RACIALIZED ASSUMPTIONS AND CONSTITUTIONAL HARM: CLAIMS OF INJURY BASED ON PUBLIC SCHOOL ASSIGNMENT

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In a disciplinary transfer claim, a student alleges a violation of procedural due process based on an involuntary assignment to an alternative school for disciplinary purposes. Courts hearing disciplinary transfer claims have struggled with whether to recognize or accord significant weight to the injury caused by assignment to a particular public school. In contrast, the Supreme Court recently accepted that injury without discussion in the context of an equal protection challenge to a school desegregation plan. This Article argues that the different approaches result not from differences in the doctrines underlying the two types of claims, but from differences in the racial composition of the presumptive plaintiff class. The assumption that white students have educational options not available to students of color causes courts to apply a different model of educational entitlement in each type of claim. The Article concludes that courts must apply the same model in all education claims in order to avoid perpetuating racial subordination.

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I. INTRODUCTION

In a disciplinary transfer claim, a student alleges a violation of procedural due process based on an involuntary transfer from his current school to an alternative school for disciplinary reasons. Courts have not yet reached a consensus about the standard for determining whether disciplinary transfer plaintiffs have suffered a cognizable injury. At one end of the spectrum, some courts have held that disciplinary transfer plaintiffs cannot allege constitutionally relevant harm—even if the receiving school is demonstrably inferior—because a student has no right to attend a particular school.[1] At the opposite end of the spectrum, other courts have assumed without discussion that involuntary removal from a regular school to an alternative program not only establishes a cognizable injury, but requires the same due process protections as complete exclusion from the educational process.[2]

Although courts hearing disciplinary transfer claims have struggled over whether to recognize the injury caused by assignment to a particular school,[3] the U.S. Supreme Court accepted that injury without discussion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[4] The plaintiffs in that case argued that their school assignments were made pursuant to desegregation plans that violated the Equal Protection Clause of the Fourteenth Amendment.[5] Because disciplinary transfer plaintiffs base their claims on the Due Process Clause, rather than the Equal Protection Clause, significant differences between the two types of claims are to be expected. However, doctrinal differences do not adequately explain the existing tensions between the two sets of cases.[6] A court's readiness to acknowledge that assignment to a particular public school can result in educational disadvantage should vary across factual contexts, but not across doctrines.

Disciplinary transfer cases and desegregation challenges differ not only in terms of the doctrine underlying the claim, but also in terms of the racial composition of the potential class of plaintiffs. White and Asian American students bring most challenges to desegregation plans, while exclusionary discipline (i.e., suspension and expulsion) disproportionately affects African American and Latino students.[7] The assumption that white students have educational options not available to students of color causes courts to apply a different model of educational entitlement in each type of claim, one based on allocation and the other based on competition.[8] The racialized deployment of these

1. *E.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997).

2. *E.g.*, Fuller v. Decatur Pub. Sch. Bd., 78 F. Supp. 2d 812, 819 (C.D. Ill. 2000).

3. See *infra* Part II.A for a discussion of the different positions courts have taken in determining whether assignment to an alternative school for disciplinary purposes causes a cognizable injury.

4. 551 U.S. 701 (2007). See *infra* Part II.B for a discussion of *Parents Involved*.

5. *Parents Involved*, 551 U.S. at 711.

6. See *infra* Part III for a discussion of the differences in the legal doctrines underlying the two types of claims.

7. *See* Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 319–20 (2002) (noting, however, that findings regarding Latino students are "not universal across locations or studies").

8. See *infra* Part IV.A for a discussion of the allocation and competition models of educational entitlement.

two educational models helps to explain why some courts have struggled with the question of injury in disciplinary transfer cases, while the *Parents Involved* Court found the disadvantage caused by assignment to a particular school too obvious to warrant discussion.

This Article proceeds as follows: Part II describes the injury analysis used by lower courts in disciplinary transfer cases and by the Supreme Court in *Parents Involved*, and analyzes the tensions between the two. Part III argues that differences in the underlying legal doctrines do not provide a satisfactory explanation for those tensions. Part IV posits an alternative explanation, based on the impact of cognitive bias, on courts' deployment of two models for the distribution of educational resources. The racialized deployment of the two models in disciplinary transfer cases and desegregation challenges implicates the courts in perpetuating racial subordination. The Article thus concludes that the competitive model invoked in *Parents Involved* should be applied in all education claims.

II. DIFFERENT APPROACHES TO PUBLIC SCHOOL ASSIGNMENT AS AN ARTICLE III INJURY

In both disciplinary transfer cases and school desegregation challenges, a student asserts that assignment to a particular public school has caused an injury. As this Part describes, lower courts hearing disciplinary transfer cases have been reluctant to acknowledge the harm created by assignment to a particular school. In contrast, the Supreme Court showed no such reluctance when deciding the most recent challenge to a school desegregation plan.[9]

A. School Discipline

In a typical disciplinary transfer case, the student has been involuntary transferred from a mainstream school to an alternative program without the procedural safeguards that accompany formal expulsions.[10] Many alternative schools used for this purpose have limited classroom instruction, strict disciplinary procedures, and no extracurricular activities.[11] Often, the only students attending an alternative school are those placed involuntarily for disciplinary or remedial reasons.[12] Students attending disciplinary programs face a dramatically higher risk of violence than those attending mainstream schools.[13] Moreover, because of curricular differences, students returning

9. See *intra* Part II.B for a discussion of the Supreme Court's treatment of a challenge to a school desegregation plan in *Parents Involved*.

10. *E.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997).

11. Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 202 (2009); Audrey Knight, Note, *Redefining Punishment for Students:* Nevares v. San Marcos I.S.D., 20 REV. LITIG. 777, 791 (2001); Patty Blackburn Tillman, Note, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 223 (1996).

12. *See* Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 82–87 (2006) (discussing "punitive" nature of "disciplinary alternative education programs").

13. Barbour, *supra* note 11, at 202.

to a mainstream school from an alternative program may be unable to advance to the next grade or to graduate with their peers.[14]

Disciplinary transfer plaintiffs usually allege that the punishment has violated their right to procedural due process, which "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[15] To establish a procedural due process violation, a plaintiff must first meet the threshold requirement of showing a greater than de minimis interference with a protected interest in liberty or property.[16] If the plaintiff establishes such an interference, the court will then apply a balancing test to determine what process is due.[17]

In *Goss v. Lopez*,[18] the Supreme Court held that exclusionary school discipline implicates property and liberty interests protected by the Due Process Clause.[19] The Court stated that "a student's legitimate entitlement to a public education" must be recognized as "a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[20] The Court also determined that school discipline could deprive students of liberty because of potential harm to "the students' standing with their fellow pupils and their teachers as well as . . . later opportunities for higher education and employment."[21]

In *Goss*, the defendant argued that the discipline imposed by the school—a ten-day suspension—had not been severe enough to implicate procedural due process requirements. The Court disagreed, noting that

> in determining whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. . . . [A]s long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.[22]

14. *Id.* at 202–03; *see also* Reyes, *supra* note 12, at 75–76 (describing an alternative education program that "was not required to provide any elective courses, even if such courses were specialized science or foreign language courses required for graduation").

15. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

16. Wilkinson v. Austin, 545 U.S. 209, 221 (2005) ("The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake."); Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.").

17. The balancing test requires the court to consider the plaintiff's interest with respect to the challenged action; the risk of error under existing procedures and the probability of reducing that risk by using different or additional procedures; and the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

18. 419 U.S. 565 (1975).

19. *Goss*, 419 U.S. at 574.

20. *Id.*

21. *Id.* at 574–75. In a subsequent case, the Court qualified these assertions about students' liberty interests and limited the extent to which stigmatic harm could support a procedural due process claim. *See* Paul v. Davis, 424 U.S. 693, 709–10 (1976) (holding that mere defamation of individual is insufficient to invoke guarantees of procedural due process).

22. *Goss*, 419 U.S. at 575–76 (internal quotation marks omitted).

Because the Court concluded that suspending a student for ten days created more than a de minimis harm, it held that procedural due process requirements applied to the punishment.[23]

Courts applying the principles established in *Goss* to disciplinary transfer cases have not reached a consensus about the injury plaintiffs must show in order to establish a greater than de minimis interference with their constitutionally protected property interest in receiving a public education. As discussed more thoroughly below, courts have applied standards that vary from categorically denying the existence of a constitutionally relevant injury, to categorically requiring the full due process protections applicable to a formal expulsion without requiring proof of the educational inferiority of the receiving school.

The Fifth Circuit has taken the narrowest view of educational entitlement in disciplinary transfer cases, holding that a mid-year reassignment from a mainstream school to a disciplinary alternative program does not implicate a protected property or liberty interest.[24] In *Nevares v. San Marcos Consolidated Independent School District*,[25] the plaintiff was removed from his regular high school for disciplinary reasons and reassigned to an alternative program with a curriculum "designed for students with educational and disciplinary problems."[26] The alternative school offered "only limited lectures."[27] Instead, students sat and "work[ed] independently from their textbooks."[28] If a student had trouble with an assignment, he had to raise his hand and "wait for the teacher to work her way through the other students," which sometimes took "as long as twenty minutes or more."[29] The alternative school did not offer any electives or honors classes, did not have a library, and did not allow students to take textbooks or any other materials home with them.[30] Students who returned to the regular school after placement in the alternative program had fallen behind their peers in credit hours, placing them at risk of not advancing to the next grade level or graduating on time.[31] After cataloguing these differences between the alternative program and the regular school, the district court in *Nevares* concluded that "a student's protected property interest in a public education is implicated when that

23. *Id.* at 576.

24. Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 27 (5th Cir. 1997).

25. 954 F. Supp. 1162 (W.D. Tex. 1996), *rev'd*, 111 F.3d 25 (5th Cir. 1997).

26. *Nevares*, 954 F. Supp. at 1166. The description of the alternative program is based on the findings of the district court. *Id.* at 1164. The appellate court did not describe the alternative program, except to note that it had "stricter discipline" and was designed for students that the school district had identified as disciplinary problems. *Nevares*, 111 F.3d at 26. Curiously, in its decision dismissing the case for failure to assert an injury, the Fifth Circuit devoted no discussion to the quality of the education offered by the alternative school, yet spent two paragraphs describing the plaintiff's alleged offense. *Id.*; *see also* Knight, *supra* note 11, at 788 (noting that Fifth Circuit "assumed a strangely disciplinarian tone in reaching its decision").

27. *Nevares*, 954 F. Supp. at 1166.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

student is removed from regular classes and placed in an alternative education program."[32]

The Fifth Circuit disagreed.[33] The court acknowledged that the plaintiff had a protected interest in a public education, but determined that the plaintiff was "not being denied access to public education, not even temporarily."[34] Instead, the plaintiff "was only to be transferred from one school program to another program with stricter discipline."[35] The court noted that it had already "rejected arguments that there is any protected interest in the separate components of the educational process, such as participation in interscholastic athletics" and indicated that it viewed "attending a particular school" as simply another one of those separate components.[36] The court thus held that the plaintiff had experienced "no constitutional deprivation[,] actual or threatened," through the reassignment to the alternative school. Accordingly, the court ordered the case dismissed "for lack of standing."[37] The court noted the importance of ensuring fair procedures in school discipline decisions, but stated, "that is for [the state] and the local schools to do."[38]

While some lower courts have interpreted *Nevares* rigidly,[39] others have determined that the decision allows courts some discretion to hear disciplinary transfer claims. For example, in *Riggan v. Midland Independent School District*,[40] the district court determined that a disciplinary transfer could implicate protected property rights "[w]hen assignment to an alternate education program effectively acts as an exclusion from the educational process."[41] Because "[t]he primary thrust of the educational process is classroom instruction," the court inferred that "minimum due process procedures may be required if an exclusion from the classroom would effectively deprive the student of instruction or the opportunity to learn."[42] The court also determined that in a situation like the one before it, where a disciplinary transfer plaintiff "was assessed a more extensive punishment" going beyond the transfer itself, "the entire punishment assessed against [the plaintiff] must be considered as a whole, not as separate elements."[43] Based on these considerations, the court held that the

32. *Id.*

33. Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26 (5th Cir. 1997).

