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Modern Day School Segregation: Equity, Excellence, and Equal Protection

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NOTES

MODERN DAY SCHOOL SEGREGATION: EQUITY, EXCELLENCE, & EQUAL PROTECTION

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"The enduring hope is that race should not matter; the reality is that too often it does." [1]

INTRODUCTION

"You can tell right away, just by looking into a classroom, what level it is."[2]

"[W]atching this flow of bodies in and out of your classroom. One flow comes in, and everyone is black . . . another set of bodies flow in and they're largely white . . . *[I]t is undeniable, what you see. You know something is going on*."[3]

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[1] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) (emphasis added).

[2] Jeffrey Gettleman, *The Segregated Classrooms of a Proudly Diverse School*, N.Y. TIMES, Apr. 3, 2005, at 1.31 (quoting a student from Columbia High School, in Maplewood, New Jersey).

[3] Interview by Cristopher Thorne with Dr. Melissa Cooper, Teacher, Columbia High Sch., in Maplewood, N.J. (Nov. 17, 2011) (emphasis added).

The "something" that is going on is academic tracking.[4] The system it creates is separate[5] and explicitly unequal. And it is a method of student placement that is more likely to be used in a diverse district than in a district that is either exclusively white or exclusively black.[6] In short, it is a system of within-school segregation,[7] and it is used pervasively throughout this country's schools.[8] Yet to date, courts have only inconsistently found that academic tracking constitutes a violation of Equal Protection.[9]

Academic tracking "is the educational practice of categorizing students by curriculum."[10] The practice involves separating students—ostensibly on the basis of "ability"—into different "tracks," "levels," or "groups," with distinct or differentially paced curriculums. The typical model involves three tracks: (1) "slow or vocational"; (2) "average or general"; and (3) "fast or academic."[11] In most districts that track, students are placed based on a combination of three criteria: (1) standardized test scores; (2) "teacher and counselor recommendations (including grades)"; and (3) "students' and their parents' choices."[12] While this practice is facially race-neutral, its effect is not. When tracking is employed in a diverse district, students become racially segregated, with white students being placed disproportionately in "fast or academic" tracks and students of color being largely relegated to "slow or vocational" tracks.[13]

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[4] *See id.*

[5] *See* Gettleman, *supra* note 2.

[6] Peter G. VanderHart, *Why Do Some Schools Group by Ability? Some Evidence from the NAEP*, 65 AM. J. ECON. & SOC. 435, 449 (2006).

[7] *See id.* at 457; *see also* People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905, 917 (N.D. Ill. 1994).

[8] CAROL CORBETT BURRIS & DELIA T. GARRITY, DETRACKING FOR EXCELLENCE AND EQUITY vii (2008).

[9] *Compare* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1412, 1429 (11th Cir. 1985), *with People Who Care*, 851 F. Supp. at 933.

[10] C. Anne Broussard & Alfred L. Joseph, *Tracking: A Form of Educational Neglect?*, 20 SOC. WORK EDUC. 110, 111 (1998).

[11] *Id.* The specific form of academic tracking with which this Note takes issue is that which classifies students into at least two tracks and which separates students of different tracks into different classrooms.

[12] JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 9 (2d ed. 2005). Different schools may weigh the three categories differently, placing greater emphasis on test scores, grades, or other criteria. *Id.*

[13] *See* Angelia Dickens, Note, *Revisiting* Brown v. Board of Education*: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 473–74 (1996).

Few people would argue that academic tracking does not have a racially disproportionate impact. However, disproportionate impact alone is not enough to make out an Equal Protection violation.[14] The Supreme Court has drawn a firm distinction between de jure and de facto discrimination.[15] The former describes discrimination that results from intentional state action,[16] while the latter refers to racially disproportionate impacts that are the result of circumstances over which the state has no control.[17] Under existing Supreme Court precedent, only de jure discrimination violates the Equal Protection Clause.[18]

As a result, current legal challenges to tracking have met with inconsistent results. Rather than address the constitutionality of academic tracking generally, courts have decided its constitutionality on a district-by-district basis.[19] Moreover, different courts have judged its constitutionality under different legal standards. Under the *McNeal* standard, for instance, academic tracking systems only constitute de jure segregation where the district can demonstrate neither that the segregative effect is not the result of past segregation nor that the tracking system will remedy the detrimental effects of past segregation.[20] Other courts have found that academic tracking constitutes de jure segregation when plaintiffs can establish that the district acted with the purpose or intent to segregate.[21] While academic scholars have proposed more broad-based challenges to tracking, those challenges have either relied on statutory relief or advanced Equal Protection approaches that rest on shaky precedential ground.[22]

This Note argues that, under existing Supreme Court precedent, academic tracking constitutes de jure segregation. It further contends that academic tracking systems need not be analyzed on a district-by-district basis because—in light of their

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[14] Washington v. Davis, 426 U.S. 229, 242 (1976).

[15] *See id.* at 240.

[16] *Id.*

[17] *See* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1049 (6th Cir. 1977).

[18] *See Davis*, 426 U.S. at 240.

[19] *See* McNeal v. Tate Cnty. Sch. Dist., 508 F.2d 1017, 1019–20 (5th Cir. 1975); People Who Care v. Rockford Bd. of Educ., 851 F. Supp. 905, 912, 1001 (N.D. Ill. 1994); Hobson v. Hansen, 269 F. Supp. 401, 406–07 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[20] *McNeal*, 508 F.2d at 1020.

[21] *See, e.g.*, *People Who Care*, 851 F. Supp. at 1001.

[22] *See infra* Part II.C.2.

unique history—wherever an academic tracking system creates within school segregation, it is per se unconstitutional. Part I of this Note analyzes the unique history of academic tracking, drawing parallels between academic tracking systems and segregation explicitly mandated by law. Part II outlines current Equal Protection doctrine both generally and within the unique context of schools, and explores how that doctrine has been applied to academic tracking cases. Finally, Part III reanalyzes the application of Equal Protection doctrine to academic tracking, ultimately concluding that, when properly analyzed under existing precedent, academic tracking constitutes de jure segregation and is therefore unconstitutional.

I. THE RACIALIZED HISTORY OF ACADEMIC TRACKING SYSTEMS

From its inception, academic tracking has been a racialized practice. This Part demonstrates the inextricable link between academic tracking and race. Section A reviews the origins of tracking practices and, in so doing, demonstrates that the same reasoning that supported explicit racial segregation has been used to justify academic tracking. Section B establishes that the explicit assumptions about racialized-ability that supported tracking at its inception continue to pervade modern academic tracking discourse.

A. The Birth of Academic Tracking

From some of its earliest appearances in legal text, the concept of segregating students on the basis of race was intimately tied to concepts of ability.[23] Almost fifty years before the Supreme Court condoned the doctrine of "separate but equal,"[24] the Massachusetts Supreme Judicial Court upheld Boston's use of a dual school system for black and white children.[25] The Court granted the school committee broad discretion to "arrange, classify, and distribute pupils, in such a manner as they think best adapted to their *general proficiency* and welfare."[26] So long as the school committee exercised that

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[23] Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1321 (1989).

[24] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[25] Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209 (1849).

[26] *Id.* at 208 (emphasis added); *see also* Note, *supra* note 23.

discretion "reasonably" and there was no showing that it had "abused" its authority, its decision that separation on the basis of race was "adapted" to the students' "general proficienc[ies]" was not open to further judicial scrutiny.[27]

Later, in *People ex rel. King v. Gallagher*, the New York Court of Appeals drew on the principle of school authority discretion when it upheld Brooklyn's racially segregated school system against an Equal Protection challenge.[28] The court explicitly based its holding on the idea that "[a] *natural distinction* exists between the[] races,"[29] noting that "legislation which recognizes th[ose] distinction[s] and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination."[30] In discussing the "natural distinction[s]" between the races, the court was not commenting merely on skin color; rather, the court was noting the well-accepted notion that students of color were intellectually inferior to Anglo-Saxon white students.[31] By condoning racial segregation, then, these early cases were implicitly condoning the separation of students into different schools on the basis of perceived ability.[32]

These notions of innate racial inferiority and superiority coincided with the invention of the first intelligence test, which led to the formal adoption of racialized-ability grouping.[33] Alfred Binet developed the first intelligence test in France in 1904 as a way "to identify 'children whose poor performance indicated a need for special education.' "[34] Although Binet's purpose was to use the test to measure *achievement*,[35] "testing was quickly adopted by scientists in the United States who believed the tests

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[27] *Roberts*, 59 Mass. (5 Cush.) at 208, 209 ("The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.").

