

Tracking in an Era of Standards: Low-Expectation Classes Meet High- Expectation Laws

by KEVIN G. WELNER

I. Introduction

Americans might reasonably assume that the end of school desegregation would coincide with the end of school segregation. But while *de jure* between-school segregation is now fading into the nation's past, *de facto* segregation, due in large part to residential segregation, remains a regularity throughout the nation.¹ Moreover, the percentage of minority students attending hyper-segregated schools, while experiencing some improvement following *Brown v. Board of Education*², has crept back up in the past two decades (see

* Assistant Professor, University of Colorado School of Education; J.D., UCLA, 1988; Ph.D., UCLA, 1997. This paper was funded in part by the Spencer Foundation's Post-Doctoral Fellowship and the University of Colorado's Junior Faculty Development Award. However, the opinions and ideas expressed herein are solely the responsibility of the author. I also wish to thank Robert Nagel, Robin Skelton, and the other organizers of the Byron R. White Center's "The End of School Desegregation?" conference at the University of Colorado Law School. Finally, I am grateful for the assistance provided by Sarah Zimmerman, Huong Thien Nguyen, Jessica Champie, and the rest of the staff at the Hastings Constitutional Law Quarterly.

1. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 85-88, 165-181 (Harvard University Press 1993). See also PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (University of Michigan Press 1985) and GARY ORFIELD & JOHN T. YUN, *Resegregation in American Schools*, THE CIVIL RIGHTS PROJECT (1999), at <http://www.law.harvard.edu/groups/civilrights/publications/resegregation99.html> (last visited September 25, 2001). According to Orfield and Yun, in 1996-1997, the average Latino student in the U.S. attended a school with 52.5 percent Latino students and only 6.6 percent white students. The average African-American student attended a school with 54.5 percent African-American students and only 8.6 percent white students. The average white student attended a school with 81.2 percent whites, 8.6 percent African Americans, and 6.6 percent Latinos.

Additional *de facto* segregation is now arising through school choice mechanisms.

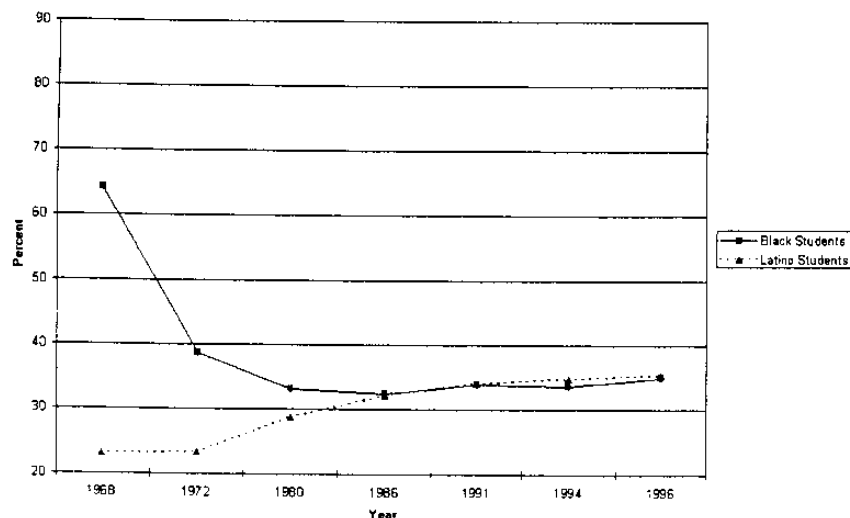
2. 347 U.S. 483 (1954).

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Figure 1).

Figure 1³

Percent Black and Latino Students in 90-100 Percent Minority Schools 1968-1996



Between-school racial segregation continues to characterize education throughout America, even while mandated desegregation apparently dwindles in import and incidence.⁴ Yet enough progress has been made toward integration of school sites that a second layer of segregation – dubbed “resegregation” or “second-generation segregation” – has spawned a major new desegregation battleground.⁵ Resegregation involves the stratification of students into different types or levels of educational experiences within a given school site, and it can take the form of tracking, special education, or discipline.⁶

This paper explores resegregation through tracking, examining aspects of tracking that leave it susceptible to legal challenge. Part II places tracking within its larger historical context, as a means for white parents to feel secure about their children’s education. Part III offers a review of scholarly literature concerning the characteristics and application of tracking. Part IV presents recent analyses of data

3. ORFIELD & YUN, *supra* note 1. Reprinted with permission.

4. Compare Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1161 (2000) (contending that the purported increase in unitary status motions has been overstated).

5. See KENNETH J. MEIER, ET AL., RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION 79 (1989).

6. See *id.*

from two school districts, investigating the harmful and segregative effects of tracking. Part V considers legal challenges to tracking within the changed national context resulting from the ongoing movement toward standards-based, high-stakes assessment.

II. Finding a Safe Harbor

Segregated educational facilities have been the norm throughout American history, and chief among the forces driving such segregation are (1) the desire of many white parents to send their children to schools with few minorities, and (2) a general willingness on the part of policymakers to create structures that facilitate the effectuation of this desire.⁷ In the pre-*Brown* years, not much creativity was needed on the part of these parents and policymakers, in either the South or the North. However, the post-*Brown* judicially-mandated integration of school sites necessitated new approaches to achieving the same (segregative) goal.⁸

Residential segregation, facilitated by the Supreme Court decision in *Milliken v. Bradley*,⁹ has indisputably provided the main avenue for continued educational segregation. However, residential segregation is merely prevalent – not universal. Consequently, segregation-minded white parents in mixed-race neighborhoods throughout the nation have struggled to find safe harbors within otherwise uninviting schools.¹⁰

Desegregation is educationally and socially meaningful only to the extent that students actually learn together in shared classrooms. Several studies have focused on the role of tracking and racially segregated classrooms in subverting the gains that might otherwise come about from desegregation.¹¹ Some inner-city magnet schools-

7. MASSEY & DENTON, *supra* note 1; see also THOMAS BYRNE EDSALL & MARY A. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992).

8. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

9. 418 U.S. 717 (1974).

10. While this article focuses on the use of tracking as a tool of racial segregation, that focus should not be taken to imply that tracking does not stratify in additional ways. While practices vary in every school, tracking also tends to segregate by socio-economic status, by behavior, and by academic achievement and motivation. For many educators, students, and parents, these latter (academic) factors provide a justifiable basis for tracking, as discussed later in this paper.

11. See ELIZABETH G. COHEN, *The Desegregated School: Problems in Status, Power and Interethnic Climate*, GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 77-95 (1984); Maureen T. Hallinan & R. A. Williams, *Interracial Friendship Choices in*

within-schools present a startling example of this phenomenon: the desirable magnet becomes populated almost exclusively by suburban students, with the host school remaining overwhelmingly minority, thus giving neighborhood students an ever-present reminder that their own education is inferior.¹² Since such magnet programs are usually ordered by courts for the express reason of prompting integration, this situation presents within-school resegregation in stark relief.¹³

My use of the term “safe harbor” is meant to reflect the variability in reasons why many white parents seek segregated schooling for their children. Old-fashioned bigotry has largely been refurbished, giving way to more socially acceptable normative fears that nonetheless still link race to objectionable characteristics.¹⁴ Such parents seek segregation because they want their children in schools and classes that they consider safe; that allow their children to be among other students who are similarly interested in learning and who do not disrupt the teacher; and that offer a top-notch curriculum, have high test scores, and send most students to top colleges.¹⁵ These parents accept the common presumption of a meaningful nexus between a white demographic and these positive school attributes.¹⁶

Given an integrated, heterogeneous school, then, high-track classes often present a refuge, offering comfort and reassurance to white parents who might otherwise flee to private schools or exercise increasingly available public school choices.

III. Tracking's Characteristics and Application

This article uses the term “tracking” to refer to any and all between-class grouping practices (i.e., arrangements that sort students into different classrooms for either all or part of the day) with both of

Secondary Schools, 54 AM. PSYCHOL. REV. 67, 67-78 (1989); Sandra Koslin, et al., *Classroom Racial Balance and Students' Interracial Attitudes*, 45 SOC. OF EDUC. 386, 386-407 (1972); J.W. Schofield & H.A. Sagar, *Peer Interaction Patterns in an Integrated Middle School*, 40 SOCIOLOGY 130, 130-38 (1977).

12. Kimberly C. West, *Note, A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L. J. 2567, 2571-77 (1994).

13. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51-58 (1990).

14. *See* Amy S. Wells & Irene Serna, *The Politics of Culture: Understanding Local Political Resistance to Detracking in Racially Mixed Schools*, 66 HARV. EDUC. REV. 93, 98-100 (1996); KEVIN G. WELNER, *LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY* (2001); PAULINE LIPMAN, *RACE, CLASS AND POWER IN SCHOOL RESTRUCTURING* (1998).

15. *See* Wells & Serna, *supra* note 14, at 101; WELNER, *supra* note 14.

16. *See id.*

the following two characteristics. First, the school must engage in a process wherein educators judge students' intellectual abilities or past achievement, or predict their future accomplishments, and use these judgments as at least part of the basis for class placement. Second, the school must differentiate the curriculum and instruction to which students in these various classrooms are exposed.¹⁷

Tracking, while its history is steeped in racism, also has a less pernicious side to its pedigree. While some may remember the flagrant use of tracking to re-segregate African Americans in the wake of *Brown*,¹⁸ the practice has additional historical roots in the efficiency-oriented reform proposals of so-called “administrative progressives” (e.g., Ellwood Cubberley) who dominated the educational landscape during the three decades preceding World War II.¹⁹ Further, in recent years, tracking's appeal to efficiency concerns has been supplemented by an appeal to choice.²⁰ Formerly rigid tracking structures have been modified to formally allow parental and student choice (usually combined with some course pre-requisites as well as teacher and counselor recommendations).²¹

In its pure theory, tracking has some advocates among educational researchers who generally assert that any discriminatory impact of the practice, while unfortunate, is the result of a misuse or abuse of an otherwise sound policy.²² Tracking, they contend, is not

17. *See id.* A second term, “ability grouping,” is also used in educational scholarship to refer to these same between-class grouping practices. Some researchers and educators have drawn distinctions between the two terms, usually labeling as “tracked” those systems that place students at a given level across subject areas and labeling as “ability grouped” those systems that group students class-by-class. *See, e.g.,* Robert E. Slavin, *Ability Grouping in the Middle Grades: Achievement Effects and Alternative*, 93 ELEMENTARY SCH. J. 535, 535-52 (1993). In reality, both terms are misnomers, since some students “jump the tracks” of almost every tracking system and since placements in these systems are, at best, based on *perceived* ability. More importantly, the day-to-day reality is virtually the same for the vast majority of students in schools approximating either definition. *See* Jeannie Oakes, *Grouping students for instruction*, 4 ENCYCLOPEDIA OF EDUC. RES. 562-68 (Marvin Alkin ed., 1991).

18. *See, e.g.,* *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.: Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

19. DAVID TYACK, *THE ONE BEST SYSTEM* 180 (1974); *see also* DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* (2000) (correctly noting that these efforts were also tinged with racism).

20. *See* SAMUEL R. LUCAS, *TRACKING INEQUALITY: STRATIFICATION AND MOBILITY IN AMERICAN HIGH SCHOOLS* (1999).

21. Yet, as both Lucas and Welner conclude, these choice mechanisms have little practical impact on classroom composition.

