases with 186 securities industry arbitration cases showed that, “while the win rates in arbitration exceed those realized in the courthouse, the amounts (on average) awarded by arbitrators were significantly lower than the amounts awarded in court.”). See also Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 400–01 (2000) (“[T]he use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage.”).

II. THE SUBSTANTIVE MOVE TOWARD ENDING THE ANTIDISCRIMINATION PROJECT

Two contesting visions of equal protection have battled since the ratification of the Fourteenth Amendment.⁷¹ Given differing contexts, neither the formalist anticlassification⁷² nor the antisubordination view⁷³ of the purpose of the equal protection clause has triumphed completely, at least up until the Roberts Court. For example, the Burger and Rehnquist Courts looked to both purposes depending on the circumstances.⁷⁴ But the Roberts Court is moving ever closer to limiting equal protection to an anticlassification purpose. The Court appears to be only one vote away from completely jettisoning the antisubordination purpose for the antidiscrimination project.⁷⁵ This section will briefly trace the two decisions—*Parents Involved in Community Schools v. Seattle School District No. 1*⁷⁶ and *Ricci v.*

71 For an overview of the history of that debate, see Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409 (2012). For the purposes of this Article, equal protection and disparate treatment discrimination jurisprudence are now, if not identical, substantially the same. See, e.g., Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

72 The anticlassification view sees the goal of equal protection, and thereby antidiscrimination law, as prohibiting formal classifications based on race, sex, etc. It is typified by a “color-blind” standard for viewing claims of race or sex discrimination without looking to the context or impact of the use of that standard. See Zimmer, *supra* note 71, at 416.

73 The antisubordination view looks to the impact of law on the historic victims of discrimination. Under this view, a color-blind standard may generally be appropriate but, in different contexts, that approach is counterproductive. See David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 665 (2000) for a distinction between what discrimination means using protected class theory: “Discrimination is not differential treatment per se, but differential treatment that arises from, and perpetuates, a caste system, a history of oppression, or exclusion of groups based on their group characteristics.”

74 See Zimmer, *supra* note 71, at 426–28. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976), is credited with articulating the two quite different ways of looking at equal protection and antidiscrimination laws. For another classic article from that same era, see Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

75 Zimmer, *supra* note 71, at 429–30.

76 551 U.S. 701 (2007).

*DeStefano*⁷⁷—that show how close the Court has come to strictly limiting the purpose of both constitutional and statutory antidiscrimination law to the anticlassification purpose epitomized by its formal color-blind standard.

Parents Involved revisited the issue of race in elementary and secondary schools, but it did not involve de jure segregation. Instead, the question involved the use of race by school boards to forestall the de facto resegregation of their schools. Both of the school districts involved in the case had adopted a modified “student choice” policy for assigning pupils to their schools. The first step started with the parents picking the schools their children would attend unless that led to particular schools becoming overcrowded. In the second step, pupils with siblings already in the school were chosen over others. Third, if that did not solve the risk of overcrowding of a particular school, the school board would use the race of the individual students to make school assignment to avoid resegregation of any of the schools.⁷⁸ Very few assignments got to this final step, but white parents nevertheless challenged this final step in the assignment policy.⁷⁹ Writing for the Court in the first three parts of the opinion, Chief Justice Roberts found that this use of race violated equal protection since avoiding the resegregation of the schools was not a compelling

⁷⁷ 557 U.S. 557 (2009).

⁷⁸ *Parents Involved*, 551 U.S. at 711–12.

⁷⁹ *Id.* at 710–11.

governmental interest.⁸⁰ Claiming the mantle of *Brown v. Board of Education*, the Chief Justice concluded his opinion with dramatic flourish, claiming that a color-blind standard was justified by *Brown*. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁸¹ That final part of the Chief Justice’s opinion was not the opinion of the Court since it was not joined by Justice Kennedy, who had joined the first three parts to make a majority. Based on the Chief Justice’s broad statement, it appears that a plurality of four of the present sitting justices—the Chief Justice along with Justices Scalia, Thomas, and Alito—have adopted the formalist, anticlassification view of the purpose of antidiscrimination law with its color-blind standard for what equal protection requires.

Because of the 4–4 split, Justice Kennedy’s concurring opinion became the opinion of the Court for the purpose of determining the current equal protection test for evaluating the express use of race. In it, he stopped just short of joining his four conservative colleagues adoption of an absolute color-blind standard. Referring to the Chief Justice’s final statement, Justice Kennedy explained why he could not join the final part of the plurality opinion:

80 The school district used race if “the racial balance at [any] school falls within a predetermined range based on the racial composition of the school district as a whole.” *Id.* at 710. This attempt at avoiding resegregation was found not to be justified by a compelling governmental interest. *Id.* at 725–26 (while “Seattle contends that its use of race helps to reduce racial concentration in schools . . . the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”).

81 *Id.* at 748.

[P]arts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.⁸²

While school boards violate equal protection if they use the race of individual students when assigning them to schools, they are not prohibited from using race in their planning processes to establish their pupil placement policies before any student is assigned to a school. For planning purposes, school boards may use the projected racial composition of its school attendance zones to avoid resegregation.⁸³

Justice Kennedy's position draws a distinction between assigning individual pupils to schools and setting up attendance zones based on his continuing acceptance of the antisegregation purpose for equal protection. His statement echoes the first Justice Harlan's dissent in *Plessy v. Ferguson*, which famously declared that "[o]ur Constitution is color-blind."⁸⁴ As it was for Justice Harlan, Justice Kennedy rejects a color-blind standard of liability. Instead, achieving a color-blind Constitution is an "aspiration" that would be

⁸² *Id.* at 787–88 (Kennedy, J., concurring) (providing equal opportunity to all students allows the schools to use race to avoid the resegregation of the schools).

The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 788 (citations omitted).

⁸³ *Id.* at 788–89.