[28] *See* People *ex rel.* King v. Gallagher, 93 N.Y. 438, 441–42, 445, 450 (1883).

[29] *Id.* at 450 (emphasis added).

[30] *Id.*

[31] *See id.*; *see also* Note, *supra* note 23.

[32] *Gallagher*, 93 N.Y. at 450; Note, *supra* note 23.

[33] Note, *supra* note 23, at 1322.

[34] *Id.* (quoting STEPHEN JAY GOULD, THE MISMEASURE OF MAN 152 (1981)).

[35] *See id.*

could measure innate intelligence."[36] Thus, the American scientists who imported IQ tests erroneously conflated academic *performance* with innate *intelligence*.[37]

It is in this historical context that the results of such exams began to be used to create a coherent educational system based on ability *and* stratified by race.[38] Lewis Terman, the man credited with importing the use of IQ testing to America, "urg[ed] the use of ability grouping to keep certain ethnic groups separated from Anglo-Americans in school."[39] This promotion of testing as a means to identify innate abilities led to a significant shift in the way students were organized in schools, as school authorities "beg[a]n sorting students into separate tracks based on initial assessments of their capacity to learn."[40] The concept of academic tracking was therefore born of the belief that races of people were biologically distinct groups with differing innate ability levels and that they should be separated in schools accordingly.[41]

Moreover, in establishing ability grouping, assumptions were made not only about students' innate abilities to learn, but also about where those "natural" capabilities positioned them in the larger economic and social hierarchy of American society.[42] Proponents of academic tracking believed that students'

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[36] *See id.*

[37] *Id.*

[38] Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 520 (1999).

[39] *Id.* at 521; *see also* R.C. Lewontin et al., *IQ: The Rank Ordering of the World*, *in* THE "RACIAL" ECONOMY OF SCIENCE: TOWARD A DEMOCRATIC FUTURE 142, 144 (Sandra Harding ed., 1993) (quoting Lewis Terman as writing that "[c]hildren of [Spanish-Indian, Mexican, and negro families] should be segregated into special classes. . . . They cannot master abstractions, but they can often be made efficient workers. . . . There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding").

[40] Note, *supra* note 23, at 1322 ("Testing experts did not seriously consider the possibility that differences between racial groups might be the result of environmental factors or cultural bias in the tests. Instead, accepting the widespread assumption that native whites were at the top of society because of their superior racial stock, they interpreted test results as reflecting innate capacity.").

[41] *See id.*

[42] Dickens, *supra* note 13, at 471. In the early twentieth century the goal of education was to prepare students "to assume different roles in the socioeconomic hierarchy," and tracking was seen as preparing students for occupations tailored to their "innate ability to learn." *Id.*

occupational choices were limited by their "innate" abilities.[43] "They explicitly rejected an alternative vision of education premised on the belief that all students had the potential to comprehend material necessary to pursue higher education."[44] Thus, embedded in the very foundation of the tracking system is the premise that only those "high-ability" students should be educated for the purpose of attending post-secondary schools, while "low-ability" students need only be prepared for vocational occupations.[45]

The education of black children was explicitly geared towards vocations under this system.[46] Remedial and vocational education was considered most appropriate for minorities and immigrants, while college preparatory courses were considered appropriate for Anglo-American whites.[47] In this way, early proponents of academic tracking created it with the express intent to stratify economically based on racialized notions of ability, which paralleled what contemporary science viewed as the "natural" positions of the races.[48]

Thus, from the inception of the system, tracking has been a racialized practice.[49] But rather than being consciously viewed as oppressive by those who instituted tracking systems, the racial undertones were seen as resulting from the "innate inferiority" of black children and were perceived to adhere to the natural racial order.[50] These assumptions about racial hierarchy informed the very structure of ability grouping, and these notions of "racial inferiority" became embedded in the system itself.[51]

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[43] *Id.*

[44] Note, *supra* note 23, at 1327–28.

[45] Dickens, *supra* note 13, at 471 (acknowledging that "advanced placement classes prepared students for college and careers that required specialized professional training," while "[r]emedial and vocational programs prepared students for low-skill jobs or for technical training").

[46] Terry Kershaw, *The Effects of Educational Tracking on the Social Mobility of African Americans*, 23 J. BLACK STUD. 152, 157 (1992).

[47] Dickens, *supra* note 13.

[48] *See* Note, *supra* note 23, at 1322–23.

[49] *See* Dickens, *supra* note 13, at 473.

[50] *See* Note, *supra* note 23, at 1322–23.

[51] *See* Dickens, *supra* note 13.

B. Tracking: Death and Resurrection

Despite massive initial support, tracking began to fall out of widespread use after the 1930s.[52] Interest in academic tracking diminished in light of studies "indicat[ing] grouping by ability had little or no effect on achievement gains."[53] As research demonstrating that "low placements could have negative effects on students" gained credibility between the mid-1930s to mid-1950s, the use of tracking declined—but only for a brief period.[54]

Academic tracking was reintroduced on a mass scale in direct response to the changing legal status of race-relations in the United States in the mid-1950s. In 1954, *Brown v. Board of Education* ruled the doctrine of "separate but equal" unconstitutional in the public school setting.[55] Following the Supreme Court's ruling, academic tracking again increased dramatically.[56] The resurgence of academic tracking minimized the effects of integration and continued to keep Anglo-American white students and students of color separate.[57]

Moreover, there is evidence indicating that tracking was intentionally used as a segregative tool. The belief that students of color had inferior innate intellectual abilities persisted into the 1960s.[58] In fact, the belief was so strongly held that legislators in at least one state considered passing a resolution "that would support a contention that Negroes are inferior to whites in innate ability and that therefore segregation is scientifically supportable."[59] Another state made the study of a book teaching

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[52] Losen, *supra* note 38, at 521.

[53] *Id.*

[54] Note, *supra* note 23, at 1323.

[55] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954); Dickens, *supra* note 13, at 472.

[56] Dickens, *supra* note 13, at 472 (noting that "[t]he *Brown* decision is directly correlated with the re-introduction of tracking as a system of academic classification"); Losen, *supra* note 38, at 521.

[57] Hobson v. Hansen, 269 F. Supp. 401, 457 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); *see* McNeal v. Tate Cnty. Sch. Dist., 508 F.2d 1017, 1018–19 (5th Cir. 1975). In the South, tracking was used "as a means of circumventing court-ordered desegregation," Losen, *supra* note 38, at 521, while in the North, tracking was used in response to demographic changes that resulted in increasing minority student populations, particularly in large urban centers, Note, *supra* note 23, at 1323.

[58] *See* Joseph A. Loftus, *Virginia Debates Negro Abilities: Legislature To Vote on Book Branding Race Inferior*, N.Y. TIMES, Feb. 18, 1962, at 62. *See generally* CARLETON PUTNAM, RACE AND REASON: A YANKEE VIEW (1961).

[59] Loftus, *supra* note 58.

racial inferiority compulsory in its state schools.[60] That those notions of racialized-ability were part of the mainstream anti-integration discourse at the same time that tracking was being reintroduced calls into serious question the race-neutrality of tracking's resurgence. Because tracking's proponents believed so strongly that ability differs by race, their racial intentions in separating by ability are clear.

Nor has the discourse on racialized-ability disappeared from the American mainstream.[61] Rather, it has simply shifted form.[62] Perhaps nowhere are racialized conceptions of ability more evident than in those diverse communities that have attempted to detrack,[63] where the parents of white, upper-track students almost invariably challenge educators' attempts to detrack on the grounds that increasing diversity will negatively impact academic rigor.[64] As one educator put it, "statements that contain racial or class biases will be coded, but everyone in the room will know what is being said and what is feared."[65] Community members may juxtapose "minority students" with "high achieving students," as though the two terms are mutually exclusive.[66] Or they may use racially neutral terms, like "some," "other," or "demographics," to make implications that are nonetheless racialized in context.[67] Other times, they will

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[60] *Id.*

[61] OAKES, *supra* note 12, at 272 (finding that "[s]tereotypical views of minority students' ability and motivation for academic work . . . remained salient in schools and communities").