22. *See* Maureen T. Hallinan, *Tracking: From Theory to Practice*, 67 SOCIOLOGY OF EDUC. 79, 79-91 (1994); TOM LOVELESS, *THE TRACKING WARS: STATE REFORM MEETS*

inherently discriminatory nor does it necessarily subject low-track students to an inferior education.²³ Notwithstanding this support from some researchers, plus tracking's wide-spread acceptance in schools throughout the U.S.,²⁴ the practice has been denounced in most scholarly literature.²⁵

Tracking's opponents point to how it is actually implemented in American schools.²⁶ They focus their attacks primarily on the tendency of tracking structures to institutionalize lower academic expectations for those students enrolled in lower tracks.²⁷ Additional concerns include the arbitrariness and inconsistency of placements, the poor quality of curriculum in low-track classes, affective damage to students, and tracking's use as a means of second-generation segregation.²⁸ The following discussion provides a brief overview of that research.²⁹

At the basic level of academic outcomes, students in low-ability classes have far lower aspirations and take (subsequent) college preparatory classes less often than do students in higher groups.³⁰ For

SCHOOL POLICY (1999).

23. See Hallinan, *supra* note 22 at 84; LOVELESS, *supra* note 22.

24. While the exact numbers are not known, it is safe to say that most secondary schools in the U.S. track their students in some or all subjects. See generally J. L. EPSTEIN & D. J. MACIVER, EDUCATION IN THE MIDDLE GRADES: OVERVIEW OF NATIONAL PRACTICES AND TRENDS (1990). Many elementary schools also engage in practices akin to tracking. See Robert E. Slavin, *Ability Grouping and Student Achievement in Elementary Schools: A Best-Evidence Synthesis*, 57 REV. OF EDUC. RES. 293, 293-336 (1987).

25. See, e.g., JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985); THE COLLEGE BOARD, ACCESS TO KNOWLEDGE (1989); H. MEHAN, ET AL., CONSTRUCTING SCHOOL SUCCESS: THE CONSEQUENCES OF UNTRACKING LOW ACHIEVING STUDENTS (1996); Jeannie Oakes, et al., *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, HANDBOOK OF RESEARCH ON CURRICULUM 570-608 (Philip Jackson ed., 1992); see Robert E. Slavin, *supra* note 24 at 293-336; CARNEGIE COUNCIL FOR ADOLESCENT DEVELOPMENT, TURNING POINTS: PREPARING AMERICAN YOUTH FOR THE 21ST CENTURY (1989); NATIONAL GOVERNORS ASSOCIATION, ABILITY GROUPING AND TRACKING: CURRENT ISSUES AND CONCERNS (1993).

26. See Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility Of School Tracking Systems To Legal Challenges*, 66 HARV. EDUC. REV. 451, 451-70 (1996); ANNE WHEELLOCK, CROSSING THE TRACKS: HOW "UNTRACKING" CAN SAVE AMERICA'S SCHOOLS (1992); OAKES, KEEPING TRACK, *supra* note 25.

27. See *id.*

28. See *id.*

29. An earlier version of this research summary was presented in Federal Court as expert testimony. See *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, No. 89-C20168, 2000 WL 1855107 (N.D. Ill. Aug. 11, 2000).

30. See generally WELNER, *supra* note 14; Welner & Oakes, *supra* note 26;

instance, Braddock and Dawkins demonstrated that minority and white eighth graders' plans to enroll in high school college preparatory and non-college preparatory classes differed markedly based on the track level of their current classes, even when the researchers controlled for other likely influences on students' aspirations, such as gender, socioeconomic status, middle school grades, achievement test scores, and post-high school plans.³¹ Further, track assignments impacted students' future schooling opportunities. By the time they were tenth graders, students who were in high-ability groups as eighth graders were the most likely to enroll in college preparatory courses, while those who had been in low-ability eighth grade classes were the least likely to so enroll, independent of such factors as grades, test scores, aspirations, and social background.³² Interestingly, too, students in eighth grade mixed-ability classes were more likely than comparable peers in low-tracks to subsequently enter college prep classes.³³

Similarly, for those eighth grade students who scored in the middle ranges of achievement, initial high school track placements influenced future high school course selection and enrollment.³⁴ For example, students scoring in the fifth decile on eighth grade tests and who were placed in biology as ninth graders had a seventy-one percent likelihood of subsequently taking physics or chemistry.³⁵ In stark contrast, similarly scoring students who were placed in low-level science in grade 9 had only a seven percent likelihood of enrolling in these advanced courses.³⁶ In fact, at every level of the eighth grade achievement hierarchy, students placed in high level classes far outpaced their peers in later advanced science course-taking.³⁷ Overall, eighty-five percent of high school students remained in the same science and math tracks in which they began.³⁸ Additionally,

WHEELLOCK, *supra* note 26; OAKES, KEEPING TRACK, *supra* note 25.

31. Braddock, et al., *Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988*, 62 JOURNAL OF NEGRO EDUC., 1, 1-13 (1993) (Students in high-ability eighth grade math classes were more likely to report that they planned to take college prep classes in senior high).

32. See *id.*

33. See *id.*

34. Sanford Dornbush, *Off The Track*, Paper Presented at the 1994 Presidential Address to the Society for Research on Adolescence, San Diego, CA. (1994) (on file with author).†

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.*

even when controlling for levels of achievement, low-track students feel less challenged, put forth less effort, do less homework, and report that teachers are less likely to ask them to demonstrate their understanding.³⁹

Carefully designed and controlled studies that compare the impact of grouped and ungrouped settings on student achievement find that high achieving students do equally well in both grouped and non-grouped schools.⁴⁰ Even staunch advocates of tracking concede that research does not support the claim that high-ability students benefit simply from being in separate classes.⁴¹ Rather, separate classes for high achieving students only benefit participants when schools provide those students with an enriched curriculum that is different from that provided to students in lower groups.⁴² Not surprisingly, all students, whether high-ability or not, seem to benefit from the types of special resources, opportunities, and support usually present in high level classes.⁴³ Gains come from the far richer curriculum and learning opportunities that these classes provide, rather than from high-achievers being separated from their lower-achieving schoolmates.⁴⁴

39. *See id.* *See also* OAKES, KEEPING TRACK, *supra* note 25; WHELOCK, *supra* note 26.

40. *See* Slavin, *supra* note 24 at 293-336. Professor Slavin has conducted the most meticulous and respected reviews of these studies. *See also* Robert E. Slavin, *Achievement Effects of Ability Grouping in Secondary Schools: A Best Evidence Synthesis*, 60 REV. OF EDUC. RES. 471, 471-500 (1993) and Frederick Mosteller, et al., *Sustained Inquiry in Education: Lessons from Skill Grouping and Class Size*, 66 HARV. EDUC. REV. 797, 842 (1996). These studies, unfortunately, do not capture important elements of detracking reforms. Thus, "School X" may undertake a reform that is "detracking" only in the sense that students are assigned to heterogeneous classes. "School Y" may undergo a much more thorough reform, consistent with recommendations in scholarly literature, that adds curricular and instructional reform to this reassignment of students. School Y's reform is likely to be substantially more successful than School X's reform, but they would be indistinguishable in the databases generally used for these studies.

41. *See, e.g.*, JAMES KULIK, NATIONAL RESEARCH CENTER ON THE GIFTED AND TALENTED, AN ANALYSIS OF THE RESEARCH ON ABILITY GROUPING: HISTORICAL AND CONTEMPORARY PERSPECTIVES (1992).

42. JEANNIE OAKES & MARTIN LIPTON, TEACHING TO CHANGE THE WORLD (1999); *see also* CAROL TOMLINSON, ASS'N FOR SUPERVISION AND CURRICULUM DEV., HOW TO DIFFERENTIATE INSTRUCTION IN MIXED-ABILITY CLASSROOMS (1995).

43. *Id.*; *see also* ELIZABETH G. COHEN, DESIGNING GROUPWORK: STRATEGIES FOR THE HETEROGENEOUS CLASSROOM (1994); SANDRA L. SCHURR, PRESCRIPTIONS FOR SUCCESS IN HETEROGENEOUS CLASSROOMS (1995).

44. Students, particularly those in secondary school, arrive with very different levels of knowledge and skills. Schools often respond to those differences by sorting out the low-achievers and offering them limited learning opportunities that could not reasonably be described as college-preparatory. Higher-achieving students are correspondingly offered

Another study found that teachers instructing classes at more than one ability level varied their instructional goals among those classes.⁴⁵ Teachers placed much greater emphasis on higher-order thinking and problem solving in high-track classes.⁴⁶

Given these pedagogical shortcomings of tracking, any racial segregation within such a system raises serious questions of discrimination. Moreover, as Professor Jeannie Oakes has repeatedly substantiated, such segregation often takes place in racially-mixed schools that employ tracking.⁴⁷ African-American and Latino students are often judged to have learning deficits and limited potential (sometimes, regardless of their prior achievement), and they are placed disproportionately in low-track, remedial programs.⁴⁸ Once placed, these students learn less than comparably-skilled students in heterogeneous classes, and they have less access to knowledge, powerful learning environments, and resources.⁴⁹ Consequently, tracking practices tend to create racially separate programs that provide minority children with restricted educational opportunities and outcomes.⁵⁰ Since low-tracked students are negatively affected by being in ability grouped classes, the achievement gap invariably widens over time between students in high and low ability groups.⁵¹

learning opportunities that, should a student take advantage of them, would provide preparation for college. Other schools, however, respond to those differences by designing heterogeneous learning environments that offer all students opportunities that, should they take advantage of them, would be college-preparatory. This does not, of course, mean that all students are taught the same material; successful heterogeneous environments are usually built around project-based learning. Consequently at any given time each student is learning something different from his or her neighbor. *See generally* COHEN, *supra* note 43 (describing a more comprehensive description of such curriculum).

45. Steven W. Raudenbush, et al., *Higher Order Instructional Goals in Secondary Schools: Class, Teacher, and School Influences*, 30 AM. EDUC. RES. J. 523, 553 (1993). The researchers performed multi-level analyses of data concerning the instructional goals of English, mathematics, social studies and science teachers in 16 secondary schools. They found that variation in teachers' emphasis on teaching higher-order thinking in all four subjects was a function of hierarchical conceptions of teaching and learning related to teachers' perceptions of students' ability group.

46. *See id.*

47. *See generally* OAKES, KEEPING TRACK, *supra* note 25; JEANNIE OAKES, MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, CLASS, AND TRACKING ON OPPORTUNITIES TO LEARN MATH AND SCIENCE (1990); Jeannie Oakes, *Two cities: Tracking and within-school segregation*, in BROWN PLUS FORTY: THE PROMISE 681, 684-87 (1995); Jeannie Oakes & Gretchen Guiton, *Matchmaking: Tracking Decisions in Comprehensive High Schools*, 32 AM. EDUC. RES. J. 3, 17-23 (1995).

48. OAKES, KEEPING TRACK, *supra* note 25, at 65-68.

49. *See id.* at 74-79.

50. *See id.*

51. *See, e.g.*, Rhona S. Weinstein, *Reading Group Membership in First Grade: Teacher*

Ultimately, tracking is philosophically premised on the belief that some children are so academically different from other children that these two (or more) groups should not be in the same classroom.⁵² Accordingly, the academically inferior children are placed in separate classrooms where, in theory, they catch up (remediate) but where, in practice, they usually fall farther behind.⁵³ Tracking, then, is about the rationing of opportunities. From the perspective of the low-track student, it is about deciding that this student should not be exposed to curriculum and instruction that would prepare him or her for subsequent serious learning. From the perspective of the high-track student, it is about enhancing the schooling environment for some students by shielding (segregating) them from other students. Thus, low-track classes serve schools in a perverse way: they allow schools to warehouse racial minority, lower-achieving, and/or otherwise problematic students – keeping them apart from more valued students.

