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July 31, 2009

A Critical Race Theory Critique on Parents Involved In Community Schools v. Seattle School District No. 1: Confirming The Majority’s Hegemonic View Concerning Diversity In Secondary Public Schools and Future Implications For Minority Students

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EXECUTIVE SUMMARY

A Critical Race Theory Critique on Parents Involved In Community Schools v. Seattle School District No. 1: Confirming The Majority’s Hegemonic View Concerning Diversity In Secondary Public Schools and Future Implications For Minority Students

If any public elementary, middle, or high school student throughout this nation was asked today to describe the racial composition of his or her school, the common answer would most likely mirror the race or ethnicity of the student who was questioned. It is no surprise that over the past two decades this nation’s public secondary school system has experienced the trend of resegregation. Thus, in this article I apply the tenets of Critical Race Theory to Parents Involved in the quest to understand why the majority of the United States Supreme Court prohibited secondary public schools from prescribing inclusive racial integration plans. The article first examines the current situation and the root causes of resegregation in secondary public schools. The article then compares the facts and holdings between Parents Involved and Grutter v. Bollinger in order to portray the competing interests within secondary public schools and higher education in regard to each institution’s goal of establishing a racially diverse student body. The article then offers an explanation concerning the central tenets of Critical Race Theory and the application of such tenets to the Court’s reasoning in Parents Involved as the majority uses Grutter to justify its holding. Using Critical Race Theory, I examine the implications of the Court’s holding in Parents Involved in regard to race relations within secondary public schools and higher education. I conclude the article by painting a picture of the future concerning racial integration in secondary public schools during the Obama Administration.

Ryan C. Marques
Introduction

The Supreme Court rulings in Parents Involved In Community Schools v. Seattle School District No. 1\(^1\) and Grutter v. Bollinger\(^2\) portray the competing interests within secondary public schools and higher education in regard to each institution’s goal of establishing a racially diverse student body. This composition will apply the tenets of Critical Race Theory (CRT) to Parents Involved in the quest to understand why the majority of the United States Supreme Court prohibited secondary public schools from prescribing inclusive racial integration plans. Following this initial inquiry, CRT will be used to understand and reconcile how the Supreme Court of the United States allowed such plans to exist within higher education; and then examine the implications from the Court’s holdings in regard to the future outlook on race relations within secondary public schools and higher education.

This composition will show that Parents Involved failed to understand the importance of achieving racial balance in secondary public schools. The majority’s holding that secondary public schools may not use race as the sole determining factor for assigning students to schools clearly exemplifies symmetrical thinking among the majority but, more importantly, shows the disconnect between judicial elites and inner city public school administrators in a time where resegregation has never appeared so pervasive within the halls of our schools.

Part I of the composition examines the current situation and the root causes of resegregation in secondary public schools. Using U.S. Department of Education and other available data, Part I aims to paint a picture concerning the gravity many secondary public schools face in regard to

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resegregation. Also, this section provides a review of the judicial challenges and sociological obstacles standing in the way of racial balancing in secondary public schools.

In order to provide a better understanding of the nuances of Parents Involved and Grutter, Part II closely examines the facts and holdings for each case respectively. Next, Part III offers an explanation concerning the central tenets of CRT while Part IV applies the central tenets to the Court’s reasoning in Parents Involved as the majority uses Grutter to justify its holding. Part V examines the implications of the Court’s holding in Parents Involved in regard to race relations within secondary public schools and higher education. Finally, Part VI discusses what the future holds for racial integration in secondary public schools during the Obama Administration. Also, this section provides recommendations and steps which the Obama Administration will look to implement in order to quell the trend of resegregation.

I. The Current Situation and Root Causes of Resegregation

A. General Data Regarding the Recent Trend of Resegregation

If any public elementary, middle, or high school student throughout this nation was asked today to describe the racial composition of his or her school, the common answer would most likely mirror the race or ethnicity of the student who was questioned. It is no surprise that over the past two decades this nation’s public secondary school system has experienced the trend of resegregation. For instance, “[b]etween 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation but then reversed direction by the year 2000, rising from 63% to 72% in the Nation.”\(^3\) Furthermore, “[a]s of 2002, almost 2.4 million students, or over 5% of all public school

\(^3\) See, Parents Involved, 127 U.S. at 2801-2802 (Breyer, J., dissenting) (referencing U.S. Dept. of Education - Appendix A).
enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99-100% minority.” One may wonder what happened to the mandates expressed in the Court’s landmark decision of Brown v. Board of Education. Unfortunately, not much has changed in the arena of school desegregation since that decision in 1954. In fact, some publications have even surfaced proposing the Court timed the decision in such a way to address world and domestic considerations, rather than empathizing with the moral qualms over blacks’ plight. A change in the Court’s jurisprudence during the 1990s authorized a return to segregated neighborhood schools. This explains the staggering numbers mentioned above, but most importantly, portrays the Court’s complacency with socio-economic segregation among the races – a direct result of school resegregation.

B. De facto Segregation

Before leaping to any sudden conclusions concerning the Court’s acquiescence over socio-economic segregation, it is important to first understand the factors of this particular type of segregation which have caused and continue to engender secondary public school resegregation. The first factor that must be taken into account is de facto segregation. De facto segregation, not

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4 Id. at 2802.
5 See, Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954) (holding that separate state-sponsored public schools for white and black children were "inherently unequal" and violated the Equal Protection Clause).
6 See, RICHARD DELGADO and JEAN STEFANCIC, CRITICAL RACE THEORY, AN INTRODUCTION 5, 18-19 (New York University Press 2001) (showing that after the two World Wars which many African Americans served coupled with the United States involvement in the Cold War at the time of that decision “[i]t would ill serve the U.S. interest if the world press continued to carry stories of lynchings, racist sheriffs, or murders like that of Emmett Till.”).
to be confused with de jure segregation, is “caused by housing patterns or generalized societal discrimination.”