34. *Id.*

35. *Id.* The court implicitly approved strict disciplinary measures by noting that "[t]oday it is generally recognized that students are being deprived of their education by lack of discipline in the schools." *Id.* at 26–27.

36. *Id.* at 27.

37. *Id.* at 26.

I Id. at 27.

39. *See, e.g.*, Stafford Mun. Sch. Dist. v. L.P., 64 S.W.3d 559, 563 (Tex. App. 2001) ("Transferring a student from regular classes to AEP ['alternative education program'] does not impact a protected property interest implicating due process concerns." (citing *Nevares*, 111 F.3d at 26–27)).

40. 86 F. Supp. 2d 647 (W.D. Tex. 2000).

41. *Riggan*, 86 F. Supp. 2d at 655.

42. *Id.* (internal quotation marks omitted).

43. *Id.* at 655–56. The entire punishment consisted of "three days suspension, five days assignment to AEP, and two letters of apology." *Id.* at 656.

plaintiff had "a protected property interest in education that was impacted by the punishment imposed."[44]

The courts deciding *Riggan* and *Nevares* both found support for their respective conclusions in a Tenth Circuit opinion, *Zamora v. Pomeroy*.[45] The *Nevares* opinion cited *Zamora* for the proposition that "[a] transfer to a different school for disciplinary reasons has . . . been held not to support the court's jurisdiction on constitutional grounds."[46] Some language in *Zamora* does suggest that disciplinary transfer plaintiffs must show the transfer was "substantially prejudicial" or amounted to "an expulsion from the educational system" in order to establish standing.[47] However, this language is misleading in light of other conclusions reached by the court.

In *Zamora*, the Tenth Circuit first concluded that the student had not been expelled but had instead been transferred "to another school which the plaintiff contends was not as good an educational institution."[48] The court acknowledged the disciplinary character of the transfer, stating that "[n]o doubt it was part of the sanction to transfer him to this school."[49] The court also implicitly concluded that the plaintiff had established an injury that implicated due process protections, stating that "[t]he factors here which entitle the plaintiff to careful hearing and scrutiny are the fact that he was suspended for a short time, and transferred to another school, one which seemingly had less standing as an educational institution."[50] The court, however, determined that "there was no lack of due process in the case at bar," because "[n]umerous hearings were held" in which the plaintiff "received a number of opportunities to be heard."[51]

The *Zamora* court's reasoning suggests that the plaintiff had succeeded in showing an interference with a constitutionally protected interest, but had failed to establish that he was actually denied the process that was due. In summarizing its conclusions, however, the court introduced considerable confusion:

> In summary, although the facts *suggest* a possible violation of [the plaintiff's] due process rights, examination of the evidence in the light of the authorities negatives this. Inasmuch as the sanctions imposed were far less

44. *Id.* at 656. A 2003 district court case would have further softened the impact of *Nevares* in disciplinary transfer cases, but the Fifth Circuit vacated the opinion after the plaintiff's graduation from high school rendered the claim moot. Murphy v. Ft. Worth Indep. Sch. Dist., 258 F. Supp. 2d 569 (N.D. Tex. 2003), *vacated as moot*, 334 F.3d 470 (5th Cir. 2003). After distinguishing *Nevares* based on its questionable assertion that "no issue of procedural due process was raised" in that case, the district court in *Murphy* determined that the plaintiff's disciplinary transfer "was no different in principle from an expulsion" for purposes of procedural due process analysis. *Id.* at 573 & n.8. The court also stated that "[b]y no means was the denial of [the plaintiff's] right to attend his home school a *de minimis* or trivial deprivation." *Id.* at 574. The court determined that the transfer had violated the plaintiff's procedural due process rights, and granted injunctive relief requiring the school district to allow the plaintiff to return to his regular school. *Id.* at 576.

45. 639 F.2d 662 (10th Cir. 1981).

46. Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 27 (5th Cir. 1997) (citing *Zamora*, 639 F.2d at 669–70).

47. *Zamora*, 639 F.2d at 670.

48. *Id.* at 667.

49. *Id.*

50. *Id.* at 668–69.

51. *Id.* at 668.

> severe than expulsion, and in view of the fact that his offense was serious, it cannot be said that they evidence an injury within the framework of the constitution, one which is capable of supporting jurisdiction of this court. The [plaintiff's] allegations that the [alternative school] was so inferior to amount to an expulsion from the educational system are not borne out by the record, and in the absence of a clear showing that the [alternative school] assignment was substantially prejudicial, the [plaintiffs] lack the requisite standing to attack the [defendants'] actions on that ground.[52]

Although the court used the language of injury, jurisdiction, and standing in this section of the opinion, its reasoning does not support the conclusion that the plaintiff failed to meet the threshold injury requirement for a procedural due process claim. The court recognized "factors . . . which entitle the plaintiff to careful hearing and scrutiny,"[53] evaluated the procedures actually provided,[54] and considered the seriousness of the student's alleged offense.[55] The nature of that analysis demonstrates that the plaintiff passed the threshold test by establishing a greater than de minimis interference with his constitutionally protected property interest in receiving a public education, but failed the balancing test because the school officials had provided adequate procedural safeguards.

Seamons v. Snow,[56] a subsequent Tenth Circuit opinion, also contains language suggesting that assignment to a particular school cannot support a procedural due process claim.[57] *Seamons*, however, did not involve a disciplinary transfer or any other type of involuntary assignment to an alternative school. There, the plaintiff alleged that the defendants had failed to respond appropriately when he reported being assaulted on school grounds.[58] When the student faced threats and harassment as a result of reporting the assault, "the principal suggested to [the plaintiff] and his parents that [the plaintiff] should leave the high school. [The plaintiff] did so and enrolled in a distant county,"[59] presumably at another mainstream high school.

The court rejected the plaintiff's procedural due process claim on two independent grounds. First, the court determined that "there must be an element of deliberateness in directing the misconduct toward the plaintiff before the Due Process Clause is implicated."[60] Because "the decision to transfer to another school was made by [the plaintiff] and his parents,"[61] rather than the school officials, the complaint failed to make the necessary showing of "any deliberate action" by the defendants.[62] Second, the

52. *Id.* at 670 (citation omitted).

53. *Id.* at 668.

54. *See id.* (noting plaintiff was given at least five occasions to explain his side of story).

55. *Id.* at 670.

56. 84 F.3d 1226 (10th Cir. 1996).

57. *See also* Doe v. Bagan, 41 F.3d 571, 576 (10th Cir. 1994) (stating that when student's request to transfer to another school was denied, plaintiff "was not denied his right to public education" because that right does not encompass "a right to choose one's particular school").

58. *Seamons*, 84 F.3d at 1230.

59. *Id.*

60. *Id.* at 1234 (citation omitted) (internal quotation marks omitted).

61. *Id.*

62. *Id.*

court determined that the plaintiff did not have a property interest in "the innumerable separate components of the educational process," including "the right . . . to attend a particular school."[63] The court thus concluded that the plaintiff "failed to allege a protectible property or liberty interest under the Due Process Clause."[64] However, because the court had already concluded that the lack of deliberate action by school officials moved the plaintiff's claim outside the ambit of the Due Process Clause, and because the plaintiff did not allege that he had been involuntarily transferred to an alternative school for disciplinary purposes, *Seamons* does not conclusively determine whether a disciplinary transfer plaintiff in the Tenth Circuit can establish a greater than de minimis interference with his constitutionally protected property interest in receiving a public education.

Similarly, although an Eleventh Circuit opinion, *C.B. v. Driscoll*,[65] contains language suggesting that involuntary transfers to alternative schools do not implicate constitutionally protected property interests, the court's statement to this effect is pure dicta.[66] In *C.B.*, the plaintiff brought numerous claims based on a series of disciplinary actions taken against him, but did not raise a procedural due process claim based on his disciplinary transfer.[67] Because no such claim was presented, the court explicitly acknowledged that it "need not address the issue" before expressing "doubt" that the plaintiff had "a property interest . . . in attending [the mainstream school] instead of the alternative school to which he was assigned."[68] The court then cited *Zamora* for the proposition that a plaintiff had no standing to challenge a disciplinary transfer absent a showing that the alternative school was "so inferior [as] to amount to an expulsion from the educational system."[69]

In *Marner v. Eufaula City School Board*,[70] a district court decision interpreting *C.B.*, the court stated that "the standard alluded to by the Eleventh Circuit" was "that the alternative school must be so inferior as to amount to an expulsion from the educational system."[71] The district court determined that the plaintiff had not met that standard.[72] Although "no classical classroom instruction occurred at the alternative school," the plaintiff had not offered evidence "that any student assigned to the alternative school suffered a detriment to his educational opportunities."[73] The court, in fact, found that "the evidence was to the contrary, as specific examples were given of students who actually improved their grades while in the alternative school."[74] Thus, while the court acknowledged that "in some instances" an alternative school

63. *Id.* at 1235.

64. *Id.*

65. 82 F.3d 383 (11th Cir. 1996).

66. *See C.B.*, 82 F.3d at 389 n.5.

67. *Id*. at 388.

68. *Id.* at 389 n.5

69. *Id.* (quoting Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) (internal quotation mark omitted).

70. 204 F. Supp. 2d 1318 (M.D. Ala. 2002).

71. *Marner*, 204 F. Supp. 2d at 1324 (citing *C.B.*, 82 F.3d at 389 n.5).

72. *Id.*

73. *Id.*

74. *Id.*

assignment would require "full procedural due process" protections, the *Marner* plaintiff's transfer could not be treated as the equivalent of a suspension.[75]

Unlike some of the preceding opinions suggesting the possibility of a categorical restriction on disciplinary transfer claims, the Sixth Circuit in *Buchanan v. City of Bolivar*[76] established an injury standard requiring a fact-specific inquiry into the harm created by the reassignment.[77] In *Buchanan*, school officials gave the plaintiff a choice between "serving a ten day at-home suspension or attending an alternative school for ten days."[78] The plaintiff chose the alternative school, but later claimed that the actions of the school officials had violated his procedural due process rights.[79] The court first determined that the record contained insufficient information to determine whether the school had provided adequate procedures to support imposing a suspension, and remanded the plaintiff's procedural due process claim to allow further factual development.[80] The court also noted that more facts were needed in order to determine "whether [the plaintiff's] attendance at [an] alternative school even implicates the Due Process Clause."[81] According to the court, the plaintiff

> may not have procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school[,] absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school.[82]

Notwithstanding the tentative language used by the *Buchanan* court, subsequent lower court decisions in the Sixth Circuit confirm that a plaintiff must at least meet the "significantly different . . . or inferior"[83] standard in order to establish that an involuntary school assignment has caused more than a de minimis interference with his constitutionally protected interest in receiving a public education.[84]

While the Eighth Circuit has not addressed the issue, a district court within the circuit recently concluded that "[i]t appears to be the consensus of the circuits . . . that placement in an alternative school does not implicate procedural due process rights

75. *Id.*

76. 99 F.3d 1352 (6th Cir. 1996).

77. *Buchanan*, 99 F.3d at 1359 (remanding procedural due process issue to district court to develop factual record).

78. *Id.* at 1355.