[62] As late as 1994, the authors of *The Bell Curve* explicitly argued that ability is inherited and racially distributed. *See generally* RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). While such blatantly racialized arguments have become less socially acceptable, the book's widespread readership demonstrates that support for notions of racialized-ability have not disappeared from the American consciousness. *The Bell Curve* was a *New York Times* Best Seller for at least fourteen weeks. *The New York Times Book Review: Best Sellers*, N.Y. TIMES, Feb. 5, 1995, at BR26.

[63] "Detracking" refers to the process of eliminating tracking from schools. *See* BURRIS & GARRITY, *supra* note 8, at viii.

[64] OAKES, *supra* note 12, at 287; *see also* Rusty Reeves, *Deleveling Doesn't Narrow Racial Lines*, NEWS-REC., Jan. 12, 2012, at 5 (commenting that "[w]ith deleveling, we are lowering educational standards").

[65] BURRIS & GARRITY, *supra* note 8, at 62.

[66] *See, e.g.*, Reeves, *supra* note 64 ("[The district superintendent] says we have an educational 'debt' to pay black children. *The high achieving children* will pay that debt.") (emphasis added).

[67] *See, e.g.*, OAKES, *supra* note 12, at 273 (recounting one educator's comment that "[w]e're getting fewer honors kids, and that's just demographics").

suggest that diversity—while a laudable goal—is incompatible with excellence.[68] Community members opposed to tracking frequently claim that different cultural backgrounds and differing abilities are responsible for the disproportionate numbers of minority students in lower tracks,[69] and that these factors are "outside the purview of the school."[70]

Yet the research consistently shows that tracking itself significantly contributes to the racialized-achievement gap. In fact, districts that have detracked have dramatically narrowed the achievement gap between white and minority students in their districts.[71] And research in districts that continue to track has demonstrated that—even in the present day—race, and not ability or achievement, is often the defining factor in track placement.[72] So why, in the twenty-first century, do schools continue to track, despite such evidence? One junior high school teacher put it this way: "Quite frankly, I think the reason we have honors is parental pressure. It's a racial issue. An honors group is a white group."[73]

The current legal status of academic tracking cannot be analyzed in a vacuum. Rather, it must be analyzed in light of its history and with reference to the beliefs about racialized-ability that motivated—and continue to motivate—its use. This brief history of academic tracking, then, illustrates two key points: (1) for at least the first fifty years of its existence, the use of academic tracking rested on explicit assumptions about racialized-ability—assumptions that continue to pervade American racial discourse; and, (2) the use of academic tracking, both at its birth and at its resurrection, was intimately connected with the use of racial segregation.

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[68] *See* Kevin Thompson, *Deleveling, Think Globally Before Acting Locally*, NEWS-REC., Jan. 19, 2012, at 4 ("Celebrating our diversity *at the expense of* our competitiveness will doom our kids to frustration and failure. Now, more than ever, we need to challenge each student *to the limits of his or her abilities* . . . .") (emphasis added).

[69] BURRIS & GARRITY, *supra* note 8, at 20.

[70] Thompson, *supra* note 68 ("Yes, there are achievement-gap issues that need to be addressed. However, many of these stem from a variety of factors that are outside the purview of the school.").

[71] *See* BURRIS & GARRITY, *supra* note 8, at 12–13.

[72] OAKES, *supra* note 12, at 233 (finding that in three different school districts, "African American and Latino students were more likely than their white and Asian peers *with the same test scores* to be placed in low-track classes").

[73] *Id.* at 266.

II. EQUAL PROTECTION CHALLENGES TO TRACKING

This Part analyzes the Equal Protection challenges that have been made to the practice of academic tracking. Section A gives a brief overview of Supreme Court Equal Protection doctrine. Section B then examines the Supreme Court's approach to Equal Protection claims in the context of education generally. Finally, Section C examines the way Equal Protection doctrine has been applied in a number of tracking cases.

A. Supreme Court Equal Protection Doctrine

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states, in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[74] The Equal Protection Clause's basic guarantee is that "all persons similarly circumstanced shall be treated alike."[75] However, courts recognize that not all state classifications are constitutionally inappropriate, and they generally give states broad discretion to determine who is and who is not "similarly circumstanced."[76] Thus, for most types of state action, the Supreme Court has held that the state need only show that the challenged classification "rationally furthers a legitimate state purpose."[77] This relatively deferential standard[78] is known as "rational-basis review."[79]

Nonetheless, the Supreme Court will not extend this level of deference to the states where certain types of classifications are involved.[80] Rather, it has subjected "those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right' "[81] to a heightened form of review known as strict scrutiny.[82] Where state action does implicate either a "suspect class" or a "fundamental right," the Court will "requir[e]

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[74] U.S. CONST. amend. XIV, § 1.

[75] Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[76] *See id.*

[77] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

[78] *Plyler*, 457 U.S. at 216.

[79] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 738 (2007).

[80] *Plyler*, 457 U.S. at 216.

[81] *Id.* at 216–17.

[82] *Id.* at 217 n.15.

the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."[83] The Court has reserved the title of "suspect class" for only those "discrete and insular"[84] groups that "command extraordinary protection from the majoritarian political process."[85] Among others, the categories of "race," "national origin," and "alienage" have been deemed "suspect classes."[86] Similarly, the Court has limited those rights that can be classified as "fundamental" and therefore deserving of strict scrutiny.[87] To determine whether an infringed right rises to the status of a "fundamental" right, the Court "look[s] to the Constitution to see if the right . . . has its source, explicitly or implicitly, therein."[88] The right to vote, the right to interstate travel, the right to procreate, and other rights of a "uniquely private nature" are among those that have been granted "fundamental rights" protection.[89]

Generally, if the state action implicates neither a "suspect class" nor a "fundamental right," the Court will apply rational basis review.[90] Occasionally, however, the Court has acknowledged that certain state classifications, while not specifically affecting a "suspect class" nor impinging on a "fundamental right," nonetheless implicate Equal Protection issues deserving of a level of scrutiny that exceeds mere rational review.[91] Under this standard, referred to as "intermediate scrutiny,"[92] the Court determines "whether [the classification at issue] may fairly be viewed as furthering a substantial interest of the State."[93] The Court subjects particular classifications to this standard to ensure that they "reflect[] a reasoned judgment consistent with the ideal of equal protection."[94] However, the

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[83] *Id.* at 216–17.

[84] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

[85] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *see also Plyler*, 457 U.S. at 216 n.14 ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."); *Murgia*, 427 U.S. at 313.

[86] *San Antonio Indep. Sch. Dist.*, 411 U.S. at 61.

[87] *See Plyler*, 457 U.S. at 217 n.15.

[88] *Id.*

[89] *Murgia*, 427 U.S. at 312 & n.3.

[90] *See id.* at 312–14.

[91] *Plyler*, 457 U.S. at 217–18.

[92] *Id.* at 218 n.16 (internal quotation marks omitted).

[93] *Id.* at 217–18.

[94] *Id.* at 217.

Court rarely applies this level of scrutiny.[95] Thus, in the vast majority of Equal Protection challenges where neither an acknowledged "suspect class" nor "fundamental right" is at issue, the Court will apply rational basis review.

At least where Equal Protection challenges on the basis of race are concerned, the Supreme Court has drawn a distinction between de jure and de facto discrimination, adding yet another layer of inquiry to the analysis.[96] Race is a "suspect class," and a law that discriminates by race on its face will be subject to strict scrutiny.[97] On the other hand, where a law is facially neutral, but nonetheless is alleged to have a disproportionate impact on individuals of a particular race, the law will not automatically be subject to strict scrutiny.[98] While a facially neutral law still is not permitted "invidiously to discriminate on the basis of race,"[99] a disproportionate impact only presents a constitutional violation where it is the result of intentional state action.[100] The plaintiffs in such a case bear the initial burden of establishing discriminatory intent.[101] Once that burden is met, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action."[102] Only if the state fails to successfully rebut the presumption of unconstitutional action will the Court apply strict scrutiny; where the state effectively rebuts the presumption, the Court will merely apply rational basis review.[103]

B. Equal Protection in the Public Schools[104]

In the context of public education, the Court's Equal Protection analysis has been even more nuanced. Since the Supreme Court's seminal decision in *Brown v. Board of*

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[95] *See id.* at 218 n.16.
[96] *See* Washington v. Davis, 426 U.S. 229, 240, 242 (1976).
[97] *See id.* at 242.
[98] *Id.*
[99] *Id.* at 241.
[100] *See id.* at 239.
[101] *See id.* at 240–41.
[102] *Id.* at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
[103] *See id.* at 242, 246.
[104] This Note does not purport to offer an exhaustive analysis of either all education-related Equal Protection claims or even all issues within the cases discussed herein. This Note confines itself to analysis of those cases and issues that bear directly on race, ability, and education. Specifically, issues such as whether wealth constitutes a "suspect class" are beyond the scope of this Note.