Before the Court’s ruling in *Grutter*, the only manner in which a secondary public school system or an institution of higher education could use race to assign students to different schools depended whether the school system or institution was remedying de jure segregation - past intentional discrimination ordered by the school system, institution, or state.

Therefore, in order to combat de jure segregation, many public school systems resorted to busing students out of their neighborhood to distant schools within the same school system in order to achieve racial balance.

Although many white parents and their children were critical of the busing mandate, the Court unanimously ruled in 1971 that busing students to promote integration was constitutional.

Unfortunately, many proponents of the busing mandate did not foresee the consequences that would eventually turn into the second factor of socio-economic segregation: white flight.

**C. The Implications of White Flight**

White flight is simply the movement of whites to the suburbs, thus resulting in the concentration of minorities in inner cities.

Interestingly enough, “[a]lthough the suburbs were just as segregated as the city – and, truthfully, often more so – white residents succeeded in convincing the courts, the nation, and even themselves that this phenomenon represented de

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8. Id. at 2802.
9. Id. at 2752.
facto segregation, something that stemmed not from the race-conscious actions of residents but instead from less offensive issues like class stratification and postwar sprawl."¹⁴ Therefore, as white flight hid behind the veil of de facto segregation, many inner city public school systems were constrained in their effort to combat the increase of racial imbalance and, unfortunately, these school systems eventually depreciated in human and financial capital. Moreover, the Court’s ruling in San Antonio v. Rodriguez in 1973 set the tone for the ever increasing monetary disparity between white suburban public schools and minority inner city public schools.¹⁵ As a result of the Court’s ruling in Rodriguez, “school districts are not required to have equal financing throughout a state . . . [thus] school-finance equity concerns must be challenged via state constitutional provisions”¹⁶ where such challenges solely rest on the fate that the state constitution addresses equity in school financing. Therefore, since public school financing is largely dependent upon property taxes, and when taking into consideration the racial segregation in public and private housing markets, “it is not surprising that there are striking race (and class) differences in school revenues and related opportunities to learn.”¹⁷ Moreover, high quality teachers and “the active involvement of parents; stable, motivated peers who value achievement and share knowledge with classmates; and a school climate imbued with high expectations -- are indirectly related to a school’s funding level through the racial and socioeconomic status


¹⁵ See, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 54-55 (1973) (holding that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, “we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.”).


composition of communities.” Therefore, because of the socioeconomic segregation coupled with the Court’s reluctance to combat de facto segregation, many inner city and even rural public school systems continue to lag behind their white suburban secondary public school counterparts in regard to educational resources. Furthermore, every public secondary school student (suburban, rural, and inner city) has been thwarted from experiencing this nation’s most treasured gift: diversity of race, thought, and understanding.

II. Analysis of Parents Involved and Grutter

Given the trend in resegregation and its negative implications, let’s analyze Parents Involved and Grutter to see how two secondary public schools and one institution of higher education have tried to combat resegregation in order to provide a more diversified learning environment for their respective students.

A. Parents Involved

In Parents Involved, the Court addressed “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.” The facts of the case are as follows: two school districts implemented the plans at issue for assigning students to each respective school district. The first school district was Seattle School District No. 1 which operated 10 regular public high schools. From 1998-2002, the Seattle School District adopted a “plan that allowed incoming ninth graders to choose from among any of the district’s high

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18 Mickelson, at 1485.
19 Id. at 2746.
20 Id.
21 Id.
schools, ranking however many schools they wish in order of preference.”\textsuperscript{22} The district used a series of tiebreakers to determine who would fill the open slots at those schools which were over-subscribed.\textsuperscript{23} The tiebreakers ranked in order from first admitting students who had a sibling currently enrolled in the chosen school; second, upon the racial composition of the particular school and the race of the student; and third, the geographic proximity of the school to the student’s residence.\textsuperscript{24} “If an oversubscribed school [was] not within 10 percentage points of the district’s overall white/nonwhite racial balance, it [was] what the district call[ed] “integration positive,” and the district employ[ed] a tiebreaker that select[ed] for assignment students whose race ‘will serve to bring the school into balance’.”\textsuperscript{25}

Petitioner, Parents Involved in Community Schools, commenced suit in the Western District of Washington on behalf of the “parents of children who had been or may be denied assignment to their chosen high school in the district because of their race.”\textsuperscript{26} Petitioner alleged that the Seattle School District’s use of race in student assignments violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Washington Civil Rights Act.\textsuperscript{27} The United States District Court for the District of Washington, the Washington Supreme Court, and the Ninth Circuit Court of Appeals sitting en banc (after two reviews) all ruled in favor of the Seattle School District’s plan.\textsuperscript{28}

\textsuperscript{22} Id. at 2747.  
\textsuperscript{23} Id.  
\textsuperscript{24} Id.  
\textsuperscript{25} Id.  
\textsuperscript{26} Id. at 2748.  
\textsuperscript{27} Id.  
\textsuperscript{28} Id. at 2748-2749.
The second school district, Jefferson County Public Schools located in Louisville, Kentucky, operated under a 1975 desegregation decree until 2000. In 2001, after the desegregation decree had been dissolved, Jefferson County adopted a plan that required “all non-magnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.” The district assigned students to non-magnet schools by allowing parents of kindergartners, first-graders, and students new to the district to submit an application indicating a first and second choice among the schools within their cluster (specified geographic area based on students’ residential address); and students who did not submit an application were assigned within the cluster by the district. “Decisions to assign students to schools within each cluster [were] based on available space within the schools and the racial guidelines in the District’s current student assignment plan[;] [and] if a school [had] reached the ‘extremes of the racial guidelines,’ a student whose race would contribute to the school’s racial imbalance [would] not be assigned there.”