79. *Id.*

80. *Id.* at 1359.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.*, Thorns v. Madison Dist. Pub. Sch., No. 06-10674, 2007 WL 1647889, at *2, *3 (E.D. Mich. June 5, 2007) (determining that 180-day reassignment to "alternative school with strict policies and no extracurricular activities" did not implicate protected property interest because plaintiffs "were not deprived of an education, but only of the ability to participate in extracurricular activities, such as football"); Fortune v. City of Detroit Pub. Sch., No. 248306, 2004 WL 2291333, at *3 (Mich. Ct. App. Oct. 12, 2004) ("[S]tudents *do not* have 'procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school absent some showing that the education received at the alternative school is significantly different from or inferior to that received at [their] regular public school[s].'" (emphasis added) (citing *Buchanan*, 99 F.3d at 1359)).

unless there is a showing that the education provided by the alternative school is substantially inferior."[85] The court determined that the plaintiff had not met the "substantially inferior" standard.[86] A few weeks later, another district court within the circuit articulated a different standard.[87] The court in the latter case determined that "the proper analysis is to look at the quality and quantity of classroom instruction given to [the plaintiff] while he was removed from regular high school classes."[88] After calculating that the plaintiff's disciplinary transfer had resulted in a seventy-three percent decrease in hours of classroom instruction per week, the court concluded that "[s]uch a reduction in weekly classroom instruction is hardly *de minimis* and is, at the very least, a 'constructive' suspension."[89]

In contrast to some of the standards described above, courts in the Third Circuit have long taken a broad view of the educational rights of disciplinary transfer plaintiffs. In 1977, a district court within the circuit explicitly held that a disciplinary transfer will support a procedural due process claim even if the student is transferred to another mainstream school rather than an alternative educational program.[90] In *Everett v. Marcase*,[91] the court acknowledged that "[i]n theory a transfer from one school to another within the same school district does not reduce the educational opportunities of the transferred pupil" because "[a]ll schools are intended to be approximately equal as to educational quality."[92] However, the court rejected the school district's argument that such a transfer did not deprive students of a protected property right:

> The evidence presented at the hearings, as well as common knowledge of urban school systems, refutes such argument. A suspension, under *Goss*, "is a serious event in the life of the suspended child." No less so is a disciplinary transfer to another school "a serious event in the life of the [transferred] child." . . . Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities. Realistically, I think many if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer, especially if the transferee school was farther from home or had poorer physical or educational facilities.[93]

The following year, in *Jordan v. School District of Erie*,[94] the Third Circuit reached a similar conclusion. The court modified a consent decree based on its determination that the due process requirements set forth in *Goss v. Lopez* applied to students removed from a mainstream school to an alternative school for disciplinary reasons.[95]

85. Chyma v. Tama Cnty. Sch. Bd., No. C07-0056, 2008 WL 4552942, at *3 (N.D. Iowa Oct. 8, 2008).

86. *Id.*

87. Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, at *5 (D.S.D. Nov. 24, 2008).

88. *Id.*

89. *Id.* at *6.

90. Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Pa. 1977).

91. 426 F. Supp. 397, 400 (E.D. Pa. 1977).

92. *Everett*, 426 F. Supp. at 400.

93. *Id.* (alteration in original).

94. 583 F.2d 91 (3d Cir. 1978).

95. *Jordan*, 583 F.2d at 97; *see also* D.C. v. Sch. Dist. of Phila., 879 A.2d 408, 420 (Pa. Commw. Ct. 2005) (holding that assigning students to alternative school instead of regular school upon their return from

In other circuits, the absence of explicit holdings on the issue should not be interpreted as agreement that disciplinary transfer plaintiffs must meet a high injury threshold in order to establish a greater than de minimis interference with the protected interest in receiving a public education. To the contrary, many courts have set a low threshold for disciplinary transfer claims precisely by not addressing the question explicitly. In decisions issued by the Ninth Circuit and district courts in the Second and Seventh Circuits, courts have treated an involuntary removal from a particular school as an expulsion even though an alternative educational program was provided.[96] Requiring the full due process protections associated with expulsion in disciplinary transfer cases amounts to an acknowledgement that a disciplinary transfer not only implicates a student's constitutionally protected interest in receiving a public education, but involves significant harm to that interest.

Finally, statutory protections at the state level can prevent disciplinary transfer challenges from reaching the courts as constitutional claims. For example, a New York statute requires that notice and a hearing be provided prior to a disciplinary transfer.[97] The availability of a statutory basis for disciplinary transfer claims may contribute to the false impression that courts have reached a consensus establishing a high injury threshold in disciplinary transfer claims.[98] As the preceding discussion indicates, it cannot be said that any such consensus exists.

B. Desegregation

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[99] the Supreme Court addressed a claim of injury based on public school assignment in the context of voluntary desegregation efforts.[100] The case arose from challenges to two desegregation plans, one in Louisville, Kentucky,[101] and the other in Seattle, Washington.[102] In both cases, the white plaintiffs alleged that they had been denied assignment to the public school of their choice because of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment.[103]

juvenile placement implicates protected due process interests); Jessica Leigh Wray, D.C. v. School District of Philadelphia*: Protecting the Due Process Rights of Students Returning to First Class School Districts After Being Adjudicated Delinquent*, 16 WIDENER L.J. 717 (2007) (analyzing the *D.C.* case).

96. Coplin v. Conejo Valley Unified Sch. Dist., 116 F.3d 483, 1997 WL 330618, at *2 (9th Cir. June 11, 1997) (unpublished table decision); E.K. v. Stamford Bd. of Educ., 557 F. Supp. 2d 272, 274–75 (D. Conn. 2008); Fuller v. Decatur Pub. Sch. Bd., 78 F. Supp. 2d 812, 819 (C.D. Ill. 2000); *see also* J.S. v. Isle of Wight Cnty. Sch. Bd., 362 F. Supp. 2d 675, 677–78, 685 (E.D. Va. 2005) (referring to disciplinary transfer as long-term suspension and evaluating relative quality of alternative school as factor in *Mathews* balancing).

97. N.Y. EDUC. LAW § 3214(5) (McKinney 2011).

98. *See, e.g.*, Chyma v. Tama Cnty. Sch. Bd., No. C07-0056, 2008 WL 4552942, at *3 (N.D. Iowa Oct. 8, 2008) ("It appears to be the consensus of the circuits . . . that placement in an alternative school does not implicate procedural due process rights unless there is a showing that the education provided by the alternative school is substantially inferior.").

99. 551 U.S. 701 (2007).

100. *Parents Involved*, 551 U.S. at 709–11.

101. McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004).

102. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

103. *McFarland*, 330 F. Supp. 2d. at 836; *Parents Involved*, 137 F. Supp. 2d at 1226–27.

To establish an injury sufficient to support federal jurisdiction over an equal protection claim, a plaintiff must do more than show that the government has engaged in racial discrimination.[104] The Supreme Court has held that, although all members of a racial group potentially suffer stigmatic harm when the government discriminates on the basis of race, only "those persons who are personally denied equal treatment by the challenged discriminatory conduct" can assert a judicially cognizable injury.[105] If the plaintiff has personally experienced unequal treatment because of his or her race, courts will recognize the injury caused by psychological harm as well as other forms of disadvantage.

Once the plaintiff has established an injury supporting federal jurisdiction over a claim involving the government's use of a racial classification, the court will analyze the claim under strict scrutiny, which requires the government to show that its action was narrowly tailored to further a compelling interest.[106] The narrow-tailoring prong of the test includes a requirement that the race-conscious action does not "unduly harm members of any racial group."[107] Accordingly, in a case challenging a school desegregation plan, a court must assess the harm caused by assignment to a particular school for two purposes: (1) to determine whether the plaintiff has alleged an injury sufficient to satisfy the standing requirements, and (2) to evaluate whether the school assignments create burdens too great to withstand strict scrutiny analysis.

In *Parents Involved*, the Court began its very brief discussion of standing by rejecting the defendants' argument that the Seattle plaintiffs could not assert an imminent injury.[108] The Court noted the plaintiffs' allegations that their children "may be 'denied admission to the high schools of their choice when they apply for those schools in the future.'"[109] The Court accepted the resulting assignment to an undesired school as a valid injury, declaring "[t]he fact that it is possible that children . . . will not be denied admission to a school based on their race . . . does not eliminate the injury claimed."[110] This statement left open the possibility that the plaintiffs' injury could consist of either the stigmatic injury caused by the racial basis for the assignment decision, the educational disadvantage caused by the lesser desirability of the assigned school, or both.

The Court's next assertion about the plaintiffs' injury clarified the necessary role of educational disadvantage in establishing jurisdiction over the claim. The Court stated that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, . . . an injury that [the Seattle

104. Allen v. Wright, 468 U.S. 737, 755 (1984); *see also* United States v. Hays, 515 U.S. 737, 744–45 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other.").

105. *Id.* (internal quotation marks omitted); *see also* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 432 (2007) (noting that plaintiff who is member of group allegedly stigmatized by government action does not have standing "unless he personally was denied equal treatment").

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

107. Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

108. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–20 (2007).

109. *Parents Involved*, 551 U.S. at 718.

110. *Id.* at 718–19.

plaintiffs] can validly claim on behalf of their children."[111] To establish the injury described by the Court, a plaintiff must not only assert a racial basis for the challenged decision, but must also establish that the decision can result in some form of prejudice independent of the racial basis for the decision.

The Court drew the language of competition and prejudice from cases involving public contracting,[112] a context in which the plaintiff can experience prejudice because of the possibility that access to the government benefit will be denied altogether. In the context of primary and secondary public schools, however, the possibility of prejudice in the form of complete exclusion is not present, because every student will receive a school assignment. Moreover, unlike public contracting, elementary and secondary public school assignments do not involve merit-based competition unless the system includes magnet schools—a situation not present in the Seattle or Louisville systems that were before the Court.[113]

Despite these differences between the contexts of public contracting and primary and secondary education, the Court determined that the public school assignment systems under review involved competition and could result in prejudice.[114] Because a public school assignment system cannot result in prejudice to any student unless different school assignments have different value, acknowledging the possibility of prejudice requires acknowledging school inequality. If all possible outcomes in a school assignment regime would be equally advantageous or disadvantageous to a student—that is, if all of the schools in the system offered equal educational opportunities—it would not be possible for any school assignment decision to result in prejudice, and it would not make sense to describe the system as competitive. Thus, by asserting that the plaintiffs could claim the injury it described, the Court assumed, without explicit discussion, that assignment to a particular public school could result in educational disadvantage, and thereby accepted that the plaintiffs had established a cognizable injury based on this disadvantage.[115]

Other portions of the *Parents Involved* opinion support this interpretation. In a section of the opinion that garnered only plurality support, Justice Roberts addressed the inherent costs of race-conscious government decisionmaking.[116] Although that discussion focused on the harm created by racial classifications themselves, Justice Roberts did not assert that the plaintiffs could establish a cognizable injury solely based on that harm. To the contrary, as described below, this portion of the opinion rests on the plurality's assumption that school inequality results in educational disadvantage to students assigned to particular public schools, and its related assumption that the *Parents Involved* plaintiffs could validly claim an injury based on that disadvantage.

111. *Id.* at 719.

112. *See id*. (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995); Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

113. *Id*. at 834–35 (Breyer, J., dissenting).

114. *Id.* at 718–19 (majority opinion).

115. *See* e. christi cunningham, *Exit Strategy for the Race Paradigm*, 50 HOW. L.J. 755, 799 (2007) (noting that none of the *Parents Involved* opinions explicitly acknowledge "that the white schools are the better schools and that the case is about a disparity in the allocation of educational resources and opportunities").

116. *Parents Involved*, 551 U.S. at 745–48 (plurality opinion).

Justice Roberts began by discussing the harms caused by the use of race in other contexts, noting that it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[117] However, Justice Roberts did not assert that the current case involved the same harm to dignitary interests; because the school assignment system under review was not merit-based, such an assertion would have required additional support. Justice Roberts then turned to the context of governmental use of racial classifications in public education, stating that "government classification and separation on grounds of race themselves denote[] inferiority" and "[i]t was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954."[118] However, Justice Roberts did not argue that the school assignment decisions in the current case involved the same denotation of racial inferiority; because the current case did not involve segregation, such an assertion would have required additional support.