Education,[105] two distinct lines of cases have developed. The first line of cases can generally be characterized as involving allegations of state- or district-imposed racial segregation.[106] This line is addressed in Subsection 1. The second line of cases involves various allegations that a facially neutral state law or policy, while not resulting in segregation, is nonetheless constitutionally invalid because it denies some class of students equal protection of the laws.[107] That line is discussed in Subsection 2. Finally, Subsection 3 briefly emphasizes the distinction between those two lines of cases, as that distinction is critical to understanding both the current case law on academic tracking and the current legal critiques of academic tracking systems.

For more than fifty years preceding the Court's decision in *Brown v. Board of Education*, school systems throughout the country were explicitly segregated on the basis of race pursuant to the doctrine of "separate but equal."[108] According to that doctrine, states or school districts could operate segregated school systems so long as the facilities provided to black and white students were "equal."[109] In *Brown I*, the Court was faced for the first time with the question of whether separate educational facilities can ever actually be "equal"; in other words, the Court had to decide whether racial segregation in the public schools constitutes a per se violation of the Equal Protection Clause.[110] In the Court's now-famous holding, Chief Justice Warren announced that it does:

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the

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[105] 347 U.S. 483 (1954).

[106] *See* Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526, 530 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 452 (1979); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5–6 (1971).

[107] *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 452 (1988); Plyler v. Doe, 457 U.S. 202, 205 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[108] *Brown I*, 347 U.S. at 490–91; *see also* Plessy v. Ferguson, 163 U.S. 537, 544–46 (1896), *overruled by Brown I*, 347 U.S. 483.

[109] *See* Sweatt v. Painter, 339 U.S. 629, 635 (1950).

[110] *See Brown I*, 347 U.S. at 493.

> plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[111]

This holding created the foundation for two distinct lines of Equal Protection cases in the public school context.

1. The Supreme Court's School Segregation Line

The first line of cases followed directly from the Court's explicit holding in *Brown I*—that is, that segregation constitutes a per se violation of Equal Protection.[112] The legal implication of the Court's holding for laws explicitly mandating segregation was obvious: The laws were constitutionally invalid.[113] However, cases in which school segregation was not imposed explicitly by law—but rather as the result of other, facially race-neutral, state or school district policies—quickly began to make their way up to the Supreme Court.[114] Through these cases, the Court began to develop a doctrine under which to analyze at what point policies that create segregation-in-fact rise to the level of unconstitutional segregation-by-law.

The first cases to reach the Supreme Court dealt with continuing segregation in school districts that had been explicitly segregated prior to *Brown I*.[115] Pursuant to *Brown II*, such districts were under "an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' "[116] Immediately after *Brown II*, however, it was unclear whether that transition could be accomplished merely by abolishing laws *requiring* separate schools, or whether those districts were also required to take further steps to desegregate.

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[111] *Id.* at 495.

[112] *See id.*

[113] *See id.* The companion case to *Brown I*, *Bolling v. Sharpe*, held federally imposed racial segregation unconstitutional as a violation of the Due Process Clause of the Fifth Amendment. Bolling v Sharpe, 347 U.S. 497, 500 (1954).

[114] *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 191 (1973) (alleging that school segregation was imposed through "the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy").

[115] *See Brown I*, 347 U.S. at 490–92.

[116] NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1045 (6th Cir. 1977) (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955)). While *Brown I* declared segregation unconstitutional, *Brown II*, decided the following year, dealt with the issue of remedy. The Court's decision in *Brown II* formed the foundation for the doctrine governing what obligations a district was under to desegregate once it had been found that the district operated a dual school system. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 298–301 (1955).

The Supreme Court articulated the extent of such a district's obligation in *Swann v. Charlotte-Mecklenburg Board of Education*.[117] The specific issue in *Swann* was whether a facially neutral student assignment system[118] that nonetheless resulted in segregated schools violated the district's affirmative duty to desegregate.[119] The Court held that the affirmative duty to desegregate does not require districts to achieve a precise racial balance.[120] However, the Court did caution lower courts to scrutinize "racially neutral" assignment plans that result in segregated schools,[121] because such plans could serve to perpetuate segregation through the "discriminatory location of school sites or [the] distortion of school size in order to achieve or maintain an artificial racial separation."[122] By acknowledging that a district's affirmative duty to desegregate encompasses more than merely avoiding those laws which explicitly segregate on their face,[123] the Court laid the foundation for what would become a key distinction: the difference between de jure and de facto segregation.[124]

The Court built upon that proposition in *Keyes v. School District No. 1*.[125] *Keyes* was distinct from the earlier desegregation cases in that the district at issue "ha[d] never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education."[126] Instead, the plaintiffs alleged that the School Board created and maintained a system of segregation by manipulating "student attendance zones, schoolsite selection and a neighborhood school policy."[127] Thus, the Court had to determine whether

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[117] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971).

[118] A student assignment system is the process by which students in a district are assigned to particular schools. *See id.* at 28–29.

[119] *Id.* at 22.

[120] *Id.* at 24.

[121] *Id.* at 26.

[122] *Id.* at 28.

[123] *See id.*

[124] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973).

[125] *See id.* at 208–09.

[126] *Id.* at 191.

[127] *Id.* A "neighborhood school policy" is one in which the school district sends children to schools in their neighborhood. These systems were often manipulated to maintain segregation by mapping the boundaries of the neighborhood schools along existing patterns of residential segregation. *Id.* at 211–12.

manipulation of race-neutral policies in a district that had never explicitly segregated by law could nonetheless constitute a violation of the Equal Protection Clause.[128]

In answering that question, the Court articulated the distinction between de jure and de facto segregation. The Court defined de jure segregation as "a current condition of segregation resulting from intentional state action directed specifically [at] the [segregated] schools"[129] and "emphasize[d] that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate."[130] An Equal Protection violation only exists where plaintiffs can establish that the segregation complained of is the result of de jure, and not de facto, segregation.[131]

Plaintiffs bear the initial burden of establishing that the segregated conditions result from intentional state action[132] and not from actions "which are beyond the control of state officials."[133] To disprove intent after plaintiffs establish a prima facie case of de jure segregation,[134] it is insufficient for the school district to merely "rely upon some allegedly logical, racially neutral explanation."[135] Moreover, a school district may not rely on the remoteness in time between the intent and the current existence of segregation.[136] Rather, if the district's actions "were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.' "[137] While it is true that eventually "the relationship between past segregative acts and present segregation may become [too] attenuated" to support a finding of

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[128] *See id.* at 198.

[129] *Id.* at 205–06.

[130] *Id.* at 208.

[131] *See* Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 45–46 (2d Cir. 1975).

[132] *See Keyes*, 413 U.S. at 198.

[133] NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1045 (6th Cir. 1977).

[134] In *Keyes*, the Court acknowledged that "[i]n the context of racial segregation in public education" there are "a variety of situations in which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated." *Keyes*, 413 U.S. at 209. Thus, in certain situations, presumptions may provide the requisite prima facie showing of intent. *Id.* at 208.

[135] *Id.* at 210.

[136] *Id.* ("We reject any suggestion that remoteness in time has any relevance to the issue of intent.").

[137] *Id.* at 210–11.

de jure segregation, the Court cautioned that the "connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist."[138] Thus, to rebut a presumption of segregative intent, the district must either affirmatively disprove that its actions were motivated by such intent or show "that its past segregative acts did not create or contribute to the current segregated condition" of the schools.[139] After *Keyes*, the key issue in any desegregation case became whether the school authorities acted with the requisite intent to segregate.