IV. Two Recent Examples⁵⁴

As discussed above, low-track placement is associated with a variety of educational disadvantages, including lower-order instruction and curriculum, lessened motivation and career-goals, and decreased academic achievement. This section examines some of these disadvantages as they recently played out in two school districts: the Woodland Hills School District, located near Pittsburgh, Pennsylvania, and the Rockford School District, located to the north of Chicago, Illinois. In each case, the data analysis explores the presence of on-going discrimination evident *after* the schools had begun implementing federal desegregation orders.⁵⁵

These analyses begin by investigating factors contributing to students' placement in high- or low-track classes. Next, I consider the short-term effects of that track placement upon subsequent

Behaviors and Pupil Experience Over Time, 68 J. OF EDUC. PSYCH. 105, 114 (1976); Adam Gamoran & Mark Berends, *The Effects of Stratification in Secondary Schools: Synthesis of Survey and Ethnographic Research*, 57 REV. OF EDUC. RES. 415, 430-32 (1987).

52. See generally OAKES, KEEPING TRACK, *supra* note 25 and WELNER, *supra* note 14.

53. See *id.*

54. For a more expansive version of the following discussion of quantitative analyses performed in the Woodland Hills and Rockford School Districts, see WELNER, *supra* note 14.

55. The analyses of Rockford data were conducted by Dr. Haggai Kupermintz, Dr. Jeannie Oakes, and myself. The analyses of Woodland Hills data were conducted by Gilbert Fitzgerald, Dr. Oakes, and myself.

achievement. Using complete cohorts (rather than sampling) from these school districts, I analyze placement in tracked classes, and, in Woodland Hills, I also analyze the impact of high- versus low-track placement. These analyses yield a complex but startling picture of the role that tracking can play – even over a very short term – in the denial of educational opportunities to African-American and Latino students in otherwise integrated districts.

Woodland Hills and Rockford both include significant choice elements within their systems, but I nonetheless analyze them in the same way as I would a more traditionally tracked system. In doing so, I rely on the research of Lucas, Rosenbaum, and others who have demonstrated the folly of such choice systems.⁵⁶ Researchers have been quite skeptical of the extent to which high school students have actually chosen their tracks, even when they say they have, and even when they have completed a formal process of “choosing,” and several studies suggest that many students do not understand the consequences of choices they may make.⁵⁷ Notably, about two-thirds of American sophomores reported on the national “High School and Beyond” study that they selected their own high school programs,⁵⁸ but many of these self-reported track placements were quite inaccurate.⁵⁹ Moreover, by the time they reach senior high, students are very likely to have learned all too well their “appropriate” place in the school hierarchy.⁶⁰

56. James E. Rosenbaum, *Social Implications of Educational Grouping*, 8 REV. OF RES. IN EDUC. 361, 377-81 (1980). Notwithstanding the negative consequences of enrolling in lower-ability level classes (as well as the disproportionate impact of these consequences on low-income students of color), some policy-makers might take solace in choice plans that allow students themselves to choose reduced educational opportunities. However, research that has investigated systems where students are permitted to choose their class levels show that such plans do little to ameliorate the negative consequences of tracking on minority students. See generally LUCAS, *supra* note 20 (using national data to demonstrate that introducing choice elements did not greatly alter the student distribution or educational characteristics of tracked systems); see also Gretchen Guiton & Jeannie Oakes, *Opportunity to Learn and Conceptions of Educational Equality*, 17 EDUC. EVAL. AND POLICY ANALYSIS 323, 323-336 (1995) (a case study of three schools revealing that faculty members pointed to course choice to justify as non-problematic the disproportionate representation of Hispanics in low-track classes).

57. Rosenbaum, *supra* note 56, at 378-81. See also CHRISTOPHER JENCKS, ET. AL., *INEQUALITY: A REASSESSMENT OF THE EFFECTS OF FAMILY AND SCHOOLING IN AMERICA* 34 (1972); GARY ORFIELD & FAITH PAUL, *HIGH HOPES, LONG ODDS: A MAJOR REPORT ON HOOSIER TEENS AND THE AMERICAN DREAM* 142 (1994).

58. Valerie E. Lee & Anthony Bryk, *Curriculum Tracking as Mediating the Social Distribution of High School Achievement*, 61 SOC. OF EDUC. 78, 81 (1998).

59. See OAKES, KEEPING TRACK, *supra* note 25; Rosenbaum, *supra* note 56.

60. OAKES, KEEPING TRACK, *supra* note 25, at 89-92.

A. The Broad Range of Prior Measured Achievement Within Tracks

The theory underlying tracking argues that, to facilitate learning, children should be separated into groups so that they may be taught together with peers of similar abilities and apart from those with higher or lower abilities. In Woodland Hills and Rockford, this theory was enacted (at best) in name only. That is, students with an extraordinarily wide range of ability levels, as measured by standardized tests, were placed together in remedial, college preparatory, and advanced academic courses.⁶¹ Contrary to theory, then, these districts created classes that were diverse in ability but imbalanced racially and with regard to course content.

The most extreme overlap existed in the Rockford School District (RSD) in 1994. The court concluded that “[t]he RSD did not narrow the range of student achievement to justify the targeting of curriculum and instruction to groups of students who were similar. Students of all levels of ability were found in nearly all classes. . . . The tracking system was an arbitrary system where students were placed into rigid tracks.”⁶² By 1999, this situation had improved, and the degree of tracking itself had decreased. However, substantial overlap continued to exist among the RSD’s remaining tracked courses. Figures 2 and 3 present “box and whisker” diagrams⁶³ of Rockford’s placement of students into English and math classes during the 1999-2000 school year.⁶⁴ They offer two examples from the tenth grade: similar patterns emerge at the other grade levels. The tremendous overlap in achievement test scores demonstrates that course placement is driven, at least in part, by factor(s) other than achievement as measured by this test.⁶⁵

61. WELNER, *supra* note 14.

62. *People Who Care v. Rockford Bd. of Educ. Sch. Dist. #205*, 851 F. Supp. 905, 958 (N.D. Ill. 1994) (setting forth a series of quartile figures, similar to the box-and-whisker diagram in Figure 2, illustrating this overlap in achievement ranges).

63. The box represents the middle fifty percent of each distribution, while the whiskers – extending from each side of the box – represent the upper and lower twenty-five percent of each distribution. The white line in each box represents the mean. The individual lines sometimes lying above and below the primary diagrams represent single “outliers” – extreme points as compared to the rest of the data set.

64. The figures use the students’ SAT9, or “Stanford Achievement Test, version 9,” score from 1998-1999.

65. The SAT9 scores capture a substantial portion of what Americans generally conceive of as “ability.” The portion of students’ ability not captured by these scores can be thought of as initiative, creativity, and other attributes that one would expect to be distributed – like ability – evenly among students of various races and ethnicities. However, standardized achievement test scores are usually skewed to the disfavor of Hispanic and African-American students, indicating that they measure something other

Figure 2
Ranges of Achievement in Tenth Grade English Classes, Rockford School District, 1999-2000

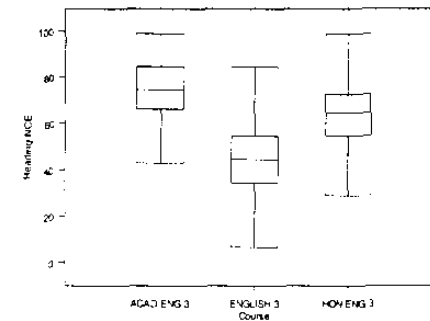
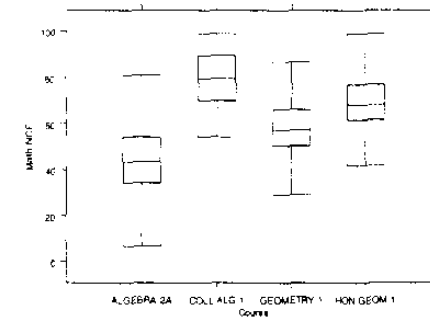


Figure 3
Ranges of Achievement in Tenth Grade Math Classes, Rockford School District, 1999-2000



than, or in addition to, natural God-given ability. Nonetheless, as flawed as the tests might be, the range of scores within ability groups is a useful indicator for determining whether the performance level of students within a given ability group is sufficiently narrow to permit teachers to target instruction to the similar needs of the students in that group. Moreover, failure to include the above critique would leave unchallenged the common presumption that tracks do accurately reflect a meaningful division based on ability. That is – even though I may personally believe that tracks cannot sort students by ability, if for no reason other than that there is no objective “ability” – useful to demonstrate, via the coin of the realm (standardized test scores), the broad range of students placed within each track. I am also mindful of the fact that many concerned parents and policy-makers turn to standardized test scores to gauge the performance of schools and districts. For this reason, these scores provide the best option for measuring achievement in this analysis and those to follow.

B. Rigidity of Track Placements

In 1994, the district court in Rockford concluded, "once a child was ability grouped in the RSD it was very difficult or almost impossible to change ability groups."⁶⁶ "The tracking system used by the RSD," the court later explained, "did not remedy differences or ameliorate disparities in achievement among racial groups, nor did it function to move students out of the low level track or move minority children into the higher track."⁶⁷

Six years later, the district had shown little improvement. Figure 4 presents the movement of students among high school English tracks in the RSD, based on cumulative data over the school years between 1996-97 and 1999-2000. These graphs reflect a pattern seen in both districts: the little mobility that exists is almost all experienced through movement to lower-level classes.⁶⁸ Moreover, the movement of minority (primarily African-American) students, as compared to the majority (white) students, is toward the lower tracks.

Another example of this rigidity is provided by the informal science grouping in Woodland Hills.⁶⁹ Perhaps as a result of the informality of the tracking, course placements were, in theory, not particularly rigid. Administrators usually agreed to parents' (infrequent) requests for changes from the schools' initial placement. However, the data show a startling degree of actual rigidity, with low-track students exhibiting almost no movement into higher tracks. High-track students had slightly more movement – to lower tracked classes.⁷⁰

Student placements in both these districts, then, were very rigid. Early judgments about students' capacities persisted throughout their school careers, and placements, once made, tended to be self-

66. *People Who Care*, 851 F. Supp. at 958.

67. *Id.* at 999.

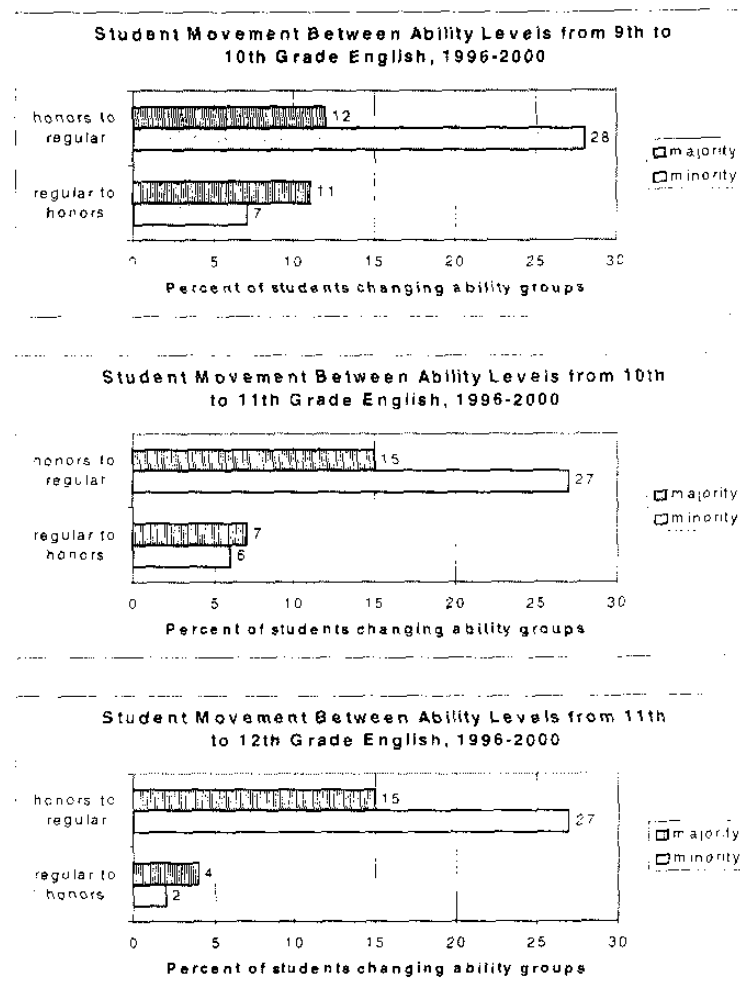
68. Oakes calls this downward pattern the "tournament model," meaning that potential winners are eliminated at each stage of competition. OAKES, KEEPING TRACK, *supra* note 25. This pattern is not surprising. Placements at higher "levels" often require that students have the benefit of more challenging curriculum and instruction in prior years. Further, prerequisite course requirements are likely to inhibit the movement of students, even those who may obtain higher test scores, in subsequent years.

