RACING ON TWO DIFFERENT TRACKS: USING SUBSTANTIVE DUE PROCESS TO CHALLENGE TRACKING IN SCHOOLS

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INTRODUCTION

When I first started teaching at Charlottesville High School (CHS), it was like teaching at two schools: half the day I spent teaching honors classes composed of mostly white students from highly educated, well-to-do families, and the rest of the day I spent teaching non-honors classes where most students were young people of color from poor families. Because there was only one high school serving Charlottesville, Virginia, a small but highly diverse city[1] in the Shenandoah Mountains, the school contained many students from different ethnic and socioeconomic backgrounds. Despite the impressive diversity, segregation was pervasive since students worked and socialized solely with others in their own academic tracks. Like many other schools across the country with similar make-up and structure, all one had to do was peer through the doorway of any classroom in the hallway and observe the racial demographics to discern whether the class was on a non-honors or honors track.

Tracking is a practice where schools divide students into different categories based on their previous achievements or potential for learning.[2] Tracking produces different levels of classes, from low

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1. Charlottesville has a majority minority student population, and twenty-five percent of the students are identified as belonging to some race other than white or black. Fifteen percent of the students speak English as a second language. *Fast Facts*, CHARLOTTESVILLE CITY SCH., http://charlottesvilleschools.org/home/about-ccs/fast-facts/ (last visited Nov. 3, 2017).

2. JEANNIE OAKES, KEEPING TRACK 3 (2d ed. 2005).

ability to high ability, based on the theory that students learn better when grouped with others at their own level.[3] However, tracking is problematic because it disproportionately divides students by race.[4] Low-tracked classes often fail to provide the same wealth of learning opportunities for learning as high-tracked classes.[5] As a result, students of color and low socioeconomic status do not receive the same educational benefits as white and/or wealthier students.[6] Tracking also limits student mobility between tracks, stigmatizes students in low tracks, distributes resources inequitably,[7] and hinders integration by eliminating opportunities for students to interact with people from different backgrounds.

In 2012, English teachers at CHS piloted an "unleveled" program for students in ninth and tenth grade[8] to respond to the negative effects of tracking. Although CHS already had non-honors and honors courses in English, the unleveled course offered students the opportunity to take a class with others who might not be in the same academic track in a traditional model. The unleveled English course centered its inquiry on pursuing "essential questions," thematic questions that were designed to draw in students of many different backgrounds so they could contribute based on their unique experiences.[9] The teachers in the unleveled program pushed their students to work at an honors level, but also differentiated[10] all discussions and assignments.[11] Notably, the course allowed students to opt in to completing additional coursework to earn honors credit; this allowed students to take this diverse and differentiated unleveled class and still put "honors" on their transcripts.

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3. *Id.* at 4.
4. *Id.* at 175.
5. *Id.* at 236.
6. *Id.*
7. Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451, 453 (1996).
8. *CHS Teachers Seeing Success with "Unleveling" Classes*, NBC29 (Feb. 23, 2015), http://www.nbc29.com/story/28065673/chs-teachers-seeing-success-with-unleveling-classes.
9. Tim Shea, *Charlottesville High School tests new instructional model*, CHARLOTTESVILLE TOMORROW (Feb. 8, 2015), http://www.cvilletomorrow.org/news/article/20129-unleveled-english/. A sample essential question is "How should people of different cultures interact with one another?" In response, students would bring in different texts and personal experiences to answer this question throughout a unit.
10. Teachers differentiated curriculum by modifying content, tasks, lessons, and assignments to meet different student needs.
11. *CHS Teachers Seeing Success with "Unleveling" Classes*, *supra* note 8.

The teachers and administrators at CHS knew that the unleveled course could not coexist forever with the honors and non-honors courses: if CHS was going to truly commit to an instructional model that would bring its diverse community of students together, the unleveled course would have to replace the others. Teachers and administrators took on two major responsibilities: (1) creating an effective unleveled class that would truly fit students of different cultural backgrounds and academic abilities, and (2) convincing the families that the unleveled program would work for all students. Through school board meetings, hearings, open houses, and individual conversations, CHS staff were constantly marketing the unleveled program: as teachers, we spoke about the academic merits of the class in addition to the social benefits of a rich learning environment where students could learn from each other's unique backgrounds. By 2017, CHS had eliminated its ninth and tenth grade English honors classes and replaced them with the unleveled "Honors Option" classes,[12] and had already begun piloting the program in other subject areas like history and science. A segregated school with a complicated racial history was taking successful steps in integrating students.

But not all students have the luxury of waiting for their schools to make voluntary efforts to desegregate their classrooms. These tracking systems perpetuate racial stereotypes and inequalities in heterogeneous schools through its seemingly neutral sorting until parents and students challenge their schools.

Because tracking practices surged as a means of resegregating students in integrated schools after *Brown v. Board of Education*,[13] plaintiffs began to file suit against their districts, claiming a violation of their equal protection rights.[14] The legal framework used to challenge tracking has closely mirrored the developments in the braoder equal protection analysis since *Brown*; it has been limited by cases such as *Washington v. Davis*[15] and *Parents Involved in Community Schools v. Seattle School District No. 1.*[16] Equal protection

12. *Minutes School Board Meeting*, CHARLOTTESVILLE CITY SCH. (Dec. 1, 2016), http://esbpublic.ccs.k12.va.us/attachments/253252fa-6785-4b34-84d2-53c8e518d10c.pdf.

13. 347 U.S. 483 (1954).

14. *See, e.g.*, Lemon v. Bossier Par. Sch. Bd., 444 F.2d 1400 (5th Cir. 1971); Moses v. Washington Par. Sch. Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir. 1972); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

15. 426 U.S. 229, 242 (1976) (holding that a state action's disproportionate impact alone does not violate the Equal Protection Clause).

16. 551 U.S. 701, 730 (2007) (rejecting racial balancing as a compelling state interest to justify the use of racial classifications).

doctrine has thus become an ineffective tool with limited success in attacking the discriminatory effects of tracking: the courts' repeated emphasis on finding past or present intentional discrimination ultimately precludes a remedy for students of color in many school districts.

Although the Equal Protection clause does not provide much relief for students in schools without a history of intentional discriminatory practices,[17] the Due Process Clause could provide another strategy to challenge tracking. The Due Process Clause protects substantive rights, including those enumerated in the Bill of Rights and other fundamental rights the Supreme Court finds rooted in "history and tradition."[18] Though the Supreme Court has rejected a fundamental right to education,[19] it has left the door open for the possibility of a fundamental right to a minimally adequate education or some basic level of education.[20] Alternatively, many states have recognized both a fundamental right to education or a fundamental right to a minimally adequate education.[21] According to the standards that currently govern the doctrine for a minimally adequate education, social science evidence focused on tracking's impacts shows that this educational practice likely violates that right.[22] Challenging tracking in states that recognize such rights under a substantive due process claim may provide a more effective litigation strategy for plaintiffs who require a court mandate.

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17. *See infra* Part II.

18. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

19. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973).

20. *See* Plyler v. Doe, 457 U.S. 202, 239 (1982) ("[As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.") (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

21. *See, e.g.*, Meyers v. Bd. of Educ. of San Juan Sch. Dist., 905 F. Supp. 1544 (D. Utah 1995) (recognizing a right to education in the Utah Constitution); Shofstall v. Hollins, 110 Ariz. 88, 90 (1973) (recognizing a fundamental right to education under the Arizona Constitution); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (recognizing a fundamental right to education under the Minnesota Constitution); Danson v. Casey, 33 Pa. Cmwlth. 614, 626 (1978) (recognizing a fundamental right to education under the Pennsylvania Constitution); Brigham v. State, 166 Vt. 246, 268 (1997) (recognizing that under the Vermont Constitution, children should be afforded substantial equality of educational opportunity); Seattle Sch. Dist. No. 1 of King Cty. v. Washington, 90 Wash. 2d 476, 487 (Wash. 1978) (recognizing a fundamental right to education under the Washington Constitution); Kukor v. Grover, 148 Wis. 2d 469, 478 (1989) (finding a fundamental right to education under the Wisconsin Constitution); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 320 (Wyo. 1980) (recognizing a fundamental right to education under the Wyoming constitution).

22. *See infra* Part IV.

Part I of this Note briefly describes tracking practices and a history of tracking in schools. Part II discusses the two federal actions that have traditionally shaped the tracking doctrine and why an equal protection approach is unworkable. Part III discusses an alternative legal doctrine under the Due Process Clause and how courts may find a fundamental right to education; it also discusses a potential litigation strategy based on states finding a right to a minimally adequate education through a substantive due process claim. Part IV offers strategies for how to use social science research to challenge tracking systems and show how the practice deprives students of a minimally adequate education.

I. BACKGROUND

A. Tracking Categorizes Students Based on Perceived Ability

Tracking is a practice where schools assign students to different courses based on ability.[23] Secondary schools typically employ tracking, while elementary schools may use "ability grouping."[24] Ability grouping and tracking are often used interchangeably to describe the same system,[25] but there can be marked differences in practice. While tracking strictly refers to assigning students to different classes within a school, ability grouping often takes place within a single classroom.[26] In an elementary school classroom that incorporates ability grouping, a single teacher may separate students into different groups based on perceived ability and provide them with different instructions and activities.[27] This Note will exclusively use the terminology of "tracking" to refer to separate classroom assignments with different teachers and distinct curricula, but courts will often label tracking systems as ability grouping models, and this Note will occasionally mention ability groupings in elementary

23. Maureen T. Hallinan, *Tracking: From Theory to Practice*, *in* THE STRUCTURE OF SCHOOLING: READINGS IN THE SOCIOLOGY OF EDUCATION 188, 188 (Richard Arum et. al. eds., 2011).

24. Tom Loveless, *2013 Brown Center Report on American Education: How Well Are American Students Learning?*, 3 BROWN CTR. ON EDUC. POLICY AT BROOKINGS 14 (2013), https://www.brookings.edu/wp-content/uploads/2016/06/2013-brown-center-report-web-3.pdf.

25. *See id.* at 13; KEVIN G. WELNER, LEGAL RIGHTS, LOCAL WRONGS 5 (2001).