In the immediate wake of *Keyes*, the circuit courts of appeals attempted to develop a standard for precisely what a plaintiff must show in order to establish "intent." In *United States v. School District of Omaha*, the Eighth Circuit provided a significant clarification of what type of "intent" is segregative in nature:

> [T]he 'intent' which triggers a finding of unconstitutionality is not an intent to harm black students, but simply an intent to bring about or maintain segregated schools. Thus, even if a school board believes that 'separate but equal' is superior for black children, that belief will not save the intentional segregation from a finding of unconstitutionality.[140]

Thus, the Eighth Circuit made clear that in looking for intent, courts are not concerned with determining whether a district's actions are malevolent or benign; they are interested only in whether or not intent to segregate motivated a district's decision.[141]

The circuit courts of appeals also began exploring methods by which such segregative intent could be established. Drawing on the Supreme Court's use of presumptions in *Keyes*,[142] a number of circuit courts of appeals began to articulate a "natural and foreseeable consequences" presumption. The presumption originated in *Oliver v. Michigan State Board of Education*, where the Sixth Circuit held that a presumption of segregative intent could be drawn where the plaintiffs can establish that

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[138] *Id.* at 211.
[139] *Id.*
[140] United States v. Sch. Dist. of Omaha, 521 F.2d 530, 535 (8th Cir. 1975).
[141] *See id.*
[142] *See supra* note 134.

segregation is "the natural, probable, and foreseeable result of public officials' action or inaction."[143] Other circuits soon adopted the Sixth Circuit's use of such a presumption.[144]

However, the use of the "natural and foreseeable consequences" presumption was quickly called into question in the wake of the Supreme Court's decision in *Washington v. Davis*.[145] There, the Court held that to establish the requisite intent for an Equal Protection violation where a facially neutral law is at issue, a plaintiff must do more than demonstrate that the law has a greater proportionate impact on one race than it does on another: "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[146] The Court also made clear that its holding applied to school desegregation cases.[147] Accordingly, the circuit courts of appeals began considering the implications of *Washington v. Davis* on the "natural, probable, and foreseeable" consequences presumption.[148]

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[143] Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974).

[144] *See* Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) (holding that "a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation"); *see also Sch. Dist. of Omaha*, 521 F.2d at 535–36 (holding "that a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation").

[145] *See* Washington v. Davis, 426 U.S. 229, 232 (1976). At issue in *Washington v. Davis* was "a qualifying test administered to applicants for positions as police officers." *Id.*

[146] *Id.* at 242. An allegation of disproportionate impact, without a showing of discriminatory purpose, constitutes mere de facto segregation. *See id.* at 240. Nevertheless, the discriminatory racial purpose need not "be express or appear on the face of the statute." *Id.* at 241. Rather, it will often be necessary to infer such a purpose "from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* at 242. Thus, while disproportionate impact alone will not suffice to establish an Equal Protection violation, it may, and often will, provide evidence of intent. *Id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of . . . mixed motivation.").

[147] *Id.* at 240; *see also* Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 990 (1976) (remanding a school desegregation case from the Fifth Circuit "for reconsideration in light of Washington v. Davis").

[148] *See, e.g.*, NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir. 1977).

For instance, appellants in *NAACP v. Lansing Board of Education* claimed that the Supreme Court repudiated the "natural, probable, and foreseeable" presumption.[149] The Sixth Circuit rejected the appellants' contention.[150] Rather, the Sixth Circuit explained that use of the presumption is entirely consistent with the holdings of *Keyes* and *Davis*,[151] because the presumption does "not dispense with the requirement that segregative intent or purpose be proven."[152] It merely permits the required intent to "be inferred from acts and policies of school authorities which had the natural and foreseeable effect of producing segregated schools."[153] The Sixth Circuit interpreted such an inference to be entirely consistent with the Supreme Court's holding in *Washington v. Davis* that "discriminatory purpose may often be inferred from the totality of [the] relevant facts."[154]

The Supreme Court itself reviewed the "foreseeable effects standard" two years later in two cases decided on the same day: *Columbus Board of Education v. Penick*[155] and *Dayton Board of Education v. Brinkman* (*Dayton II*).[156] In both cases, the Court affirmed that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose."[157] The Court did caution that foreseeability alone does not "make[] out a prima facie case" and will not "routinely shift[] the burden of persuasion to the defendants."[158] Nevertheless, the Court endorsed the use of such an inference in appropriate circumstances[159]: "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' "[160]

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[149] *Id.* at 1047.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).
[155] 443 U.S. 449, 464–65 (1979).
[156] 443 U.S. 526, 536 n.9 (1979).
[157] *Id.*; *see Columbus Bd. of Educ.*, 443 U.S. at 464.
[158] *Dayton II*, 443 U.S. at 536 n.9.
[159] *See id.*; *Columbus Bd. of Educ.*, 443 U.S. at 464–65.
[160] *Columbus Bd. of Educ.*, 443 U.S. at 465. Other evidence the Supreme Court considers relevant to intent includes: "[t]he historical background of the

Thus, although the Court emphasized that proof of foreseeability *alone* is insufficient,[161] it retained the permissible inference of segregative intent where "the natural, probable, and foreseeable result of public officials' action or inaction was an increase or maintenance of segregation."[162]

From these Supreme Court holdings has emerged a coherent doctrine governing allegations of public school segregation. For there to be a constitutional remedy, a court must find that the segregation is the result of de jure, and not de facto, segregation.[163] Plaintiffs bear the initial burden of establishing discriminatory intent.[164] To make out a prima facie case of de jure segregation, a plaintiff must establish: "(1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools."[165] The essential differentiating factor between de jure and de facto segregation is "purpose or intent to segregate."[166]

Plaintiffs need not establish that segregation was the sole purpose of the state action; they need only show that segregative intent or purpose "has been a motivating factor in the decision."[167] Moreover, the segregative purpose need not "be express or appear on the face of the statute."[168] Rather, it is permissible to infer such a purpose "from the totality of the relevant facts."[169] While neither disparate impact nor foreseeable consequences—nor both—are alone sufficient to establish an

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decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events leading up [sic] the challenged decision"; "[d]epartures from the normal procedural sequence"; "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and "legislative or administrative history." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977). These factors are not "exhaustive," however. *Id.* at 268.

[161] *See Dayton II*, 443 U.S. at 536 n.9.

[162] *See* Alexander v. Youngstown Bd. of Educ., 675 F.2d 787, 793 (6th Cir. 1982).

[163] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209–11 (1973).

[164] *Id.* at 208.

[165] NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir. 1977); *see Alexander*, 675 F.2d at 791.

[166] *Keyes*, 413 U.S. at 208.

[167] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

[168] Washington v. Davis, 426 U.S. 229, 241 (1976).

[169] *Id.* at 242.

Equal Protection violation, they are nonetheless important considerations from which a court may infer segregative intent.[170] Once the plaintiffs have made out a prima facie case of unconstitutional de jure segregation, the burden shifts to the defendant to either affirmatively disprove segregative intent or demonstrate "that its past segregative acts did not create or contribute to the current segregated condition."[171]

2. The "Importance of Education" Line

At the same time that the school desegregation cases were developing, the Supreme Court was simultaneously deciding a second, distinct line of cases alleging Equal Protection violations in the public schools. These cases were not alleging conditions of racial segregation; rather, they alleged that various state actions otherwise impinged a fundamental right or disadvantaged a suspect class.[172] The early cases in this line were based, at least in part, on the proposition that the Supreme Court's holding in *Brown I* recognized education as a "fundamental right."[173]

In *San Antonio Independent School District v. Rodriguez*, however, the Court rejected the proposition that education is a "fundamental right."[174] At issue in *San Antonio* was a school-financing system that plaintiffs alleged deprived those in relatively poorer school districts of Equal Protection of the laws.[175] The Court analyzed the issue by determining whether the financing system disadvantaged a suspect class or impinged a fundamental right.[176] The Court answered both questions in the negative.[177]

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[170] *See* Columbus Bd. of Educ. v Penick, 443 U.S. 449, 464 (1979).

[171] *Keyes*, 413 U.S. at 211.

[172] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[173] *Id.* at 29. There was a great deal of strong language in *Brown I* that seemed to support that contention. *See Brown I*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms." (emphasis added)).