Petitioner, Crystal Meredith, commenced suit in the Western District of Kentucky alleging violations of the Equal Protection Clause of the Fourteenth Amendment because her son, who was new to the district, was denied transfer to a school where space was available because the transfer would have created “an adverse effect on the desegregation compliance” of the school in which Meredith’s son had been assigned. Similar to the Seattle School District case, Jefferson County’s plan was ruled in favor by both the United States District Court and the Sixth Circuit
Court of Appeals.\textsuperscript{34} The Supreme Court, however, granted certiorari to both cases, and reversed the Ninth and Sixth Circuit Courts of Appeals at the same time.

\textit{B. Grutter}

In \textit{Grutter}, the Court addressed “whether diversity [was] a compelling interest that [could] justify the narrowly tailored use of race in selecting applicants for admission to public universities.”\textsuperscript{35} The facts of this case are as follows: The University of Michigan Law School employed an admissions policy from 1995 to 2000 that focused on “academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’”\textsuperscript{36} The policy also required “admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant [would] contribute to the life and diversity of the Law School” . . . while also considering the applicant’s undergraduate grade point average and Law School Admissions Test score.\textsuperscript{37} The policy further “reaffirm[ed] the Law School’s longstanding commitment to ‘one particular type of diversity,’ that is, ‘racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.’”\textsuperscript{38} Finally, “the policy [sought] to guide admissions officers in ‘producing classes both diverse and academically outstanding, classes made up of students who promise to

\textsuperscript{34} Id.

\textsuperscript{35} See, \textit{Grutter}, 539 at 2335.

\textsuperscript{36} Id. at 2331.

\textsuperscript{37} Id. at 2331-2332.

\textsuperscript{38} Id. at 2332.
continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.”

Petitioner Barbara Grutter, a white Michigan resident, applied to the University of Michigan Law School in 1996 with a 3.8 Grade Point Average and a 161 Law School Admission Test Score. The Law School rejected petitioner’s application and placed her on a waiting list. Petitioner “filed suit in the United States District Court for the Eastern District of Michigan against the Law School . . . alleging that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment [and] Title VI of the Civil Rights Act of 1964.”

“Petitioner further alleged that her application was rejected because the Law School use[d] race as a ‘predominant factor,’ giving applicants who belong to certain minority groups ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups.’”

The United States District Court enjoined the law school from using race as a factor in its admissions decisions because the Law School’s asserted interest in achieving diversity was not compelling nor narrowly tailored. The Sixth Circuit Court of Appeals sitting en banc reversed the District Court’s judgment and vacated the injunction. The Supreme Court granted certiorari and affirmed the Sixth Circuit Court of Appeal’s decision holding that the Law School had a

39 Id.
40 Id.
41 Id.
42 Id.
43 Id. at 2332-2333.
44 Id. at 2335.
45 Id.
compelling interest in attaining a diverse student body, and its admissions program was narrowly tailored to serve its compelling interest.\textsuperscript{46}

\section*{III. Critical Race Theory – Basic Tenets}

In its simplest form, CRT is a movement among “a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power.”\textsuperscript{47} Some may confuse CRT with the civil rights movement, but CRT is distinguishable in a manner that CRT “questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”\textsuperscript{48} In addition, CRT centers on “the various ways in which the received tradition in law adversely affects people of color not as individuals but as a group.”\textsuperscript{49} Moreover, CRT “attempts to analyze law and legal traditions through the history, contemporary experiences, and racial sensibilities of racial minorities in this country . . . \[where\] \[t\]he question always lurking in the background of CRT is: What would the legal landscape look like today if people of color were the decision makers?”\textsuperscript{50}

Given the broad definition of CRT, it is not hard to imagine that many differences exist concerning the objectives of CRT. However, the basic objective of CRT “is to use the law to effectuate racial equality.”\textsuperscript{51} Although the basic objective has been widely accepted among critical race theorists, one critical race theorist has questioned the elusiveness of CRT’s basic

\begin{footnotesize}
\begin{enumerate}
\item Id. at 2347.
\item See Delgado and Stefancic, at 2.
\item Id. at 3.
\item Brooks, \textit{supra} note at 86.
\item Id.
\end{enumerate}
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objective, and “has gone so far as to suggest that people of color should abandon the notion that the legal system can be used as a vehicle of social transformation.”\(^52\) Placing aside the permanence of racism argument, CRT’s basic objective is employed through a methodology called the “subordination question . . . [which] asks whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns of racial minorities and if so, how is this problem best remedied?”\(^53\) Ultimately, the subordination question “seeks to deconstruct the existing legal order to reveal ways in which it invalidates or handicaps the claims of people of color,” thus allowing critical race theorists and those who accept this theory to develop subjective and objective assumptions on the concept of racism in the United States.\(^54\)