Turning to the facts of the case before the Court, Justice Roberts did not attempt to draw any parallels between the psychological harms caused by segregation and the injury experienced by the *Parents Involved* plaintiffs. Instead, Justice Roberts focused on the impact of the race-conscious school assignments on the plaintiffs' access to public education. He stated that the "racial classifications at issue here . . . accord differential treatment on the basis of race"[119] and went on to clarify that no state may "use race as a factor in affording educational opportunities among its citizens."[120] In determining that the racial classifications had resulted in unequal access to educational opportunity, Justice Roberts necessarily assumed that the schools in the system were not equal. If all of the schools afforded the same educational opportunities, then assigning a student to one integrated school instead of another could not have had any impact on the distribution of educational opportunity.[121]

Justice Thomas's concurrence in *Parents Involved* demonstrates the same underlying assumptions about school inequality and the resulting injury to educational interests. Justice Thomas asserted that "[a]s these programs demonstrate, every time the government uses racial criteria to 'bring the races together,' . . . someone gets excluded, and the person excluded suffers an injury solely because of his or her race."[122] Because a system of public school assignment results in every student being placed somewhere, a desegregation plan cannot cause any student to be excluded from the system as a whole. At most, a student can be excluded from a particular school and assigned to another school instead; exclusion through assignment cannot be described as an injury unless the schools are unequal. Accordingly, by characterizing exclusion

117. *Id.* at 746 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)) (internal quotation mark omitted).

118. *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954)).

119. *Id.* at 747.

120. *Id.* (quoting Transcript of Oral Argument at 7, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8)) (internal quotation marks omitted).

121. *Cf.* cunningham, *supra* note 115, at 799–800 ("Justice Roberts' description of the school system and student preferences in Seattle . . . suggests that the white schools were the better schools.").

122. *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (quoting *id.* at 829 (Breyer, J., dissenting)).

from a particular school as an injury, Justice Thomas accepted that school inequality can cause a student to be injured by assignment to a particular school.

While Justice Thomas, the plurality, and the majority assumed school inequality without explicit discussion, Justice Breyer's dissent addressed school quality directly.[123] Justice Breyer argued that the challenged desegregation plans "d[id] not seek to award a scarce commodity on the basis of merit, for they [were] not magnet schools; rather, by design and in practice, they offer[ed] substantially equivalent academic programs and electives."[124] Because the schools were substantially equal "in aspiration and in fact,"[125] Justice Breyer concluded that "the school plans under review [did] not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional."[126] In its lengthy response to the dissent,[127] the plurality did not address Justice Breyer's assertion that the desired schools and the assigned schools were substantially equal.

That the *Parents Involved* Court did not articulate its assumptions about school inequality is especially surprising in light of the explicit disagreement about school inequality in the lower court opinions in the case. For example, the Ninth Circuit's en banc opinion asserted that the Seattle plan's limitation on student choice imposed only a "minimal burden" shared equally by all of the students in the system, because every student would receive a school assignment and no student was entitled to a place at any particular school.[128] The dissent objected to this characterization, arguing that

> [i]t is common sense that some public schools are better than others. Parents often move into areas offering better school districts, and ubiquitous research guides compare the quality of public schools according to standardized test scores, program offerings, and the sort. It may be that . . . bureaucratic voices sing a lullaby of equal educational quality in the District's schools. But the facts show that parents and children have voted with their feet in choosing some schools rather than others. The verdict of that "market" makes a hash out of such assurances by the District.
>
> Thus, [the desegregation plan] in reality does limit access to a governmental benefit among certain students. The District insulates applicants belonging to certain racial groups from competition for admission to those schools perceived to be of higher quality.[129]

The Ninth Circuit panel opinion had made a similar point, stating that "Seattle's public high schools vary widely in quality . . . . [S]ome of the schools offer programs or opportunities not offered in other schools."[130]

Similarly, the Washington district court concluded that "[t]he school board has not yet achieved its ultimate goal of offering the best possible education in all of its high

123. *See id.* at 835–36 (Breyer, J., dissenting).

124. *Id.* at 835.

125. *Id.* at 848.

126. *Id.* at 836.

127. *Id.* at 735–45 (plurality opinion).

128. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1191 (9th Cir. 2005) (en banc).

129. *Id.* at 1211 (Bea, J., dissenting).

130. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236, 1239 (9th Cir. 2002).

schools. . . . [D]isproportionately, the schools located in the northern end of the city continue to be the most popular and prestigious, and competition for assignment to those schools is keen."[131] Although the court accepted that students assigned to particular schools "are deprived of curriculum advantages not necessarily available at other schools," it also found that "maintaining a diversified school system is a step towards ensuring equal quality throughout the district."[132] The district court concluded that acknowledging the plaintiffs' injury did not require a decision in the plaintiffs' favor, since the school board had determined that "depriving some students of access to their first choice" was necessary in order to "provide an equitable and diverse educational opportunity to the district as a whole."[133]

The district court evaluating the Louisville desegregation program took a different view of school equality. The court described the schools in the Louisville system as "equal and integrated," and determined that "[t]he same education is offered at each school."[134] As a result, the court concluded that assignment to a particular school "neither denies anyone a benefit nor imposes a wrongful burden."[135] Curiously, while the court stated that the similarities among the schools compelled the conclusion that "an assignment to one school over another does not cause constitutional harm to any student,"[136] the court did not question the plaintiffs' standing to raise their claim.

C. Tensions Among the Cases

In a disciplinary transfer case, a student has been removed from his regular school for disciplinary reasons and reassigned to another school, often a disciplinary alternative educational program with no extracurricular activities and limited classroom instruction.[137] Courts hearing disciplinary transfer cases have struggled to determine whether the student has suffered an injury of constitutional dimension.[138] In contrast, the *Parents Involved* Court accepted that a student assigned to one regular school instead of another for purposes of integration has suffered a cognizable injury.[139] Although the lower courts in *Parents Involved* disagreed about the extent of that injury,

131. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1225 (W.D. Wash. 2001).

132. *Id.* at 1231 n.7.

133. *Id.* at 1232.

134. McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004). The court explained that "all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools." *Id.* at 862.

135. *Id.* at 860.

136. *Id.* at 862.

137. See *supra* notes 10–14 and accompanying text for a discussion of disciplinary alternative education programs.

138. See *supra* Part II.A for a discussion of the varying approaches courts have taken to determine whether a disciplinary transfer plaintiff has shown a cognizable injury.

139. See *supra* notes 108–15 and accompanying text for a discussion of *Parents Involved*'s standing analysis.

none asserted that it involved such a de minimis degree of educational disadvantage as to require the court to dismiss the case for lack of standing.[140]

The varying determinations about the injury caused by assignment to a particular public school result largely from differences in the courts' willingness to acknowledge school inequality in each context. Courts hearing disciplinary transfer cases have struggled over whether to recognize the inequality of schools that are demonstrably unequal both in practice and by design, in a context in which the purpose of the school assignment is to punish the student. In contrast, the *Parents Involved* Court assumed school inequality without discussion in a context in which the schools were designed to be equal and the purpose of the school assignments was to provide the students with the benefits of a racially integrated education. Significantly different views of school equality correspond to equally significant differences in the scope of exclusion required to establish an injury. While the *Parents Involved* Court accepted exclusion from a particular school as a cognizable injury,[141] some courts hearing disciplinary transfer cases have required a student to show exclusion from the educational system as a whole.[142]

Concerns about federalism and local control can make courts reluctant to examine the relative quality of public schools or to interfere in school assignment decisions. Those concerns have carried significant weight with courts hearing disciplinary transfer cases.[143] In contrast, a plurality of justices in *Parents Involved* dismissed arguments about local control over public schools, explicitly refusing to show any deference to school officials.[144] Justice Breyer argued in favor of deference in his dissent, noting that the Court had repeatedly emphasized the importance of local control over desegregation because "judges are not well suited to act as school administrators."[145] The plurality rejected this argument, asserting that the nation's long history of racial discrimination counsels against any deference to school officials' use of racial

140. See *supra* notes 128–36 and accompanying text for a discussion of the district and circuit court decisions in *Parents Involved*.

141. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–20 (2007).

142. *See, e.g.*, Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318 (M.D. Ala. 2002). See *supra* notes 70–75 and accompanying text for a discussion of this case.

143. *E.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 27 (5th Cir. 1997) ("[T]he student and parents must be treated fairly and given the opportunity to explain why anticipated assignments may not be warranted. But that is for Texas and the local schools to do. We would not aid matters by relegating the dispute to federal litigation."); Foster v. Tupelo Pub. Sch. Dist., 569 F. Supp. 2d 667, 675 (N.D. Miss. 2008) ("[T]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members . . . ." (quoting Wood v. Strickland, 420 U.S. 308, 326 (1975) (internal quotation marks omitted)); Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735, 740 (S.D. Tex. 2001) ("[F]ederal courts are extremely, and quite properly, hesitant to become involved in the public schools' disciplinary decisions . . . ."); *see also* Youssef Chouhoud & Perry A. Zirkel, *The* Goss *Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 379–80 (2008) (describing "judicial trend [of] increasing deference to public school authorities" in school discipline context).

144. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 744 (2007) (plurality opinion).

145. *Id.* at 848–49 (Breyer, J., dissenting).

classifications.[146] In light of the well-established history of racial disproportionality in the application of school discipline,[147] the plurality's response raises questions about why courts hearing disciplinary transfer cases do not show the same wariness of deferring to school officials. Whatever the reasons, courts hearing disciplinary transfer cases have accorded greater weight to concerns about federalism and local control than the *Parents Involved* Court, likely contributing to differences in the courts' willingness to acknowledge school inequality in each context.

Since the Supreme Court has yet to hear a disciplinary transfer case, it is possible that it would acknowledge the injury caused by a disciplinary transfer just as readily as it accepted the injury alleged by the *Parents Involved* plaintiffs. However, even if one were to accept that outcome as likely, it is worth examining why the current state of the law reflects such divergent approaches to the injury caused by public school assignment. For example, binding precedent in the Fifth Circuit currently closes the courts to a student reassigned to a disciplinary program in the middle of the school year without notice or explanation,[148] while under *Parents Involved* those same courts are open to a student assigned to one regular school instead of another because of a race-conscious desegregation plan.[149]

It could be argued that courts more readily acknowledge the injury in desegregation cases because the plaintiff students in such cases are blameless, while the plaintiff students in disciplinary transfer cases have been accused of wrongdoing that may, in the court's view, justify providing a lesser degree of educational opportunity. Such an argument, however, fails to recognize that in the context of school discipline a primary purpose of due process safeguards is to determine whether any such wrongdoing actually occurred. Even if one were to accept that a student may forfeit his educational rights through misbehavior, it does not follow that a school may revoke the student's educational rights through a mere accusation of misbehavior, without allowing the student an opportunity to show that the accusation is false.

III. DOCTRINAL EXPLANATIONS FOR THE DIFFERENT APPROACHES

Whereas *Parents Involved* accepted that an assignment to a particular public school can cause injury in the desegregation context, lower courts have been extremely reluctant to acknowledge that same injury when hearing disciplinary transfer claims. This Part examines the possibility that differences in the legal doctrines underlying the two claims may explain the different approaches used by courts for evaluating the harm caused by public school assignments.

146. *Id.* at 744–45 (plurality opinion) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.")).

147. *See generally* Skiba et al., *supra* note 7.

148. *See* Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997) (holding that student transferred to school with stricter discipline suffers no cognizable injury under Due Process Clause).

149. *See Parents Involved*, 551 U.S. at 718–20 (holding that students subjected to race-conscious desegregation plan suffer cognizable injury under Equal Protection Clause).

A. Article III, Due Process, and Equal Protection

Every claim heard by the federal courts must satisfy the justiciability requirements imposed by Article III of the Constitution, which limits the federal judicial power to "Cases" and "Controversies."[150] As part of the case or controversy requirement, the plaintiff must establish that he has standing to bring the claim,[151] which requires a showing of "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[152] A plaintiff cannot establish a cognizable injury solely by asserting that the government has violated the law.[153] Rather, the injury must be a "concrete and particularized" harm affecting the plaintiff personally,[154] and not a generalized grievance shared by the public as a whole.[155]

To satisfy the federal standing requirements, a plaintiff's alleged injury must also be an invasion of a "legally protected interest."[156] As the Supreme Court has explained, "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted."[157] It is possible, therefore, that the different outcomes in the courts' standing analyses of desegregation-based assignments and disciplinary transfer-based assignments may be rooted in the legal doctrine underlying the respective claims.[158] In disciplinary transfer cases, the doctrine underlying the claim is procedural due process, while in desegregation challenges, the doctrine underlying the claim is equal protection. The two doctrines create different legal significance for some forms of injury.