⁸⁴ 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

justified once our society would, in fact, be blind to race. To reach that objective, a color-blind standard “in the real world . . . cannot be a universal constitutional principle.”⁸⁵ To move toward the goal of a color-blind society, school boards can use race to plan to avoid the resegregation of the schools and move society a step closer to becoming color-blind in reality.⁸⁶ What does violate equal protection,⁸⁶ however, is a school using the race of individual students to assign them to their schools. Such individualizing of race is a “crude” measure that threatens “to reduce children to racial chits valued [to be] traded according to one school’s supply and another’s demand.”⁸⁷

After *Parents Involved*, the Roberts Court was only Justice Kennedy’s vote away from adopting the formalist, color-blind standard for equal protection. Even in *Parents Involved*, the difference between the four Justices who would go the whole way and Justice Kennedy did not seem that large. Subsequently, Justice Kennedy appeared to move even closer to a color-blind standard of equal protection except again in quite narrow

⁸⁵ *Parents Involved*, 551 U.S. at 788.

⁸⁶ *Id.* at 788–89:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races[.]

Id. Race can be used in the “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”

Id.

⁸⁷ *Id.* at 798. In contrast, using race in the district’s planning process is not such a crude measure. “These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” *Id.* at 789.

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circumstances. In 2009, the Court decided the New Haven firefighters' case, *Ricci v. DeStefano*,⁸⁸ which involved a Title VII claim of disparate treatment discrimination when the City of New Haven ("City") decided not to use the results of a civil service promotion test. The reason to jettison the test results was that, if used, the result would be a disparate impact on test takers who were people of color. Plaintiffs were seventeen whites and one Hispanic who, it turned out after the individual test scores had been discarded, would have been promoted if the scores were used.⁸⁹ This time Justice Kennedy spoke for the Court. The Court reversed summary judgment that had been granted for the City and decided that, as a matter of law, the City had committed disparate treatment discrimination by deciding not to use the test scores.⁹⁰ When the City made its decision, it knew the aggregate racial consequences⁹¹ of using the test scores and knew that their use would result in an adverse effect on the minority test takers, but it did not know the identity of the individual test takers.⁹² Based on the fact that the City knew what the consequences for the three racial

88 557 U.S. 557 (2009).

89 *Id.* at 574.

90 *Id.* at 592–93.

91 The City did not know the scores of the individual test takers when it was making its decision. Nor did the test takers know their scores when the City made its decision. *Id.* at 567.

92 The Court summarized the results of the tests as follows:

Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant. Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

groups would be, Justice Kennedy took the step of finding the City liable of disparate treatment discrimination by deciding not to use the test results.⁹³ That decision, he found, was solely the result of the City’s intent to discriminate only against the white firefighters who would have been promoted if the test results had been used. That means that the City did not intend to discriminate against the Hispanic and African-American test takers who were equally disadvantaged when the test scores were not used: “[a]ll the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates.”⁹⁴ Further, Justice Kennedy concluded, “[w]hatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results *solely* because the higher scoring candidates were white.”⁹⁵

Id. at 566 (citations omitted). The Court held that as a matter of law the tests resulted in a disparate impact by looking just at the pass rates, which did not tell the whole story of that impact since simply passing the test would not necessarily lead to promotion during the two year life span for using the tests:

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a *prima facie* case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities were approximately one-half the pass rates for white candidates[.]

Id. at 586.

⁹³ *See id.* at 592–93.

⁹⁴ *Ricci*, 557 U.S. at 579.

⁹⁵ *Id.* at 579–80 (emphasis added).

This moves Justice Kennedy ever closer to his four “conservative” colleagues.⁹⁶ In *Parents Involved*, the school district went too far in its use of race by knowing and using the race of individual students in making school assignments. In *Ricci*, Justice Kennedy’s holding is extraordinary. He found the City solely liable to some white test takers when the evidence actually showed that some Hispanic and African-American firefighters were disadvantaged by the decision and some members of all three groups with low test scores would get another chance by whatever promotion policy the City would use instead.⁹⁷ Deciding as a matter of law that the discrimination was only against some white test takers when members of all three racial groups were affected by the decision with no evidence that out of all the successful test takers the City picked just the white test takers to discriminate against is remarkable. Without some nonracial explanation that is not apparent and is very unlikely, it is a graphic demonstration that whites are now the group in a preferred position

96 “Conservative” here is used in the sense of alignment with the politics on the right, which, at this time, is decidedly activist.

It is often assumed that liberals like judicial activism and conservatives like judicial restraint. It is not so simple. For one thing, judicial activism and judicial restraint do not necessarily correlate with liberal and conservative outcomes. For example, on such questions as the constitutionality of affirmative action, regulations of commercial advertising, gun control laws, and campaign finance regulation, judicial restraint would lead to politically “liberal” results, and judicial activism would produce politically “conservative” results. Not surprisingly then, at some times in our history, judicial activism has been embraced by conservatives and criticized by liberals, and at other times, judicial activism has been embraced by liberals and criticized by conservatives.

Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 490 (2012).

97 Finding liability for disparate treatment discrimination on the simple fact that the City knew what the racial consequences of its decision would be in the aggregate is unprecedented. See Michael J. Zimmer, *Ricci’s “Color-Blind” Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257 (2010).

for equal protection.⁹⁸ At most, the evidence in the record showed that the decision not to use the test scores had a disparate impact on the group of white test takers. Since *Washington v. Davis*,⁹⁹ a showing of disparate impact by itself would not establish an equal protection violation if the plaintiffs were people of color and would not prove intentional discrimination.¹⁰⁰ But now, at least when the plaintiffs are white males, such a showing will establish a violation.