26. Loveless, *supra* note 24, at 13.

27. *Id.* at 14. The report provides an example of ability grouping in elementary schools where the teacher might spend time instructing one group at a time. While this takes place, "the other students work independently—engaged in cooperative group activities or computer instruction or completing worksheets to reinforce skills. The teacher rotates among the groups so that each student receives a dose of teacher-led instruction in these small settings." *Id.*

schools. However, it is still important to understand that "institutional sorting" can take place very early in a student's educational career.[28]

Tracking categorizes students based on their "perceived ability."[29] First, educators and administrators try to evaluate "perceived abilities" based on many factors such as standardized test scores, IQ tests, grades, teacher recommendations, and parent requests.[30] Once schools make their assessments, they assign students to distinctive academic "tracks" with different teachers and curricula.[31] Historically, schools divided students into academic, general, or vocational tracks where the specific content of the curricula channeled students towards college or career after graduation.[32]

Modern tracked classes take a number of different forms but frequently feature "course levels."[33] For example, schools may offer tracked courses such as English 10 for students of average perceived abilities and English 10 Honors for advanced learners. These classes may feature the same reading list with different expectations and assignments or may be constructed entirely differently. In mathematics tracks, greater variation may take place in curriculum subject matter because advanced math students may be able to choose Algebra II while lower achievers may be limited to Algebra I or Pre-Algebra.[34] Offering Advanced Placement (AP) classes[35] or International Baccalaureate (IB) in any subject may further divide students into different learning groups based on perceived abilities. Additionally, special education tracks often make up the bottom tier of student learners. Ultimately, students in tracked classes find themselves in homogenous learning groups where there are classrooms of "high, average, or low achievers"[36] that systematically funnel students towards vocational or college-bound ends.[37]

28. KAROLYN TYSON, INTEGRATION INTERRUPTED 1 (2011).
29. 1 EDUCATION LAW § 5:12, Westlaw (database updated December 2016).
30. Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 519 (1999). Most schools utilize standardized tests and grades. *Id.* However, as described in more detail in this section, these processes are subject to numerous biases and complexities that conflict with any perceptions of neutrality and fairness.
31. Loveless, *supra* note 24, at 13.
32. Hallinan, *supra* note 23, at 188.
33. *Id.*
34. Loveless, *supra* note 24, at 13.
35. *Id*.
36. 1 EDUCATION LAW § 5:12, Westlaw (database updated December 2016).
37. Hallinan, *supra* note 23, at 188.

Evaluating students' perceived abilities based solely on academic criteria is not always an objective process. For example, standardized test scores are a major factor for determining student assignments but also are highly criticized as a complicated and inaccurate measure of academic performance.[38] Studies have shown that students from low-income or minority backgrounds are more likely to perform poorly or fail on standardized tests.[39] The test questions are often drafted in ways that require cultural capital that white, middle-class students have greater access to than low-income students of color.[40] Consequently, many also critique tracking for depending on such measures because gaps in performance do not accurately capture student potential but instead "mark class privilege."[41] In fact, although courts have not found testing per se unconstitutional as a means of assigning students, they have scrutinized the quality and results of such tests as well as a school's inappropriate dependence on them.[42]

Tracking assignments also result from many other factors outside of a child's control. A prevalent misunderstanding is that academic placement in a track strongly reflects a student's attitude towards school and a student's (and parent's) preference in a particular course.[43] However, many socioeconomic factors lead to disparities in test scores, grades, and classroom performance including the quality of teaching and instruction in different tracks, a child's parental involvement or support, and lower expectations shaped by "conscious

38. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 116 (2000).

39. *Id.*

40. *Id* at 117. One example of such cultural insensitivity is "a mandate that students with limited English proficiency take high-stakes tests only in English, a practice that effectively prevents them from fully demonstrating their academic skills." *Id.* Another example cited in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), included a principal who spoke of black children's limited familiarity with concepts that frequently appeared in tests and textbooks such as department stores and zoos; because black children often never ventured a few blocks from home and never visited department stores or zoos.

41. *Id.* at 116.

42. *See, e.g.*, Lemon v. Bossier Par. Sch. Bd., 444 F.2d 1400, 1401 (5th Cir. 1971) (declining to rule on the validity of testing per se); Moses v. Wash. Par. Sch. Bd., 330 F. Supp. 1340, 1345 (E.D. La. 1971) (holding that testing cannot be used to resegregate students in a recently desegregated school system); Spangler v. Pasadena Cty. Bd. of Educ., 311 F. Supp. 501, 519 (C.D. Cal. 1970) (analyzing whether testing measures relied too much on verbal achievement); *Hobson*, 269 F. Supp. 480–85 (analyzing whether environmental, psychological, and cultural factors were disregarded when making inferences about the innate intellectual capabilities of black children based on standardized test norms).

43. TYSON, *supra* note 28, at 2.

or unconscious racism."[44] Social and psychological factors cause discrepancies in academic achievement between different racial and socioeconomic groups of students and their disproportionate placement.[45] Additionally, parents of minority students are less likely to be assertive in trying to advocate for their children's placement in upper tracks.[46] Despite these findings that student assignments to leveled courses are not always dependent on objective evaluations of student performance, tracking systems thrive.

Additionally, prerequisites or "gate keeping" courses make tracks more rigid, which in turn makes it difficult for students to enroll in more challenging courses outside of the tracked path.[47] Once students are assigned to low tracks in middle and high schools, it can be logistically impossible to switch tracks even if a student is willing and prepared. Schools do not always present information about prerequisites to students or parents in an effective manner so students can plan ahead.[48] By failing to adequately convey the consequences of these early decisions, schools ensure that, on the whole, those who challenge tracking decisions are families with institutional knowledge and spare resources—often upper and middle class white families.

Ultimately, there is a strong base of evidence showing that tracking systems in diverse schools often result in segregated classes.[49] In fact, schools with student demographics of between 30% and 60% black students are the most highly segregated.[50] In such schools, poor and minority students are consistently overrepresented in low tracks while wealthier students are overrepresented in high tracks.[51]

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44. 1 EDUCATION LAW § 5:12, Westlaw (database updated December 2016).
45. *Id.*
46. Losen, *supra* note 30, at 525.
47. *Id*. at 519–20.
48. *Id.* at 520.
49. Robert E. Slavin, *Achievement Effects of Ability Grouping in Secondary Schools: A Best Evidence Synthesis*, 60 REV. OF EDUC. RES. 471, 473 (1990); Jomills Henry Braddock II & Marvin P. Dawkins, *Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988*, 62 NEGRO EDUC. 324, 326–29 (1993); Samuel R. Lucas & Mark Berends, *Sociodemographic Diversity, Correlated Achievement, and De Facto Tracking*, 75 SOC. OF EDUC. 328, 343 (2002); Samuel R. Lucas & Mark Berends, *Race and Track Location in U.S. Public Schools*, 25 RES. IN SOC. STRATIFICATION AND MOBILITY 169, 169–87 (2007).
50. Charles Clotfelter et. al., *Segregation and Resegregation in North Carolina Public Schools*, 81 N.C. L. REV. 1375 (2003).
51. OAKES, *supra* note 2, at 65–67, 175.

B. Tracking Has Historically Been Implemented to Segregate Students

Dividing students by ability in schools has deep roots in racial segregation. This practice was affirmed in a Massachusetts case called *Roberts v. City of Boston*.[52] In *Roberts*, the Massachusetts Supreme Judicial Court held that Boston's dual school system separating black and white students was lawful because the school committee had "plenary authority . . . to arrange, classify, and distribute pupils . . . as they think best adapted to their general proficiency and welfare."[53] *Roberts* was thus the first to hold that school authorities should be able to serve the distinct educational needs of black and white children by segregating them. Later cases also reflected the prevailing idea that black students were intellectually inferior to white students, upholding segregated schooling because of "natural distinction[s] between the races" and rejecting the idea that ability grouping based on racial classifications was discriminatory.[54]

From the late 19th century to early 20th century, a rapidly-growing influx of immigrants also drove tracking implementation in schools.[55] Student enrollment increased from 200,000 to over 1.5 million between 1880 and 1918, and new high schools were built to keep up with the population increase.[56] The demographics critically shifted so that students with foreign-born parentage made up 58% of all students in thirty-seven of the nation's largest cities.[57] No longer were schools made up of mostly white Anglo-Saxon middle-class students; poor rural families and European immigrants were rushing to American cities to take advantage of compulsory education.[58] Furthermore, the newest immigrants coming from southern and eastern Europe "had darker skin" and markedly different languages, religions, and traditions than the northern and western EuropeanAmericans.[59]

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52. 59 Mass. 198, 208 (1849).
53. *Id.*
54. *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1320–21 (1989) (citing 9 People *ex rel* King v. Gallagher, 93 N.Y. 438, 450 (1883)); *see also* Ward v. Flood, 48 Cal. 36 (1874) (holding that white and black students must attend different schools); Cory v. Carter, 48 Ind. 327, 361 (1874) ("[T]here . . . must be a classification of the children [that] ought to and will reference to some properties or characteristics common to or possessed by a certain number of the whole; and these classes may be . . . taught in different parts of the same school, or in different rooms in the same school- house, or different school-houses . . . .").
55. OAKES, *supra* note 2, at 19.
56. *Id.*
57. *Id.* at 19–20.
58. *Id.*
59. *Id.* at 25.