69. These courses were not "tracked" in the traditional sense. Students were not explicitly identified as "college prep," "regular," or "remedial." However, the system was *de facto* tracked in the sense that students, beginning in the ninth grade, were stratified into two or more types of courses. For instance, the district's ninth graders took either "Physical Science" (low-track) or "Biology with Lab" (high-track).

70. See generally WELNER, *supra* note 14.

perpetuating. Lower tracked students became caught in a downward cycle: their education failed to prepare them in terms of knowledge and skills, and their transcripts reflected missing prerequisites for later courses. Moreover, the labels became ingrained, internally for students themselves and externally for teachers, counselors and other students.

Figure 4



C. Racial Discrimination in Track Placement

The previous two sections discuss the failure of these tracking systems to actually group by ability as well as the failure of the schools to ensure mobility between tracks – particularly the failure of low track placement to “remediate” students, helping them to move into higher tracks. That earlier discussion helps to demonstrate the *educational* indefensibility of the tracking systems in these districts. This section shifts that focus a bit, presenting powerful substantiation of racial bias within these tracking systems.

1. Rockford

Proof of such racial bias lies at the heart of the 1994 district court opinion in Rockford. The court printed 38 pages of figures, methodically demonstrating “that in all schools and in all subject areas race contributed to the class assignment and track placement.”⁷¹ The court was particularly shocked that African-American students who “qualified” for two or more tracks were consistently placed in the lower track, while white students were consistently placed in the higher track.⁷² While that court has attempted to remedy this discrimination, Figure 5 presents a table showing that the problem has continued in Rockford, at least through the 1999-2000 school year.⁷³

71. *People Who Care*, 851 F. Supp. at 961-98, 999.

72. *Id.* at 999.

73. It should be noted, however, that the RSD has been forced by the courts into substantial improvements to its tracking system. The disparities shown in Figure 5, for example, are not nearly as stark as those presented in the 1994 district court opinion. See *People Who Care*, 851 F. Supp. at 961-98.

Figure 5

Placement of Majority and Minority High School Students at Each “Slice” of Math/Reading Achievement in Regular and Advanced Classes Rockford School District, 1999-2000⁷⁴

Math/Reading Achievement	Majority Students ⁷⁵	Minority Students
Decile 1	633/3%	1212/2%
Decile 2	941/5%	1207/4%
Decile 3	1166/7%	1103/7%
Decile 4	1492/15%	1109/13%
Decile 5	1367/20%	667/15%
Decile 6	1819/31%	650/24%
Decile 7	1788/46%	446/37%
Decile 8	2346/61%	377/59%
Decile 9	2271/74%	227/70%
Decile 10	2124/86%	98/81%

In any given slice, one can see how comparably-scoring students were treated by the RSD. Discrimination existed against minority students at both high and low levels of achievement; even minority students in the highest scoring groups fared worse than majority students with the same scores. While the extent of discrimination against minority students within any one of these achievement ranges may appear small, the combined impact across all of the ranges is considerable. Moreover, as the Rockford court pointed out, the imbalance is strongest in the fifth through seventh deciles, where one finds the bulk of minority students who would arguably be qualified for the district’s high-track classes.⁷⁶

74. To generate this table, each course placement was separately coded and matched to each individual student’s SAT9 score from the prior year. For math and science placements, the student’s SAT9 math score is used; for English and social science placements, the student’s SAT9 English score is used. Thus, a given student’s placements in a given school year show up in these tables separately for each core area (one placement for math, one for English, etc.).

75. Each cell sets forth the number of placements followed by the percentage of those placements that were in advanced classes. For instance, for the first cell under “Majority Students,” there were 633 placements, and 3% of those placements were in advanced classes.

76. *People Who Care v. Rockford Bd. of Educ. Sch. Dist. # 205*, 246 F.3d 1073 (7th Cir. 2001) (reversing the district court’s denial of RSD’s motion seeking release from court supervision). Judge Posner and his colleagues had indicated throughout this desegregation litigation that they favored a prompt resolution of court involvement. See

This is clear evidence of second-generation segregation – resegregation of students within school sites. The racial disparities between tracks could be partially explained by differences in measured achievement. But racial sorting also occurred among students with comparable achievement. That is, the disproportionate placement of African-American and Latino students in low-track classes, and the corresponding exclusion of these students from high-track classes, went above and beyond any disparate impact attributable to prior achievement.⁷⁷ In its denial of the RSD's recent motion seeking release from court supervision, the Rockford district court opinion reproduced the above slice analysis.⁷⁸

To further examine this phenomenon, the following section presents regression analyses of the data from Woodland Hills.

2. Woodland Hills

Using a logistic regression model,⁷⁹ we examined seventh grade

generally *People Who Care v. Rockford Bd. of Educ. Sch. Dist. #205*, 111 F.3d 528 (7th Cir. 1997); *People Who Care v. Rockford Bd. of Educ. Sch. Dist. #205*, 171 F.3d 1083 (7th Cir. 1999). The 2001 opinion reversing the judgment failed to take up most of the lower court's findings, including those based on the tracking analyses discussed in this article.

77. As a policy matter, the negative impact of low-track placement (discussed *infra*, in Section "D") is even more important than the proof of racial discrimination among students of comparable prior achievement. Racial minority students, nationally as well as in the four districts studied, tend to have much lower test scores and are disproportionately educated in lower-track classes. This means that these students are being given an inferior education, a practice that cannot be justified merely by pointing to lower prior achievement. In fact, the basic idea behind "remedial" education is to help lower-achieving students to catch up to their counterparts – the exact opposite of the documented impact of low track placement in these districts.

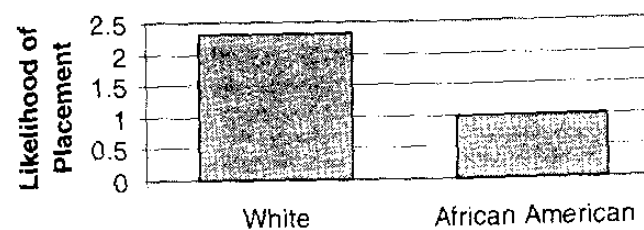
78. In reversing this lower court ruling in favor of the plaintiffs, the Seventh Circuit panel did not address the slice analysis. See *People Who Care*, 246 F.3d at 1073. However, in its 1997 opinion reversing the district court's remedial order, the Seventh Circuit focused on an earlier slice analysis and concluded that the appropriate remedy for the documented discrimination was to enjoin the "misuse" of tracking. Specifically, the court limited the available remedy—based upon the then-existing record—to an injunction that would "forbid the district, on pain of contempt if the prohibition is flouted, to track students other than in accordance with criteria that have been validated as objective and nonracist." *People Who Care*, 111 F.3d at 536. The appellate court reasoned that the plaintiffs "implicitly" conceded, "by accusing the school district of having placed white kids in higher tracks, and black kids in lower tracks, without always complying rigorously with objective criteria, such as scores on achievement tests," that discrimination in the RSD could be eliminated without abolishing tracking. *Id.* at 536. Of course, the plaintiffs made no such concession. The slice analysis had only been offered to counter the school district's assertions of fair placements. Interestingly, on remand the school district acknowledged that it could not design a tracking system that actually complied with the Seventh Circuit "objective criteria" requirement – there must be room for subjectivity – and agreed to racial guidelines for tracked classes.

79. Both logistic regression and the more common linear regression are useful tools

English track placement in Woodland Hills.⁸⁰ The results indicated that the two strongest predictors of track placement are the students' GPA and ITBS ("Iowa Test of Basic Skills") scores. However, as represented in Figure 6, race also powerfully drives course placement. Controlling for GPA ("average") and ITBS, a white student was 2.3 times more likely than an African-American student to be placed in the high-track English class.

Figure 6

Relative Placement in High Track for Each Race, Controlling for Average and ITBS Score



Note that this analysis shows only this single year's impact of race. Further, the students' GPA and ITBS scores are baseline predictors that measure academic achievement or potential at the end of the sixth grade (or earlier). They therefore incorporate previous impact resulting from, among other things, the students' race. The

for developing prediction models. As demonstrated in the following section (concerning the prediction model for students' achievement), linear regression is best used when the dependent variable can take on many different values (e.g., scores along a scale of 1-100). By contrast, logistic regression is used where, as here, the dependent variable can have only two values (e.g., high-track or low-track); the model estimates the probability of either of the two events occurring. More technically, linear regression estimates the parameters of the model using the method of least squares; regression coefficients are selected that result in the smallest sum of squares between the observed and the predicted values of the dependent variable. In logistic regression, the parameters of the model are estimated using the maximum-likelihood method; the selected coefficients make the observed results most likely.

80. For this model, we (Gilbert Fitzgerald, Dr. Oakes, and I) evaluated the following predictors of seventh grade English track placement in Woodland Hills for the year prior to the district's detracking: sixth grade English grade-point average ("average"), sixth grade ITBS reading score, and race (note that the "free and reduced lunch" data in the Woodland Hills database, which might normally be used as an indicator of socio-economic status, was either absent or erroneous; so this covariate was excluded from the analyses).

analysis, therefore, shows only the additional, ongoing effect from race.⁸¹

D. The Impact of Tracking on Achievement

Previous research has demonstrated that placement in a low-track class is likely to have a negative impact on later achievement.⁸² This section adds several analyses to that body of literature – a slice analysis of the Rockford data as well as regression analyses from Woodland Hills.⁸³

1. Rockford

In Rockford, tracking allowed high-track students to improve academically but stifled the learning of low-track students. Differential track placement drove immediate divergence between comparable students, and this divergence continued over subsequent years (see Figures 7a and 7b below).⁸⁴ The trend shown in these graphs – of low scoring students tending to improve their scores in later years, while high scoring students tend to have their scores fall (regardless of course level) – is an example of a statistical phenomenon known as “regression toward the mean.”⁸⁵ This

81. Consider, for example, an African-American student in kindergarten. For the next six years, she may receive benefits or damage driven by her race. By the end of the sixth grade, this characteristic may have driven higher or lower ITBS scores and/or GPA. Therefore, an analysis showing ITBS and GPA as strong predictors of course placement may be showing hidden effects of the race variable.

82. See Oakes, et al., *Curriculum Differentiation*, supra note 25.

83. Keep in mind that the data from these districts encompass the entire population; they do not arise from random samples drawn from those populations. Therefore, measures of statistical significance, such as confidence intervals and “p-statistics,” are unnecessary to discover whether the differences are real. If one were using samples rather than universal data, however, one would need to use statistical tests to be confident that observed differences would also be found in the larger population.