Justice Kennedy claims, nevertheless, that there remains a place for the use of race that does not violate equal protection and so, as of now, a small area exists justified by the antidisubordination principle that he articulated in *Parents Involved*. An employer still can use the potential racial consequences of its actions when it is planning what employment practices to adopt but not when they are implemented:

[We do not] question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race . . . Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.¹⁰¹

98 The opinion for the Court by Justice Kennedy and the concurrence by Justice Alito demonstrate great empathy for the white plaintiffs. Justice Kennedy's opinion does not mention the Hispanic plaintiff or the other Hispanic and African-American test takers who were disadvantaged when the test results were not used. This appears to be a vivid example that we are far from being a post-racial society and, perhaps, is a graphic example of how implicit bias influences behavior.

99 426 U.S. 229 (1976).

100 *See* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

101 *Ricci*, 557 U.S. at 585.

Justice Kennedy's approach in *Parents Involved* and *Ricci* appear to create a line between the permissible and the impermissible use of race, but it is not identical in the two cases. Using the race of individual students as the deciding factor in what school a student would attend in *Parents Involved* fell on the impermissible side of the line. But in *Ricci*, acting on the knowledge of the aggregate racial consequences without using the race of the individual test takers also fell on the impermissible side of the line. So, a choice to insulate the decision-maker from knowing the race of the affected individuals would not necessarily be safe from liability since that did not save the City in *Ricci*. Using race to draw school attendance lines is on the permissible side of the line and so too would be its use when planning to adopt a particular employment policy, but it falls over the line into the impermissible once the employer begins to implement its policy. The line in *Ricci* has the odd consequence of allowing an employer to use the projected racial consequences of an employment practice but denying it the right to use race once the policy is in use and the actual racial consequences become known.

How strong at least one Justice's view of the color-blind standard is can be seen by Justice Scalia's concurrence in *Ricci*. While speaking only for himself, he suggests that the disparate impact provisions of Title VII violate equal protection because they require that

the employer like the City in *Ricci* know the racial consequences of the employment practice it uses.¹⁰² That knowledge violates an absolute color-blind rule of equal protection:

Title VII not only permits but affirmatively *requires* [employer] actions when a disparate-impact violation *would* otherwise result Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.¹⁰³

For Justice Scalia, the anticlassification underpinnings of his color-blind rule of equal protection completely trump the antidisubordination basis for disparate impact law. Since the constitution trumps statutes, the disparate impact provisions in section 703(k) of Title VII appear to be unconstitutional by his lights, at least as to claims of race discrimination.¹⁰⁴ “Requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes” would result in section 703(k)'s unconstitutionality.¹⁰⁵ In other words, what the Rehnquist Court failed to effectuate by its

102 *Id.* at 595 (Scalia, J., concurring). Justice Scalia does not announce his support for that conclusion, but he certainly is encouraging parties to raise the issue.

103 *Id.* at 594. He further elaborates:

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level.

Id. at 594–95.

104 It is not clear what would happen to claims of disparate impact discrimination based on sex, national origin, religion, age, or disability.

105 *Ricci*, 557 U.S. at 594.

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statutory interpretation of Title VII in *Wards Cove Packing Co. v. Atonio*,¹⁰⁶ when Congress rejected that view by enacting section 703(k) in the 1991 Civil Rights Act,¹⁰⁷ Justice Scalia suggests be done by basing its view in the Constitution.

The 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* will have a significant impact on class action, but it may also implicate substantive antidiscrimination law. While dealing with the class action issues, the Court described both Title VII theories of systemic disparate treatment and systemic disparate impact. Those descriptions may foreshadow the future thrust of the Court's interpretation of those laws.¹⁰⁸ As to systemic disparate treatment, Justice Scalia never analyzed the basic statistical showing the plaintiffs had made that there was a substantial difference in pay and promotions for women and men across all the Wal-Mart stores.¹⁰⁹ Such a showing has long been the start of a systemic disparate treatment case showing a policy or practice of discrimination.¹¹⁰ Without referring to the evidence in the record, Justice Scalia found there was no “significant proof” that Wal-Mart operated under a general policy of discrimination.”¹¹¹ While Wal-Mart was not shown to not have an express policy of discrimination, the policy of granting unstructured and

106 490 U.S. 642 (1989).

107 Pub. L. No. 102-166, 105 Stat. 1071 (1991).

108 Zimmer, *supra* note 97.

109 Uncontroverted evidence showed that women were paid less than men across the country and that they filled 70% of the hourly jobs but only 33% of management jobs, even though most promotions come from the pool of hourly workers. While the opinion of the Court did not mention these statistics, Justice Ginsburg did quote the district court's finding of facts. *Wal-Mart*, 131 S.Ct. 2541, 2563 (2011) (Ginsburg, J., dissenting).

110 *See* *Teamsters v. United States*, 431 U.S. 324 (1977) (because African American truck drivers who worked for the employer were available, the “inexorable zero” of them in the line driver job was systemic disparate treatment discrimination).

111 131 S. Ct. at 2553–54.

unreviewed discretion to the store managers to make pay and promotion decisions, while neutral on its face, had significant impact on women because of the way those managers exercised that discretion. All the Wal-Mart women faced the risk of discrimination. That was the central issue in the case, and the Supreme Court failed to deal with it.

Plaintiffs further relied on the techniques for sophisticated statistical analysis that the Court had approved in *Hazelwood School District*¹¹² and *Bazemore v. Friday*.¹¹³ Justice Scalia finds that this evidence is not probative of discrimination because the studies were “insufficient to establish that [plaintiffs’] theory can be proved on a classwide basis.”¹¹⁴ “A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.”¹¹⁵ Rather than following precedent by first analyzing the basic statistical data and the statistical studies flowing from that data, Justice Scalia begins his discussion by criticizing “social frameworks” evidence for not demonstrating statistical significance, even though that type of evidence is not statistically based.¹¹⁶ The failure to even acknowledge what the precedents were and how they were

112 *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

113 438 U.S. 385 (1986).

114 131 S. Ct. at 2555. To support his conclusion, he fails to look at the challenged policy from the perspective of Wal-Mart itself and looks only at whether or not the policy was uniformly discriminatory in operation.

115 *Id.*

116 *Id.*

applied does not bode well for the future of the systemic disparate treatment theory of discrimination.