[174] *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 37.

[175] *Id.* at 19–20.

[176] *Id.* at 18.

[177] *Id.*

Although the Court did reaffirm its "historic dedication to public education"[178] and acknowledge "the vital role of education in a free society,"[179] it nevertheless held that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[180] Instead, the Court held that the only relevant determination in deciding whether education was a fundamental right was "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[181] The Court answered this question in the negative, holding that—at least in the context of this case—education was not a fundamental right.[182]

The next school Equal Protection case to address the fundamental right paradigm was *Plyler v. Doe*.[183] The issue in that case was whether a Texas law barring un-documented immigrant children from receiving a free public education—when children who are United States citizens and children who are legally admitted immigrants were provided such an education—violated the Equal Protection Clause.[184] The Court reaffirmed its holding in *San Antonio* that public education is not a fundamental right, yet the Court also went to great lengths to emphasize the importance of a public education.[185] Because "education provides the basic tools by which individuals might lead economically productive lives to the benefit of [the Nation]," the Court took the position that it "cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social

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[178] *Id.* at 30.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 33.

[182] *Id.* at 36–37. While the Court refused to assign education "fundamental rights" status in and of itself, it did acknowledge that where a state deprives a child of educational opportunities and that deprivation, in turn, threatens to deprive that child of his or her effective exercise of other, recognized fundamental rights, an Equal Protection violation may exist. *Id.* at 37 (suggesting that "an interference with fundamental rights" may arise if a district were to "fail[] 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").

[183] *See* Plyler v. Doe, 457 U.S. 202, 215–17 (1982).

[184] *Id.* at 205.

[185] *Id.* at 221 (explaining that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation").

order rests."[186] Thus, while public education is not a "fundamental right," the total deprivation of a public education nonetheless presents "recurring constitutional difficulties."[187] Therefore—even in the absence of either a suspect class or a fundamental right[188]—the Court found that the nature of the deprivation[189] required application of intermediate scrutiny.[190]

In *Kadrmas v. Dickinson Public Schools*, however, the Supreme Court carefully limited its holding in *Plyler* to the "unique circumstances" of that case.[191] In *Kadrmas*, plaintiffs alleged that a state law permitting "some local school boards, but not others, to assess a fee for transporting pupils between their homes and the public schools"[192] violated Equal Protection.[193] The Supreme Court rejected their claim,[194] disposing of "the proposition that education is a 'fundamental right' " or should otherwise be subjected to heightened scrutiny.[195]

This line of cases, therefore, follows the typical approach in most Equal Protection claims.[196] The Court first must decide what level of scrutiny it will apply to the alleged violation at issue.[197] In order for the Court to subject a state classification to strict scrutiny, either a "suspect class" or a "fundamental right" must be implicated.[198] Otherwise, with very rare exceptions,[199] mere rational basis review will be applied.[200] Because the Supreme Court rejected the contention that education is a

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[186] *Id.*

[187] *See id.* at 217, 221.

[188] *Id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' ").

[189] *Id.* ("[The law at issue] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

[190] *See id.* at 224.

[191] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988).

[192] *Id.* at 452.

[193] *Id.* at 455–56.

[194] *Id.* at 452.

[195] *Id.* at 458.

[196] *See supra* Part II.A.

[197] *See Kadrmas*, 487 U.S. at 457–58.

[198] *See supra* notes 80–82 and accompanying text.

[199] Plyler v. Doe, 457 U.S. 202, 216–18 (1982); *see Kadrmas*, 487 U.S. at 459.

[200] *See Kadrmas*, 487 U.S. at 457–58.

"fundamental right,"[201] the fact that a discrimination or a disparate impact occurs in the context of the public schools will not automatically entitle a plaintiff to strict scrutiny.[202] Rather, courts must address the classification at issue in each individual case to determine whether it rises to the level of a suspect class or a classification otherwise deserving of heightened protection.[203]

3. Clarifying the Distinction

What should be clear from this discussion is that the above Supreme Court Equal Protection doctrines govern distinctly different cases. While the approach taken in *San Antonio*, *Plyler*, and *Kadrmas* is broadly applicable to a variety of Equal Protection violations,[204] whether based on race or not, the more specific approach taken in the desegregation cases is applicable only in those situations where a condition of school segregation is alleged.[205] Because the Supreme Court's decision in *Brown I* declared de jure segregation in public schools per se unconstitutional, the inquiry in segregation cases focuses not on levels of scrutiny or fundamental rights, but merely on whether a condition of unconstitutional de jure segregation exists.[206]

C. Equal Protection and Academic Tracking

The Supreme Court has never granted a petition for certiorari to hear an Equal Protection challenge to the practice of academic tracking. However, since the Supreme Court's decision in *Brown I*,[207] several circuit courts of appeals have had the opportunity to consider whether academic tracking constitutes an Equal Protection violation.[208] Several legal scholars have also addressed the issue of academic tracking and proposed solutions

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[201] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

[202] *See Plyler*, 457 U.S. at 223–24.

[203] *See generally Kadrmas*, 487 U.S. 450 (disparity in school fees); *Plyler*, 457 U.S. 202 (legal status and education); *San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (wealth and education).

[204] *See generally Kadrmas*, 487 U.S. 450 (alleging inequality in school fees); *Plyler*, 457 U.S. 202 (alleging discrimination based on legal status); *San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (alleging wealth discrimination).

[205] *See supra* notes 163–71 and accompanying text.

[206] *See supra* Part II.B.1.

[207] 347 U.S. 483 (1954).

[208] *See generally* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985); McNeal v. Tate Cnty. Sch. Dist., 508 F.2d 1017 (5th Cir. 1975); Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

to address the legal implications involved.[209] Subsection 1 explains the various court decisions on academic tracking, while Subsection 2 outlines the solutions proposed by various commentators. Finally, Subsection 3 illustrates why both the legal and scholarly approaches are insufficient.

1. Existing Court Decisions on Academic Tracking

The existing approach to deciding academic tracking cases has by no means been consistent. The earliest circuit to address tracking was the Court of Appeals for the District of Columbia in *Smuck v. Hobson*. In that case, the court of appeals upheld a district court ruling ordering the Washington, D.C. schools to abolish the practice of academic tracking.[210] The district court drew a distinction between de jure and de facto segregation,[211] defining de jure segregation as "segregation specifically mandated by law or by public policy pursued under color of law"[212] and describing de facto segregation as resulting "from the action of pupil assignment policies not based on race but upon social or other conditions for which government cannot be held responsible."[213] The district court rejected the contention that ability grouping was a form of de jure racial segregation[214] and analyzed the constitutionality of academic tracking under rational basis review.[215]

However, even under this permissive standard, the court found tracking to be unconstitutional.[216] The court acknowledged the government's discretion to classify individuals, but asserted that a government classification can only be upheld where "those included within or excluded from the respective classes [are] those for whom the inclusion or exclusion is appropriate."[217] Thus, the court reasoned, "the track system is fatally defective,"[218] not because it purposefully discriminates on the

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[209] *See generally* Dickens, *supra* note 13; Losen, *supra* note 38; Note, *supra* note 23.

[210] *Smuck*, 408 F.2d at 189.

[211] Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[212] *Id.*

[213] *Id.*

[214] *See id.* at 512 n.208.

[215] *Id.* at 511.

[216] *Id.* at 513.

[217] *Id.*

[218] *Id.*

basis of race, but "because for many students placement is based on traits other than those on which the classification purports to be based."[219]

While the district court case in *Hobson* is perhaps one of the most cited academic tracking cases, its approach to academic tracking has not been followed by later courts. Rather, it was the Fifth Circuit, in *McNeal v. Tate County School District*, that developed perhaps the most commonly followed approach.[220] Faced with an academic tracking system in a formerly dual school district, the court held that "[a]bility grouping, like any other non-racial method of student assignment, is not constitutionally forbidden."[221] The court expressed concern with substituting its judgment for that of educators regarding the advantages and disadvantages of tracking, and therefore decided that educators "ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect."[222] Even if ability grouping does cause segregation, it "may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities."[223] Thus, the Fifth Circuit's approach permits tracking in any "otherwise unitary system"—no matter what degree of segregation it creates—so long as the segregative result is either: (1) not the result of other de jure segregation; or (2) being used for the benign purpose of remedying past de jure segregation.[224]

Since the Fifth Circuit's decision in *McNeal*, other circuit courts of appeals have adopted, and elaborated on, the "*McNeal* standard" in academic tracking cases.[225] For example, the

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[219] *Id.* The court went on to state: "[R]ather than being classified according to ability to learn, these students are in reality being classified according to their socioeconomic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability." *Id.* at 514.