At the same time, scientific theories about intelligence, particularly Social Darwinism, were beginning to take hold and provide justification for schools to segregate the incoming immigrants from the more traditional middle-class white Americans.[60] Social Darwinism established ethnocentric ideas that biological forces were the cause of inferior characteristics of certain population groups and that it was possible to change the environment for such lesser groups to improve their "evolutionary" development.[61] Educators and administrators used these principles to rationalize dividing students who were "destined for college" from those "destined for low-level jobs" into separate tracks and were thus able to segregate students by social class and ethnicity.[62]

Although tracking was very popular by the 1920s, these structures declined significantly starting in the late 1930s.[63] Schools responded to studies showing that tracking and ability grouping practices had little or no effect on achievement gains and that placement in lower tracks negatively impacted students.[64] Though tracking practices ultimately declined between 1935 and 1955,[65] gifted programs, or enrichment classes that would take students out of the regular classroom curriculum, became a predominant form of grouping students by ability to separate certain ethnic groups from western and northern European Americans.[66]

Tracking practices resurged after *Brown v. Board of Education* as a vestige of former de jure segregation; schools sought to resegregate students by race under the guise of perceived ability.[67] Many southern schools deliberately adopted tracking systems to circumvent desegregation orders.[68] Additionally, schools in northern states used tracked courses to isolate the large influx of black students migrating into the cities.[69] Tracking was again legitimized based on

60. *Id.* at 16–17, 25.
61. *Id.* at 23.
62. Losen, *supra* note 30, at 520 n.21.
63. *Id.*; *Teaching Inequality*: *The Problem of Public School Tracking*, *supra* note 54, at 1323.
64. *Teaching Inequality*: *The Problem of Public School Tracking*, *supra* note 54, at 1323.
65. *Id.*
66. Losen, *supra* note 30, at 520–21.
67. *Id.* at 520. After *Brown*, "there was a dramatic increase in the use of ability grouping as a means of circumventing court-ordered desegregation, particularly in the southern states." *Id.* at 521.
68. *Teaching Inequality: The Problem of Public School Tracking*, *supra* note 54, at 1323.
69. *Id.*

misunderstandings about the perceived abilities of poor, black students.[70]

Tracking declined in popularity again in the late 1980s-90s because of several instrumental studies that criticized the effects of tracking.[71] For example, Jeannie Oakes published the first edition of her influential book, *Keeping Track*, and showed evidence that black, Hispanic, and poor children were disproportionately placed in remedial classes while middle-class white children were assigned to honors classes.[72] She, as well as other critics, charged tracking systems with "reproduc[ing] and perpetuat[ing] inequality" and argued that "although tracking is typically justified by educators as a strategic response to student heterogeneity, the practice is undergirded by normative beliefs regarding race and class—and politically defended by white, middle-class parents to protect privilege."[73] Such critiques drove political organizations to condemn tracking and many schools answered the call to detrack.[74]

However, since the 2000s, schools have again increased the use of ability grouping practices,[75] perhaps as a response to the accountability demands of the No Child Left Behind Act.[76] Although there is more data showing a dramatic rise in ability groupings in elementary schools,[77] there is not as much data following the growth

70. *See id.* Despite the fact that *Brown* explicitly prohibited school segregation, "misconceptions about the intellectual ability of poor and minority students continued to result in their segregation in public schools in both the North and the South." *Id.*

71. Loveless, *supra* note 24, at 15. Studies in the 1970s and 1980s criticized tracking because of its effects on race and class. A common critique was that "[g]rouping students by ability, no matter how it is done, will inevitably separate students by characteristics that are correlated statistically with measures of ability, including race, ethnicity, native language, and class." *Id. See also generally* Robert E. Slavin, *Ability Grouping and Student Achievement in Elementary Schools: A Best Evidence* Synthesis, 57 REV. OF EDUC. RES. 293 (1987) (criticizing ability grouping for failing to improve academic achievement); OAKES, *supra* note 2 (criticizing tracking as an ineffective educational practice that creates inequitable opportunities for learning).

72. OAKES, *supra* note 2, at 65–67.

73. Loveless, *supra* note 24, at 15.

74. *Id.* Organizations such as the National Governors Association, the American Civil Liberties Union, the Children's Defense Fund, and the NAACP Legal Defense Fund condemned tracking practices. *Id.*

75. *Id.* at 17–20.

76. *Id.* at 20. The No Child Left Behind Act demanded that schools grant more attention to students who scored below "proficiency" on state exams. This pressure may have encouraged schools to serve this group through a low-track class. *Id.*

77. *Id.* at 17. The data shows that the percentage of 4th grade students placed in ability groups rose from 39% in reading and 41% in math in 2000 and then 71% in reading and 54% in math in 2009. *Id.*

of tracking in secondary schools.[78] The National Assessment of Educational Progress (NAEP) has collected the most data on tracking in math from 1990–2011 and found only a slight dip in prevalence in the 1990s and a small increase in the 2000s.[79] In English Language Arts classes, NAEP found that 60% of students were in tracked classes in 1990, 32% in 1998, and then 43% in 2003.[80]

II. THE HISTORY OF TRACKING LITIGATION UNDER THE EQUAL PROTECTION CLAUSE

The Supreme Court's decision in *Brown v. Board Education*[81] laid an important framework for future litigation against tracking structures in schools. *Brown* firmly signaled the end of de jure segregation,[82] but left open questions concerning the legality of de facto segregation. Later courts would interpret *Brown* to mean that alleging violations of the Equal Protection Clause under the Fourteenth Amendment would require a finding of discriminatory intent rather than segregative effects resulting from neutral actions or circumstances.[83] This limitation would greatly hinder challenges to tracking when schools implemented the system without explicit bias, but nonetheless created racially isolated learning environments within the school.

The Supreme Court has not heard a case on school tracking, but other federal courts have reviewed the constitutionality of tracking practices. Tracking and ability grouping are not unconstitutional per se,[84] but courts have developed a generally consistent doctrine to evaluate the legitimacy of such structures. There are three major types of federal actions used to overcome tracking systems which have been coined by Kevin G. Welner and Jeannie Oakes: Type-I (Original Equal Protection), Type-II (Past Intentional Discrimination), and Type-III (Title VI).[85] However, this Note will only describe Type I and Type II, which have more definitive doctrines. Ultimately, the equal protection

78. *Id.* at 18.
79. *Id*. at 17.
80. *Id.* The last survey was conducted in 2003, so it is unclear if the trend has continued. *Id.* at 18.
81. 347 U.S. 483 (1954).
82. *Id.* at 494.
83. Washington v. Davis, 426 U.S. 229, 240–41 (1976).
84. *See, e.g.*, Holton v. City of Thomasville Sch. Dist., 490 F.3d 1257, 1262 (11th Cir. 2007), *as clarified on denial of reh'g*, 521 F.3d 1318 (11th Cir. 2008); McNeal v. Tate Cty. Sch. Dist., 508 F.2d 1017, 1020 (5th Cir. 1975).
85. Welner & Oakes, *supra* note 7, at 454–55.

doctrine's allowance of de facto segregation makes it unusable for challenging today's tracking systems.

A. Type I: Original Equal Protection

Type I actions proceed under traditional equal protection doctrine. Plaintiffs may challenge schools' tracking practices as a violation of the Equal Protection Clause if they show both a disparate impact and a discriminatory intent.[86] If both of these elements are met, particularly the requisite intent, a school's acts will be analyzed under strict scrutiny.[87] Any tracking system employed to intentionally segregate students by race is unconstitutional.[88] However, Type I cases are relatively infrequent because proving discriminatory intent is such a high burden.[89]

Early tracking challenges did not require a finding of discriminatory intent. For example, in the seminal case *Hobson v. Hansen*,[90] the D.C. school district implemented a rigid four track system in its primary and secondary schools shortly after it started to desegregate it schools.[91] Using equal protection analysis,[92] the district court found that the tracking system violated black and poor children's rights to equal educational opportunities.[93] Although there was some evidence that administrators were implementing many other school policies (besides tracking) in a discriminatory manner, the court did not attack the tracking system specifically because of an underlying purpose to resegregate students.[94] Instead, the court focused on how standardized aptitude tests sorted students disproportionately on the basis of race.[95] The court held that

86. People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 851 F. Supp. 905, 931 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997).

87. *Id.* at 910.

88. *Id.* at 910 ("It is a violation when intentional governmental conduct has created or perpetuated the segregative conditions."); Morales v. Shannon, 516 F.2d 411, 412–14 (5th Cir. 1975); *McNeal*, 508 F.2d at 1020.

89. Welner & Oakes, *supra* note 7, at 454.

90. 269 F. Supp. 401 (D.D.C. 1967).

91. *Id.* at 411, 442.

92. *Id.* at 511.

93. *Id.* at 406.

94. *See id.* at 514. The court found it persuasive that "[t]he evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, although given on a system-wide basis, are completely inappropriate for use with a large segment of the study body." *Id.*

95. *See id.* at 480–82 (discussing the inadequacies of the standard aptitude tests because of environmental and psychological factors).

> [b]ecause these tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading tests scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or – more precisely – according to environmental and psychological factors which have nothing to do with innate ability.[96]

Ultimately, the court found the tracking structure unconstitutional because of its disparate impact on black and poor students, rather than finding a systematic effort to resegregate.[97]

However, the disparate impact analysis was foreclosed by the Supreme Court's decision in *Washington v. Davis*,[98] a case that focused on the disparate effects of written personnel examinations that were a component of a police department application. The Court changed the framework of the Equal Protection Clause so that disproportionate impact on different racial groups alone does not make a law unconstitutional.[99] The Court held that a finding of "invidious discrimination" demands discriminatory intent; thus, the tracking doctrine under the equal protection analysis now requires plaintiffs to show the requisite intent.[100] Circumstantial evidence can be used to prove intent in tracking cases.[101] Such evidence may include

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96. *Id.* at 514.

97. *See id.* at 513. The court recognized that

> the law has a special concern for minority groups for whom the judicial branch of government is often the only hope for redressing their legitimate grievances; and a court will not treat lightly a showing that educational opportunities are being allocated according to a pattern that has unmistakable signs of invidious discrimination. Defendants, therefore, have a weighty burden of explaining why the poor and the Negro should be those who populate the lower ranks of the track system.

Id.

98. 426 U.S. 229, 242 (1976).

99. *Id.* The court held that a facially neutral law is

> invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. (citations omitted).

100. *See* People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 851 F. Supp. 905, 910 (N.D. Ill. 1994), *aff'd in part, rev'd in part*, 111 F.3d 528 (7th Cir. 1997). The court stated the rule for establishing unconstitutional racial imbalance within a school system: "the plaintiff must show that the governmental authorities created or maintained racial segregation in the schools and that their actions were motivated by segregative intent." *Id.* at 910.

101. *Id.* at 911 (citations omitted).