CRT’s basic assumption is “that American society and its institutions, including its legal institutions, are fundamentally racist, and that racism is not a deviation from the normal operation of American society.”\(^55\) One penumbra from CRT’s basic assumption reflects the idea from a critical race theorist that white racism is hegemonic, which plainly means “all our institutions of education and information – political and civic, religious and creative – either knowingly or unknowingly ‘provide the public rationale to justify, explain, legitimate, or tolerate racism.’”\(^56\) Another critical race theorist suggests that since racism is so deeply ingrained in our culture and transmitted by tacit understandings, racism exists on an unconscious level.\(^57\) On the conscious level, however, two models exist to help explain racial justice through CRT.\(^58\) The first model, symmetrical equality, “focuses on racial sameness denying that there are . . . any

\(^{52}\) Id. at 86-87 (discussing Professor Derrick Bell’s view on CRT’s basic objective).
\(^{53}\) Id. at 88.
\(^{54}\) Id. at 89-90.
\(^{55}\) Id. at 90.
\(^{56}\) Id. at 90 (discussing Professor Derrick Bell’s view on white racism as hegemonic).
\(^{57}\) Id. at 90 (discussing Professor Charles Lawrence’s view on unconscious racism).
\(^{58}\) Id. at 92.
significant natural differences between [the races].” Symmetrical equality is comprised of two smaller patterns where the first pattern – assimilation – proceeds from the notion that “the law should require social institutions to treat [non-whites] as they already treat [whites];” and the second pattern – pluralism – “argues that equality requires institutions to adopt standards that can reasonably accommodate differences that result from the uneven distribution of societal advantages and disadvantages.” The second model, asymmetrical equality, “embraces racial differences [and] rejects the notion that all [racial] differences are likely to disappear, or even that they should,” thus CRT more closely aligns with this model.

As demonstrated above, CRT is concerned with the human psyche and how racial discrimination can be identified on the conscious and unconscious level. For instance, CRT analysis has shown that “the [Supreme] Court creates an imaginary world where discrimination does not exist unless it was consciously intended.” Furthermore, on the unconscious level, CRT unveils the cultural biases of judges due to how “[j]udges are not immune from our culture’s racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs.” Moreover, CRT proves that stigmatization, consciously or unconsciously, is still pervasive across many communities and professions. While stigmatization contains many elements, it focuses mainly on the dominant group in society differentiating “itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in

59 Id. at 92.
60 Id. at 92.
61 Id. at 93.
63 Lawrence, supra note at 380.
64 Id. at 351.
that community as equals.” Stigmatization harms an individual through the infliction of psychological injury “by assaulting a person's self-respect and human dignity,” and through branding an “individual with a sign that signals her inferior status to others” while designating the individual as an outcast.

It is, however, interesting to note that stigmatization may be a by-product of early childhood assimilation with regard to culture and outlook on race. For instance, “[i]ndividuals learn cultural attitudes and beliefs about race very early in life, at a time when it is difficult to separate the perceptions of one's teacher (usually a parent) from one's own.” In addition, “[c]hildren learn not so much through an intellectual understanding of what their parents tell them about race as through an emotional identification with who their parents are and what they see and feel their parents do . . . [i]f we do learn lessons about race in this way, we are not likely to be aware that the lessons have even taken place.” Moreover, “[i]f we are unaware that we have been taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs.” Eventually, those feelings and beliefs will transition first into categorization (a tendency to exaggerate the differences between categories such as black persons or white persons with a dimension on the range of human intelligence for each group), and then solidify into stigmatization.

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65 Id. at 350.
66 Id. at 351.
67 Id. at 337
68 Id. at 337-338.
69 Id. at 338 (discussing Piaget and his work on moral development of children).
70 Id. at 338.
71 Id. at 337.
IV. Parents Involved: A Critical Race Theory Critique

A. Application of The Central Tenets of CRT to The Majority Opinion

The majority in Parents Involved was formed by Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Alito, and Justice Thomas. All five Justices were appointed by a Republican President, and all but one Justice was white. The procedural posture of the case is as follows: The Washington Supreme Court, the United States District Court, and the Ninth Circuit Court of Appeals all affirmed the Seattle School District integration plan. The United States District Court and the Sixth Circuit Court of Appeals both affirmed the Jefferson County School District integration plan. Given the procedural history, one begs to question why the Court decided to grant certiorari in the first place, and furthermore, why the majority decided to overrule two United States District Courts and two United States Circuit Courts of Appeals. Without CRT analysis, the question posed would simply be answered as the Court was only exercising its Constitutional duty and jurisdictional power. However, through the lens of CRT, one sees that the Court, and especially the majority, sought out this case as an opportunity to legitimatize and justify its view on school integration.

Chief Justice Roberts first set the tone in this case by asserting a review of strict scrutiny, and then cited only two instances in which racial classifications for school integration were found to be compelling: remedying the effects of past intentional discrimination; and achieving diversity

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72 See, Parents Involved, 127 U.S. at 2745.


74 See, Parents Involved, 127 U.S. at 2748-2749.

75 Id. at 2749-2750.
in higher education. He then proceeded to state that “the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more.’” Before even considering the breadth of both school integration plans and their efforts to combat resegregation, Chief Justice Roberts’ judicial view was exemplified by his firm assertion in the language of the first four pages of the opinion. For instance, no matter how drastically resegregation had affected both school districts, Chief Justice Roberts expressed that neither school district nor any other school district would be able to construct race conscious integration plans in order to combat resegregation, thus confirming the Court’s “imaginary world where discrimination does not exist unless it was consciously intended.” This is disheartening given that he decided to tuck away a very important piece of information from a very critical Court case concerning desegregation in a footnote that stated, “[i]t would be constitutionally permissible for a school district to seek racially balanced schools as a matter of ‘educational policy.’” Nonetheless, both school districts were fighting an uphill battle even before their respective integration plans were considered in detail.