In an equal protection case, the stigmatic harm caused by racial discrimination can sometimes suffice as an allegation of injury.[159] However, governmental use of race that stigmatizes all members of a racial group does not alone establish a cognizable injury,

150. U.S. CONST. art. III, § 2, cl.1; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–61 (1992) (explaining Article III justiciability requirements).

151. *Lujan*, 504 U.S. at 560.

152. Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

153. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974) ("[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public . . . .").

154. *Lujan*, 504 U.S. at 560.

155. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 600–01 (2007) (quoting *Lujan*, 504 U.S. at 573–74).

156. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct 1436, 1442 (2011) (quoting *Lujan*, 504 U.S. at 560-61).

157. Warth v. Seldin, 422 U.S. 490, 500 (1975) (citation omitted); *see also* Ashutosh Bhagwat, *Injury Without Harm:* Texas v. Lesage *and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445, 454–55 (2001) (noting that, despite language to the contrary in *Lujan*, subsequent decisions by the Supreme Court show that "legal context, including both the substantive law at issue and the nature of the relief sought, does matter when defining injury in fact").

158. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639–42 (2006) (discussing connections between standing and merits determinations).

159. *E.g.*, Allen v. Wright, 468 U.S. 737, 755 (1984) (noting that stigmatization is cognizable injury for those personally denied equal treatment).

even if the plaintiff experiences significant psychological harm as a result.[160] Instead, the plaintiff must also show that he personally experienced unequal treatment because of the government's racially discriminatory actions.[161] In contrast, in a procedural due process case, the stigmatic effect of government action cannot alone establish injury regardless of any unequal treatment personally experienced by the plaintiff.[162] In addition to stigmatic harm, the plaintiff must show that "a right or status previously recognized by state law was distinctly altered or extinguished."[163] If that showing is made, stigma becomes "an important factor in evaluating the extent of harm" caused by the government action.[164]

In most cases, establishing that the plaintiff's injury is "fairly traceable to the defendant's allegedly unlawful conduct"[165] requires a showing that the government action left the plaintiff in a worse position than he would have faced but for the illegality. A different standard applies in an equal protection case alleging that the government has "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group."[166] In that type of case, the injury consists of "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[167] Plaintiffs in equal protection claims falling into that category can establish standing based on an unequal opportunity to compete.[168] No similar relaxation of the standing requirements applies to any category of procedural due process claims.

There are also significant differences in the types of government action that may be reached by the two types of claims. The Due Process Clause prohibits arbitrary deprivations of life, liberty, or property,[169] but does not itself create property interests, which are "defined by existing rules or understandings that stem from an independent source such as state law."[170] As a result, a plaintiff bringing a procedural due process claim must first meet the threshold requirement of showing the existence of a protected

160. *See id.* at 755 (indicating stigmatization of entire group insufficient to demonstrate legally cognizable injury in equal protection case).

161. *Id.*

162. While statements in *Goss v. Lopez*, 419 U.S. 565 (1975), suggested otherwise, the Court made clear in *Paul v. Davis* that stigmatic injury alone could not cause sufficient interference with a liberty interest to support a procedural due process claim. 424 U.S. 693, 709 (1976).

163. *Paul*, 424 U.S. at 711.

164. *Id.* at 709.

165. *Allen*, 468 U.S. at 751 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

166. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

167. *Id.*

168. *Id.*; *see also* Bhagwat, *supra* note 157, at 450 (demonstrating that plaintiffs in equal protection cases can establish standing without alleging "loss of a tangible benefit," since "loss of opportunity to compete" is sufficient); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1466–72 (1995) (analyzing why Court differentiated standing for equal protection cases).

169. *See* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 459–60 (1989) ("The Fourteenth Amendment reads in part: 'nor shall any State deprive any person of life, liberty, or property, without due process of law,' and protects the individual against arbitrary action of government . . . .").

170. Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (internal quotation mark omitted).

property or liberty interest.[171] In contrast, the protections of the Equal Protection Clause extend beyond governmental actions that deprive individuals of liberty and property interests; even when distributing a benefit, the government may not engage in invidious discrimination.[172]

To establish an injury cognizable under the Due Process Clause, one must not only show that the challenged government action implicates a protected liberty or property interest; one must also show that the government action has caused more than a de minimis interference with that interest.[173] It is unclear whether plaintiffs bringing equal protection challenges to desegregation plans must make a similar showing of greater than de minimis harm based on their school assignment. On the one hand, the Ninth Circuit has declared that "there is no *de minimis* exception to the Equal Protection Clause" because "[r]ace discrimination is never a 'trifle.'"[174] Other courts have agreed.[175] On the other hand, courts consistently refuse to hear equal protection claims based solely on an allegation of injury caused by racially discriminatory comments or slurs,[176] which would clearly be actionable if there were no de minimis threshold applicable to the Equal Protection Clause. More broadly, there is authority for the proposition that a de minimis injury will not support any constitutional claim,[177] though there is also authority for the opposite proposition. [178]

171. Swarthout v. Cooke, 131 S. Ct. 859, 861 (2011) ("[S]tandard analysis under [the Due Process Clause] proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient.").

172. *See, e.g.*, Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 618 (1985) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").

173. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("There is . . . a *de minimis* level of imposition with which the Constitution is not concerned."); *see also* Paul v. Davis, 424 U.S. 693, 710–11 (1976) (noting that liberty and property interests can attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law" and that "procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove *or significantly alter* that protected status" (emphasis added)).

174. Monterey Mech. Co. v. Wilson, 125 F.3d 702, 712 (9th Cir. 1997); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1198 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (quoting same language).

175. *See, e.g.*, Berkley v. United States, 287 F.3d 1076, 1088 (Fed. Cir. 2002) ("[T]here is no *de minimis* exception to the Equal Protection Clause." (quoting *Monterey Mech.*, 125 F.3d at 712)); Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 351 (D.C. Cir. 1998) (dicta) ("[T]he Equal Protection Clause would not seem to admit a *de minimis* exception.").

176. *See* Lee v. Mackay, 29 F. App'x 679, 680–81 (2d Cir. 2002) ("[The plaintiff] makes no cognizable equal protection claim from an allegation of racial comments alone."); DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000) ("The use of racially derogatory language . . . does not violate the Constitution. Standing alone, simple verbal harassment does not . . . deny a prisoner equal protection of the laws." (citations omitted)); Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997) (holding "abusive language directed at [plaintiff's] religious and ethnic background" categorically insufficient to support equal protection claim), *abrogated on other grounds by* Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008).

177. *See* Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) ("[E]ven in the field of constitutional torts de minimis non curat lex.").

178. *See* Lewis v. Woods, 848 F.2d 649, 651 (5th Cir. 1988) ("A violation of constitutional rights is never *de minimis* . . . .").

B. Contextual Evaluation of Doctrinal Differences

As the previous section described, differences in the legal standards governing procedural due process claims and equal protection claims can be relevant to the showing of injury required to support federal jurisdiction. This section evaluates those differences in the context of disciplinary transfer cases and desegregation challenges in order to determine whether the legal significance of the harm caused by assignment to a particular school varies between the two types of cases.

1. Psychological Harm Created by the Racial Classification Itself

In some circumstances, the government's use of a racial classification can, in and of itself, cause psychological injury sufficient to support jurisdiction over the plaintiff's claim.[179] This creates a potential explanation for why courts would scrutinize the educational disadvantage caused by a school assignment in a disciplinary transfer case but not in a desegregation challenge. However, this explanation could only be satisfactory in cases where a desegregation plaintiff alleged this type of psychological harm and the court accepted that allegation as a cognizable injury.

Unlike segregation, desegregation does not present a situation in which it is obvious that the government's use of a racial classification creates psychological injury sufficient to establish standing. Segregation carries an inherent expression of animus and assertion of racial inferiority, with the psychological harms attendant to those situations.[180] A court hearing a segregation challenge could assume those harms without discussion, and no one would doubt that the plaintiff had established the individualized injury necessary to support the court's jurisdiction over the claim.[181] In contrast, establishing standing for a desegregation challenge based on psychological injury requires explanation, because desegregation does not carry the same expression of animus or assertion of inferiority.[182]

In *Parents Involved*, the Court did not raise the issue of psychological harm in its discussion of standing.[183] Instead, the Court focused on the plaintiffs' allegations of injury based on each student's assignment to a particular school other than the school of their choice.[184] The Court's focus and the plaintiffs' allegations make it clear that the plaintiffs' claim of injury was based, not on any stigmatic harm caused by the racial classifications, but on the undesirability of being assigned to schools that the plaintiffs

179. Allen v. Wright, 468 U.S. 737, 755 (1984).

180. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

181. *See, e.g.*, Johnson v. California, 543 U.S. 499, 507, 509 (2005) (indicating racial segregation is "immediately suspect" because it threatens to stigmatize individuals based on their racial class and incite hostility among races).

182. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability."); *see also* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 940 (2008) ("Desegregation can only inflict the same injury as segregation if we ignore the question of what each signifies.").

183. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–20 (2007).

184. *Id.*

perceived as inferior.[185] From the point of view of both the plaintiffs and the Court, the school assignments were the injury, and the racial classifications were the impermissible means of inflicting the injury.

The Court's discussion of school assignment as a competitive system supports this interpretation. The Court did not state that the plaintiffs' injury resulted simply from participation in a race-based school assignment system, which would have left open the possibility that the plaintiffs' injury consisted of psychological harm caused by the use of a racial classification. Instead, the Court described the plaintiffs' injury as "being forced to *compete* in a race-based system *that may prejudice*" them.[186] This emphasis on competitive disadvantage indicates that the plaintiffs' injury resulted from the potential outcome of the process (the school assignment) rather than the process itself (the racial classification). This illustrates the distinction between the standing question and the merits question: while the injury arose from the outcome, the illegality inhered in the process.

The plurality in *Parents Involved* explicitly discussed the psychological harms caused by racial classifications in other contexts,[187] but stopped far short of asserting that the plaintiffs' injury consisted of those harms. In describing the reasoning of *Brown v. Board of Education*,[188] Justice Roberts stated that "segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority."[189] In describing the parallels between *Brown* and *Parents Involved*, however, he made no mention of racial stigma, focusing instead on the use of race "as a factor in affording educational opportunities."[190] He argued that "the racial classifications at issue here . . . accord differential treatment on the basis of race" and "determine admission to a public school on a racial basis."[191] He did not argue that the racial classifications caused psychological harm.

The plurality and dissent's discussion of the No Child Left Behind Act (NCLB) offers further support for the proposition that the Court did not view the plaintiffs' injury as psychological harm caused by race-conscious government decisionmaking.[192] In his dissent, Justice Breyer argued that the majority opinion had called into question the constitutionality of numerous federal laws, including NCLB, that "use racial

185. *See* Jessica Blanchard, *Supreme Court to Hear Seattle Schools Race Case: Justices to Decide Dispute That Began in Ballard*, SEATTLE POST-INTELLIGENCER, June 6, 2006, at A1 ("In Seattle, much of parents' anger over the school-assignment process came from the widespread assumption that some high schools—mainly in the city's more affluent North End—were academically superior to others."). The parents' view that educational disparities exist among Seattle's schools is supported by publicly available measures of educational quality. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 615–16 (2009).

186. *Parents Involved*, 551 U.S. at 719 (emphasis added).

187. *Id.* at 745–46 (plurality opinion).

188. 347 U.S. 483 (1954).

189. *Parents Involved*, 551 U.S. at 746.

190. *Id.* at 747.

191. *Id.*

192. *See id*. at 745 (arguing NCLB irrelevant to plaintiffs' case); *id*. at 828, 851 (Breyer, J., dissenting) (citing NCLB as evidence of federal government's own race-conscious decisionmaking).

classifications for educational or other purposes."[193] The plurality rejected this argument, stating that the issues raised by NCLB "have nothing to do with the pertinent issues in these cases."[194] If being subject to a decision based on a racial classification invariably caused cognizable psychological harm, however, then NCLB *would* raise issues related to those examined in *Parents Involved*.[195] The plurality's statement to the contrary indicated that it viewed the current case as a question of an independent injury inflicted by means of a racial classification, rather than a psychological injury caused by the classification itself.