"1) the historical background and sequence of events leading up to the conduct maintaining or exacerbating racial imbalance in the schools; 2) departures from typical procedural sequences or substantive criteria normally considered important by the decisionmaker; and, 3) contemporaneous evidence concerning the decision-making process."[102] Furthermore, if a plaintiff can show discriminatory intent and causation, the burden shifts to the defendant to prove that "the same segregative conduct would have occurred even had the impermissible purpose not been considered."[103]

Finding discriminatory intent is very difficult without being able to point to a history of de jure segregation. There are only a couple of cases where plaintiffs have been able to successfully challenge tracking under these circumstances.[104] For example, in *People Who Care v. Rockford Board of Education*, plaintiffs claimed that the Illinois school district engaged in systematic discriminatory practices which included tracking.[105] The school district did not have a history of explicit de jure segregation, but the court held that a pattern of discriminatory practices "occurred over a substantial period of time and in a substantial portion of the Rockford public schools and constituted a system-wide attempt to separate the races."[106] The court found that the district intentionally discriminated against students of color by analyzing the consistently disproportionate assignment of students of color to lower tracked courses, the district's knowledge of these disparities and "woefully inadequate efforts" to remedy the differences in opportunities, and the district's practice of placing black students whose achievement scores qualified them for two or more tracks in the lower track.[107] Additionally, the court used testimony

102. *Id.* at 931 (citations omitted).

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

104. *Id*. at 933–34; Hobson v. Hansen, 269 F. Supp. 401, 513 (D.D.C. 1967).

105. *See People Who Care*, 851 F. Supp. at 908, 911. Other discriminatory practices included drawing school boundaries to increase racial segregation; providing inequitable transportation to students based upon their race, providing inequitable facilities and equipment to students of color in segregated schools, and placing students of color disproportionately in special education programs. *Id.* at 933.

106. *Id.* at 933.

107. *Id.* at 913–14. The court stated

> [t]he evidence clearly supports a finding that the mistracking resulted in unfavorable treatment for minority students. The ultimate result of this mistracking was that minority students whose achievement scores qualified them for regular and basic tracks were far more likely to be placed in the lower than the higher track for which they qualified, and white students were far more likely to be placed in the higher track than the lower track when their achievement scores qualified them for both tracks.

Id. at 915.

from the district's personnel corroborating an intent to segregate minority students from white students in its other practices besides tracking.[108] *People Who Care* may stand for the proposition that severe discriminatory effects coupled with blatant knowledge of inaccurate placement of students is required to show intent.[109]

Though not a case on school tracking, *Parents Involved in Community Schools v. Seattle School District No. 1*[110] is relevant to the tracking original equal protection doctrine because of its implications for de facto segregation. The Supreme Court heard two cases concurrently challenging school assignment practices on the basis of race.[111] In one case, Seattle School District No 1. sought to create racial balance in its schools even without a history of previous de jure segregation.[112] The district characterized a school as "oversubscribed" if the demographics were not within ten percentage points of the district's overall white/nonwhite racial proportion and allowed the use of a racial tiebreaker to admit students into schools to correct the imbalance."[113] In the second case, Jefferson County Public Schools adopted a voluntary student assignment plan where all nonmagnet schools had to maintain a "minimum black enrollment of 15% and a maximum black enrollment of 50%," despite the fact that Jefferson County School District had just achieved unitary status the year before.[114]

Chief Justice Roberts wrote the plurality opinion and was joined by Justices Alito, Scalia, and Thomas. The plurality opinion first held that "when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."[115] The Court could have held that when a government or law benefits people of a historically discriminated group, strict

108. *Id.* at 914.

109. *See id.* The court stated,

> [t]he defendant also objects to the Magistrate Judge's finding that the defendant did not track students objectively and had a rigid tracking program. The defendant attributes these inequities to "mistakes" and not "intentional discrimination." The evidence on this point is replete with statistical, documentary and anecdotal support which establishes that the defendant was aware of the problem, but chose to do nothing to correct it.

Id.

110. 551 U.S. 701 (2007).

111. *Id.* at 710–11.

112. *Id.* at 711–12.

113. *Id.* at 712.

114. *Id.* at 715–16.

115. *Id.* at 720.

scrutiny is not appropriate; however, the plurality did not recognize a distinction between classifications that "burden" or "benefit."[116] Because the school assignment plans were subject to strict scrutiny, the school districts had the burden of showing that the use of racial classifications were "narrowly tailored" to achieve a "compelling" government interest.[117]

The Court stipulated that there were two possible compelling interests that the school districts could show.[118] First, the school could use racial classifications to remedy the effects of past intentional discrimination.[119] However, the Court quickly dismissed this possibility in these two cases by asserting that there had never been de jure segregation in Seattle public schools,[120] and noting that Jefferson County had achieved unitary status.[121] Secondly, the school could promote viewpoint diversity as established in *Grutter v. Bollinger*.[122] However, the Court interpreted *Grutter* to limit the interest in promoting viewpoint diversity to the unique institutional needs of universities.[123]

Furthermore, the plurality opinion rejected racial balancing as a compelling state interest, despite the defendant school district's arguments that racially diverse learning environments benefit students educationally and socially.[124] The plurality found the practice of racial balancing troubling because it would continue to promote the use of race in governmental decision-making.[125] Additionally,

116. *See id.* ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny . . . . [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 721. The district court had found that Jefferson County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects . . . Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students." *Id.*

122. *Id.* at 722–23.

123. *Id.* at 724.

124. *Id.* at 725.

125. *Id.* at 730. The Court stated that

> [a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.

Id.

addressing racial imbalance caused by factors other than segregation via state action (essentially, de facto segregation) does not qualify as a compelling interest.[126] The plurality opinion essentially cut off any future arguments that there is ever a compelling interest in remedying the effects of de facto segregation in schools.

Racial classifications are rarely used to track or de-track students in today's schools. However, any tracking systems that are the result of de facto segregation rather than intentional discrimination cannot rely on racial balancing as a compelling interest to overturn the system because strict scrutiny applies if any sort of classification is used. Additionally, *Parents Involved* reflects a further limitation on plaintiffs' use of equal protection doctrine to combat de facto segregation and the Supreme Court's current support for such limitations. Therefore, Type I challenges are now unlikely to provide a workable doctrine for challenging modern tracking systems.

B. Type II: Past Intentional Discrimination

Type II federal actions are much more commonly used to challenge tracking.[127] The doctrine under Type II actions is not necessarily distinct from an equal protection analysis, but it is an expansion in specific contexts.[128] Type II actions generally govern conflicts that emerge in schools in the process of securing release from the mandates of their desegregation order or where plaintiffs move to modify their district's desegregation orders.[129] While courts give less deference to school districts are or were recently under a desegregation order,[130] Type II actions are not available to the vast majority of schools with newly changed demographics with diverse student populations.

First, plaintiffs may challenge tracking by showing that the school's practices perpetuate or reestablish a dual school system that separates racial groups.[131] If the court finds that tracking causes significant segregative effects, the school may justify the structure by showing that its practices "(1) are not based on the present results of past discrimination or (2) will remedy such present results through

126. *Id.* at 736.

127. WELNER, *supra* note 25, at 40.

128. Oakes & Welner, *supra* note 7, at 454 (characterizing Type II actions as being for preexisting desegregation orders).

129. WELNER, *supra* note 25, at 40.

130. *See infra* note 135 and accompanying text.

131. McNeal v. Tate Cty. Sch. Dist., 508 F.2d 1017, 1019–20 (5th Cir. 1975).

better educational opportunities."[132] Most of these cases hinge on whether the practices result from a school's previous discriminatory practices or, alternatively, whether the school had the requisite intent to discriminate on the basis of race.

After a court finds segregative effects, it will look to a school's previous history of either de jure segregation or any past intentional discrimination.[133] Most cases challenging tracking emerged where schools were or had previously been operating under desegregation orders.[134] Under these circumstances, the court may be more skeptical of the tracking practice because resegregating students on the basis of ability essentially resegregates students by race.[135] Furthermore, "a relatively recent history of discrimination may be probative evidence of a discriminatory motive which, when coupled with evidence of the segregative effect of ability grouping practices, may support a finding of unconstitutional discrimination."[136] Courts thus grant the plaintiffs a presumption that former de jure segregation has a connection with the discriminatory effects at issue.[137]

Many cases also feature conflicts in schools that achieved unitary status shortly before the tracking lawsuit or while the school was seeking unitary status from the courts. A school district achieves "unitary status" when it has "abandoned the 'dual' status of 'intentional segregation by race,'" complying with the Constitution's command under the Fourteenth Amendment.[138] The status also indicates that the district has "eliminated the vestiges of prior [de jure] segregation to the greatest extent practicable[.]"[139] Cases such as

132. Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 753 (5th Cir. 1989).

133. Georgia State Conference of Branches of NAACP v. State of Ga., 775 F.2d 1403, 1413 (11th Cir. 1985) ("In evaluating the constitutional validity of ability grouping, courts have acknowledged the importance of examining the school district's history of segregation.").

134. *See, e.g.*, Lemon v. Bossier Par. Sch. Bd., 444 F.2d 1400 (5th Cir. 1971); Moses v. Washington Par. Sch. Bd., 330 F. Supp 1340 (E.D. La. 1971), *aff'd*, 56 F.2d 1285 (5th Cir. 1972).

135. Castaneda v. Pickard, 648 F.2d 989, 996 (5th Cir. 1981). One rationale for much closer judicial scrutiny of school districts with a previous history of de jure discrimination is that "ability grouping, when employed in such transitional circumstances may perpetuate the effects of past discrimination by resegregating, on the basis of ability, students were previously segregated in inferior schools on the basis of race or national origin." *Id.*

136. *Id.*

137. *See* Berry v. Sch. Dist., 442 F. Supp. 1280, 1294–95 (W.D. Mich. 1977) ("A presumption of segregative intent arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolution application of racially neutral policies.").