Moving through the majority opinion, Chief Justice Roberts’ next stop was to compare the beneficial effects of diversity between the Law School’s integration plan in *Grutter* and the districts’ integration plans in *Parents Involved*. Chief Justice Roberts asserted that the districts’ integration plans were different than the Law School’s plan, because as the Law School’s plan considered race as “a broader effort to achieve ‘exposure to widely diverse people, culture, ideas

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76 Id. at 2751 – 2753.

77 Id. at 2752.

78 Lawrence, at 325.

and viewpoints,” the districts’ plans considered race for some students was determinative standing alone.\textsuperscript{80} At this instant, symmetrical equality arrives to the scene and takes hold within the majority and concurring opinions. For instance, it is evident that a symmetrical thought process existed within Chief Justice Roberts’ mind when he refused to acknowledge that race even though standing alone was comprised of diverse people, culture, ideas and viewpoints. Although both school districts did not eloquently spell out the benefits of their plans, it must have been implied to anyone other than the majority that the districts’ plans would indeed achieve the benefits of diversity through race alone. The definition of race itself consists “of the different varieties or populations of human beings distinguished by physical traits such as hair, eyes, skin color, body shape, etc . . . [and] inherited characteristics which are unique to their isolated breeding population.”\textsuperscript{81} Moreover, even though the words et cetera and unique are hidden behind the definition’s vast meaning, these two words convey that there is even more to the background of race. For example, the word et cetera within the context of race can be expanded to include one’s ideas, values, and culture, while the word unique encompasses what one brings to the world through his or her thoughts, actions, and even reactions.

Chief Justice Roberts’ symmetrical thought process limits his and the majority’s ability to accept that there are indeed many significant natural differences between the races, regardless of age or intellect. Therefore, although the school districts’ plans may have been determined by race alone, each secondary school student was afforded the opportunity to turn the definition of race into a tangible medium even before entering into higher education. Nonetheless, according

\textsuperscript{80} \textit{Id.} at 2753.

\textsuperscript{81} Webster’s New World College Dictionary at 1180 (2000).
to Chief Justice Roberts, higher education is where students should first start appreciating others’ uniqueness, culture, and viewpoints.

Chief Justice Roberts’ continual reliance on *Grutter* in order to distinguish the higher educational setting from the secondary school setting in regard to the benefits of diversity is again important to consider in regard to symmetrical equality. For instance, Chief Justice Roberts stated, “this Court relied upon considerations unique to institutions of higher education, noting that in light of ‘the expansive freedom of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition,’”82 therefore, the Court in *Grutter* allowed the Law School’s plan to pass strict scrutiny review while also accepting the plan as a compelling interest. Although Chief Justice Roberts’ symmetrical lens was not focused on the denial of racial differences, it was however magnified on his inability to acknowledge that there are social and economic differences concerning access to higher education (where diversity supposedly should first be appreciated) between whites and minorities. For example, in 2005 the United States educational attainment for the white population 25 years and over having some college experience but no degree (30,257,420) paled in comparison to blacks (4,669,434) and Latinos (3,506,435) within the same category.83 In addition, white students who actually experienced four years of “expansive freedom of speech and thought associated with the university environment”84 and graduated with a bachelor’s

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degree (27,220,486) starkly contrasted with blacks (2,436,572) and Latinos (2,016,035). Therefore, Chief Justice Roberts’ view that minority students would eventually be able to enjoy the benefits of diversity with their white counterparts when they enter into higher education was weak given the data on college enrollment and completion. Furthermore, Chief Justice Roberts continued to disregard the fact that white flight and school resegregation had been and continues to be increasing across the nation, therefore, Chief Justice Roberts wrote the majority opinion as if a problem did not exist, and that eventually minority students would enter into higher education. Unfortunately, as many social workers, school guidance counselors, teachers, and secondary school administration agree, higher education is too late to begin the process of integration if this nation desires to quell racism and achieve racial equality.

Chief Justice Roberts finally steered his thoughts toward the concept of pedagogical asserted educational benefits. Chief Justice Roberts stated, “[t]he plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored . . . to ‘the goal established by the school board of attaining a level of diversity within the schools that approximates the district’s overall demographics.’”

Chief Justice Roberts and the majority are symmetrical in their thinking again with regard to the order of priority between the school districts’ overall demographics and the pedagogical asserted educational benefits. One may argue without carrying out the school boards’ goal to achieve a level of diversity within the schools that approximate the district’s overall demographics, how would a school district even begin to achieve the pedagogical educational benefits of diversity. One simply cannot learn the


86 See, Parents Involved, 127 U.S. at 2755 – 2756.
values, ideas, idiosyncrasies, and culture of one’s counterpart when surrounded by others who are of the same race and ethnicity taught by a mirror’s reflection of the classroom.