2. Equal Opportunity to Compete

A lower justiciability threshold applies in equal protection cases involving an allegation that the government has "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group."[196] If a case falls into that category, the plaintiff can establish injury based on denial of the equal opportunity to compete for a benefit rather than denial of the benefit itself.[197] This raises the question whether the existence of this lower standard explains why a court would treat the injury caused by assignment to a particular school differently in the context of an equal protection challenge to a desegregation plan than in the context of a procedural due process challenge to a disciplinary transfer.

By its own terms, the lower justiciability standard applies only when the plaintiff is not certain to receive the governmental benefit he seeks. That situation is clearly present in the context of college admissions and government contracting, where the outcome of a competitive system can result in the plaintiff being excluded from a government benefit that is not available to everyone who requests it. Because of compulsory education laws, however, complete exclusion is not a possible outcome of elementary and secondary public school assignments. In the assignment context, therefore, there is no possibility of a decision that will result in the student being denied access to the educational system. At most, a student can be denied the opportunity to attend a particular school.

193. *Id.* at 861 (Breyer, J., dissenting); *see also id.* at 828 (noting that fifty-one federal statutes have racial classifications).

194. *Id.* at 745 (plurality opinion); *see also* Stuart Biegel, *Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy after* Seattle-Louisville *and* Ho v. SFUSD, 4 STAN. J. C.R. & C.L. 159, 181 (2008) ("[T]he *Seattle-Louisville* Court has not banned all race-conscious remedies. Indeed, were it to consider such a ban in the near future, it would have to contend with the argument that a broad, sweeping ruling of that nature would also invalidate key portions of major . . . statutes such as No Child Left Behind."). One provision of NCLB, which the plurality dismissed as irrelevant to the "pertinent issues" in *Parents Involved*, requires states to track the academic achievement of students by race and ethnicity. *Parents Involved*, 551 U.S. at 745 (plurality opinion) (citing 20 U.S.C. § 6311(b)(2)(C)(v) (2006)).

195. The alternative interpretation of the plurality's statement would be that both NCLB and the current case raised questions about the psychological harm inherent in government use of racial classifications, but in the current case the issue was not "pertinent." It is unlikely, however, that the *Parents Involved* plurality viewed the injury in fact necessary to give the Court jurisdiction over the plaintiffs' claim as a trivial issue.

196. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

197. *Id.*

In a system containing schools of equal quality, the opportunity to attend a particular school cannot be construed as a benefit. Accordingly, in order to apply the lower justiciability threshold in a desegregation case, a court must determine that educational quality varies among the schools in the system. In a system containing schools of unequal quality, students attending the better schools receive the benefit of increased educational opportunity, while students attending the weaker schools suffer educational disadvantage.

In *Parents Involved*, the Court applied the lower justiciability threshold to the plaintiffs' claim when it characterized their injury as "being forced to compete in a race-based system that may prejudice" them.[198] In so doing, the Court accepted the underlying assertion of inequality among the schools in the system, and thereby acknowledged that assignment to a particular school can result in an educational disadvantage. That same acknowledgement would require a court hearing a disciplinary transfer claim to accept a plaintiff's assertion of a greater than de minimis interference with his constitutionally protected interest in receiving a public education.[199] Because the underlying acknowledgement of school inequality and resulting educational disadvantage would require a court to recognize a plaintiff's standing to bring either claim, the doctrinal difference represented by the equal-opportunity-to-compete standard cannot explain why the *Parents Involved* Court would treat the harm caused by assignment to a particular school differently than a court hearing a disciplinary transfer claim.

3. Existence of a Protected Property Right

The constitutional prohibition on racial discrimination governs a broader range of government activity than does the guarantee of procedural due process. While the Equal Protection Clause prohibits racial discrimination even with respect to the distribution of purely discretionary benefits, the Due Process Clause requires procedural safeguards only for property and liberty interests.[200] If the harm caused by assignment to a particular school relates to a purely discretionary benefit rather than a protected property interest, this doctrinal difference would explain why courts would attach greater significance to the harm caused by assignment to a particular school in the context of an equal protection challenge to a school desegregation plan than in the context of a procedural due process challenge to a disciplinary transfer.

Ever since the Supreme Court decided *Goss v. Lopez*[201] more than thirty years ago, it has been well-established that students have a constitutionally protected property interest in receiving a public education. Some courts have determined, however, that disciplinary transfer does not implicate that interest.[202] These courts have reasoned that

198. *Parents Involved*, 551 U.S. at 719 (majority opinion).

199. This statement assumes that the educational disadvantage amounts to a greater than de minimis interference with the student's protected interest in receiving a public education. The argument that not every decision causing educational disadvantage creates such an interference is addressed in the next section of this article. See *infra* Part III.B.3.

200. See *supra* notes 169–71 and accompanying text for a discussion of procedural due process claims.

201. 419 U.S. 565 (1975).

202. See *supra* Part II.A for discussion of disciplinary transfer cases.

the right to a public education does not create a separate right to each individual component of the educational process, such as the right to participate in extracurricular activities or to attend a particular school.[203] Under this view, depriving a student of access to a particular school affects only the location where the student receives educational services, and this discretionary decision falls outside the orbit of the Due Process Clause.

Although a student generally has no right to attend a particular school,[204] a disciplinary transfer plaintiff alleges more than the invasion of that narrowly-defined legal interest. The student alleges, instead, that the transfer has resulted in a significant educational disadvantage by removing him from his regular school to an alternative school *designed* to offer different, and usually reduced, educational opportunities.[205] The distinction raises questions about why some courts have reframed disciplinary transfer claims to reflect a narrower view of the relevant educational interests. A court, after all, could easily accept that a student has no protected right to attend a particular school while also recognizing that the total effect of a disciplinary transfer creates more than a de minimis harm to a student's protected interest in receiving a public education.

In *Goss*, the Supreme Court held that "[a] 10-day suspension from school is not *de minimis* . . . and may not be imposed in complete disregard of the Due Process Clause."[206] The Court's reasoning made clear that due process protections apply even to suspensions as short as one day.[207] Accordingly, when courts hold that an involuntary transfer to a disciplinary alternative educational program does not implicate due process protections, they assert that a disciplinary transfer creates less of an interference with educational interests than does a one-day suspension. Common sense compels the opposite conclusion. If given the option of choosing between the two forms of punishment, any reasonable parent would choose a one-day suspension over a long-term transfer to a disciplinary program.[208]

If the total effect of assignment to a particular school had only a de minimis impact on the educational interests of a disciplinary transfer plaintiff, the total effect of assignment to a particular school would have to be just as trivial for a plaintiff bringing

203. *E.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997).

204. *See* Bustop, Inc. v. Bd. of Educ. of L.A., 439 U.S. 1380, 1382–83 (1978) (rejecting plaintiffs' claim that extensive, mandatory busing infringed on their liberty and privacy rights); *see also* McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004) (citing cases supporting proposition that "a student has no constitutional right to attend a particular school").

205. *E.g.*, Nevares v. San Marcos Consol. Indep. Sch. Dist., 954 F. Supp. 1162, 1166 (W.D. Tex. 1996), *rev'd*, 111 F.3d 25 (5th Cir. 1997) (finding that differential education offered in alternative disciplinary school could negatively impact student's "future educational and employment opportunities").

206. *Goss*, 419 U.S. at 576.

207. *Id.* at 575–76 ("[I]n determining whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake. . . . [T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, is not decisive of the basic right to a hearing of some kind." (citations omitted) (internal quotation marks omitted)); *see also id.* at 585 n.3 (Powell, J., dissenting) ("[The majority's] opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today.").

208. *Cf.* Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Pa. 1977) ("[M]any if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer . . . .").

a desegregation challenge. If anything, a desegregation plaintiff experiences a lesser injury to educational interests, not a greater one, since disciplinary transfers typically involve an interruption in classroom instruction as the student is moved from one school to another in the midst of the school year.[209] A public school assignment through a desegregation plan, which takes effect at the start of the school year, does not create an equivalent harm.

Nonetheless, it could be argued that a court could accept a desegregation plaintiff's allegation of injury without acknowledging any harm to the protected interest in receiving a public education. The nature of the harm would fall outside of the range of interests protected by procedural due process if the plaintiff's injury involved simple inconvenience, rather than educational advantage.[210] The *Parents Involved* decision offers some support for this possibility. When describing the facts of the case, the Court noted that one of the plaintiffs objected to a school assignment on the basis of the school's distance from the plaintiff's home.[211] As previously discussed, however, other portions of the opinion make clear that the Court viewed the plaintiffs' injury not as mere inconvenience, but as unequal access to educational opportunity.[212] The Court's emphasis on the plaintiffs' competitive disadvantage in the school assignment system,[213] the plurality's condemnation of the use of race in the distribution of educational resources,[214] Justice Thomas's concurrence describing exclusion from a particular school as an injury,[215] the dissent's objection that the schools were substantially equal,[216] and the disagreement about school quality in the lower court decisions,[217] all support the interpretation that the Court viewed the plaintiffs' injury as educational disadvantage rather than simple inconvenience. Accordingly, the property-interest limitation in procedural due process cases cannot explain why *Parents Involved* would accord greater weight to the harm created by assignment to a particular school than courts hearing disciplinary transfer cases.

4. Cognizability of De Minimis Injury

De minimis harm to a protected liberty or property interest will not support a procedural due process claim.[218] If the Equal Protection Clause does not similarly contain a de minimis threshold, this doctrinal difference would explain why courts

209. *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 744 n.17 (2007) (plurality opinion) ("There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed . . . .").

210. *But see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 72 P.3d 151, 156 n.5 (Wash. 2003) (noting that school commute of sufficient duration may implicate protected property interest in education created under Washington state law if busing was mandated).

211. *Parents Involved*, 551 U.S. at 717.

212. See *supra* Part II.B for analysis of the Court's opinion in *Parents Involved*.

213. *Parents Involved*, 551 U.S. at 719.

214. *Id.* at 746–47 (plurality opinion).

215. *Id.* at 759 (Thomas, J., concurring).

216. *Id.* at 835 (Breyer, J., dissenting).

217. See *supra* notes 128–36 and accompanying text for a discussion of the district and circuit court opinions in *Parents Involved*.

218. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

would set a higher bar for showing educational disadvantage resulting from school assignments in disciplinary transfer cases than in desegregation challenges.

As noted, however, the case law demonstrates no clear consensus as to whether and how a de minimis threshold, like the one applicable to the Due Process Clause, applies in the context of other constitutional provisions, including the Equal Protection Clause.[219] The *Parents Involved* Court did not discuss the relationship between de minimis injuries and the Equal Protection Clause; in fact, the phrase "de minimis" does not appear anywhere in the opinion. If the Court had determined that the Equal Protection Clause is not subject to a de minimis threshold, it would have resolved an unsettled legal question, one potentially affecting the cognizability of de minimis injuries under other constitutional provisions. It is unlikely that the Court made such a significant doctrinal move without explicitly stating that it was doing so.

Moreover, the discussion of the plaintiffs' injury indicates that the *Parents Involved* Court did not view the harm caused by assignment to a particular school as de minimis. The Court stated that the plaintiffs could validly claim an injury based on competitive disadvantage, citing cases involving government contracting.[220] By analogizing the plaintiffs' potential school assignment to the potential loss of a government contract, the Court did not necessarily assert that the two contexts involved injuries of equal weight, but it did implicitly assert that both injuries rose above the de minimis level.

Because there is conflicting authority as to the cognizability of a de minimis injury under the Equal Protection Clause, and because the *Parents Involved* Court neither addressed that doctrinal question nor applied the lower injury threshold, the de minimis threshold applicable to the Due Process Clause does not adequately explain why the *Parents Involved* Court would treat the harm caused by assignment to a particular school differently than courts hearing disciplinary transfer cases.