Without saying so, the Court may be moving toward the view of Judge Ikuta from her dissent in *Dukes* in the Ninth Circuit.¹¹⁷ She would narrow systemic disparate treatment claims to express policies of discrimination and to policies neutral on their face but shown to have been adopted by the members of top management with an intent to discriminate. By her view, *Teamsters*, *Hazelwood School District*, and *Bazemore*,¹¹⁸ and their statistically based proof of systemic disparate treatment by the corporate employer would be jettisoned. The Court did not go that far, but *Wal-Mart* is a step in that direction.

The discussion of systemic disparate impact law is equally disturbing and inadequate. While acknowledging that delegating discretion to make pay and promotion decisions to the store managers was the kind of “subjective” employment practice that the Court had held in *Watson v. Fort Worth Bank & Trust* could be challenged as disparate impact discrimination,¹¹⁹ Justice Scalia characterizes Wal-Mart’s subjective policy as “a very common and presumptively reasonable way of doing business—one that that we have said ‘should itself raise no inference of discriminatory conduct.’”¹²⁰ Other than his own view of what is reasonable and not discriminatory, and in face of evidence clearly showing

117 *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 637 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting).

118 See Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 410 (2011) (“Justice Scalia . . . frames systemic disparate treatment theory as imposing entity liability only for individual moments of disparate treatment”).

119 487 U.S. 977 (1988).

120 *Wal-Mart*, 131 S. Ct. at 2554.

impact on women, Justice Scalia's approach, if adopted, would suggest that plaintiffs cannot use statistical evidence to challenge the way a policy operates. If so, that would appear to preclude the application of section 703(k)'s ban on disparate impact discrimination at least to subjective practices and perhaps to employer practices whether they were objective or subjective.¹²¹

In sum, the Court in *Parents Involved* held that the defendants violated equal protection because the final step of their pupil assignment policy used the race of individual students to avoid resegregation.¹²² In *Ricci*, the defendants took action to avoid the risk of disparate impact liability but that action violated Title VII's disparate treatment basis for liability because it had a disparate impact on whites. This is so even though there was no evidence of an intent to discriminate against the whites and the decision had a negative impact on some members of all three races. White plaintiffs won in these two cases. In *Wal-Mart*, the Court not only refused to certify a class of women workers but, in doing so, appears to have run roughshod over substantive Title VII law. In *Parents Involved*, four Justices rejected any antidisubordination purpose for antidiscrimination law and appeared to be calling for an absolute color-blind standard for antidiscrimination. The last holdout among the conservative Justices is Justice Kennedy and, for him, the antidisubordination purpose, by which color-blindness is an aspiration, not a standard of liability, applies only

121 Of course, given Justice Scalia's apparent view that the disparate impact provisions of Title VII in section 703(k) are unconstitutional, it may be that he thinks careful analysis of a disparate impact case is not necessary.

122 See *supra* notes 78–80 and accompanying text.

in limited circumstances. Despite the distinction that he articulates, Justice Kennedy ultimately voted with the conservative bloc in all three of these cases and wrote the decision in one of them.

III. THE FUTURE OF THE ANTIDISCRIMINATION PROJECT

A. Affirmative Action in Higher Education

The current Term may provide further understanding of the present Court's treatment of the antidiscrimination project. In February, 2012, the Court granted certiorari in *Fisher v. University of Texas*.¹²³ *Fisher* involves a challenge to an affirmative action admissions policy used by the University of Texas at Austin (UT) to admit undergraduates. This is the first chance the Roberts Court has had to address issues of affirmative action in higher education.¹²⁴ The Fifth Circuit found the policy not unconstitutional because it was

123 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012). The oral argument was October 10, 2012. Justice Kagan recused herself. There already is some significant academic analysis of *Fisher*, even before it is argued or decided. The first round of a Vanderbilt Law Review En Banc Roundtable was published on July 23, 2012 and consists of articles by Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* *Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77 (2012); James F. Blumstein, *Grutter and Fisher: A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57 (2012); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113 (2012); Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45 (2012); Gerald Torres, *Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97 (2012).

124 Based on the prior voting record of the present members of the Court, the chances that the lower court will be reversed are quite high.

Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas, and Alito have *never* voted to uphold the affirmative action programs at issue in *any* racial affirmative action case that the Supreme Court has resolved on the merits of a constitutional challenge. Even though Justice Kennedy does not always cast his swing vote with the four other conservative Justices on nonracial issues, Justice Kennedy *has* always voted with the conservative bloc to invalidate racial affirmative action.

Spann, *supra* note 123, at 48.

consistent with the Rehnquist Court's decision in *Grutter v. Bollinger*¹²⁵ that upheld the University of Michigan law school's affirmative action policy. In affirming summary judgment for UT, the Fifth Circuit held "that the Equal Protection Clause did not prohibit a university's 'narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.' Mapping on *Grutter*, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations."¹²⁶ Fisher argues that the UT's policy is beyond *Grutter* but also challenges *Grutter* itself.¹²⁷

The challenged policy was only one part of a broader program by the university to create a diverse student body. Eighty-one percent of the entering class was admitted through the Top Ten Percent Law¹²⁸ ("Top Ten Percent") that guarantees admission to all graduates of Texas high schools who are in the top ten percent of their class. With ninety percent of the undergraduate seats reserved for Texas residents, all but two percent of Texas resident applicants are admitted through the Top Ten Percent program.¹²⁹ Some of the non-Top Ten Percent admissions of Texans are made based only on their Academic Index (AI) scores—a

125 539 U.S. 306 (2003).

126 *Fisher*, 631 F.3d at 218 (quoting *Grutter*, 529 U.S. at 343).

127 The question presented is: "Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003)." Brief for Petitioner at *i*, *Fisher v. Univ. of Texas*, 132 S. Ct. 1536 (2012) (No. 11-345).