Chief Justice Roberts and the majority, within the context of assimilation, believe also that minority students should learn from the same pedagogic model as white students. However, social interaction between white and minority secondary school students in a class and school setting is far more critical to the development and appreciation of diversity than pre-conceived pedagogical instruction at the secondary level. Moreover, Chief Justice Roberts’ affixation concerning pedagogical benefits, and those benefits only, may be traced to his and President George H.W. Bush’s conservative ideology and their reluctance to steer away from the burdensome objectives placed on school districts found in the No Child Left Behind Act. For instance, The No Child Left Behind Act uses sanctions that constrain the improvement of schools while placing too great an emphasis on standardized testing, thus leaving adequate funding by the wayside. Lastly, in an effort to solidify the majority’s opinion, Chief Justice Roberts’ referred to Grutter, and stated, “the number of minority students the [Law] school sought to admit was an undefined ‘meaningful number’ necessary to achieve a genuinely diverse student body . . . while the racial balance the districts [sought] [was] a defined range set solely by reference to the demographics of the respective school district.”

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87 See, Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (Stevens, J., dissenting) (“[a]n integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty.”).


90 See, Parents Involved, 127 U.S. at 2757.
districts would continue to fall victim to the ever increasing trend of school resegregation while institutions of higher education would continue to remain immune to this epidemic.

B. Application of The Central Tenets of CRT to The Plurality Opinion

Justice Kennedy’s withdrawal from the majority opinion indicated that the plurality had pushed too far into present day conservative ideology with the plurality’s reasoning that 53 years of Court ordered school desegregation would somehow rectify the social implications derived from nearly 180 years of state sponsored school segregation. The ever present subordination question arose within the plurality opinion when Chief Justice Roberts stated, “[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society.” 91 This statement in its entirety acts as a legal custom and thought among conservative judicial elites that subordinates important interests and concerns of racial minorities.

It is evident that de jure segregation is still present in today’s society, and even the Court in 1992 in Freeman v. Pitts “acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated . . . [and] [i]t is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems.” 92 Therefore, the Court’s opinion in 1992 coupled with the recent statistics of resegregation demonstrate that racial proportionality confined to secondary schools, and no other entity, is indeed justified to combat de facto segregation. Furthermore, one may argue inclusive

91 Id.
racial proportionality in secondary schools is an important interest and concern for racial minorities.

Before *Brown*, inclusive racial proportionality ceased to exist, so black and Latino students were continually deprived of the rich educational resources white public secondary students enjoyed. It may be argued that parents of minority children who were once deprived of such resources would accept an inclusive rational proportionality plan in order to ensure their children do not encounter the same inequalities that they faced during times of segregation.

Towards the end of the plurality opinion, Chief Justice Roberts focused on two interrelated aspects which again showed a great sense of judicial bias. In addressing the school districts’ defense to their plans as an effort to combat identifiable housing patterns, Chief Justice Roberts first asserted that “[a]s the districts’ demographics shift, so too will their definition of racial diversity.” He then followed with a second assertion that “[t]he sweep of the mandate claimed by the district[s] is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.” Although judicial bias was not as prevalent in Chief Justice Roberts’ first assertion as it was in the second, his concern that the districts would always be amending their definition of racial diversity demonstrated the disconnect between a wealthy Supreme Court Justice and those who serve as inner city public school administrators. One may argue if inner city school districts do not change their definition of racial diversity in a manner that correlates with demographic shifts, how will the school district combat white flight and continue to provide adequate educational resources for minority students. Chief Justice Roberts’ judicial bias in regard to his second assertion concerning remedying the effects of past societal discrimination not only portrayed his elitism but continues to taint the entire Court and

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93 *See*, *Parents Involved*, 127 U.S. at 2758.
94 Id.
its predecessors of judicial elitism in the context of public secondary school segregation and their attempt to hide behind the veil of the Equal Protection Clause. For instance, the so-called past societal discrimination Chief Justice Roberts referred to was the change in demographics of housing patterns in each school district. Although changes in housing patterns today are more or less a result of economics, the Federal Housing Authority (a governmental body) at one time restricted minorities from living outside of inner cities through a process called redlining. \(^95\) One may argue that many inner city minorities still feel the effects of this governmental process today given low property values, inadequate educational resources, and unsanitary conditions. Therefore, one can see how Chief Justice Roberts and the Court “undoubtedly share the values and perceptions of that subculture (elite white backgrounds) which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities”\(^96\) in their effort to combat school resegregation (a direct conduit of governmental housing discrimination).

**C. Application of The Central Tenets of CRT to Justice Thomas’ and Justice Kennedy’s Concurrences**

Although both Justice Thomas and Justice Kennedy joined the majority opinion, their concurrences were starkly different. Justice Thomas, seen as a CRT outlier,\(^97\) flatly asserted that “[r]acial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.”\(^98\) Justice Kennedy, appreciating the steps the school districts took to combat resegregation stated, “[d]iversity, depending on its meaning and

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\(^{96}\) Lawrence, at 380.

\(^{97}\) Brooks, at 96-98 (describing Professor Bell’s indictment that “[Justice Thomas] does not think like a black.”).

\(^{98}\) See, Parents Involved, 127 U.S. at 2768.
definition, is a compelling educational goal a school district may pursue.”

Justice Thomas (symmetrical thinking) mentioned that the school districts should not have taken into account any significant natural differences between the races in regard to “housing patterns, employment practices, economic conditions, and social attitudes.” On the other hand, Justice Kennedy (asymmetrical thinking) acknowledged that the plurality was wrong in “ignoring the problem of de facto resegregation in schooling . . . [and] [t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.” Moreover, one witnesses the seesaw debate between Justice Thomas and Justice Kennedy, however, what differentiates Justice Kennedy from Justice Thomas and every other Justice is that he offered a solution rather than relying on rhetoric. Justice Kennedy would allow school districts to maneuver around this staunch opinion and combat resegregation if school districts “include strategic site selection of new schools; draw attendance zones with general recognition of the demographics of neighborhoods; allocate resources for special programs; recruit students and faculty in a targeted fashion; and track enrollments, performance, and other statistics by race.”