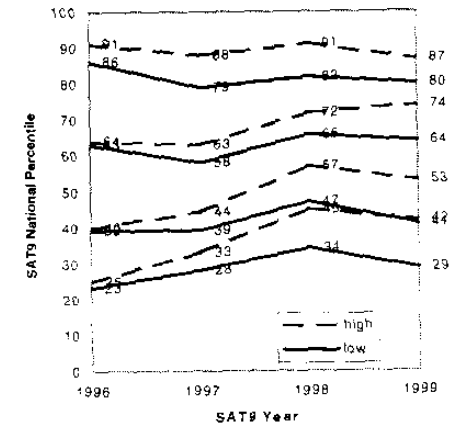
84. We first divided the students into five comparable sub-sections, based on their SAT9 scores. The first subsection consisted of students scoring in the bottom twenty percent of all students. The second was the next highest-scoring quintile, up through the top twenty percent. We then divided the students in these quintiles into students placed in the higher level classes and those placed in the lower level classes. We did this for both math and English. The RSD students took the SAT9 only through the tenth grade, so we focused on the earliest grades possible: eighth grade for math; ninth grade for English. Next we plotted these students’ progress over time. Note that about ten percent of students each year moved between ability levels, generally in a downward direction (recall the earlier discussion of rigidity). In order to accurately demonstrate the impact of remaining in a given track, students who moved are not represented in the graphs.

85. This regression effect is the statistical equivalent of the common sense notion that extreme experiences tend to even out over time. This effect was named “regression toward the mean” by Sir Francis Galton who observed that tall parents tend, on average,

phenomenon, however, cannot account for the separation between students placed in high and low ability groups. Accordingly, these graphs provide strong evidence that low-track classes employ curricula and instructional methods that do not help students catch up to the performance level of their higher-tracked colleagues. In fact, these students fall further behind.

Figure 7a
Impact of 1997 8th Grade Math Placement, Woodland Hills⁸⁶

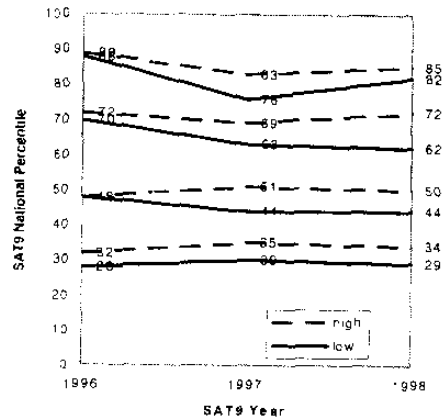
Impact of 1997 8th Grade Math Placement
(Series are omitted if high or low contains less than 13 students)



to have shorter children, and short parents tend, on average, to have taller children. Similarly, taller children tend to have shorter parents, and shorter children tend to have taller parents. See DONALD T. CAMPBELL & DAVID A. KENNY, A PRIMER ON REGRESSION ARTIFACTS 1-3 (1999); see also GENE GLASS & KEN HOPKINS, STATISTICAL METHODS IN EDUCATION AND PSYCHOLOGY 152-84 (Allyn & Bacon, 3d ed. 1995).

86. Series are omitted if high or low contains less than thirteen students.

Figure 7b

Impact of 1997 9th Grade English Placement, Woodland Hills⁸⁷Impact of 1997 9th Grade English Placement
(Series are omitted if high or low contains less than
13 students)

Looking first at the math graph, the 1996 plot points represent the beginning scores of students in each quintile.⁸⁸ At this beginning point, students later placed in higher and lower level classes from each scoring range were relatively comparable to one another. The 1997 data points represent the next year's scores, after the students were separated into ability grouped classes. For each cohort studied, the students in the lower level course fell further behind. This separation continued throughout later years – in most cases widening.

The most dramatic example of the impact of tracking is the contrast between the higher grouped students from the second quintile and the lower grouped students from the third quintile: the group means actually cross. That is, the (initially) lower scoring, high-tracked students came to surpass the (initially) higher scoring, low-tracked students.

English tracking had a similar effect, with students in the higher level classes gaining slightly or losing slightly over a two-year period, while students in the lower level classes lost considerable ground over

87. Series are omitted if high or low contains less than thirteen students.

88. The lowest quintile is omitted, as too few students were in the higher level courses.

at same period.⁸⁹

These analyses demonstrate with remarkable clarity that the tracking system actively denied educational opportunities to the students in lower level classes. Such findings point to one of the most important criticisms of tracking nationally: that placements tend to take on lives of their own, symbolizing a student's rank and capabilities and powerfully influencing his or her future chances.⁹⁰

2. Woodland Hills

We also examined the impact of tracking in Woodland Hills' English courses. We created a statistical model, using linear regression analysis, to determine the impact on subsequent test scores of various possible predictor variables. In particular, we were focused on the placement of students into either high- or low-track English courses in the seventh grade.⁹¹ Using the seventh grade ITBS score as the outcome, Figure 8 shows the effect size for each predictor.⁹² The earlier (sixth grade) ITBS score was, not surprisingly, the strongest and most consistent predictor of the later ITBS score; each one-point increase in sixth grade ITBS drove a 0.76-point increase in seventh grade ITBS. However, three other predictors showed relatively strong effects.⁹³ Most importantly, placement in the high-track, rather than the low-track, English class drove a 4.8-point increase.⁹⁴

89. Note that this analysis could not extend to 1998-99 because the students were then eleventh graders and did not take the SAT9.

90. A substantial body of research supports this conclusion. See, e.g., LUCAS, *supra* note 20 and OAKES, KEEPING TRACK, *supra* note 25, at 3-4.

91. In addition to sixth grade ITBS (the pre-test), these analyses included the following predictors: course (track), sex, race, free/reduced lunch status, gifted status, and junior high school attended.

92. The analysis used a "robustified generalized linear model (glm)," which downplays the effect of extreme data points. The multiple r-squared for this model is 0.77, which means that the model accounts for 77% of the observed results. Please note that Figure 8 does not show the earlier (sixth grade) ITBS score, because, unlike all the other predictors, it is not dichotomous. That is, it has more than two possible values.

93. Each of these factors is presented as a contrast between two students who are otherwise identical. This can also be thought of as a transition of a hypothetical student from one status to another. The analysis shows, in addition to the impact of track placement, the following two strong effects: the status of being white, rather than African-American, drove a 3.0 point increase; and the status of being identified as gifted drove a 3.7 point increase over those not so identified.

94. We also conducted a series of analyses that examined the impact, after one year, of Woodland Hills' detracking reform. In a nutshell, these analyses indicated that formerly low-track students tended to benefit from this detracking effort, as did those formerly high-track students who had scored greater than seventy-four on their sixth grade ITBS. This latter finding would be consistent with a recent study of detracked "Talent

Figure 8

Factors Driving 7th Grade Reading Achievement
Woodland Hills, 1994-1995

	Value	Std Error
6 th Grade ITBS	0.76	0.03
Sex	-0.09	0.41
Race	1.50	0.56
Lunch Status	0.11	0.50
Gifted Status	1.86	0.55
Junior High	-0.63	0.45
Track Placement (L to H)	2.39	0.52

E. The Broader Impact of Tracking on Rockford Students' School Careers

In Rockford, many minority students were retained and dropped out of school. To see tracking within this broader context, consider the following "high school career" analysis. This analysis offers a comprehensive view of what happens to children as they move through high school, and it encompasses outcomes that range from dropping out to graduation.

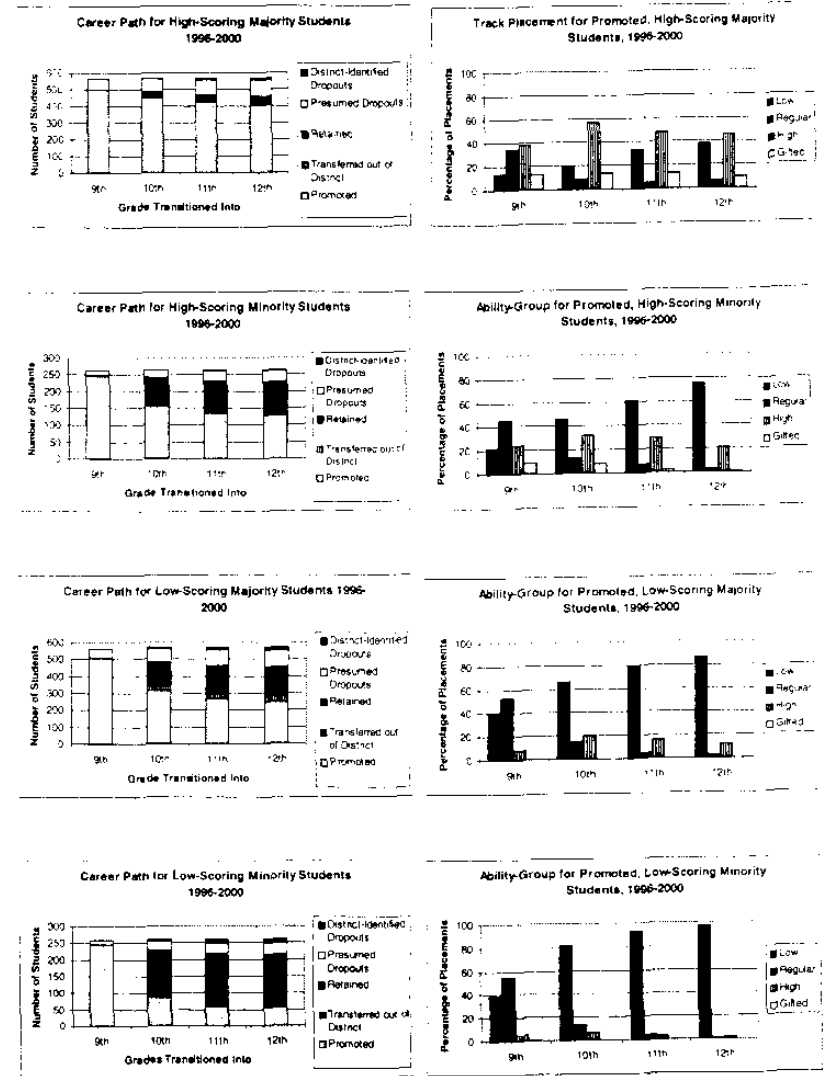
To highlight trends among different groups of students, we first separated the data for the districts' minority and majority students. We then took the average of the students' SAT9 math and English scores and subdivided each of these groups, splitting them in half at their median score. That is, we formed four groups: (a) high scoring majority students, (b) high scoring minority students, (c) low scoring majority students, and (d) low scoring minority students.

For each of these four groups, we began by compiling all the students in eighth grade in school year 1995-96. Using the high scoring majority students as an example, 566 students were counted in eighth grade. This discrete group of students was followed over four-plus school years, ending as the students entered twelfth grade. This analysis allows us to see a relatively complete overview of what happens to RSD students in high school. The career paths for the four groups are presented in the following set of graphs (Figure 9). Each path is presented as a two-graph set; the first graph identifies whether

Development" middle schools, where students with the strongest academic skills demonstrated the greatest academic benefits from the reform. DOUGLAS MACIVER, ET AL., REPORT OF THE CENTER FOR THE EDUCATION OF STUDENTS PLACED AT RISK. WORKING TOGETHER TO BECOME PROFICIENT READERS: EARLY IMPACT OF THE TALENT DEVELOPMENT MIDDLE SCHOOL'S STUDENT TEAM LITERATURE PROGRAM 15 (1998).

the students were promoted, while the second graph shows the levels of courses taken by those promoted students.

Figure 9



Looking at the high scoring majority students (the first set of graphs) as an example, one sees relatively few students lost in the transition from eighth to ninth grade. One of these students transferred from the district, while 65 are "Presumed Dropouts."⁹⁵ Among those students who were promoted to ninth grade (500 students, in this example), the second graph in each set shows the placement breakdown. Most of the students in this example were enrolled in high level courses. The following year, some of these students (450) were promoted to tenth grade. Others, however, were retained (25), were presumed dropouts (14), were identified as dropouts (4), or transferred out of the district (8). This pattern continues through to the outset of the twelfth grade.