[220] McNeal v. Tate Cnty. Sch. Dist., 508 F.2d 1017 (5th Cir. 1975).

[221] *Id.* at 1020.

[222] *Id.*

[223] *Id.*

[224] *See id.*

[225] Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 (11th Cir. 1985) (quoting *McNeal*, 508 F.2d at 1020) ("This circuit's precedent establishes that, despite any resulting numerical racial disproportionality, achievement grouping is permissible in a school district that has not been declared fully unitary 'if the school district can demonstrate that its assignment method is

Eleventh Circuit makes it even clearer that the "*McNeal* standard" will permit *any* degree of racial segregation caused by ability grouping so long as one of the two *McNeal* factors is met.[226] After finding the factors satisfied in that case, the court nonetheless openly acknowledged that "the racial disparity in the local defendants' lower achievement groups is substantial."[227] Despite this significant degree of segregation, the Eleventh Circuit found that such segregative effects were permissible because of the district court's factual finding that "the ability grouping schemes will remedy the consequences of prior segregation."[228]

The approach taken by the District Court for the Northern District of Illinois in *People Who Care v. Rockford Board of Education*[229] stands in stark contrast to the Fifth and Eleventh Circuits' approach. There, the plaintiffs alleged that actions by their school district, including the implementation of an academic tracking system, created an unconstitutional condition of de jure segregation.[230] Rather than apply the *McNeal* standard, the district court applied the Supreme Court's school segregation doctrine.[231]

Thus, the district court's inquiry focused on whether "the governmental authorities created or maintained racial segregation in the schools" and whether "their actions were motivated by segregative intent."[232] The court cautioned that "segregative intent should not be confused with evil motive" and emphasized that "the required intent is simply the intent to keep the races separate."[233] The court explained that "conduct motivated by such intent is actionable even when there is no

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not based on the present results of past segregation *or* will remedy such results through better educational opportunities.' ").

[226] *See id.* at 1414–15.

[227] *Id.* at 1414 n.14.

[228] *Id.* at 1416. The Eleventh Circuit has continued to adhere to the *McNeal* standard, reaffirming it as recently as 2007 in its decision in *Holton v. City of Thomasville School District* and expressly rejecting the district court's analysis of "whether the ability-grouping program was intentionally discriminatory." Holton v. City of Thomasville Sch. Dist. (*Holton II*), 490 F.3d 1257, 1260 (11th Cir. 2007); *see also* Holton v. City of Thomasville Sch. Dist. (*Holton I*), 425 F.3d 1325, 1328 (11th Cir. 2005).

[229] 851 F. Supp. 905 (N.D. Ill. 1994).

[230] *Id.* at 908, 910, 922–23.

[231] *See id.* at 930–31.

[232] *Id.* at 931.

[233] *Id.* at 932.

desire to inflict educational harm upon any racial group."[234] In applying this approach, the district court found that "a pattern of facts and circumstances occurring over a long period of time clearly supports a finding of intentional conduct."[235] That tracking creates intra-school, rather than inter-school segregation, is of no consequence: Both violate the Constitution equally.[236] In fact, the court observed that "[s]uch internal segregation may even be more invidious because its effects are observable to the students every school day."[237]

The Seventh Circuit did not review the district court's determination of liability.[238] It did, however, have the opportunity to review the district court's order of remedy in *People Who Care v. Rockford Board of Education*.[239] In dicta from that opinion, Judge Posner seems to reluctantly agree that, were tracking "adopted in order to segregate the races," tracking would present an Equal Protection violation for which a remedy would be available.[240] Because a constitutional remedy is only available where de jure segregation has been found,[241] the implication of Judge Posner's statement is that where tracking is implemented with a segregative purpose, it would constitute de jure segregation.[242] He therefore implicitly condones the district court's reasoning on liability.[243]

Clearly, the *McNeal* standard and the approach taken by the district court in *People Who Care* represent two distinct methods of analyzing academic tracking cases. Because the Supreme

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[234] *Id.*

[235] *Id.* Among the "pattern of facts and circumstances" that supported an inference of segregative intent was the district court's finding that "tracking of students by race into various educational programs" occurred in the school district at issue. *Id.* at 933.

[236] *Id.* at 917 ("Within school segregation by intentional conduct is the same as intentional conduct resulting in systemwide segregation. This internal segregation is unlawful."); *see also* Reed v. Rhodes, 607 F.2d 714, 731 (6th Cir. 1979); Hobson v. Hansen, 269 F. Supp. 401, 511–13, 512 n.208 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[237] *People Who Care*, 851 F. Supp. at 917; *see also* Hart v. Cmty. Sch. Bd., 383 F. Supp. 699, 740 (E.D.N.Y. 1974), *aff'd sub nom.* Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37 (2d Cir. 1975).

[238] People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 532–33 (7th Cir. 1997).

[239] *Id.*

[240] *Id.* at 536.

[241] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208–09 (1973).

[242] *See People Who Care*, 111 F.3d at 536.

[243] However, because that statement was dicta, it is not controlling.

Court itself has never decided the issue, the circuit courts of appeals remain free to adopt either approach, or to craft a new solution.

2. Commentators' Critiques of Academic Tracking

Several commentators critical of academic tracking have attempted to develop legal analysis that would require its discontinued use.[244] Such commentators have tended to take issue with the *McNeal* standard and to advocate for an analysis of tracking either as an Equal Protection violation or a violation of Title VI of the Civil Rights Act of 1964. For example, one commentator "questions the assumptions that underlie judicial tolerance of tracking."[245] The author criticizes existing legal approaches, such as the *McNeal* standard, as granting too much deference to the expertise of school officials,[246] and takes issue with the "scientific basis" of tracking.[247] But rather than ground his or her legal attack in the Equal Protection Clause, the author instead argues that "Title VI of the Civil Rights Act of 1964 provides one vehicle for challenging the widespread use of tracking."[248] Such a statutory challenge, the author argues, would require school authorities to "prove the educational necessity of tracking schemes that have a disproportionate impact on minorities."[249] A Title VI challenge would not require the plaintiff to establish intent and would subject tracking systems to "the kind of heightened scrutiny required by Title VI disparate impact analysis."[250] In the author's view, given the lack of clear evidence demonstrating the benefits of academic tracking, schools likely would not be able to demonstrate that tracking is educationally necessary, and tracking would therefore not sustain a Title VI challenge.[251]

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[244] *See generally* Dickens, *supra* note 13; Losen, *supra* note 38; Note, *supra* note 23.

[245] Note, *supra* note 23, at 1319.

[246] *See id.* at 1327.

[247] *Id.*

[248] *Id.* at 1334 (footnote omitted).

[249] *Id.*

[250] *Id.* at 1340.

[251] *Id.*

On the other hand, others argue that academic tracking presents an Equal Protection violation.[252] For example, Angelia Dickens argues that academic tracking should be unconstitutional "because education is fundamentally important and because tracking systems classify students based on race."[253] Dickens suggests that the Court should adopt the "belief in the fundamentality of education" adopted by Justice Marshall in his dissent in *San Antonio*[254] and further argues that tracking constitutes a classification based on race that should be subject to strict scrutiny.[255] Thus, under Dickens's formulation, a school district would be required to show that tracking is "narrowly tailored to serve a compelling state interest."[256] In the author's view, a district will likely not be able to establish a compelling interest for tracking; and therefore, an Equal Protection challenge to tracking under her framework for strict scrutiny analysis would likely succeed.[257]

3. Existing Approaches Are Insufficient

Both the existing *McNeal* standard and the Equal Protection and statutory challenges proposed by commentators are insufficient methods for approaching a legal analysis of academic tracking systems. The approach taken by the District Court for the Northern District of Illinois in *People Who Care*[258] comes far closer to providing an accurate analysis under existing Supreme Court precedent, though as will be demonstrated in Part III, a deeper look into both Supreme Court doctrine and the history of tracking has even broader implications than the holding in that case would suggest.