128 TEX. EDUC. CODE ANN. § 51.803 (West 2009).

129 *Fisher*, 631 F.3d at 227.

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formula based on SAT or ACT scores and high school grade point averages.¹³⁰ Those Texans not admitted on their AI scores then still have a chance to be admitted by a combination of their AI scores and another score, the Personal Achievement Index (PAI). The PAI is made up of scores on two essays and a personal achievement score.¹³¹ The PAI consists of the holistic evaluation of demonstrated

leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a “special circumstances” element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and . . . the applicant's race.¹³²

In 2008, the year Fisher applied, only 216 of the 1208 non-Top Ten Percent admittees from Texas were African American or Hispanic; many of these students would have been admitted without regard to their race on, for example, their AI score alone.¹³³

Based on its interpretation of *Grutter*, the Fifth Circuit adopted the lower court's evaluation of the policy:

The district court found that both the UT and *Grutter* policies “attempt to promote ‘cross-racial understanding,’ ‘break down racial stereotypes,’ enable students to better understand persons of other races, better prepare students to function in a multicultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as ‘spokespersons’ for their race.” Like the law school in *Grutter*, UT “has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.” UT has made

130 *Id.*

131 *Id.* at 228.

132 *Id.*

133 *Id.* at 261.

an “educational judgment that such diversity is essential to its educational mission,” just as Michigan's Law School did in *Grutter*.¹³⁴

The main thrust of Fisher’s argument is that, despite the lower courts’ analysis, her case is easily distinguished from *Grutter*.¹³⁵ In the last five pages of her merits brief, she finally argues that “*Grutter* should be clarified or overruled” because the lower court “preserved the form of strict scrutiny but replaced its substance with deference to the academy at every stage of the judicial inquiry.”¹³⁶ Since Fisher quotes Justice Kennedy’s dissent in *Grutter* eight times in those five pages, he is obviously the target of her attack on *Grutter*. He, along with Justices Scalia and Thomas who are now on the Court, were in the dissent in *Grutter*.¹³⁷ Although Fisher does not cite *Parents Involved* in this section of her brief, she appears to hope to convince Justice Kennedy that *Grutter* does not survive his approach to the use of race in that case.¹³⁸

134 *Id.* at 230–31 (footnotes omitted).

135 In summary, she claims that the UT policy is not consistent with *Grutter* because UT uses race to mirror the demographics of Texas, not to enhance educational diversity. Furthermore, unlike in *Grutter*, UT measures the “critical mass” of students of color at the classroom level, not the student body as a whole. Also, UT did not show a “strong basis in evidence” that its use of race was “necessary” because Top Ten Percent admissions had already produced a diverse student body. Next, echoing *Parents Involved*, she argues that the use of race is not narrowly tailored because so few students are admitted pursuant to it. Finally, she argues that the Fifth Circuit substituted a good-faith, process-oriented review for strict scrutiny. *See* Brief for Petitioner at 53–57, *Fisher v. Univ. of Texas*, 132 S. Ct. 1536 (2012) (No. 11-345).

136 *Id.* at 53.

137 While neither Chief Justice Roberts nor Justice Alito were on the Court when *Grutter* was decided, Fisher is probably safe to assume, based on Chief Justice Roberts’s opinion in *Parents Involved* that called for a color-blind standard of equal protection, that they will vote to overrule *Grutter*. Justices Breyer, Ginsburg, and Sotomayor are likely to vote to affirm.

138 *See* Amar, *supra* note 123, at 85 (predicting Justice Kennedy will be the key vote and will either write the opinion for the Court or his concurrence will be its actual holding).

If the Court reaches the substantive question,¹³⁹ Justice Kennedy's present position on affirmative action is likely to be the swing vote that determines the outcome.¹⁴⁰ In his *Grutter* dissent, Justice Kennedy begins his opinion by adopting Justice Powell's position in *Bakke* that, based on academic freedom found in the First Amendment, educational diversity is a compelling governmental interest:¹⁴¹

The separate opinion by Justice Powell in *Regents of University of California v. Bakke* is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary.¹⁴²

While accepting that educational diversity is a compelling governmental interest, Justice Kennedy faulted the *Grutter* majority for failing to do what it said it was doing, which was applying strict scrutiny to the law school's use of race.¹⁴³ In Justice Kennedy's view, the Court had confused the end (the compelling governmental interest in educational diversity) with the means (that race was narrowly tailored to achieve that end).¹⁴⁴ Because of the deference accorded the law school, the Court failed to adequately review what a

139 There are significant justiciability issues—standing, mootness including whether defendant's conduct is capable of repetition yet evading review—issues that might be decided to pretermitt consideration of the merits. For a discussion of these issues and a critique of the Court's failure to decide them consistently, see Amar, *supra* note 123, at 85.

140 With Justice Kagan having recused herself, the Court would likely be evenly divided if Justice Kennedy joins with the moderate bloc to make it 4–4. In that case, the lower court decision is affirmed but the Court's decision is without precedential value.

141 A way to distinguish Justice Kennedy's acceptance of the rejection of diversity as a compelling governmental interest for lower education in *Parents Involved* may be that academic freedom is more solidly established in higher education.

142 *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (citation omitted).

143 *Id.*

144 *Id.* at 387–88.

“critical mass” of students of color meant and whether it was narrowly tailored to achieve only educational diversity and not racial balancing. For Justice Kennedy, the law school’s “concept of critical mass [was] a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas” because “race is likely [to be] outcome determinative for many members of minority groups”¹⁴⁵ who are not accepted simply on their Law School Admissions Test (LSAT) and Undergraduate Average (UGA) scores. Thus, for him, achieving that critical mass meant that the determination of admissions decisions for these minority applicants was not individualized in a holistic sense but was simply based on their race.¹⁴⁶

Based on his approach in *Grutter*, Justice Kennedy is likely to be as critical of the Fifth Circuit’s deference to UT in *Fisher* as he was of the deference the Court gave to the Michigan Law School in *Grutter*. In fact, the Fifth Circuit appeared to extend its deference from determining that educational diversity was a compelling governmental interest, the acceptable area of deference for Justice Kennedy, to UT’s determination that the way the policy worked satisfied strict scrutiny.¹⁴⁷ Thus, the Fifth Circuit found that “the narrow-tailoring inquiry [that is, whether the means are narrowly tailored to serve only the end]—like the compelling-interest inquiry—is undertaken with a degree of deference to the

145 *Id.* at 389.