C. Do Doctrinal Differences Compel Different Approaches?

Even assuming for the sake of argument that the differences between procedural due process and equal protection doctrine *allow* courts to accord greater weight to the harm caused by assignment to a particular school in desegregation challenges than in disciplinary transfer claims, it is clear that doctrinal differences do not *compel* courts to do so. The *Parents Involved* Court could have adopted an extremely narrow view of the injury caused by school assignment without breaking with equal protection precedent. For example, the Court could have stated the following:

> A student has no right to attend a particular public elementary or secondary school.[221] A race-conscious assignment to a school other than the particular

219. See *supra* notes 173–78 and accompanying text for a discussion of courts applying the de minimis standard to constitutional claims.

220. *Parents Involved*, 551 U.S. at 719 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995); Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

221. *See* Bustop, Inc. v. Bd. of Educ. of L.A., 439 U.S. 1380, 1383 (1978) (dictum) (stating Court has "very little doubt" that U.S. Constitution permitted school district to force extensive busing plan to desegregate schools).

> school of the student's choice does not work an injury cognizable under the Equal Protection Clause unless the assignment involves segregation,[222] discriminatory intent,[223] merit-based competition,[224] or educational disadvantage. With regard to the latter, because of the respect due to the states in our federal system and in recognition of the importance of local control over educational decisions,[225] we will not simply assume that the states have failed to provide their citizens with substantially equal public schools such that assignment to one school rather than another results in educational disadvantage.

The Court would then have dismissed the claim for lack of standing or explained why the plaintiffs had made the required showing.

IV. AN ALTERNATIVE EXPLANATION BASED ON RACE AND COGNITIVE BIAS

Disciplinary transfer cases and challenges to desegregation plans differ not only in the doctrine underlying the two types of claims, but also in the racial composition of the potential class of plaintiffs. White and Asian American students typically challenge desegregation plans,[226] while exclusionary school discipline disproportionately affects African American and Latino students.[227] As a result, each type of claim invokes a very different set of racialized assumptions about the educational opportunities that would be available to the plaintiff in the absence of the challenged decision. As explained below, these assumptions can cause courts to unwittingly apply a narrower view of educational entitlement in disciplinary transfer cases than in desegregation challenges.

A. Two Models of Educational Resource Distribution

Because every student will attend one school or another, a court's assessment of the harm created by assignment to a particular elementary or secondary school requires a comparative inquiry. One side of the comparison involves the actual school assignment and the educational opportunity available to the student while attending that school, while the other side involves the educational opportunity that would have been available to the student in the absence of the asserted illegality. Because a court must make this comparison in order to determine the harm caused by assignment to a particular school, the court's view of the severity of the plaintiffs' injury will depend

222. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation is unconstitutional under the Fourteenth Amendment as "a denial of the equal protection of the laws").

223. Washington v. Davis, 426 U.S. 229, 230 (1976).

224. Grutter v. Bollinger, 539 U.S. 306, 370 (2003).

225. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

226. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–19 (2007) (white plaintiffs); Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 857 (9th Cir. 1998) (Asian American plaintiffs).

227. *See* Skiba et al., *supra* note 7, at 319–20 (describing racial disproportionality in school discipline); *see also* Reyes, *supra* note 12, at 86–87 (detailing racial disproportionality in Texas disciplinary alternative education programs).

on its assumptions about how educational resources would have been distributed in the absence of the challenged conduct.

If courts view the severity of the harm caused by assignment to a particular school differently in different contexts, as this Article has argued,[228] then there must be more than one set of assumptions at work regarding students' default levels of access to education. Those differing sets of assumptions can be described in terms of two models for the distribution of educational resources, one based on allocation and the other on competition.

1. Allocation

Under what could be termed the allocation model of educational resource distribution, students are allocated slots in substantially equal schools at the direction of state and local officials. According to this model, principles of federalism and local control require the federal courts to show great deference when reviewing school assignment decisions because state and local governments control the distribution of educational resources.[229]

Federalism concerns also compel federal courts adopting this model to avoid the presumption that a state has failed to provide equal educational opportunities to its citizens. As a result, the courts will not closely scrutinize the quality of the education provided in particular schools, but will ask only whether each school provides a minimally adequate education.[230] The courts will demand strong evidence of inequality before accepting a plaintiff's assertion of disadvantage caused by state and local decisions about the distribution of educational resources. Complete exclusion from the educational system will establish the required degree of harm,[231] as will de jure segregation,[232] but differences in school funding will not warrant judicial intervention.[233]

A court applying this model in a disciplinary transfer case will assume that the student receives a minimally adequate education at the alternative school, just as he would have at the regular school. The only difference apparent to the court will be that state and local officials have determined that the student should receive educational services at a different school. The court will hesitate to interfere with that discretionary decision, and will require a strong showing of disadvantage before accepting that the

228. See *supra* Part II.C for a discussion of the divergent approaches courts have taken in determining the existence and extent of cognizable harm caused by school assignment.

229. See *supra* note 143 and accompanying text for a description of the judicial trend toward deference to public school authorities, based on concerns of federalism and local control.

230. Dissenting in the landmark case that upheld the Texas school finance system, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), Justice Marshall found "strong intimations" of a similar view in the majority opinion. *Id.* at 88 n.50 (Marshall, J., dissenting). Justice Marshall posited that "the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is 'enough.'" *Id.* at 88.

231. Goss v. Lopez, 419 U.S. 565, 574–76 (1975).

232. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

233. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 54–55.

student has established a greater than de minimis interference with his constitutionally protected property interest in receiving a public education.[234]

Similarly, under this model, a court will assume that a plaintiff challenging a desegregation plan receives the same minimally adequate education at the assigned school as he would have received at the desired school. The only difference apparent to the court will be that state and local officials have determined, in their discretion, that the student should receive educational services at a particular school in order to guarantee all students the benefits of an integrated education. The court may acknowledge the student's subjective disappointment at being assigned to a school other than the particular school of his choice, but will view the potential for disappointment as a minor burden shared equally by all of the students in the school system.[235]

2. Competition

Under what might be termed the competition model of educational resource distribution, students compete to attend schools that vary widely in educational quality. Because student competition determines the distribution of educational resources, federal courts applying this model will carefully scrutinize school assignment decisions in order to ensure fairness to the students competing in that system.

Courts applying this model can look to the No Child Left Behind Act (NCLB)[236] as support for the proposition that federalism does not require any presumption of school equality or deference to state and local control over school assignment decisions. The statute requires not only recognition but measurement of educational inequality among the public schools,[237] and provides that states must modify their school assignments based on the results of those measurements.[238] Moreover, because

234. For disciplinary transfer opinions illustrating aspects of this model, see Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997) (rejecting plaintiff's argument that transfer to alternative school violated Constitution, because student was not denied access to public education); Buchanan v. Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1996) (finding lack of sufficient facts to implicate Due Process Clause, because there was no showing that alternative school was inferior or different from regular public school); C.B. v. Driscoll, 82 F.3d 383, 389 (11th Cir. 1996) (rejecting notion that "right to public education encompasses a right to choose one's particular school"); and Zamora v. Pomeroy, 639 F.2d 662, 669–70 (10th Cir. 1981) (finding rights were not violated because plaintiff "was not deprived of education" and was able to graduate).

235. The dissent and several of the lower court opinions in *Parents Involved* illustrate aspects of this model. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 835–36 (2007) (Breyer, J., dissenting); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc) (Kozinski, J., concurring); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1239 (W.D. Wash. 2001); *see also* McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 859–60 (W.D. Ky. 2004) (concluding that assignment plan "neither denies anyone a benefit nor imposes a wrongful burden").

236. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C. (2006)).

237. 20 U.S.C. §§ 6311(b)(2), 6316(a) (2006) (requiring states to have accountability system); *id.* § 6316(a) (requiring review of annual progress).

238. *Id.* § 6316(b)(1)(E) (requiring local educational agencies to provide students with option to transfer out of schools identified as needing school improvement).

the standardized testing mandated by NCLB has established that educational outcomes vary dramatically across different schools,[239] federal courts adopting this model will be receptive to claims of injury based on the educational disadvantage caused by assignment to one school instead of another.

A court applying the competition model will view all claims of injury based on assignment to a particular school against a backdrop of significant inequality among the public schools. Under this model, disciplinary transfer presumptively creates an injury that should be accorded significant weight, because the punitive purpose of the reassignment itself indicates that the student has been reassigned to an inferior rather than a superior school. Similarly, a court applying this model will determine that a desegregation plan creates a presumptive injury by restricting the student's ability to compete for a spot in the superior schools.

B. Racialized Deployment of the Two Models

The *Parents Involved* Court applied the competition model of educational resource distribution when evaluating the harm caused by assignment to a particular public school, describing the plaintiffs' injury in terms of competitive disadvantage.[240] In contrast, courts hearing disciplinary transfer cases have often applied the allocation model, and have hesitated to acknowledge that assignment to an alternative school causes educational disadvantage.[241] The varying deployment of these two educational models across the two contexts is disturbing, yet unsurprising, when viewed in light of the racial composition of the presumptive plaintiff class for each type of claim, and the prevailing assumptions about the relationship between race and access to education.

It is well known that most states have historically financed public education in large part through local property taxes collected and distributed within a school district.[242] This longstanding feature of the school finance system, combined with wide disparities in district wealth, causes school quality and educational opportunity to vary by zip code.[243] As a result, parents with school-age children routinely make housing

239. Some schools consistently achieve adequate yearly progress ("AYP"), while others are subject to federal intervention for failing to reach their targets for multiple consecutive years. *See generally* GAO REP. TO THE SEC'Y OF EDUC., NO CHILD LEFT BEHIND ACT: EDUCATION NEEDS TO PROVIDE ADDITIONAL TECHNICAL ASSISTANCE AND CONDUCT IMPLEMENTATION STUDIES FOR SCHOOL CHOICE PROVISION (2004), *available at* http://www.gao.gov/new.items/d057.pdf (describing AYP rates).

240. *Parents Involved*, 551 U.S. at 718–19. See *supra* Part II.B for an examination of *Parents Involved*'s standing analysis.

241. See *supra* Part II.A for a review of the approaches taken by courts in disciplinary transfer cases.

242. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470 (2003). *But see* Preston C. Green et al., *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283, 303 (2008) ("[M]ost states no longer receive most of their funding from local property taxation."). Even if states have substantially reduced their reliance on local property taxes as a source of education funding, most people are still likely to believe that access to education varies by zip code and that access to housing varies by race. It is the prevalence of those beliefs, rather than the true facts of the situation, that result in the cognitive-bias effect described here.

243. Chemerinsky, *supra* note 242, at 1470. School finance systems need not be facially based on local property taxes in order to have this effect. *See* John E. Coons, *Private Wealth and Public Schools*, 4 STAN. J. C.R. & C.L. 245, 275 (2008) ("The [California school finance] system has the veneer of uniform funding, but

choices based on school attendance zones.[244] However, not all parents have equal access to the housing located in attendance zones connected to high-quality schools.

Multiple structural barriers limit the housing options available to parents of color. Home purchasing power depends not just on income, but also wealth,[245] and the distribution of wealth shows massive racial disparities.[246] Because wealth results from the cumulative effects of economic opportunity over time and across generations, the long and continuing history of racial discrimination in America has created a large gap between white wealth and black wealth.[247] While an "asset pillar" supports the white middle class, African Americans claim middle-class status largely based on income alone.[248] These economic realities skew home purchasing power in favor of white parents and limit the residential mobility of parents of color.

Racial discrimination in housing creates another structural barrier to parents of color seeking access to desirable school attendance zones. Government policies such as redlining,[249] as well as legally enforceable forms of exclusion such as racially restrictive covenants,[250] continue to have noticeable effects. In addition, although the federal Fair Housing Act (FHA) prohibits racial discrimination in housing,[251] the law has had limited effect.[252] Private discrimination remains both "rampant"[253] and "vastly

the rich prudently cluster, while their private foundations provide the add-ons for the chosen district or school. The poor are clustered and pose no threat of transfer out of the 'public' system.").