138. Freeman v. Pitts, 503 U.S. 467, 487 (1992).

139. Spurlock v. Fox, 716 F.3d 383, 386 (6th Cir. 2013) (citations and quotations omitted).

these range from shortly after Brown to modern day. For example, in *Hoots v. Pennsylvania,*[140] a Pennsylvania district petitioned for unitary school status in 1999 when the court had previously ruled in 1973 that district was engaging in de jure discrimination.[141] Although the court found that the district provided all students with an equal educational opportunity after complying with its desegregation order, it revised the order to eliminate tracking.[142] More recently in 2014, a suit challenged the tracking practices in a Florida school that had achieved unitary status in 2012 after forty-two years under a desegregation order; the court ultimately found that the tracking system did not improperly consider race.[143]

If a school has attained unitary status or has always been a unitary school district, tracking practices are more difficult to challenge. First, the school must show that the school district has been operating as a unitary school for a sufficient period of time before legitimizing any practice that results in a dual school system.[144] If the school district has been recognized as a unitary school for a satisfactory amount of time, the court does not automatically find that school tracking practices are based on the "present results of past segregation[.]"[145] Instead, the plaintiff has the burden of proving that the unitary school districted implemented the tracking system with an intent to discriminate.[146] Finally, even if racial segregation in tracked courses is the present result of past segregation or the school district intentionally discriminated against racial groups, the practice can still pass constitutional muster if it can "remedy the results of past segregation through better educational opportunities."[147]

Ultimately, like Type I claims based on the original equal protection doctrine, Type II claims are only practicable if there is a specific legal history of de jure discrimination. Without previous intentional discrimination, tracking litigants are unlikely to prevail with claims based on equal protection.

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140. 118 F. Supp. 2d 577 (W.D. Pa. 2000).

141. *Id.* at 580, 583.

142. *Id.* at 613.

143. United States v. Jefferson Cty. Sch. Dist., 63 F. Supp. 3d 1346, 1349, 1351 (N.D. Fl. 2014).

144. Lemon v. Bossier Par. Sch. Bd., 444 F.2d 1400, 1401 (5th Cir. 1971); Simmons v. Hooks, 843 F. Supp. 1296, 1302 (E.D. Ark. 1994); Moses v. Washington Par. Sch. Bd., 330 F. Supp 1340, 1345 (E.D. La. 1971), *aff'd*, 56 F.2d 1285 (5th Cir. 1972).

145. *Simmons*, 843 F. Supp. at 1302.

146. *Id.*

147. *Id.*

III. SUBSTANTIVE DUE PROCESS AS A POSSIBLE LITIGATION STRATEGY

Challenges against tracking systems may not have much success under an equal protection claim without showing an explicit history of discrimination in school, but a substantive due process claim may provide different avenues of attack in both federal and state courts. There is no federal fundamental right to education, but the Supreme Court has not dismissed the possibility of a fundamental right to some level of basic education.[148] State courts recognize the right to education much more expansively; because courts are more likely to interpret stronger state obligations to provide a minimally adequate education, tracking litigants should probably bring state claims under substantive due process violations.

A. The Fundamental Right to an Education in Substantive Due Process

i. Federal Substantive Due Process Protects Specific Fundamental Rights

The Fourteenth Amendment protects certain rights through the Due Process Clause.[149] The Due Process Clause protects both procedural and substantive rights.[150] The Fourteenth Amendment does not include explicit language protecting substantive rights, but the Supreme Court has traditionally recognized the protection of such rights under the Constitution.[151]

There are three components of substantive due process. First, the Due Process Clause prohibits the states from violating citizens' enumerated rights under the Bill of Rights.[152] Much of the Bill of Rights is "incorporated" by the Fourteenth Amendment, with a few

148. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973) ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short . . . as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

149. U.S. CONST. amend. XIV.

150. *Id.* ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

151. 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:16, Westlaw (database updated November 2017).

152. *Id.*

exceptions.[153] Second, the Court can draw from the Due Process Clause as a source for finding unenumerated "liberties" or fundamental rights.[154] Only fundamental rights warrant the highest security under strict scrutiny analysis.[155] Finally, substantive due process protects citizens from arbitrary abuses of power by government officials.[156]

The Court has articulated a general framework for finding new fundamental rights under the Fourteenth Amendment. The Court initially uses a method of narrowly defining fundamental rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[157] Next, the Court must provide a "careful description" of the asserted fundamental liberty interest.[158] Rights such as marriage or the right of parents to guide the upbringing of their children have been found by this method.[159] However, the Court has at times been willing to go even beyond enumerated rights and liberties rooted in "history and tradition" to reflect evolving social trends and focus on matters "central to personal dignity and autonomy."[160]

ii. There Is No Current Federal Fundamental Right to Education

The Supreme Court has refused to recognize a fundamental right to education under the Constitution. The Court has addressed the question of whether the Due Process Clause protects a federal fundamental right to education in two of significant cases. In *San Antonio Independent School District v. Rodriguez*,[161] parents

153. Peter S. Smith. *Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825, 848–49 (1997).

154. 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:16, Westlaw (database updated November 2017).

155. *Id.* When the court designates a liberty interest as fundamental, "government may not interfere with that right (infringement) unless it survives strict scrutiny analysis[.]" *Id.*

156. *Id.*

157. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations and quotations omitted).

158. *Id.*

159. 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:16, Westlaw (database updated November 2017); *see also* Loving v. Virginia, 388 U.S. 1 (1967) (establishing the freedom to marry person of another race); Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing the right of parents to have their children taught in a foreign language).

160. *See Glucksberg*, 521 U.S. at 724–27 (discussing the Court's precedents in finding fundamental rights "central to personal dignity and autonomy" in *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261 (1990) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)).

161. 411 U.S. 1 (1973).

challenged the Texas financing system based on dramatic disparities in school funding from district to district.[162] They asserted that the unequal spending per pupil interfered with their children's fundamental right to an education.[163] The Court stated that there was a possibility that there might be some "identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise" of the right to speak or vote, but that there was no charge that Texas had failed "to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[164] Ultimately, the Court declined to hold that education was a fundamental right because it did not find that the Constitution explicitly or implicitly guaranteed such a right.[165] The Court then applied a rational basis test and upheld the Texas school system, acknowledging the rational purpose of local control.[166]

A decade later, the Supreme Court in *Plyler v. Doe*[167] established that although education is not a fundamental liberty, it is also not a mere governmental benefit.[168] In *Plyler*, undocumented immigrant children were denied the opportunity to attend public schools in Texas.[169] The Court again held that education was not a fundamental right, but applied a heightened scrutiny to review the Texas statute rather than rational basis.[170] Because the children were "innocent" and could "affect neither their parents' conduct nor their own status," the Court reasoned that the analysis should focus on whether the "State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests."[171]

The Court more explicitly identified education as an important liberty from *Rodriguez* by also implying that there is some minimum amount of education necessary to ensure that students could one day participate meaningfully in the democratic system.[172] First, it

162. *Id.* at 4–6, 13–16.
163. *Id.* at 17.
164. *Id.* at 36–37.
165. *Id.* at 33–35.
166. *Id.* at 54–55.
167. 457 U.S. 202 (1982).
168. *Id.* at 221.
169. *Id.* at 205–06.
170. *Id.* at 230.
171. *Id.* at 220.
172. *Id.* ("[As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political

recognized the significance of education in laying a foundation of knowledge that would support "the preservation of a democratic system of government," and also acknowledged that denial of an education has many permanent impacts on a child.[173] It stated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[174] This idea of a minimum level of education guaranteed to maintain the "fabric of our society"[175] has opened the door to the possibility that the Supreme Court would apply the same heightened scrutiny when the right to an education has been violated.[176] *Plyler's* heightened scrutiny is most likely to apply in a case where there are three factors to consider: "[a] denial of educational opportunity; a disabling classification applied to an innocent group; and the gravity of the plaintiff's harm."[177]

iii. Some State Constitutions Recognize a State Fundamental Right to Education

States have been more willing to recognize a fundamental right to education than the federal courts.[178] As opposed to federal courts' assumption that constitutional rights under the Federal Constitution are "negative rights" where the government cannot interfere with granted rights, but it does not have a duty to act, state constitutions often use "positive rights" language to describe the government's affirmative duty to provide a public education.[179] Some constitutional provisions are merely aspirational, while others have created and recognized a fundamental right.[180] Consequently, the latter states have committed to a form of heightened scrutiny analysis under state substantive due process clauses[181] and may be jurisdictions that would strongly favor plaintiffs in tracking litigation.

Although state courts still consider federal case law on substantive due process because it is more developed and because state courts

system if we are to preserve freedom and independence.") (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

173. *Id.* at 221–22. The Court acknowledges the "inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual." *Id.* at 222.

174. *Id.* at 223 (citation and quotation omitted).

175. *Id.* at 221.

176. Smith, *supra* note 153, at 841–43.

177. *Id.* at 842.

178. *See supra* note 21 (listing state cases finding a fundamental right to an education).

179. Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 427–31 (2000).

180. *Id.* at 431.

181. *Id.* at 424.

seek to be consistent with federal precedent,[182] plaintiffs in state courts have been much more successful in challenging local systems through a deprivation of a right to education claim. For example, plaintiffs have challenged the quality of educational resources in state funding cases and have succeeded in twenty-eight states,[183] whereas unequal funding in *San Antonio* did not violate any fundamental right to education.[184]

More notably, *Sheff v. O'Neill*[185] focuses on an issue of de facto segregation that calls to mind the segregative effects of tracking in a state right to education case. In *Sheff*, the Connecticut Supreme Court held that there is a state constitutional imperative to remedy racial and ethnic isolation in Hartford's schools which violated students' fundamental right to education.[186] Although there had been no state action because demographic patterns ultimately caused racial segregation,[187] the Connecticut Supreme Court still found that the Connecticut Constitution "contains a fundamental right to education and a corresponding affirmative state obligation to implement and maintain that right."[188] This state constitutional imperative combined with another Connecticut constitutional provision in § 20 that "[n]o person shall be denied the equal protection of the law *nor be subjected to segregation* or discrimination . . . because of . . . race [or] . . . ancestry . . ." compelled the court to engage in strict scrutiny analysis and condemned de facto segregation caused by neighborhood demographics.[189] Ultimately, interpretations of state constitutions can provide a more expansive opportunity to grant remedies based on state doctrine that relies on a fundamental right to education.