146 *Id.*

147 Amar, *supra* note 123, at 86.

University's constitutionally protected, presumably expert academic judgment."¹⁴⁸ This appears to be at odds with a point in Justice Kennedy's dissent in *Grutter*: "[t]he Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. . . . [D]eference is not to be given with respect to the methods by which [educational diversity] is pursued."¹⁴⁹

The approach Justice Kennedy took in *Grutter* appears in a way to foreshadow his subsequent approach in *Parents Involved*, where he joined the opinion of Chief Justice Roberts finding that the use of the racial identity of individual children to assign them to schools violated equal protection.¹⁵⁰ In contrast to Chief Justice Roberts, Justice Kennedy still did accept the antidisubordination purpose for equal protection:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races.¹⁵¹

Thus, it is not a violation of equal protection for a school board to use race in siting schools, setting attendance zones, and for other purposes to avoid resegregation.¹⁵² But using the race of individual students to assign them to their schools goes too far and violates equal

148 *Fisher*, 631 F.3d. at 232.

149 *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

150 *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring).

151 *Id.* at 788–89.

152 Race can be used in the “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” *Id.* at 789.

protection. For Justice Kennedy, the law school in *Grutter*, though masked by the law school's claim it was acting to achieve educational diversity by admitting a "critical mass" of students of color, was just using race to admit applicants to the law school.¹⁵³ Note that in his view in *Grutter*, the race of individual applicants to law school can be used in making admission decisions to law school as long as race is not "predominate." In *Parents Involved*, the race of a student was determinative of the school she would go to. In a way, his accepting of deference to a school board in its role-setting policy by, for example, deciding to avoid school resegregation, mirrors his acceptance of deference to the Michigan Law School's determination that educational diversity was a compelling governmental interest satisfying the first step of strict scrutiny, but his problem arose once those policies were being implemented.

In *Ricci*, Justice Kennedy claimed that it was permissible to use the knowledge of the racial consequences of a practice the employer was thinking of using. But he found there was intentional discrimination solely against the white test takers even though the City did not know the race of the individual test takers when it made its decision.¹⁵⁴ Knowing the general consequences for three different racial groups, whether or not it used the test scores for promotion, still triggered liability in favor of some of the white test takers even without individualization. So Justice Kennedy appears to now take the position that, at least as to white plaintiffs, the line between the permissible and impermissible uses of race is no

¹⁵³ See *supra* 144–46 and accompanying text.
¹⁵⁴ *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009).

longer solely when the race of individuals is used, but also when an action is taken when its aggregated racial consequences are known but the impact on individuals is not known. Whatever Justice Kennedy has said, he has, so far, always come out in favor of white plaintiffs.

After knowing how Justice Kennedy has dealt with race cases brought by whites, it is not difficult to predict that UT will likely lose in *Fisher*. In deferring to UT's method of implementing its plan, the Fifth Circuit failed to dig deeply into what "critical mass" means and how it worked. Because of this failure, Justice Kennedy is likely to find that the deference the lower court gave to UT masks the use of race as determinative in admissions, just as he did in *Grutter*. So reversal of the Fifth Circuit is very likely but, if the decision is reversed, it should be remanded for a full inquiry into the question of what "educational diversity" means and, quantitatively and qualitatively, what constitutes the "critical mass" that satisfies strict scrutiny. The concept of "critical mass" was not developed by the Court in *Grutter* or by the Fifth Circuit in *Fisher*, nor was its relationship to "educational diversity." If the description of the plan is simply a cover for making admissions where race predominates, the plan will fail to satisfy strict scrutiny. But, if *Grutter* is still good law, the way the plan operates and the way race is used when its use is not predominant will determine whether the plan survives strict scrutiny.

To judge the relationship between the means and the end requires some development of what "educational diversity" is all about. The Court has rejected the use of race to

achieve racial balance or to redress general “societal discrimination” because they involve the direct use of race as an end the Court has found to be unconstitutional.¹⁵⁵ “Educational diversity,” therefore, has to be an end independent of race itself and apparently independent of the positive consequences for those people of color who are admitted through the affirmative action plan.¹⁵⁶ Thus, “race-based advantages for minorities are justified as instrumental—a means to achieve a broader objective . . . [that] does not focus on minority students or their interests but on ‘attaining a diverse student body.’”¹⁵⁷ Disconnecting equal protection from its original purpose of aiding the victims of slavery shows how warped the law has become when equal protection is limited to an anticlassification purpose that protects whites much more than it protects the historic victims of discrimination.¹⁵⁸

What people of color add to the white majority’s educational experience—their instrumental use—is the significantly different life experience they may have lived before they come to college.¹⁵⁹ That includes the experience of racism and discrimination. But it also includes the differences that result from the extensive segregation of housing and

155 *Grutter*, 539 U.S. at 353. *See id.* at 330 (“racial balancing . . . is patently unconstitutional”). Race may be the end served only when providing a remedy to the actual victims of defendant’s discrimination.

156 Blumstein, *supra* note 123, at 65 (“Justification for the preference did not focus on the students receiving the preference—redressing class-based harms to minorities disadvantaged by past racial injustices. . . . The student who secured the lion’s share of the educational benefits from student body diversity were white students who matriculated.”).

157 Blumstein, *supra* note 123, at 65.

158 *See* Amar, *supra* note 123, at 95–96 (stating that the original intent of equal protection was to authorize governmental action to aid the victims of slavery).