D. Application of The Central Tenets of CRT to Justice Breyer’s Dissent

After the analysis concerning the majority and plurality opinions, Justice Breyer’s dissent reassured the Court and CRT proponents that achieving racial balance in public secondary schools was indeed a compelling interest and should not have fallen victim to strict scrutiny review. Justice Breyer, recognizing the majority’s hegemonic approach to student integration,

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99 Id. at 2789.
100 Id. at 2775.
101 Id. at 2792.
102 Id.
quickly denounced the merit of the majority’s assertion that the school districts’ plans did not pass the Constitutional muster of strict review. Even more, Justice Breyer used the same case which Chief Justice Roberts used in order to distinguish when the Constitution would allow such racial integration plans permissible. For instance, Justice Breyer used the following quote from *Grutter* in order to emphasize the importance of context when reviewing race based governmental action under the Equal Protection Clause.\(^{103}\) In *Grutter*, the Court stated that “[s]crutiny is not ‘strict in theory, but fatal in fact.’ Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”\(^{104}\) Therefore, Justice Breyer asserted, “[the majority] apply the strict scrutiny test in a manner that is “fatal in fact” only to racial classifications that harmfully *exclude*; [the majority] apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include* . . . The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.”\(^{105}\) In addition, Justice Breyer countered Chief Justice Roberts’ ruling that the school districts’ plans were not as narrowly tailored as the Law School’s plan and were not of a compelling interest. For example, Justice Breyer stated in reference to the school districts’ plans that “race becomes a factor only in a fraction of students’ non-merit based assignments – not in large numbers of students’ merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely*, not more severely, than the criteria at issue in *Grutter*.”\(^{106}\) Finally, Justice Breyer expressed that “[d]isappointed students are not rejected from

\(^{103}\) Id. at 2817.

\(^{104}\) See, *Grutter* 539 U.S. at 2339 (discussing and citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

\(^{105}\) See, *Parents Involved*, 127 U.S. at 2817-2818.

\(^{106}\) Id. at 2825.
a State’s flagship graduate program; they simply attend a different one of the district’s many public schools, which in aspiration and in fact are substantially equal.”107

Justice Breyer’s asymmetrical thinking in that “[p]rimary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days,”108 echoes the importance in allowing school districts, not judicial elites, the opportunity to combat resegregation and its effects on children. Although Chief Justice Roberts’ symmetrical and misused slogan that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”109 is captivating, the implications of resegregation on school districts will continue to outweigh his fruitless axiom as this nation’s public educational system continues down the path of what judicial elites once thought was eviscerated.

**V. Implications of *Parents Involved* In Regard to Race Relations In Secondary Public Schools**

It is no revelation that the majority’s hegemonic holding in *Parents Involved* will produce further implications concerning race relations between minority and nonminority students within secondary public schools and higher education. The effects of de facto segregation coupled with the Court’s constraints on racial balancing and school funding provide the canvass in which to paint today’s perceptions that inner city secondary public schools will never perform as well or exceed their predominately white suburban counterparts. As graduation rates, physical appearance of inner city school buildings and houses, and most importantly, diversity in the class room continue to regress, the stigmatization among the white adult population concerning the inferiority of minorities will progress. Unfortunately, the white adult population, more cognizant

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107 Id.
108 Id. at 2823.
109 Id. at 2769.
of characteristics concerning inferiority than children, will continue to perceive black children as athletes and Latino children as offspring of illegal immigrants, thus designating minority children as outcasts in the realm of education. Moreover, Justice Thomas’ opinion that “the courts are so willing to assume that anything that is predominantly black must be inferior”\(^\text{110}\) is in a great sense actually true within the context of educational resources and funding of minority populated secondary public schools, even though Justice Thomas would disagree. Henceforth, as minority populated secondary public schools continue to see funds and resources dwindle in the name of de facto segregation, stigmatization among the white adult population will continue to strengthen in regard to the inferiority of minority students.

The result of white adult stigmatization concerning minority students will most likely engender white child categorization of their minority counterparts. For instance, CRT explains that “[i]ndividuals learn cultural attitudes and beliefs about race very early in life” through the influence of one’s parents and teachers.\(^\text{111}\) So, as resegregation continues to separate white children from minority children in schools and neighborhoods, both sets of children at the elementary level will first wonder why such a homogenous environment exists among their friends and teachers. Next, as children move through the ranks of elementary and middle school and become more influenced by their parents’ and teachers’ opinions and emotions concerning race, children will begin to process and then emulate the same opinions and emotions as their elders. Unfortunately, since white adult stigmatization has already embedded itself into white culture, white children will not be able to escape the inevitable process of categorization.

Constant paternalistic opinions concerning race from white parents, continuous observations of

\(^{110}\) See, Missouri v. Kalima Jenkins, 515 U.S. 70, 118 (1995) (Thomas, J., concurring) (Asserting that “[t]he mere fact that a school is black does not mean that it is the product of a constitutional violation.”).