B. Courts Recognize a Right to a Minimum Adequate Education

The Supreme Court has explicitly left open the question of whether there is a fundamental right to a minimum level of education,

182. *Id.* 425–26.

183. Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case Out of Education*, 59 S.C. L. REV. 755, 780 (2008).

184. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973).

185. 678 A.2d 1267 (Conn. 1996).

186. *Id.* at 1270–71. The court observed that social influences on racial isolation in schools such as neighborhood demographics; it also recognized that students' ethnic and socioeconomic background impaired student performance in standardized testing. *Id.* at 1273.

187. *Id.* at 1285.

188. *Id.* at 1279.

189. *Id.* at 1281–82.

but has implied that there may be such a right.[190] Building on the jurisprudence of *Rodriguez*[191] and *Plyler*,[192] the Supreme Court and lower federal courts have grappled with finding a "minimally adequate education" as a legal conclusion in substantive due process cases.[193] Many of the lower federal court cases focused on school funding in questions of educational adequacy[194] because the Supreme Court's holding in *Rodriguez* narrowly applied to school funding variations resulting solely from property tax variations.[195]

Ultimately, courts are often willing to engage in a factual inquiry to determine whether a student has access to educational services and the potential impacts of being denied these services.[196] For example, in *Donnell C. v. Illinois State Board of Education*,[197] an Illinois federal district court denied a motion to dismiss a complaint based on the inadequacy of educational services for juvenile pretrial detainees.[198] A showing that some students were "not being taught courses other than reading and math, did not have textbooks, workbooks or other instructional materials, and were not given learning disability assessment and instruction" were sufficient factual allegations to consider at trial.[199] Courts may thus consider the quality of education being provided rather than just the opportunity to attend school when trying to find a minimum adequate level.

A fundamental right to a minimum adequate education would be consistent with the jurisprudence in *Rodriguez* and *Plyler* and would

190. Papasan v. Allain, 478 U.S. 265, 284 (1986).

191. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) ("[N]o charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

192. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) ("[As] . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.") (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))

193. Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1005–07 (2001).

194. *Id.*

195. *See Allain*, 478 U.S. at 287 ("*Rodriguez* did not, however, purport to validate all funding variations that might result from a State's public school funding decision. It held merely that the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case.").

196. *See* Safier, *supra* note 193, at 1005–07 (describing the Supreme Court's and other courts approaches in determining whether there is a right to a minimally adequate education and how they looked beyond the mere participation in school).

197. 829 F. Supp. 1016 (N.D. Ill. 1993).

198. *Id.* at 1020.

199. *Id.* at 1018. This case ultimately settled. Safier, *supra* note 193, at 1007.

also be rooted in the history and tradition of a right to acquire knowledge. In *Meyer v. Nebraska*,[200] the Supreme Court struck down a statute forbidding teaching in any other language but English and any other language class until after eighth grade.[201] The Court found that the legislature was interfering with "the opportunities of pupils to acquire knowledge[.]"[202] Additionally, in *Board of Education v. Pico*, the Court found that removing books from a school library violated an important right to "receive information and ideas" which is an "inherent corollary of the rights of free speech and press[.]"[203] Denying students some level of information that infringes on their ability to participate in democratic society could be construed as the denial of some minimum level of quality education.[204]

The Supreme Court's hesitation in finding a fundamental right to a minimally adequate education is related to why it does not find that there is a general fundamental right to education: it is difficult to find an objective floor for the quality of education required.[205] However, a federal threshold would not only be preferable for consistency reasons, but would also be more realizable today than it would have been when *Rodriguez* and *Plyler* were litigated. Congress has been more proactive in implementing mandatory national standards for public schools through the No Child Left Behind Act and Common Core Standards movement. Courts could tie a standard for a minimally adequate education to Congress's federal mandates. Alternatively, a minimally adequate education could also be evaluated according to state standards.[206] Thus, "the issue of a minimally adequate education would be collapsed into the question of what a state's qualitative predetermined floor is."[207] If federal courts are reluctant to determine what level of scrutiny to apply, it

200. Meyer v. Nebraska, 262 U.S. 390, 400, 403 (1923).
201. *Id.* at 403 .
202. *Id.* at 401.
203. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982).
204. *See supra* note 148 (conceding there may be a constitutionally minimum basic education to allow the meaningful exercise of the right to speak and vote); *supra* note 172 (stating that there is some degree of education required to participate effectively in the democratic system).
205. Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right,* 51 WM. & MARY L. REV. 1343, 1407 (2010).
206. *Id.* at 1408.
207. *Id.*

could defer to states and whether they view the education right as fundamental.

C. Many States Recognize a Fundamental Right to a Minimally Adequate Education

Every state constitution provides for free public education.[208] Though not all states recognize a fundamental right to education, many still interpret their constitutions to grant a minimum basic education.[209] There is still no consistent standard for what adequacy entails, but several states stand out as models for how states approach adequacy standards.

One model is to follow state statutory or administrative standards to define a minimum adequate education. For example, in *Seattle School District v. State*, plaintiffs challenged the state's method of raising "special excess levy elections," where school districts could supplement insufficient state funding for public schools by seeking more funding from the local electorate.[210] Voters were never required to approve the request, and school districts had no independent authority to raise funds; thus, schools often operated with insufficient money to support its educational programs.[211] Plaintiffs brought a claim that the "State had failed to discharge its 'paramount duty' to make 'ample provision for the education' of its resident children" and to "provide for a general and uniform system of public schools" pursuant to the Washington Constitution.[212] The court interpreted the constitutional provision[213] and found that the Legislature intended that the State provide "basic education" as opposed to "total education."[214] Nonetheless, the State had a constitutional duty to teach "beyond mere reading, writing, and arithmetic" and create "broad educational opportunities . . . in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas."[215] These principles for an effective education shape the

208. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 129 (2013).

209. *Id.*; Cochran, *supra* note 179, at 437–38.

210. Seattle Sch. Dist. No. 1 of King Cty. v. State, 585 P.2d 71, 77–78 (Wash. 1978).

211. *Id.* at 78. During the 1975-1976 year, 40% of students in the state were in districts operating under budget. *Id.*

212. *Id.* The Court interpreted Const. art. 9, § 1 and 2 of the Washington constitution. *Id.*

213. *Id.*at 94.

214. *Id.* at 95.

215. *Id.* at 94.

essential skills and opportunities that would make up the minimum of the education that is constitutionally required in Washington.[216] Ultimately, the court held that it was the legislature's duty to define and give substantive meaning to the constitutional provision requiring education and declined to configure a judicial standard.[217] Other states have followed this approach and allowed their legislatures to shape the minimally adequate education standard with specific guidelines.[218]

Alternatively, some courts have established judicially created requirements. In *Rose v. Council for Better Education, Inc.*,[219] the Kentucky Supreme Court interpreted its constitution[220] to require the state to provide all students with an "efficient" education, or an "equal opportunity to have an adequate education."[221] The Court also articulated particular guidelines that would not only become the substantive content of the constitutional requirement, but would also become the prototype for other states' standard for a minimally adequate education.[222] These standards included:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
>
> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
>
> (iii) sufficient understanding of governmental processes to

216. *Id.* at 95.

217. *Id.* at 95. This case was later overruled by the Washington Basic Education Act of 1977, which ultimately communicated a statutory standard for a basic education. Fed. Way Sch. Dist. No. 210 v. State, 219 P.3d 941, 947 (Wash. 2009).

218. *See* Idaho Sch. For Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (1993) (holding that school districts follow the state board of education requirements); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994) (holding that the minimally adequate education standard should follow those education standards adopted by the Kansas Legislature); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (holding that the court should follow Minnesota's minimum accreditation standards).

219. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989).

220. *Id.* at 205. The Kentucky Constitution states that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." *Id.* at 200.

221. *Id.* at 211.

222. Cochran, *supra* note 179, at 413. *See also* Bonner v. Daniels, 885 N.E.2d 673, 693 n.9 (Ind. Ct. App. 2008), *transfer granted, opinion vacated* (Sept. 24, 2008), *vacated*, 907 N.E.2d 516 (Ind. 2009). Massachusetts, Arkansas, and New Hampshire explicitly adopted Kentucky's standards. *Id.* Kansas also adopted Kentucky's standards. Gannon v. State, 402 P.3d 513, 524 (Kan. 2017). Other states have also been influenced by Kentucky's standards such as Alabama and South Carolina. *Bonner*, 885 N.E.2d at 693 n.9.

> enable the student to understand the issues that affect his or her community, state, and nation;
>
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
>
> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
>
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
>
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[223]

These standards ultimately emphasize a minimum level of knowledge and skills that each child requires to achieve success in academic and vocational fields. These standards also emphasize the necessary skills and knowledge to engage with the political and social community. Some states have adopted these exact guidelines, while others have developed their own.[224]

IV. STRATEGIES USING SOCIAL SCIENCE EVIDENCE TO SHOW THAT TRACKING DEPRIVES STUDENTS IN LOW-TRACKED CLASSES OF A MINIMALLY ADEQUATE EDUCATION

Overturning tracking systems is not easily achieved by challenging a school's action under federal substantive due process grounds, but this approach has a greater likelihood of success than under equal protection grounds. Ideally, the Supreme Court and federal courts would shift from the *Rodriguez* jurisprudence and further develop the *Plyler* framework in applying a heightened review when the educational opportunities of discriminated groups of people are at stake. Even if the federal courts recognize a fundamental right to a minimally adequate education, the courts will still have to determine a standard of adequate education—a standard that will either be tied to a Congressional standard, a wholly new judicial standard, or one based on those of the state courts.

223. *Rose*, 790 S.W.2d at 212.