159 *See* Brown-Nagin, *supra* note 123, at 129.

schools and the treatment of people of color in society generally.¹⁶⁰ The lion's share of the white majority has experienced racial segregation in housing and schools, but they are much less likely to focus on it as a racial issue.¹⁶¹ Generally, they look at all, or almost all, white neighborhoods and schools to be natural or the normal state of affairs and not the consequences of the racial divide in this country.¹⁶² Thus, in determining "critical mass," it is necessary to decide how large the presence of people of color must be to educate the predominantly white student body of what society actually looks like as a whole. Using the percentage of people of color in our society at large could be the "critical mass" one might expect because, if achieved, the student body would then mirror society. But, of course, it is more complicated than that. For many reasons beyond the scope of this Article, but including the result of residential and school segregation and extreme economic inequality that has a tremendous negative impact on people of color, a university, particularly a

160 *Id.* at 130.

161 *Id.* ("Whites are the least likely to comfortably interact with those from different racial backgrounds because they are the least likely of all college matriculates to have interacted with other racial groups prior to arriving on campus. Blacks, Latinos, and Asians all grow up in more integrated areas, and by virtue of their racial 'minority status,' these groups tend to attain white cultural literacy.") (citation omitted). *See also* BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* 1 (1997) (explaining that whites are largely unconscious as to their race and to the advantages flowing from being white).

162 That the residential segregation is largely the product of de facto discrimination and that school segregation flows from residential segregation does not mean that it is not the product of illegal discrimination. The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968), provides for equal housing opportunities regardless of race, creed, or national origin. It further provides for government enforcement. *Id.* Still, housing discrimination is difficult to challenge when it involves individual housing transactions.

“flagship” like UT, might be hard pressed to find that many people of color who would be successful students if admitted.¹⁶³

Whatever the upper limit is, it is clear that token representation is not the “critical mass.”¹⁶⁴ For one reason, people of color cast as racial tokens are pushed to be “representatives of their race,” rather than individuals with their own interests, values, skills, and goals.¹⁶⁵ So, tokenism is not diversity. The law school in *Grutter* looked to having a critical mass in the school overall.¹⁶⁶ That may be sufficient where, at least in most law schools, the first-year classes are required and so people of color in those required classes would make them diverse. UT, however, is a huge university, with many schools, departments, majors, and areas of study.¹⁶⁷ Having the “critical mass” determined at the university-wide level does not necessarily mean that there will actually be diversity in the classroom, which UT said was its goal.¹⁶⁸ It would surely be an equal protection violation to set racial quotas for individual classes that are elective. While encouraging and nudging

163 While redressing societal discrimination through affirmative action has been held not to be a compelling governmental interest, admitting students to create an educationally diverse environment is not directly redressing that long, sad history of discrimination. Perhaps, the fact that these students of color who are admitted will have improved chances to succeed in our multiracial society can be characterized as a bonus to the end that is achieved but is not the end itself.

164 See Torres, *supra* note 123, at 105.

165 Do a thought experiment: suppose Justice Thomas or Herman Cain was such a token student in a university or one of its classes. If he felt compelled to present the views of the vast majority of people of color, his own identity, with views quite different from most but nevertheless the same as some people of color, would be submerged. So the full richness of our diverse society would be left in the shadow, leaving one dimensional stereotypes.

166 *Grutter*, 539 U.S. at 318.

167 People of color are far from being equally represented in all these schools with all their different majors. See Brown-Nagin, *supra* note 123, at 129.

168 Fisher v. Univ. of Tex., 631 F.3d 213, 225 (5th Cir. 2011).

might help, it may be impossible to do that on a large scale at an institution of any size or complexity. Therefore, determining “critical mass” at the university-wide level may be the best proxy that is available for classroom diversity. But to do that, presumably, the size of that mass must be quite large, so the presence of more than a token representation in many classes is likely.

A college education should be much more than simply what goes on in classrooms. The life of the university beyond the classroom is important to providing students with the experience that prepares them to live successfully once they graduate. So, the ongoing experience college students have—from dorm life, to athletics, to groups formed by special interests whether or not those interests are academic—can all be experiences that should help them mature into successful, complete adults. In determining “critical mass,” a university may calculate a numerical goal by taking into account the self-segregation by students of color that is all too common in college life outside the classroom. That mass must be large enough that students of color will not feel the need to self segregate to “seek relief from the burdens of ‘one-way’ integration.”¹⁶⁹

Looking at what “educational diversity” actually means helps determine the qualitative, as well as quantitative, dimensions required to achieve a “critical mass” of people of color on a campus. Using the representation of people of color in society at large

¹⁶⁹ Brown-Nagin, *supra* note 123, at 131.

is a good starting place.¹⁷⁰ But many factors influence whether that is practical or not. For example, the need to choose only applicants who, by their prior records, are predicted to be successful students would influence the number chosen.¹⁷¹ Since, however, the goal of educational diversity is to serve the student body generally, the percentage of the whole student body necessary to achieve that goal is quite substantial.

In sum, the Court's decision in *Fisher* may directly further the move the Roberts Court has made away from an antistatutory view of equal protection and toward a strict anticlassification view. Most likely, that depends on the position Justice Kennedy takes.¹⁷² If he decides *Fisher* is within the holding of *Grutter*, and *Grutter* is still good law, he could vote to affirm *Grutter*. This would likely produce a 4–4 decision affirming the Fifth Circuit but would have no precedential effect. Should he join his four conservative brethren and reverse, the question would be on what grounds. The narrowest result for reversal would be to distinguish *Fisher* from *Grutter*, deciding that *Grutter* need not be reconsidered. One basis for making that distinction is that the challenged plan is not necessary because the Top Ten Percent plan already satisfies the educational diversity goal of UT without directly

170 It is not unreasonable for UT to use the Texas population since the affirmative action plan at issue in *Fisher* is utilized only for Texas residents. *Fisher*, 631 F.3d at 236.