One of the most telling aspects of these analyses lies in the comparison of the four groups. In particular, the high scoring minority students fared much worse – particularly in terms of retention – than did the high scoring majority students. Only about half of high scoring minority students made it as far as the twelfth grade on a timely basis. Of course, of the thirty-four percent of the students⁹⁶ who are retained at least once, some will eventually graduate – but few areas of education scholarship are clearer than that which demonstrates that retained students drop out at an extremely high rate.⁹⁷ Consequently, while this analysis did not examine the ultimate fate of retained students, it is a safe bet that many would ultimately fall into one of the two dropout categories.

Another striking part of this analysis is the final set of graphs concerning the lower scoring half of the minority students. Only twenty-two percent of the students⁹⁸ who started out in eighth grade made it to twelfth grade without being retained, dropping out or (in the case of 7 students) transferring from the district. Moreover, from tenth grade on, almost all of these students were in the lower level classes. Students in this group stood a 3.4 times greater chance of being retained or dropping out than of advancing unimpeded to the

95. The "District-Identified Dropouts" in this analysis are those students coded by the district as leaving before graduation but not transferring to another school. The students coded as "Presumed Dropouts" are those who simply disappear from the database. Some of these missing students may not, in fact, be dropouts (they were in the district one year and disappeared the next with no coding explaining their whereabouts).

96. Eighty-nine out of 262.

97. See FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION 34 (Lorrie Shepard & Mary Lee Smith eds., 1989) (noting that dropouts are five times more likely to have repeated a grade than are high school graduates and that students who repeat two grades have a probability of dropping out of nearly one hundred percent).

98. Fifty-seven of the 259.

twelfth grade. They stood a 65 times greater chance of being retained or dropping out than of making it into a twelfth grade class in a high or even a mid-level track.

F. Lessons from these Two Districts

The collection of analyses set forth above paints a compelling and dynamic picture. African-American and Latino students were disproportionately and discriminatorily placed in low-track classes that, while purporting to be homogeneous, actually encompassed a wide range of measured abilities. Once placed in these low tracks, these students had to overcome great odds to move up within the track structure. Year after year, these students fell further and further behind their high-track counterparts. These track placements and this racial discrimination interacted and existed as a cycle, resulting in very different schooling careers.⁹⁹

The impact of fixed characteristics, particularly race, is thus greater than might be revealed by the snapshot of any given analysis. Analyses predicting test scores show the minor impact, for any given year, of race (e.g., a 3 point detriment for African Americans). But this impact is cumulative over each year measured. If this trend continued over a student's K-12 career, this 3 point detriment would snowball into a 39 point detriment. When the racial element of track placement, along with the achievement impact of track placement, is superimposed on this more direct racial impact, one sees a double-whammy for African Americans in terms of later achievement. Race is not only a direct predictor of lower test scores; it is also an indirect predictor, through the disparate track placement. Taken as a whole, then, these analyses highlight two harmful elements of tracking. First, the low-track classes have a detrimental impact on students' later academic performance. Second, the analyses reveal that African-American and Latino students are disproportionately enrolled in these low-track courses, even after controlling for prior achievement.

99. An even more thorough description of the tracking systems in these two districts would take into account the artificial starting point for the above investigations. For instance, consider a standardized test taken near the end of the eighth grade and used in a regression analysis to predict ninth grade placement. Use of this baseline score from the eighth grade standardized test as an independent variable (rather than choosing the score of, e.g., the sixth grade test) is somewhat arbitrary. In fact, this eighth grade score should be thought of as the dependent variable in some earlier but unmeasured model that predates grade 8.

V. Standards, High-Stakes Testing, and Tracking

The gravamen of the above analyses lies in one key contention: *the quality of educational opportunities offered in low-track classes is substantially inferior to that offered in high-track classes.* The level, and even the existence, of that inferiority varies from school to school (and from class to class), but these variations tend to disappear when one moves to a macro-scale of, for instance, the overall impact of a district's tracking practices.¹⁰⁰ Inferiority is also, however, a social construct: it is contextualized within community values concerning the purpose of schooling. An obvious example of this contextualization would be the value placed on a non-academic vocational education in a blue-collar versus a white-collar community.¹⁰¹ White-collar students and parents are more likely to view the vocational education as inferior.¹⁰²

In the past, this difference of opinion concerning the value of different types of education added a layer of difficulty for courts considering challenges to tracking systems.¹⁰³ However, any such dispute has now been resolved by an avalanche of legislation collectively known as the standards movement.¹⁰⁴ These federal and

100. See generally WELNER, *supra* note 14 and OAKES, KEEPING TRACK, *supra* note 25, at 40-60.

101. See PAUL WILLIS, LEARNING TO LABOR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 77-81 (1990); ANNETTE LAREAU, HOME ADVANTAGE: SOCIAL CLASS AND PARENTAL INTERVENTION IN ELEMENTARY EDUCATION (Jay Macleod ed., 2d ed. 2000) (1994).

102. *Id.*

103. See Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

104. It is also known as the standards-based accountability movement, and it grew out of the systemic reform movement. See Marshall Smith & Jennifer O'Day, *Systemic School Reform*, THE POLITICS OF CURRICULUM AND TESTING 233-67 (Susan Fuhrman & Bruce Malen eds., 1991). These reforms are grounded in the idea of alignment between curriculum standards, performance standards, assessment, teacher preparation, staff development, and other forms of capacity-building, incentives, and mandates. As generally practiced, the state adopts a set of standards along with a statewide test and a system of rewards and punishments directed at students, teachers, schools, and/or school districts and all dependant upon students' test scores. At the federal level, see the Individuals with Disabilities Education Act Amendments of 1997, 20 U.S.C. §§ 1400 *et seq.* (Supp. V. 1999); Title I of the ESEA, 20 U.S.C. §§ 6301 *et seq.*; the Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-6084 (2001); the 1994 School-to-Work Opportunities Act, 20 U.S.C. §§ 6101 *et seq.* (2001); and the 1994 Improving America's Schools Act (ESEA reauthorization), Pub. L. No. 103-382, 108 Stat. 3518 (1994). This latter statute provides, for instance, that low-achieving, disadvantaged students must receive "accelerated," "enriched," and "high-quality" curricula, "effective instructional strategies," and "highly qualified instructional staff." Improving America's Schools Act, 20 U.S.C. §§ 6314(b)(1), 6315(c)(1), and 6320(a)(1) (2001). For examples of state statutes, see Cal. Educ. Code §

state statutes provide a framework for a national push for standards and high-stakes accountability.¹⁰⁵ The federal government has even demanded that federally funded vocational education programs be structured around the same high-stakes standards and assessments.¹⁰⁶

This standards legislation should resolve the issue of whether schools are required to generally offer an academic education. Moreover, the legislation effectively provides courts with guidelines concerning the actual level of academic preparation that elected representatives have determined to be necessary.¹⁰⁷ The following discussion considers the future of tracking challenges given this new

60602(a)(2) (West 2001) which mandates the adoption of "a set of statewide academically rigorous content standards and performance standards in all major subject areas", and § 60605 which sets forth the requirement, as part of the Standardized Testing and Reporting (STAR) Program, that students be tested in basic skills in reading, spelling, written expression, mathematics, history-social science, and science). Also see Tex. Educ. Code § 39.025 (Vernon 1996) which requires students to perform satisfactorily on the secondary exit-level TAAS before being eligible to receive a high school diploma, and Tex. Educ. Code § 39.131 which describes accreditation sanctions and interventions for school districts and campuses not meeting the accreditation criteria, including that of the secondary exit-level TAAS.

105. *Id.* As discussed briefly, states' accountability systems are often tied to important items such as grade promotion and graduation. This gives the tests "high-stakes" for the impacted students. Some states also attach stakes to students' test scores that are directed at schools or teachers. Because these repercussions do not directly impact students, the legal actions discussed in this article are not implicated by such schemes.

106. See Carl D. Perkins Vocational-Technical Education Act Amendments of 1998, 20 U.S.C. § 2301 *et seq.*, particularly 20 U.S.C. § 2323, establishing a state performance accountability system.

107. Michael Rebell argues that standards-based reforms have provided courts with "judicially manageable" tools, allowing them to devise effective remedial orders in adequacy cases. He contends that the recent success of adequacy cases can be traced back to the 1989 decision in *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989). Specifically, he points to the *Rose* court's use of standards as a means of describing and driving a remedy for inadequacy. The legislation and court cases that framed standards-based reform, Rebell contends, have substantially enhanced educational adequacy notions from earlier fiscal equity cases. Standards-based reforms have, he notes, given the concept of educational adequacy substantive content. He further argues that the recent success in fiscal equity actions is due to the shift from direct challenges to the level of educational funding to challenges based on the denial of constitutionally protected basic educational opportunities. Michael A. Rebell, *Education Adequacy Litigation and the Quest for Equal Educational Opportunity*, STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT 2 (1999). Mr. Rebell litigated the New York State case that has become the most recent instance of the success of this adequacy approach. See *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475 (S.D.N.Y. 2001) (finding the current state school funding system denies students in New York City the opportunity for a "sound basic education" as guaranteed by the state constitution). Building on the approach begun in *Rose*, the court held that a "sound basic education" consists of "the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment." *Id.*

standards-driven, high-stakes environment.

A. Focusing on the Contention

School districts generally respond to allegations of discriminatory tracking with testimony proffered to demonstrate the following: (1) tracking may be controversial but it is a common practice, historically as well as today;¹⁰⁸ (2) the district's particular placement system allows for students and parents to ignore teacher and counselor recommendations and opt for more (or less) challenging classes; (3) secondary schools (where most tracking occurs) work within a larger context formed by a variety of factors over which these schools have little or no control (e.g., differences in students' prior education, as well as the wealth and education of the students' parents), and which accounts for differences in students' achievement and course placement; (4) the pattern of low academic achievement of minority students, in the district and nationwide, is not attributable to the schools but rather to these other factors (see (3) above); (5) patterns of differential achievement and course placement in the accused district are no worse than similar patterns (so-called "achievement gaps" or "test-score gaps") nationwide; and (6) students' achievement test scores would forecast even lower minority high-track enrollment than is actually found in the accused district.¹⁰⁹

As they have with regard to desegregation in general, courts have evidenced a great deal of hesitancy toward intervention in schools' tracking practices.¹¹⁰ The above district responses have accordingly

108. See *People Who Care*, 111 F.3d at 536. The court stated that tracking is a "controversial educational policy" and argued that "lawyers and judges are not competent to resolve the controversy." It cited scholarly authority for the proposition that most American students are tracked and reasoned that, "as the consensus of the nation's educational authorities, [tracking] deserves some consideration by a federal court." *Id.*

109. While this final argument is sometimes presented, it has often been grounded on a flawed statistical analysis akin to Simpson's Paradox. See Kevin G. Welner, et al., *Lies, Damned Lies, and Expert Testimony*, Paper Presented at the Annual Meeting of the American Educational Research Association, Seattle, WA (2001) (on file with author); see also E. H. Simpson, *The Interpretation of Interaction Contingency Tables*, 13 J. OF THE ROYAL STAT. SOC. 238, 241 (1951). For examples of these six contentions, see *Evans v. Buchanan*, 447 F. Supp. 982 (D. Del. 1978), remanded to 512 F. Supp. 839 (D. Del. 1981); *People Who Care v. Rockford Bd. of Educ. Sch. Dist.*, 111 F.3d 528 (7th Cir. 1997); and *People Who Care v. Rockford Bd. of Educ. Sch. Dist.*, 851 F.Supp. 905 (N.D. Ill. 1994).