244. This common knowledge is reflected in the advertising practices of realtors and landlords, who routinely emphasize the public school options linked to a particular unit or property. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1211 (9th Cir. 2005) (en banc) (Bea, J., dissenting) ("Parents often move into areas offering better school districts, and ubiquitous research guides compare the quality of public schools according to standardized test scores, program offerings, and the sort.").

245. While changes in lending practices during the housing bubble temporarily reduced this link between wealth and home purchasing power, most lenders have returned to the longstanding practice of requiring a significant down payment before issuing a mortgage. Kenneth R. Harney, *Mortgage Industry Changes Throw New Hurdles in Borrowers' Way*, L.A. TIMES, Apr. 18, 2009, http://www.latimes.com/classified/realestate/news/la-fi-harney19-2009apr19,0,6099613.story. Wealth matters for renters as well, as security deposits and other up-front costs play a role in renting that is parallel to the role played by down payments in homebuying.

246. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH (2d ed. 2006).

247. *Id.* at 154–59.

248. *Id.* at 96–97.

249. *Id.* at 19–23.

250. *See* Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1977–79 (2000) (tracing use of racially restrictive covenants over time).

251. 42 U.S.C. §§ 3601–3631 (2006).

252. *See* Bell & Parchomovsky, *supra* note 250, at 1980–81 (discussing reasons for "limited effectiveness of the Fair Housing Act"). Federal enforcement of the FHA has been the subject of intense criticism. *See, e.g.*, NAT'L COMM'N ON FAIR HOUS. AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 19 (2008), *available at* http://www.civilrights.org/publications/reports/fairhousing/future_of_fair_housing_report.pdf (discussing underenforcement of FHA by Department of Housing and Urban Development (HUD)); Judith Browne-Dianis & Anita Sinha, *Exiling the Poor: The Clash of Redevelopment and Fair Housing in Post-Katrina New Orleans*, 51 HOW. L.J. 481, 507 (2008) (describing HUD's enforcement of FHA as "lackadaisical").

253. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1398 (2009).

underreported,"[254] and "[s]tudies using pairs of black and white testers continue to reveal substantial amounts of racial steering in the housing market."[255]

Because of these structural barriers and others, white parents on average have more opportunities than parents of color to buy or rent housing in the attendance zones connected to high-quality schools. Few people would find this information new or surprising, as racial disparities in access to education are both long-standing and well-recognized. This type of racial common knowledge can, in turn, affect the cognitive processes of judges hearing education claims, causing them to view injuries caused by school assignments differently depending on the race of the student asserting the claim.

The impact of racial common knowledge on judicial decisionmaking can occur on a purely subconscious level, in the complete absence of any racist intent. Research has established that race, like other socially relevant categories, activates deeply embedded knowledge about the social meaning of the racial category.[256] That knowledge will affect cognitive processes automatically, without any intent or awareness on the part of the person making the decision.[257] In a context requiring the decisionmaker to evaluate a student's preexisting level of access to education, the well-known connection between race and educational opportunity will undoubtedly form part of the knowledge base that affects the decisionmaking process.

Even among judges who strongly support racial equality, knowledge of the racial status quo will operate to create connections between white students and broad educational opportunities on the one hand, and connections between students of color and limited educational opportunities on the other. These connections make courts more likely to assume that white students have the opportunity to compete for spots in desirable schools, while students of color must instead rely on school officials to allocate a spot in an available school. As a result, courts will be more likely to apply the competition model to claims involving white students and the allocation model to claims involving students of color.[258]

This mapping of student race to models of educational resource distribution corresponds to racial stereotypes, which may act to reinforce the connections created by racial common knowledge. The competition model posits that students within the public education system have agency and ambition, qualities associated with racial stereotypes about white people. In contrast, the allocation model positions students as passive and dependent, qualities associated with racial stereotypes about people of

254. Carl Nightingale, *Overcoming Discrimination in Housing, Credit, and Urban Policy*, 25 BUFFALO PUB. INT. L.J. 77, 139 (2006–2007).

255. Emens, *supra* note 253, at 1398. *See generally* Charles L. Nier, III & Maureen R. St Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941 (2011).

256. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1504–05 (2005). *See generally* David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857 (2011).

257. Kang, *supra* note 256, at 1505–06.

258. *Cf.* Maurice R. Dyson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in* PICS v. Seattle School District, 40 U. TOL. L. REV. 145, 164 (2008) ("Seattle's open-choice program may have been held unconstitutional in part because of its significant usurpation of . . . white families' assumed entitlement that their children may attend the school of their choice.").

color. The prevalence of these stereotypes makes them part of the racial meaning that can affect decisionmaking on a subconscious level, even if the judge making the decision would sincerely and emphatically reject the stereotypes on a conscious level.

The absence of racist intent by the courts does not mitigate the harm to the students. When courts apply the competition model to claims involving white students and apply the allocation model to claims involving students of color, they accord more weight to the injury experienced by a white student assigned to a particular school than they accord to the same injury experienced by a student of color.[259] As a result, the racialized deployment of the two models of educational resource distribution furthers racial subordination.

V. CONCLUSION

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[260] the Supreme Court accepted a claim of injury based on assignment to a particular public school. While scholars have found much to criticize in the *Parents Involved* opinion,[261] the Court's implicit acknowledgement of school inequality has largely escaped attack.[262] In one sense, that aspect of the decision seems unremarkable when one considers that the opinion was issued six years after the enactment of the No Child Left Behind Act (NCLB).[263] The standardized-test data generated through NCLB's mandate has conclusively established that the nation's elementary and secondary public schools vary widely in educational outcomes. In addition, the federal statute established an unprecedented level of intervention in state and local decisions about educational resource distribution,[264] significantly weakening federalism-based arguments about the

259. *Cf.* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 332–33 (2002) (arguing that courts have unjustifiable tendency to subject disadvantaged groups to higher injury standard); Spann, *supra* note 168, at 1424 (describing "racially correlated character of the [Supreme] Court's standing decisions").

260. 551 U.S. 701 (2007).

261. *E.g.*, Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 942, 990 (2008) ("*Parents Involved* stifles *Grutter v. Bollinger*'s expansive potential."); Dyson, *supra* note 258, at 147 (arguing that *Parents Involved* majority utilized disingenuous rhetoric to disguise "real animating reason for its holding and rationale"); Osamundia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 795 (2008) (arguing *Parents Involved* undermines *Brown v. Board of Education*); Lawrence, *supra* note 182, at 940 (lambasting *Parents Involved* as culmination of Court's "doctrinal march to re-segregation in the name of 'colorblindness'").

262. *But see* Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race*, 6 SEATTLE J. SOC. JUST. 673, 695–96 (2008) (criticizing *Parents Involved*'s substitution of "structural equality" for "true equality").

263. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C. (2006)).

264. *See* Biegel, *supra* note 194, at 164 n.8 ("[NCLB] represented a major shift in the role of federal officials regarding K-12 education governance."); Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297, 306 (2008) ("NCLB imposes unprecedented federal statutory requirements and levels of scrutiny on public schools as a prerequisite to receiving federal funding."); Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1456 (2007) ("To be sure, the federalism realignment owing to NCLB is substantial . . . ."); Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12

degree of deference federal courts must show to state and local officials in matters involving education.

In another sense, however, the Court's acknowledgement of the injury caused by assignment to a particular school is quite remarkable. The Court recognized school inequality, but only as an unarticulated fact in the background of the case, and not as an independent cause for constitutional concern. The Court implicitly acknowledged that some schools are inferior, but offered no recourse for the students who would be forced to attend them. The Court described school assignment as a competition, but expressed no concern for those who lose, and did not interrogate the rationality of holding such a competition in the first instance. Acknowledging that schools are not currently equal does not require accepting that school inequality is an acceptable or inescapable fact of life, yet the *Parents Involved* decision reveals a Court that has done both.

Although *Parents Involved* held that the desegregation plans before the Court violated the Equal Protection Clause,[265] the Court's recognition of the injury caused by assignment to a particular public school did not compel that outcome. Because the existence of a cognizable injury is a question distinct from the merits of the claim,[266] courts can recognize the injury caused by a school assignment but uphold the constitutionality of the desegregation plan under which the assignment was made.[267] It is true that courts evaluate the burden created by individual school assignments as part of the inquiry into whether a desegregation program is narrowly tailored,[268] and that one way of minimizing the program's burden is to argue that all of the schools in the system are substantially equal.[269] However, it cannot be true that justifying integration requires pretending that all schools are equal. Indeed, creating a legal fiction of school equality undermines one of the central justifications for desegregation plans: ensuring that students of all races have equal opportunities to attend high-quality schools.

Justice Kennedy's concurrence in *Parents Involved* illustrates how some arguments in favor of school desegregation rely on the premise that schools do not all currently provide the same quality of educational services. Justice Kennedy noted approvingly that one purpose of the desegregation plan before the Court was "to make sure that racially segregated housing patterns did not prevent non-white students from

WIDENER L. REV. 637, 642 (2006) (criticizing "massive shift in federal power over education created by NCLB").

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

266. Although a court's view of the merits can influence its decisions about justiciability, the existence of a cognizable injury does not require a court to decide the case in the plaintiff's favor. Fallon, *supra* note 158, at 640; *see also* Healy, *supra* note 105, 475 ("[A] grant of standing means only that a plaintiff can be heard in federal court. The plaintiff must still show that the defendant violated a duty or obligation imposed by law.").

267. The Washington district court opinion in *Parents Involved* illustrates this possibility. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1239 (W.D. Wash. 2001) ("[E]ven as the Seattle School District works to improve the programs and facilities at the weaker schools, it must be allowed to provide all of Seattle's students the equal opportunity . . . to attend the city's more popular schools.").

268. Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

269. *See, e.g.*, McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004) ("[W]hen the Board makes a student assignment among its equal and integrated schools, it neither denies anyone a benefit nor imposes a wrongful burden.").

having equitable access to the most popular over-subscribed schools,"[270] and emphasized "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[271] That reasoning would simply make no sense if all of the schools in the system were already substantially equal.

The *Parents Involved* Court's recognition of the educational disadvantage caused by assignment to a particular public school must now extend to disciplinary transfer claims, a context in which courts have shown a great deal of reluctance to acknowledge that same injury.[272] Because white students bring most challenges to school desegregation plans, while exclusionary school discipline disproportionately affects students of color, it is likely that implicit racial bias has affected judicial approaches to the harm involved in the two types of claims.[273] Failing to apply the same view of the injury caused by assignment to a particular public school in each context implicates the courts in perpetuating racial subordination. Because the *Parents Involved* decision characterized school assignment as a competitive system that can result in educational disadvantage, courts should now apply that same competition-based model of educational resource distribution in all education claims.

This aspect of the *Parents Involved* decision also creates opportunities for reform on a broader level. The competitive view of educational-resource distribution applied in *Parents Involved* differs from the allocative view apparent in *San Antonio Independent School District v. Rodriguez*,[274] where the Court deferred to the state's decisions about the appropriate allocation of educational resources instead of recognizing and questioning the reasons for the unequal distribution of those resources. If courts reject the allocation model in favor of the competitive model, and consistently approach school assignment as a competitive system that can result in educational disadvantage, it will become increasingly difficult for courts to conclude that the opportunity to participate in that system has been made available to all students on equal terms.[275] The resulting judicial scrutiny of the bases upon which students are forced to compete for access to education will ultimately require changes to fundamental aspects of the public school system. Simply put, no student should be denied access to equal educational opportunity on any basis, and no student should be forced to compete for educational resources on the basis of factors beyond his or her control.

270. *Parents Involved*, 551 U.S. at 786–87 (Kennedy, J., concurring). The plurality also acknowledged the defendants' contention that "its use of race helps . . . to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools." *Id.* at 725 (plurality opinion); *see also* cunningham, *supra* note 115, at 800 ("[T]he school districts' characterizations of their goals reflect the desire to achieve equality of educational opportunity by providing Black children access to the better schools.").

271. *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring).

272. See *supra* Part II.A for a discussion of how lower courts have handled disciplinary transfer claims.

273. See *supra* Part IV for an argument that the divergent judicial treatment of the two claims can be explained by cognitive bias.

274. 411 U.S. 1 (1973).

275. *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 493 ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").