\(^{111}\) Lawrence, at 337-338.
school buses filled with minority children only, and recurrent drive-bys of old and crumbling school buildings where minorities attend are all variables that white children will latch on to during the process of categorization. Finally, by the time white children have almost completed high school, the process of categorization concerning the inferiority of minorities has most likely solidified into stigmatization. However, high school is the time where most adolescents develop their own sense of intuition and begin to intellectually challenge their superiors’ thoughts and opinions. Therefore, if school districts had the opportunity to combat resegregation and integrate their schools, white students would be afforded the opportunity to challenge and contradict the principles of white adult stigmatization through their positive interactions with minority students. Even more, allowing school districts to maintain a racially inclusive student body from elementary through high school might even jettison the process of child categorization and finally place a moratorium on stigmatization forever. Unfortunately, because the Court refused to unclench its fist and allow integration, stigmatization will most likely continue and ironically become more pervasive within the context of higher education.\footnote{See, Indiana University Purdue University Indianapolis State of Diversity, Diversity Performance Indicator: Campus Climate for Diversity, (2009).}

Although there is much debate concerning whether racial integration yields educational benefits for minority students,\footnote{See, Parents Involved, 127 U.S. at 2776, 2822.} the impetus of this debate should change course from educational benefits to race relations starting in the class room. The process of thought and the action of learning curricula are derived from the self and one’s instructor. Racial competence and respect, however, derive from social interaction with other races. For instance, the number of studies that confirm that black and white students in desegregated schools are less racially
prejudiced\textsuperscript{114} pale in comparison to the number of studies that contradict such claims. In addition, another study has shown that desegregation of schools can even help bring adult communities together,\textsuperscript{115} which may help quell the evils of white adult stigmatization concerning minorities. So, the question looms as to how school districts will be able to combat resegregation in light of the Court’s decision. The answer may be found in Justice Kennedy’s concurrence, but school districts will most likely find themselves back in the halls of the courtroom again defending their racial integration plan if they followed such a prescribed plan by only one Supreme Court Justice. What may be done in order to accomplish social interaction among the races in class rooms is to consider the inverse and look outside the class room rather than inside. For instance, a comprehensive focus on housing policy, wages, and health care coupled with an effort to create a civil rights agenda for secondary public schools while adding support and training plans for teachers may help combat the effects of de facto segregation.\textsuperscript{116} Moreover, the human connection between minority and sympathetic nonminority families, teachers, and students must continue to lead the cause in the fight against resegregation, because without all parties working in harmony, judicial elitism and white stigmatization will continue to prevail and control the destiny of minorities. Thankfully, though, the election of Barack Obama has provided a new perception and a solid foundation in which to build upon in the effort to help school districts combat resegregation.


VI. The Future of Racial Integration in Secondary Public Schools

What the future holds for racial integration in secondary public schools during the Obama Administration will be determined by the President’s direct and indirect actions. Before considering these actions, it is important to first consider how this nation has evolved in regard to white perceptions on blacks before the election of Barack Obama. For instance, a study conducted in 1990 showed that “roughly two-thirds of the White public believe[d] that African-Americans’ lack of ability and/or motivation account[ed] for the gap in socioeconomic status between Whites and African-Americans [and] [o]nly 30% attribute[ed] this gap to structural factors, such as discrimination or poor education.”

This data not only confirmed that a sense of unconscious racism loomed over the majority of whites concerning the poor achievement levels of blacks, but more importantly, demonstrated that whites would never conceive the thought that a black individual would be President of the United States. Only 18 years after the study, however, the election of Barack Obama as President (a product of an integrated school) shocked the conscious and even the unconscious, and will hopefully place perceptions of blacks and other minorities in a more positive and enlightening context.

President Obama can either directly or indirectly change the outlook on racial imbalance in secondary public schools. President Obama has the executive power to directly appoint a new Supreme Court Justice, such as The Honorable Sonia Sotomayor, that would most likely favor racial integration in secondary public schools in contrast to the past seven Justices who were

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appointed by Presidents that favored a roll back of school civil rights.\textsuperscript{119} On the other hand, President Obama can indirectly change the effects of the Court’s decision by providing leadership on education policy. For instance, sensitive to the growth of the Latino population in secondary public schools, President Obama will look to expand early head start programs and also provide funding and support of English language learning programs.\textsuperscript{120} President Obama will also look to create more diversity in regard to teachers within secondary public schools as he will create new Teacher Service Scholarships for those teachers who desire to teach in underfunded and less than privileged school systems.\textsuperscript{121} Finally, and most importantly, President Obama will revamp the No Child Left Behind Act by making sure inner city school districts who have felt the burden of resegregation receive the proper funding in order to rebuild their class rooms and provide the proper instruction that predominately white suburban school districts enjoy.\textsuperscript{122}

\textbf{Conclusion}

After decades of successful desegregation and racial balance in secondary public schools, this nation and its highest judicial system have turned back the clock. Resegregation is running rampant and school districts have nowhere to turn. Categorization and stigmatization will continue to strengthen. Ideas of inferiority and mediocrity will cloak the minds and hearts of minority students. But then again, maybe not. As Atlas refused to shrug his shoulders, so too must President Obama. While the generations of the past sit on the sidelines, it is this generation

\textsuperscript{119} Orfield, at 6.

\textsuperscript{120} \textit{See}, The White House President Barack Obama: The Agenda - Education at \url{http://www.whitehouse.gov/agenda/education/} (2009).

\textsuperscript{121} \textit{See}, The White House President Barack Obama: The Agenda - Education at \url{http://www.whitehouse.gov/agenda/education/} (2009).

that must stand up and lend a hand in order to keep our children’s world atop the shoulders of a man that continues to defy the odds.