171 Admitting applicants of color knowing they are not likely to succeed in order to provide educational diversity benefitting the white majority would be a clear demonstration that affirmative action is not undertaken to benefit the historic victims of discrimination.

172 Given the surprise outcome in the Affordable Care Case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), where Chief Justice Roberts, not Justice Kennedy, was the swing vote, it must be remembered that it is very hard to predict outcomes in advance.

using race.¹⁷³ A slightly broader basis for reversal would be based on the way the Fifth Circuit handled the issue of whether the plan was narrowly tailored to be limited to achieving educational diversity. The broadest basis would be to reverse because the Court has decided to overrule *Grutter*.

B. Other Consequences of a Color-Blind Standard of Liability for Race

From the point of view of those committed to continuing the antidiscrimination project, the worst case outcome in *Fisher* would be if the Court decided to reverse, overrule *Grutter*, and adopt a more or less absolute color-blind rule. If that were to happen, challenges to race-based affirmative action by governmental entities, other than public institutions of higher education, would likely be successful based on *Fisher*. There would obviously be consequences to antidiscrimination statutes as well, with a high potential to be quite disruptive across a wide swath of laws dealing with a variety of situations. Justice Scalia gave us a foreshadowing in his concurring opinion in *Ricci*. He suggested that, pursuant to a color-blind standard of equal protection liability, section 703(k) of Title VII (which creates the disparate impact cause of action) would be unconstitutional as to race because it is a government mandate that employers know and act on the racial consequences

¹⁷³ The Top Ten Percent plan does not expressly use race but it was enacted with the purpose of expanding the racial diversity of UT. *Fisher*, 631 F.3d at 224. It was not challenged in *Fisher* even though it was enacted with a racial purpose.

of their employment practices.¹⁷⁴ Imposing a color-blind interpretation of antidiscrimination statutes would put in jeopardy *United Steelworkers of America v. Weber*,¹⁷⁵ where the Court found that a carefully constructed affirmative action plan to benefit African Americans did not violate Title VII.¹⁷⁶

Interesting questions would arise as to the constitutionality of governmental affirmative action plans based on sex, age, and disability because these classifications are not subject to strict scrutiny.¹⁷⁷ The equal protection standard for classifications based on sex is so-called intermediate scrutiny so that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁷⁸ It is not at all clear how the Court would view an affirmative action plan for women, since the Court views the standards of review for race and sex differently.¹⁷⁹ The Court’s decision in *Johnson v. Transportation Agency of Santa Clara County*, upholding an affirmative action plan to benefit women, despite a challenge under Title VII, would be of

174 *See supra* note 102–107 and accompanying text. Age classifications are subject to rational basis scrutiny. Disability classifications are judged using deferential rational basis scrutiny so the disparate impact provisions of the Americans with Disability Act, section 12112(b)(3), would likely not be found to violate equal protection. As for age discrimination, see *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004), where the court held that an employer plan treating the older group of workers better than a younger group, with all over age 40, did not violate the Age Discrimination in Employment Act of 1967 (ADEA).

175 443 U.S. 193 (1979).

176 *Id.* at 197.

177 Disability classifications are subject to rational basis review, perhaps with a bite. *See City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which would make for interesting equal protection questions.

178 *United States v. Virginia*, 518 U.S. 515, 531(1996).

179 The difference between the constitutional standards for race and gender might reside in cases where the Court accepts that there are true genetically-based differences between men and women. *See e.g., Nguyen v. Immigration & Naturalization Service*, 533 U.S. 53, 73 (2001) (women, not men, give birth to babies).

questionable continuing authority.¹⁸⁰ If the Court established something like a gender-blind rule for sex discrimination claims, it would seem to put at risk some earlier decisions where gender classifications had been upheld.¹⁸¹ It is also unclear how affirmative action for women would be treated.¹⁸²

All in all, the adoption of a strict color-blind standard for race-based affirmative action would likely have implications far beyond race cases. It would raise issues in broad areas of the law and could trigger successful challenges to those laws. The potential for the disruption of a wide swath of law might give the Court pause before taking this final step, a step that now seems to be up to Justice Kennedy.

CONCLUSION

The Roberts Supreme Court has been slicing away at the bolus of the antidiscrimination law. It is doing this through the creation of new procedural law, including strong presumption favoring arbitration agreements. These include so-called “mandatory” agreements as well as ones involving a union waivers of the statutory rights of the workers it represents. To the extent arbitration is the forum for resolving employment disputes, the workers are not only deprived of the right to go to court but also to a jury and, most likely, to bring class actions. For those employment disputes that are not sent to arbitration, the Court has rejected notice pleading and imposed a heightened “plausible”

180 480 U.S. 616 (1987).

181 *See e.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981) (stating that the exclusion of women from the military draft does not violate equal protection).

182 *See Johnson*, 480 U.S. at 642 (holding that Title VII does not prohibit affirmative action plan for women).

standard for pleading. Also, class actions have become much more limited and difficult to pursue for claims of discrimination.

Substantively, the Court has also been narrowing antidiscrimination law by its interpretations of the systemic theories of discrimination—disparate treatment and disparate impact.¹⁸³ Individual disparate treatment discrimination is difficult to prove and, given the new procedural limits on litigating these cases, the antidiscrimination project gets ever smaller in scope and possibility. For equal protection law, the Court is edging ever closer to a final rejection of the antistatutory purpose and the acceptance of the anticlassification one. Should the Court take that final step by the changed vote of Justice Kennedy, all of antidiscrimination law will be vulnerable to constitutional attack, including the disparate impact theory of discrimination.

Limiting the scope of the antidiscrimination laws to an anticlassification purpose imposes an unstated, and unproven, assumption that the present existing social, economic, and employment situation eliminates the need for direct attempts to redress the historic discrimination that continues unabated today. The antidiscrimination laws have been turned upside down. The antidiscrimination project is gradually being ended.

¹⁸³ See, *Zimmer*, *supra* note 71, at 455.