110. See, e.g., *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989); *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Coalition to Save Our Children v. State Bd. of Educ.*, et al., 901 F. Supp. 784 (D. Del. 1995).

held powerful sway in these courts.¹¹¹ Yet these responses invariably neglect the above-stated key contention underlying the plaintiffs' claims: *the quality of educational opportunities offered in low-track classes is substantially inferior to that offered in high-track classes*. If minority students are taught disproportionately in classes that present inferior opportunities, and if schools create and maintain an educational structure that facilitates this disproportionality, then, even if one were to concede the truth of all the above arguments, this should not insulate schools from liability. Under the Department of Education's implementing regulations for Title VI, schools would have the burden of proving the educational necessity for practices that produce this disparate racial impact.¹¹² Further, even if low-track classes do not disproportionately house minority students, they raise important issues under state constitutional education clauses¹¹³ as well as due process claims tied to high-stakes testing.¹¹⁴

111. See *Quarles*, 868 F.2d at 753-56; *Georgia State Conference of Branches of NAACP*, 775 F.3d at 1412-21; *Coalition to Save Our Children*, 901 F. Supp. at 822-24.

112. 34 C.F.R. §100.3(b)(2) (2000). The Supreme Court's recent 5-4 decision in *Alexander v. Sandoval*, No. 99-1908, 2001 U.S. LEXIS 3367 at *1 (2001), eliminated the long-standing private right of action under Title VI's implementing regulations. However, the decision did not address the validity of the disparate impact regulations themselves--"we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Id.* at *4. Accordingly, the holding in *Sandoval* leaves open an important legal avenue for private enforcement of rights set forth in the Title VI regulations. 42 U.S.C. § 1983 enables private parties to sue state actors responsible for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In the words of Justice Stevens (dissenting in *Sandoval*), "[T]his case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief." *Id.* at *14. See also Powell v. Ridge, 189 F.3d 387, 400-403 (3d Cir. 1999); C. Mank Bradford, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KANS. L. REV. 321 (2001); Kevin G. Welner, *Alexander V. Sandoval: A Setback for Civil Rights*, 9 EDUC. POLICY ANALYSIS ARCHIVES 24 (2001) (available at <http://epaa.asu.edu/epaa/v9n24.html>). In fact, some courts have, since *Sandoval*, allowed plaintiffs to use §1983 to invoke the Title VI regulations. *South Camden Citizens in Action v. New Jersey Dept. of Env. Prot.*, 145 F. Supp. 2d 505 (D. N.J. 2001). Because of this alternative approach to enforcing Title VI rights, the Court's *Sandoval* decision presently has only a minimal impact on the litigation approaches set forth in this article, and the discussion herein of legal actions should therefore be read as concerning actions enforcing Title VI regulations via § 1983. That said, advocates must also be wary of this legal avenue, since it is highly susceptible to an eventual Supreme Court decision akin to *Sandoval* itself.

113. See, e.g., *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

114. *Brookhart v. Illinois*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); Paul Weckstein, *School Reform and Enforceable Rights to*

Elsewhere, I have argued that well-framed cases can and do result in detracking orders¹¹⁵ and, less optimistically, that even the strongest detracking case will not succeed without a judge whose underlying values encompass racial and social justice.¹¹⁶ But my continued examination of such cases leads me to further conclude that the significance of this crucial contention (alleging the inferior quality of educational opportunities offered in low-track classes) repeatedly gets lost in the litigation shuffle. Successful legal challenges to tracking must not get sidetracked into mini-controversies about fairness of placement practices, achievement gaps, or any of the other above-stated defendant contentions. A school district must bear the burden of demonstrating that *any* student placed in a low-track class will be given educational opportunities (i.e., curriculum and instruction) equivalent to a schoolmate placed in higher-tracked classes.¹¹⁷

B. Legal Challenges

Legal challenges to tracking have been the subject of several detailed analyses in recent years.¹¹⁸ As a rule, these challenges were brought pursuant to the Fourteenth Amendment's Equal Protection

Clause¹¹⁹ and/or Title VI of the 1964 Civil Rights Act, as implemented through regulations issued by the U.S. Department of Education.¹²⁰ Actions may also be brought under state constitutions' equal protection clauses¹²¹ or framed in terms of educational adequacy, under state constitutions' education clauses.¹²² The first two authorities, the Equal Protection Clause and Title VI, have provided the foundation for a great deal of progress, but they also suffer limitations in terms of difficult evidentiary barriers.¹²³ State education clauses and equal protection clauses have become increasingly important, particularly in driving greater equity in school finance structures. But only rarely have these cases considered larger issues concerning students' opportunity to learn.¹²⁴

119. The action would be brought under 42 U.S.C. § 1981, which protects individuals from discrimination based on race in making and enforcing contracts, participating in lawsuits, and giving evidence.

120. Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, section 602, "authorizes and directs" federal departments and agencies that extend federal financial assistance to particular programs or activities "to effectuate the provisions of section 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1 (2001). The Department of Education, in exercising its statutory authority under section 602, promulgated such a regulation, codified as 34 C.F.R. §100.3(b)(2) (2001), which prohibits a funding recipient from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." That is, the regulation does not include an intent requirement.

121. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977); *Butt v. State*, 842 P.2d 1240 (Cal. 1992).

122. See, e.g., *Small Sch. Sys. v. McWhitten*, 851 S.W.2d 139 (Tenn. 1993); *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989). See generally K. T. Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C.L. REV. 401 (2000).

123. See generally Welner & Oakes, *supra* note 26, at 451-57 (discussing the intent requirement and the reluctance of courts, even before *Sandoval*, to balance the Title VI disparate impact test with the usual discretion granted to educational policymakers). Equal protection and Title VI claims also suffer the obvious drawback that the plaintiff must show, at a minimum, disparate racial impact. That is, tracking cannot be attacked as generally denying an adequate education to students placed in low-track classes, no matter what the students' racial or ethnic background.

124. See, for example, *Williams v. State of California*, S.F. Super. Ct., Case No. 312236, seeking to hold the state liable for substandard learning conditions in many California schools pursuant to the state constitution's education clause, equal protection clause, and due process clause (unpublished case), and *Daniels v. State of California*, L.A. Super. Ct., Case No. BC214156, challenging the denial of equal and adequate access to Advanced

Quality Education, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 306-389 (1999).

115. See Welner & Oakes, *supra* note 26, at 457-65.

116. See WELNER, *supra* note 14.

117. In a Title VI (§ 1983) case based on disparate racial impact, this burden arises once the plaintiffs have demonstrated disparate placement in low-track classes. *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999). In a high-stakes case based on due process or a state's constitutional adequacy guarantee, this racial element disappears. See e.g., *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (North Carolina schools held to have a duty to provide every child with the opportunity to receive a "sound basic education"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993) (New Hampshire public schools held to have a duty to provide a "constitutionally adequate education" to every educable child); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (Kentucky's constitution held to require provision of equal opportunity and access to an "adequate education"); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 368-69 (N.Y. 1982) (New York schools held to have a duty to provide a "sound basic education"). Thus, these states must - in theory at least - provide equitable funding. See also *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y.1995); *Powell v. Ridge*, 189 F.3d at 387.

118. See generally Angelia Dickens, *Revisiting Brown v. Board Of Education: How Tracking has Resegregated America's Public Schools*, 29 COLUM. J. OF LAW AND SOC. PROB. 469 (1996); Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 134 HARV. C.R.-C.L. L. REV. 517 (1999); Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318 (1989). See also JOSEPH E. BRYSON & CHARLES P. BENTLEY, *ABILITY GROUPING OF PUBLIC SCHOOL STUDENTS: LEGAL ASPECTS OF CLASSIFICATION AND TRACKING METHODS* 49-94 (1980) (for an older analysis).

To this miscellany of legal authority, opponents of tracking may now consider the impact of high-stakes testing. Past challenges to such testing have usually sought the remedy of a diploma being awarded.¹²⁵ Plaintiffs in these cases challenged the fairness of exit exams (generally framed as a violation of substantive due process) when their underlying schooling provided insufficient preparation for the assessment.¹²⁶ In contrast, future challenges might actually embrace the standards movement and contend that the plaintiffs' schooling itself is unfair. Such claims would build on states' own adopted standards, arguing to the court that schools now have a clear obligation to give every eligible student an opportunity to learn the curriculum designated and assessed by the state.¹²⁷

These claims raise issues under all the above-cited authority as well as the federal and state statutes that frame the national push for standards and accountability. An action based on high-stakes accountability would presume that each state has a right to adopt learning standards and to make diplomas and promotion contingent upon certain learning as demonstrated by a given assessment.¹²⁸ But the state must also implement its policy decision in a fair and equitable manner.

Thus, an educational opportunity challenge grounded in the standards movement may state a claim for relief under one or more of the following: Title VI,¹²⁹ a constitutional due process clause, and a state constitution education clause (or equal protection clause).¹³⁰

Placement courses by the State of California and by the Inglewood Unified School District, again in violation of the Equal Protection Clause and the Education Clause of the California Constitution, as well as California Educational Statutes. Both *Williams* and *Daniels* are grounded upon *Butt*, 4 Cal. 4th 668 (1992), which held that the state is ultimately responsible for providing the constitutionally guaranteed education.

125. *Brookhart v. Illinois*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552 (E.D. Tex. 1992); *Williams v. Austin Indep. Sch. Dist.*, 796 F. Supp. 251 (W.D. Tex. 1992); *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981).

126. *Id.*

127. William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301 (2001); William L. Taylor, *Standards, Tests, and Civil Rights*, 20 EDUC. WEEK 40, 41-56 (2000); James Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Lingering Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990).

128. See, e.g., *Debra P. v. Turlington*, 644 F.2d 397, 402 (5th Cir. 1981) (acknowledging the state's discretion to establish minimum standards to improve educational quality).

129. In the wake of *Sandoval*, a private right of action pursuant to Title VI would have to include proof of intentional discrimination. An OCR enforcement action or a § 1983 action may, however, be grounded in a finding of disparate impact.

130. Another possibility may be an injunctive action alleging that the state is in

Each of these possibilities is considered below.

In *GI Forum v. Texas Education Agency*,¹³¹ the court was called upon to determine the legality of Texas' use of the TAAS test as an exit exam. Texas Assessment of Academic Skills (TAAS), while an advancement over the state's old Texas Educational Assessment of Minimal Skills (TEAMS), remains essentially a test of rudimentary skills.¹³² That is, it does not require a great deal of higher-order thinking.¹³³ Because of this minimal nature of TAAS, the court rejected the plaintiffs' Title VI claims, reasoning as follows:

The Plaintiffs introduced evidence that, in attempting to ensure that minority students passed the TAAS test, the TEA [Texas Education Agency] was limiting their education to the barest elements. The Court finds that the question of whether the education of minority students is being limited by TAAS-directed instruction is not a proper subject for its review. [Footnote omitted.] The State of Texas has determined that a set of knowledge and skills must be taught and learned in State schools. The State mandates no more than these "essential" items. Test-driven instruction undeniably helps to accomplish this goal. It is not within the Court's power to alter or broaden the curricular decisions made by the State.¹³⁴

Texas' victory in *GI Forum* was thus grounded upon the court's finding that Texas' educational standards do not extend beyond the limited elements that are assessed by the TAAS. The court was not willing to question test-driven instruction, since this type of instruction is the educational policy of Texas. That is, Texas has

violation of its own standards-based reform legislation. Such an action would focus on express provisions of that legislation concerning the schools' obligations to prepare students for the tests, or implicit obligations based on accountability provisions. See Koski, *supra* note 127, at 308-309 (discussing the possibility of, and the drawbacks with, mandamus actions asking courts to force educational agencies and state legislatures to provide meaningful educational resources to achieve high state standards, based on statutes that explicitly identify a legal duty to provide educational opportunities related to state standards). Koski also includes an extensive discussion of possible equal protection actions, which he argues could be based upon any of the following three arguments: "(1) the failure to apply the same high content and performance standards to schools in poor or minority communities as those applied in middle-class communities; (2) the failure to hold accountable schools in poor or minority communities for the same performance standards as schools in middle-class communities; and (3) the failure to provide to students in poor or minority communities the same standards-driven educational inputs, such as curricula linked to the standards, as are provided in middle-class communities." *Id.* at 311.