224. Cochran, *supra* note 179, at 416. Other states that have developed their own criteria including Alabama, North Carolina, New York, and South Carolina. *Id.*

Currently, tracking litigants have the best chance of success utilizing a state substantive due process claim proceeding in states that recognize education as a fundamental right. Furthermore, jurisdictions that recognize a right to a minimally adequate education may be even more favorable because "the adequacy approach pose[s] much less risk of creating broad new rights to government services because courts [can] base their decisions on the unique language of their constitutions' education articles."[225] In states that recognize neither, litigants may have to argue first for the right and second for a standard based on judicially created criteria similar to those established in Kentucky.[226]

Litigants challenging tracking in states with little constitutional or legislative guidance for a minimally adequate education can use the arguments outlined in the rest of Part IV. These arguments closely follow Kentucky's *Rose* standards[227] and are supported by social science research. Kentucky's standards generally focus on three major objectives: (1) equip students with a sufficient base of skills and knowledge; (2) prepare students for future employment and educational pursuits; and (3) enable students to compete favorably with other students in future employment and educational pursuits.[228] Social science research shows that tracking as an educational practice fails to substantially meet all three objectives and thus deprives students of a minimally adequate education.

Many studies have focused on the efficacy of tracking and its impacts on students in different course levels and ability groups. Some studies focus on individual schools or a small set of schools, while others synthesize data through meta-analysis (studies that look at a mass of other results from other studies). Investigations focused on one school are not always persuasive because they do not always provide a satisfying range for comparison, but large reviews of tracking systems sometimes gloss over the complicated contexts of individual schools, their backgrounds, and operations. However, findings from both types of studies are valuable for their narrative and empirical data and provide different facets of tracking's outcomes.

225. *Id.* at 414.
226. *See Rose*, 790 S.W.2d at 212 (articulating Kentucky's standards).
227. *See id.*
228. *Id.*

A. Low Track Classes Fail to Equip Students with a Sufficient Base of Skills and Knowledge

Defining a minimum base of skills and knowledge may seem like another difficult standard to articulate, but the Supreme Court and lower courts have generally been consistent in pronouncing that education should prepare students to meaningfully engage in the democratic system and succeed in college or career.[229] Requiring that schools train and educate students with a minimum base of skills and knowledge to participate in democracy and the job market should thus be a part of the standard. The Partnership for 21st Century Learning (P21), a national advocacy organization that has been influential in outlining important skills that today's students should acquire,[230] could provide substantive guidelines for this minimum base. In their *Framework for 21st Century Learning*, P21 has focused on different areas of literacies in addition to skills such as creativity and innovation, critical thinking and problem solving, communication, and collaboration.[231]

Litigants that challenge tracking systems under a state substantive due process claim will likely have to show that tracked classes fail to equip students with a sufficient base of skills and knowledge.[232] Students in lower-tracked classes will be more likely to bring a claim and thus will argue that their class structure and curriculum fails to provide them with a minimum set of skills and basic knowledge. Plaintiffs will have to point to specific deficiencies in their individual

229. *See id.* (articulating Kentucky standards that emphasize preparation for academic and vocational training); Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (recognizing "the public school as a most vital civic institution for the preservation of democratic system of government" and that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"); Seattle Sch. Dist. No. 1 of King Cty. v. State, 585 P.2d 71, 94 (Wash. 1978) (quoting the Washington Constitution when it said that the purpose of education is to "fit them for usefulness in the future").

230. *Partnership for 21st Century Learning*, NAT'L EDUCATORS ASS'N REFERENCE CTR., http://www.nea.org/home/34888.htm (last visited Dec. 15, 2017).

231. *Framework for 21st Century Learning,* P'SHIP FOR 21ST CENTURY LEARNING, http://www.p21.org/storage/documents/docs/P21_framework_0816.pdf (last visited Dec. 15, 2017). Under Key Subjects and 21st Century Themes, P21 promotes global awareness, financial, economic, business and entrepreneurial literacy, civic literacy, health literacy, and environmental literacy. *Id.* P21 also advocates for a set of information, media, and technology skills as well as life and career skills (flexibility and adaptability; initiative and self-direction; social and cross-cultural skills; productivity and accountability; leadership and responsibility). *Id.*

232. *See Rose*, 790 S.W.2d at 222 (articulating Kentucky's standards, which describe some minimum base of skills and knowledge).

school systems to succeed in their claims and thus much of their arguments will be contextual. Plaintiffs could also focus on what external social science research has proven about tracking's effectiveness.

Lower-tracked classes often fail to provide students with the opportunity to develop the minimum skills and knowledge base to engage effectively in democratic institutions. This evidence is shown most prominently through qualitative evidence rather than quantitative evidence, as shown in Jeannie Oakes's book, *Keeping Track*; her seminal research involved studying 25 secondary schools and their tracking systems from very different communities.[233] Part of her research incorporated interviewing students, parents, teachers, and administrators.[234] Ultimately, Oakes found that students in lower tracks and higher tracks "had markedly different access to knowledge and learning experiences[.]"[235]

When she asked teachers what they hoped students would learn from their classes, teachers gave responses that generally fell into two categories: "independence" and "conformity."[236] In the "independence" category, teachers generally expressed a desire to teach their students critical thinking, the ability to work on individual projects/assignments, self-direction, and creativity.[237] In the "conformity" category, teachers communicated a desire to teach their students merely to behave in class and complete simple tasks.[238] Oakes found that higher-tracked classes were more likely to emphasize the skills under "independence," while lower-tracked classes emphasized the "conformity" skills.[239] Furthermore, when students were asked what was the most important thing they learned or done in class so far, student responses mirrored the same trend.[240] Skills in the independence category constitute important skills

233. OAKES, *supra* note 2, at 41.
234. *Id.* at 42.
235. *Id.* at 74.
236. *Id.* at 84.
237. *Id.*
238. *Id.* at 82–85. Oakes found that teachers focused on compliant behaviors such as how to get along with others, work quietly, improve study habits, cooperate, and conform to rules and expectations. *Id.* at 84–85.
239. *Id.* at 85.
240. *See id.* at 67–72. Students in higher tracked classes primarily focused on learning how to think critically and independently, prepare for college, and apply what they have learned to understand current and future events. *Id.* at 67–70. Students in lower tracked classes primarily focused on skills related to job applications and skills, and many of them even wrote "nothing" or "I don't remember." *Id.* 70–72.

required for effective participation in today's democratic and social institutions. Plaintiffs may be able to show the same discrepancy exhibited in this study in their schools.

Furthermore, lower-tracked classes are often taught by less qualified teachers in low-track classes.[241] Low-tracked classes are usually not desirable assignments, and veteran teachers may be able to secure the more preferable high tracked classes.[242] As a result, studies show that teachers in low tracks tend to have less teaching experience, fewer degrees, and less certifications in the subject area they were assigned to teach.[243] Although more experience does not always make one teacher superior to another, studies have consistently shown that experienced teachers continue to increase their effectiveness in improving student outcomes over time.[244] One study showed that greater teacher experience correlates with lower rates of student absenteeism.[245] Ultimately, higher rates of student attendance is an important element in helping students acquire more skills and knowledge by the simple fact that they are present in class.

Low tracks may also deprive students of a minimum base of knowledge and skills in ways that are unrelated to curriculum. Oakes's study shows that students in high tracks reported more positive relationships with their teachers than students in low tracks.[246] Positive student-teacher relationships produce better academic outcomes because these interactions motivate students to engage more fully in the classroom environment.[247] Additionally, students in low tracks indicated that their classes were characterized by "yelling," "fighting," and "arguing," while students in high tracks never mentioned these words and were more likely to use "warm, helpful feelings" to characterize their classes.[248] Negative classroom interactions in lower tracks may detract from a safe learning

241. *Id.* at 227. *See also* Adam Gamoran, *Alternative Uses of Ability Grouping in Secondary Schools*, 102 AM. J. EDUC. 1, 5 (1993). Other studies have also reported the same finding. *Id.*

242. OAKES, *supra* note 2, at 227.

243. *Id.*

244. Helen Ladd & Lucy Sorensen, *Returns to Teacher Experience: Student Achievement and Motivation in Middle School*, 1–2, 22–23, 30 (National Center for Analysis of Longitudinal Data in Educational Research, Working Paper No. 112, Dec. 2015).

245. *Id.* at 4, 27–30.

246. OAKES, *supra* note 2, at 124–26. Students in high-track classes were more likely to perceive their teachers as caring about them than those in low-track classes. *Id.*

247. Diana Raufelder, Sandra Scherber, & Megan Wood, *The Interplay Between Adolescents' Perceptions of Teacher Relationships and their Academic Self-Regulation*, 53 PSYCHOL. SCHS. 736, 737 (2016).

248. OAKES, *supra* note 2, at 125.

environment and prevent students from taking on academic challenges and acquiring a sufficient base of knowledge and skills.

B. Low-Track Classes Fail to Prepare Students for Future Employment and Higher Educational Pursuits

Litigants must also show that low-track classes do not prepare students for future job and higher educational opportunities. Although plaintiffs may have data on their specific school's outcomes, they should also be able to point to general social science research to support their claim that tracking fails to provide students in the lower tracks with a minimally adequate education to succeed in college and careers.

It is easier to show that low-track classes do not adequately prepare students for college. Being placed in a low-track can have profound impacts on long term educational and post-graduate outcomes. For example, one study showed that being placed in a high- or low-track high school course could dramatically impact future enrollment in higher-level classes.[249] Students who scored in the fifth decile on eighth grade tests and took biology in ninth grade had a 71% chance of later taking physics or chemistry.[250] Conversely, students who scored at the same percentile and took a low-level science class in ninth grade only had a 7% chance of later taking advanced science courses.[251] Students placed in low-tracks often have "lower aspirations" and higher dropout rates than higher-tracked students.[252] Although sociological factors also play a significant role in creating these discrepancies, tracking inhibits a student's potential to achieve academically.

The very nature of tracked classes is that there are very different expectations for students in different tracks based on perceived abilities. These distinct expectations create different kinds of work and demands in the classrooms. One study followed sixteen secondary schools and found that teachers were more likely to emphasize higher-order thinking and problem solving in high-tracks than in low-tracks.[253] Whereas high tracked students are pushed to engage in

249. WELNER, *supra* note 25, at 10.
250. *Id.*
251. *Id.*
252. Losen, *supra* note 30, at 522.
253. *See* WELNER, *supra* note 25, at 11 (describing a study performed by Raudenbush, Rowan, and Cheong in 1993).

critical thinking, problem solving, and other higher-order skills that involve projects and complex texts, low-tracked students are often drudging away on basic literacy tasks and worksheets.[254] The tracking systems often sends a very clear message to students in low track classes that they are unfit to pursue a college degree, especially when the track is more strongly linked with vocational programming.[255]

Showing that the tracked school system fails to provide students with a minimally adequate education can be more difficult if the school has a strong vocational program. Ultimately, vocational programs vary in the range of opportunities and some provide excellent training while others are more deficient.[256] However, racial and socioeconomic stratification still exists within vocational programs, where nonwhite students are often more concentrated in areas where the trade requires lower skill and white students are more concentrated in more lucrative trades.[257] If schools are supposed to truly train students to work in the 21st Century, the standard for a minimally adequate education should correlate with training in more modern and profitable fields. Public schools need to ensure that students have equitable opportunities to choose programs in more lucrative fields.

C. Tracking Fails to Enable Students to Compete Favorably with Student Counterparts

Finally, litigants must show that the tracking system fails to provide students with a basic education that allows them to compete with their peers locally or in "surrounding states." This may require more state-specific research, but an argument about how students in low tracks fail to compete with their student counterparts in the same school or other schools without tracking should also be persuasive.

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254. *See* Gamoran, *supra* note 241, at 6 (describing a study where low track classes where "knowledge was defined by daily work sheets" because teachers had low expectations for students' academic progress.); OAKES, *supra* note 2, at 76–77, 88–89 (detailing observations and student responses regarding what low track classes focused on in terms of skills and activities).

255. OAKES, *supra* note 2, at 75, 170; Beth Rubin, *Detracking in Context: How Local Constructions of Ability Complicate Equity-Geared Reform,* 110 TCHRS. C. REC. 646, 689 (2008).

256. OAKES, *supra* note 2, at 164.

257. *Id.* at 166–67. Programs with greater populations of nonwhite students focused more heavily on trades for low-level occupations such as clerical skills and manual labor. *See id.* Programs at schools with greater populations of white students offered a wider range of skills including those above and also "managerial and financial aspects of the business world," marine technology, aviation, food preparation, and general woodworking. *Id.*

Students in low-track classes fail to compete with students in high-track classes. Evidence shows that tracking systems have a disproportionate impact on academic gains: students in low tracks will make much less academic progress in grades and test scores throughout the year than those in high tracks.[258] Additionally, research shows that the achievement gaps between students in tracked classes grow steadily over time.[259] Professor Robert Slavin, a prominent scholar in tracking, has conducted numerous studies that compared student achievement in tracked and untracked settings. When Slavin synthesized data from twenty-nine studies on tracking in secondary schools,[260] he found that students in higher tracks make more academic gains in mathematics than students in lower tracks.[261] Oakes found in her research following twenty-five schools that students in lower tracks made smaller gains (and even losses) in standardized achievement tests than their counterparts in higher tracks over the course of a year.[262] Large discrepancies in learning gains grow wider over time and magnify differences between the students in high and low tracks, often along lines of race and socioeconomic status. These gaps make it impossible for students to leave those tracks and catch up with their peers.

Tracking also reinforces the idea that students in low tracks cannot compete with students in high tracks. Tracking's exacerbation of sociological and psychological pressures is well documented by social science research. For example, Karolyn Tyson wrote a highly

258. *See* OAKES, *supra* note 2, at 236–39 (finding that high-track placement led to achievement gains while low track placement consistently demonstrated lesser achievement gains and describing other students that show similar evidence); Karl L. Alexander, Martha Cook, & Edward L. McDill, *Curriculum Tracking and Educational Stratification: Some Further Evidence*, 43 AM. SOC. REV. 47, 57 (1978) (finding that students placed in college bound tracks made much higher gains on the Sequential Test of Educational Progress (STEP) throughout 11th grade than those in low tracks); Yehzkel Dar & Nura Resh, *Classroom Intellectual Composition and Academic Achievement*, 23 AM. EDUC. RES. J. 357, 369–70 (1986) (finding that students in low-resource homogenous classes make less educational gains that those in high resource homogenous classes); Adam Gamoran & Robert D. Mare, *Secondary School Tracking and Educational Inequality: Compensation, Reinforcement, or Neutrality?*, 94 AM. J. SOC. 1146, 1171–73, 1176–78 (1989) (finding that "average rates of both achievement and graduation would be higher if all students enrolled in the college track" and also describing a study that found that high track student achieve more and low track students achieve less than students in untracked schools).

259. OAKES, *supra* note 2, at 236.

260. Slavin, *supra* note 49, at 484. These results primarily focus on students and classes in seventh through ninth grades. *Id.*

261. *Id.* at 487–88. These studies controlled for IQ, socioeconomic status, pretests, and other measures. *Id.*

262. OAKES, *supra* note 2, at 236.

recognized book that documents how tracking shapes black students' self-perceptions, school life, and academic performance.[263] She begins her book by explaining that "the image of overwhelmingly black lower-level classes and overwhelmingly white advanced classes[] sends a powerful message to students about ability, race, status, and achievement."[264] Especially as adolescents try to figure out their academic and social fit, a school's academic sorting practices can reinforce racial patterns and stereotypes.[265] An adolescent's success or failure at school is pivotal: studies show that students base much of their formulation about their identity, abilities, and potential on their academic performance in school.[266] Thus, in tracked schools that are also racially divided, these segregated structures sustain "the myth of black inferiority" when black students have to face that reality every day.[267] Furthermore, students in lower tracks report much more negative views of themselves than students in higher tracks.[268] This self-fulfilling prophecy prevents students from recognizing their full potential and performing comparatively with their peers.

Finally, students in low-track classes are not able to compete with students who attend schools without tracking. Tracked courses do not improve a student's educational performance unless the higher-tracked class utilizes a much richer curriculum. A consistent body of literature supports the finding that tracking itself as an educational strategy has little impact on overall student achievement in standardized test scores and grades.[269] A fairly recent meta-analysis of 500 studies concluded that tracking had "minimal effects on learning outcomes."[270] Slavin found that high-achieving students perform equally well in tracked and untracked classes and do not benefit from

263. *See* TYSON, *supra* note 28, at 8.
264. *Id.*
265. *Id.*
266. *Id.* at 21.
267. *Id.* at 34.
268. OAKES, *supra* note 2, at 143.
269. *See* Walter R. Borg, *Ability Grouping in the Public Schools*, 34 J. EXPERIMENTAL EDUC. 1, 36 (1965) (finding no significant difference between the proportions of overachievers, underachievers, and normal achievers in tracked and untracked systems); James A. Kulik & Chen-Lin Kulik, *Effects of Ability Grouping on Secondary School Students: A Meta-Analysis of Evaluation Findings*, 19 AM. EDUC. RES. J. 415, 420–23 (1982) (finding only a slight improvement of examination performance in grouped classes than ungrouped classes); Slavin, *supra* note 49, at 473 (finding that the effects of ability grouping on student achievement are essentially zero).
270. JOHN HATTIE, VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT 90 (1st ed. 2008).

separate classes unless the high-track program exposes the high achievers to material typically taught at a higher grade.[271] There is even "little empirical evidence" that gifted-education programs provide academic benefits.[272] Another study shows that students in high tracks only benefit when the course incorporates an enriched curriculum very different from the low-track curriculum.[273] Untracked classes with the same rich curriculum and learning opportunities can provide much greater gains than simply separating students by ability.

Students in untracked classes perform better than they do in tracked classes. For example, one study described the effects of a heterogeneously grouped mathematics program with an accelerated curriculum on academic achievement.[274] After the school detracked, the percentage of minority students who met the mathematics mastery requirement tripled from 23% to 75%.[275] Additionally, the detracking movement in Rockville Centre School District has also produced significant results in improving academic outcomes.[276] The school abandoned the track system and required all students to study an accelerated math curriculum in heterogeneous groups.[277] Previously, only 23% of African American or Hispanic students had passed state algebra standardized tests before entering high school, but after placing students in heterogeneously grouped classes, this percentage of students also tripled to 75%.[278] As the school district continued to detrack classes in high school, 82% of all African American or Hispanic students graduated with a Regents diploma (a particular level of New York diploma), whereas only 23% of students within this demographic attained this diploma before in tracked classes.[279] Detracking boosts academic achievement, but keeping students in tracked classes prevents them from performing academically at a higher level and competing with peers in untracked schools.

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271. Slavin, *supra* note 49, at 486; WELNER, *supra* note 25, at 10.

272. Rena F. Subotnik & Karen D. Arnold, *Longitudinal Study of Giftedness and Talent*, BEYOND TERMAN 2 (Rena F. Subotnik & Karen D. Arnold eds., 1994).

273. WELNER, *supra* note 25, at 10.

274. Carol Corbett Burris, Jay P. Heubert, & Henry M. Levin, *Accelerating Mathematics Achievement Using Heterogeneous Grouping*, 43 AM. EDUC. RES. J. 105, 117–19 (2006).

275. *Id.* at 119.

276. Carol Corbett Burris & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, 86 PHI DELTA KAPPAN 594, 596 (2005).

277. *Id.*

278. *Id.*

279. *Id.* at 597.

CONCLUSION

Children and parents in diverse, racially segregated schools should be able to challenge tracking systems and fight for a system that delivers greater educational opportunities for all. Tracking is an ineffective and inequitable educational practice, especially in schools where students have incredibly diverse racial and socioeconomic backgrounds. While litigants may not be able to rely on the Federal Equal Protection or Substantive Due Process clauses to overturn tracking, they may be more successful contesting the system with a state substantive due process claim on the basis that low-tracked classes deny students a minimally adequate education. Furthermore, there may come a time when the Supreme Court and federal courts recognize a fundamental right to a minimally adequate education and provide a basis for relief through federal substantive due process.

But overturning tracking in the courtroom is only the first battle; schools will have to use the expertise of their teachers and administrators to differentiate their instruction so that untracked classrooms truly work for all students. Schools will need more resources to retrain teachers, and teacher education programs must also develop teachers capable of working in untracked classrooms. This will not happen without the muscle of the courts or legislative bodies recognizing the right to a minimally adequate education and mandating that schools work towards fulfilling their obligations to the students. Until all schools prioritize equitable educational opportunities for all, students and parents may need to rely on the courts to take the first steps to eliminate discriminatory tracking.