131. 87 F. Supp. 2d 667 (W.D. Tex. 2000).

132. See Walt Haney, *The Myth of the Texas Miracle*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41 (2000) (available at <http://epaa.asu.edu/epaa/v8n41/>). See also *GI Forum*, 87 F. Supp. 2d at 671.

133. Haney, *supra* note 132.

134. *GI Forum*, 87 F. Supp. 2d at 681.

chosen to use the TAAS to drive instruction covering the state-adopted curriculum.¹³⁵ Arguably, the court could have engaged in a closer examination of the state's curriculum standards and attacked the TAAS as driving overly superficial instruction of that curriculum – but such an approach would have challenged state discretion to an unusual degree and the plaintiffs' complaint failed to properly frame this issue.¹³⁶

Imagine, however, a legal action in a state with a test that requires more than TAAS's basic skills.¹³⁷ Minority students still could not successfully challenge the practice of teaching to the test, so long as their instruction includes full preparation for that test.¹³⁸ But instead of focusing on the "punishment" (the retention or diploma denial), students' legal attacks might challenge the state's failure to fulfill its voluntarily assumed affirmative duty to provide each student with a fair opportunity to learn the material covered by the high-stakes exam.¹³⁹ This shift in focus accomplishes at least three goals: it puts the court in the position of enforcing, rather than overturning, state policy; it suggests the remedy of increased educational resources and higher expectations for students; and it allows for claims grounded either in racial discrimination or independent of the students' race.¹⁴⁰

Moreover, while past challenges have centered on exit exams, a standards-based challenge could also be based on the threat of retention in grade. Although denial of grade promotion may not implicate students' property interests (as does denial of a diploma), and therefore may not support a due process claim, such retention

135. *Id.*

136. See *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1529 (M.D. Ala. 1991) citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

137. Every state except Iowa has adopted standards in core academic areas. More than half of all states now have exit exams. SANDRA THOMPSON & MARTHA THURLOW, NAT'L CENTER ON EDUC. OUTCOMES, 1999 STATE SPECIAL EDUCATION OUTCOMES: A REPORT ON STATE ACTIVITIES AT THE END OF THE CENTURY (1999) available at <http://www.coied.umn.edu/nceo/OnlinePubs/99StateReport.htm>.) While no state's exam is beyond criticism, Kentucky and Washington are two states whose tests assess higher-order thinking.

138. *Debra P. v. Turlington*, 644 F.2d 397, 402 (5th Cir. 1981).

139. Again, the value of this approach is contingent upon a state assessment that tests higher-order thinking skills. The key issue, from the perspective of advocates of quality education for all students, is whether such full preparation drives a high level of instruction.

140. Race-based claims could be made under equal protection clauses or under Title VI; race-independent claims could be grounded in standards legislation and made under due process clauses and state education clauses, as discussed further below.

should suffice to raise Title VI issues concerning disparate racial impact.¹⁴¹ So long as the state has set forth standards attached to accountability mechanisms, it should be held responsible for providing learning opportunities that correspond to these standards. The state is forbidden from providing white students with better preparation for such tests, unless this difference is driven by an "educational necessity."¹⁴²

A legal challenge to tracking along these lines invites a reconsideration of the inequitable structures allowing for such stratification of educational opportunities. That is, these actions would not question the legal right or individual propriety of parental decisions to seek out the best opportunities for their children.¹⁴³ But they do cast doubt on the legality of schooling structures that effectively ration high expectations and quality opportunities to learn, thereby enabling these parental decisions.¹⁴⁴ The call for American students to meet world-class standards in the Goals 2000 and state standards/accountability legislation is explicitly inclusive: *all* students must be held to these high standards.¹⁴⁵ The same goal underlies the

141. See *supra* text accompanying note 96. A prominent recent report from the National Research Council argued that high-stakes tests should not be used to retain students if those students are not given adequate supports: "Research shows that students are typically hurt by simple retention and repetition of a grade in school without remedial and other instructional supports." NATIONAL RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION 3 (Jay P. Heubert & Robert M. Hauser, eds., 1999).

142. See *Larry P. v. Riles*, 793 F. 2d 969, 982-83 (9th Cir. 1986) (placing the burden on a Title VI defendant to prove that an exam with a disparate impact on African-American children was "required by educational necessity"). See also *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (requiring a demonstration of a "substantial legitimate justification"), quoting *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F. 2d 1403, 1417 (11th Cir. 1995); *NAACP v. Medical Ctr.*, 657 F.2d 1322, 1333 (3d Cir. 1981) (requiring a "legitimate nondiscriminatory reason"). Title VI challenges grounded in allegations of disparate opportunities to prepare for high-stakes exams share many similarities with Title VI challenges grounded in allegations of disparate opportunities to prepare for college, work, and citizenship. One important difference, however, is that the high-stakes exams are tied to state-adopted curriculum standards. The standards and exams express a clear state intent concerning minimally adequate education, thus making the liability determinations and remedial orders more judicially manageable. See *Rebell*, *supra* note 107.

143. See *WELNER*, *supra* note 14; *LAREAU*, *supra* note 101.

144. See *supra* text accompanying note 124. See also *People Who Care v. Rockford Bd. of Educ. Sch. Dist.*, 851 F. Supp. 905 (N.D. Ill. 1994).

145. Setting aside the rhetoric, however, the legislation does carve out exceptions to accountability provisions, particularly for students with low-incidence (severe) disabilities. See *Losen*, *supra* note 118, at 407-60. These exceptions, it should be noted, do not directly implicate the vast majority of students in low-track classes.

demand that is now an ingredient of both IDEA and Title I – that students served under these laws be included in state testing and reporting frameworks.¹⁴⁶

Even the standards themselves – that is, setting aside the high-stakes tests tied to those standards – supply a strong basis upon which courts can ground decisions challenging the adequacy of students' educational opportunities. At least two state supreme courts have expressly turned to their state standards to give meaning to a constitutional adequacy clause.¹⁴⁷ Thus, courts have already begun interpreting constitutional adequacy mandates to require that students be provided with an opportunity to learn the state standards.¹⁴⁸ A logical extension of these cases is to demand similar adequacy at every level within a structure of curriculum differentiation. Individual policy decisions that create stratification within a larger (presumably adequate) system can produce inequalities and should also be challenged under the same guidelines

146. IDEA now requires inclusion of special education students in statewide (and district-wide) assessments (see 20 U.S.C. § 1412(a)(16) (2001) and 34 C.F.R. § 300.138(a) (2001)), and the 1994 amendments to Title I impose similar requirements for students served by that program (see 20 U.S.C. § 6311(b)(1)(B) (2001)). President George W. Bush's education legislation, called "No child left behind," similarly attempts to drive educational improvement through standards and accountability through testing.

147. Idaho Sch. for Equal Opportunity v. Evans, 976 P.2d 913 (Idaho, 1998); United Sch. Dist. v. State, 885 P.2d 1170 (Kan. 1994); Idaho Sch. for Equal Opportunity v. Evans, 850 P.2d 635 (Idaho, 1993). See also Opinion of the Justices, 624 So.2d 107 (Ala., 1993) (incorporating the trial court opinion using the state standards to explain the adequacy clause); Leandro v. State, 488 S.E.2d 249 (N.C. 1997) ("[e]ducational goals and standards adopted by the legislature are factors which may be considered on remand to the trial court for its determination as to whether any of the state's children are being denied their right to a sound basic education. . . . Another factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests." [citation omitted]). The court also noted that neither of these factors should be determinative. *Id.* at 355. On remand, Wake County Judge Howard E. Manning Jr., in the re-named case of *Hoke County v. N.C. State Board of Education*, issued an opinion holding that the North Carolina constitution requires the state to make sure that every student has the opportunity to meet grade-level standards for academic achievement as measured by the state standards and assessments. 2000 WL 1639686 (N.C. Super. October 12, 2000). See Todd Silberman, *State Might Have To Ante Up for Standards*, NORTH CAROLINA NEWS AND OBSERVER, October 23, 2000; see also Kathleen Kennedy Manzo, *N.C. Judge Backs Suit By Districts*, EDUCATION WEEK (November 1, 2000). While all these courts welcomed the standards as legislative determinations of adequacy, and while the courts may have been more willing to intervene given these legislative clarifications, the ultimate task of interpreting the state constitutions rests with their state courts. The courts must take care not to cede this responsibility to their state legislatures.

148. As noted above, these courts tend to look to both the state standards and the state assessments.

of educational adequacy.

VI. Conclusion

Courts exhibit justifiable timidity when called upon to meddle with educational policy decisions. When plaintiffs seek interference in a matter that implicates nothing more than a genuine educational dispute (e.g., phonetic versus whole language reading instruction), courts properly defer to elected policymakers. If, however, plaintiffs challenge an educational policy that is proven to stratify educational opportunities and to allocate lesser opportunities to a minority (racial or otherwise), then court deference merely abdicates the judiciary's role as a check on democratic tyranny.

The analyses presented in this article demonstrate how tracking can, and often does, stratify opportunities in this discriminatory manner. African-American and Latino students are disproportionately placed in low-track classes that, while they purport to be homogeneous, encompass a wide range of measured abilities. Once placed in low tracks, these students must overcome great odds to move up within the tracked structure. Year after year, they fall further and further behind their high-tracked counterparts. Taken as a whole, these analyses highlight two harmful elements of tracking. First, African-American and Latino students are disproportionately taking these low-track courses, even after controlling for prior achievement. Second, the low-track classes have a detrimental impact on students' later academic performance – regardless of race.

At a time when America's elected policy-makers have expressly united around the policy goal of having all children achieve world-class standards, tracking stands out as an incongruous impediment to reaching this goal. Past legal challenges, grounded in proof of racial discrimination, have prompted a few courts to demand tracking reform. But these approaches have formidable limitations and are unlikely to prompt large-scale change. They are, by nature, particular responses to particular unlawful conduct. In contrast, the legislation setting forth state standards and high-stakes assessments is specifically designed to prompt large-scale change. Such legislation is intended to move some issues of quality from the local level to the statewide (or even national) level. Lawmakers, reacting to what they perceived as a patchwork of low and high quality education, turned to standards-based reform as a means to demand that all students meet state-prescribed standards.

Perhaps the rhetoric of "world class standards for all children"

and “no child [is] left behind” was not intended by policymakers to be taken literally. Perhaps the standards and high-stakes assessments were intended only to embarrass and punish, as some have charged.¹⁴⁹ But this new statutory context nonetheless invites legal challenges to within-school disparities that stratify opportunities to learn. Whether so intended or not, the standards and assessments provide support for actions grounded in due process and in state education clauses, as well as in Title VI. In a society where discrimination has largely shifted from the overt racism challenged in *Brown v. Board of Education*¹⁵⁰ to more subtle institutional racism¹⁵¹ and economic oppression,¹⁵² litigation must respond accordingly and even, if the occasion so demands, make use of rhetorical (and statutory) hypocrisy.

149. See, e.g., DAVID BERLINER, & BRUCE BIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS* 189-90 (1995).

150. 347 U.S. 483 (1954).

151. See CORNEL WEST, *RACE MATTERS* 1-8 (1994). See also Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *HABERMAS AND THE PUBLIC SPHERE* 135-7 (1992).

152. See JEAN ANYON, *GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM* 6-14 (1990); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* *passim* (1990).