The *McNeal* standard largely fails to abide by existing Supreme Court doctrine.[259] Where an existing condition of segregation in violation of the Equal Protection clause is alleged,

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[252] *See, e.g.*, Dickens, *supra* note 13, at 482.

[253] *Id.*

[254] *Id.* at 485.

[255] *Id.* at 500.

[256] *Id.*

[257] *See id.* at 501. *But see* Losen, *supra* note 38, at 527–29 (arguing that under a scrutiny Equal Protection analysis, "only if facially neutral ability grouping practices achieved nearly total segregation would they trigger strict scrutiny review" and that, as a result, "most constitutional challenges are unlikely to succeed").

[258] *See supra* notes 229–37 and accompanying text.

[259] *See supra* notes 163–71 and accompanying text.

the Supreme Court has expressly instructed courts to look for evidence of segregative intent as the defining characteristic of de jure segregation.[260] Yet the *McNeal* standard requires courts to ignore the issue of segregative intent[261] and look only to whether the segregative result is either (1) not the result of *other* de jure segregation or (2) being used for the benign purpose of remedying past de jure segregation.[262] By requiring courts to analyze whether the segregative result is the effect of *other*, past de jure segregation, the *McNeal* standard forces the courts to bypass the critical question of whether an academic tracking system that causes segregative effects is itself a method of present-day de jure segregation that independently violates the Equal Protection Clause—that is, whether it was instituted with the purpose or intent to segregate.[263] Moreover, the second prong of the *McNeal* standard—that an academic tracking system that creates a segregative result is acceptable so long as it is being used to remedy past de jure segregation—ignores the central holding of *Brown I*, which was that racial segregation, for whatever purpose, is inherently unequal and therefore per se unconstitutional.[264] The Sixth Circuit put it simply: "Benevolence of motive does not excuse segregative acts."[265]

Similarly, the Title VI remedy suggested by one commentator, while potentially effective, does not go far enough. Academic tracking does not merely present a potential violation of Title VI; it also significantly encroaches on students' Equal Protection rights when it is used in a way that creates intra-school segregation.[266] While a statutory remedy may

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[260] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205–06 (1973); *see also supra* notes 163–71 and accompanying text.

[261] *Holton II*, 490 F.3d 1257, 1260 (11th Cir. 2007); *see also Holton I*, 425 F.3d 1325, 1328 (11th Cir. 2005).

[262] McNeal v. Tate Cnty. Sch. Dist., 508 F.2d 1017, 1020 (5th Cir. 1975).

[263] *See supra* note 224 and accompanying text.

[264] *Brown I*, 347 U.S. 483, 495 (1954); *see also* United States v. Sch. Dist. of Omaha, 521 F.2d 530, 535 (8th Cir. 1975) ("[T]he 'intent' which triggers a finding of unconstitutionality is . . . simply an intent to bring about or maintain segregated schools. Thus, even if a school board believes that 'separate but equal' is superior for black children, that belief will not save the intentional segregation from a finding of unconstitutionality.").

[265] Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 183 (6th Cir. 1974).

[266] *See infra* Part III.

undoubtedly be a useful tool for challenging academic tracking systems, an unconstitutional violation deserves a constitutionally guaranteed remedy.

However, the constitutional remedy proposed by Dickens is not firmly anchored in existing Supreme Court doctrine. While many legal scholars likely share the author's sentiment that "Justice Marshall's belief in the fundamentality of education is an idea courts should adopt,"[267] that argument is foreclosed by the Supreme Court's holding in *San Antonio*, which by now is firmly established.[268] Perhaps more importantly, however, even if Dickens's approach were to succeed, application of strict scrutiny would still permit academic tracking were the court to find that it is "narrowly tailored to serve a compelling state interest."[269] If, on the other hand, academic tracking is analyzed as—and found to constitute—a form of de jure segregation under the Supreme Court's holding in *Brown I*, it would be per se unconstitutional.

III. A DIFFERENT APPROACH: ACADEMIC TRACKING AS A DE JURE METHOD OF INTRA-SCHOOL SEGREGATION

As set forth above, the line of cases from *Brown I* to *Columbus* and *Dayton II*, long ignored by scholars and courts, clearly demonstrates that academic tracking systems constitute a per se violation of Equal Protection[270] in all instances where their use results in within school segregation—not merely in those individual districts with a history of segregation.[271] To make out

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[267] Dickens, *supra* note 13, at 485.

[268] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). At this point, the doctrine is almost forty years old, and has been reaffirmed at least twice since it was decided. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Plyler v. Doe, 457 U.S. 202, 221 (1982).

[269] Dickens, *supra* note 13, at 500.

[270] The constitutionality of academic tracking systems in exclusively one-race districts is beyond the scope of this Note. While the pedagogical value of academic tracking in *any* school system is questionable at best, the object of this Note is not to engage in debate over the system's educational utility. Rather, this Note seeks to identify the racialized processes through which tracking systems perpetuate intra-school racial segregation, and confines itself to legal analysis of the constitutional doctrines through which this modern day school segregation may be challenged.

[271] "Within school segregation" is defined, for purposes of this Note, as a condition that exists when the proportion of students of a particular race in a given academic track or level significantly differs from the proportion of students of that race within the academic grade. For instance, if, in a particular district, the seventh grade is comprised of forty percent white students and sixty percent black students,

such a prima facie case, a plaintiff must establish: "(1) action or inaction by public officials"; "(2) with a segregative purpose"; "(3) which actually results in increased or continued segregation in the public schools."[272] The contention that "academic tracking systems constitute a per se violation of Equal Protection in all instances *where their use results in within school segregation*"[273] quickly disposes of the third element. By definition, where tracking systems do not "actually result[] in increased or continued segregation in the public schools,"[274] no per se violation will be found.

The first element—"action or inaction by public officials"[275]—is similarly simple to establish. The decision to use, or to continue to maintain, a system of academic tracking is unquestionably an "action or inaction by public officials."[276] The decision to newly implement an ability grouping system is clearly an action on the part of the school board. Similarly, whether one characterizes the continued use of academic tracking as either "action" or "inaction," the classification is of no consequence. This element is satisfied by *either* "action *or* inaction by public officials."[277] Thus, in every instance in which the use of an academic tracking system results in within school racial segregation, the first and third elements of a prima facie case of unconstitutional de jure segregation will be satisfied.

That leaves only the second element, the distinguishing factor of any de jure segregation claim: "purpose or intent to segregate."[278] The disparate impact, foreseeable consequences, and unique racialized history of academic tracking provide ample evidence of segregative intent. In fact, academic tracking

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each academic track should also be comprised of approximately sixty percent black students and forty percent white students. A significant departure from those proportions in any level would indicate a segregative tracking system. It is important to note that this requirement does not violate the Supreme Court's holding in *Washington v. Davis* that mere disproportionate impact is insufficient to establish a prima facie case of de jure discrimination. This is so because the other elements of the proposed approach require a finding that segregative intent is inherent in systems of academic tracking.

[272] NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 (6th Cir. 1977); *see supra* note 172 and accompanying text.

[273] *See supra* text accompanying notes 270–71.

[274] *Lansing Bd. of Educ.*, 559 F.2d at 1046.

[275] *Id.*

[276] *See id.*

[277] *Id.* (emphasis added).

[278] Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973).

systems are so inherently racialized that their very use justifies a finding of segregative intent. For any school district to (1) continue to use a system (2) that was established for the express purpose of separating students on the basis of race into distinct and unequal curriculums and (3) which continues to have a segregative effect is the very definition of de jure segregation.[279] To explain this point, it is helpful to go through the analysis step by step.

First, *Columbus* held that while neither disparate impact nor foreseeable consequences are alone sufficient to establish an Equal Protection violation, they are nonetheless important considerations from which a court may infer segregative intent.[280] In any district where the use of an academic tracking system creates within school segregation, both factors will inevitably be present. With regard to disproportionate impact, the disproportionate placement of black students in remedial and low educational tracks has been widely recognized.[281] Moreover, the requirement that an academic tracking system "result in within school segregation" to be found a per se violation of Equal Protection ensures that in all cases under this approach, there will be a disproportionate impact. The very definition of "within school segregation" adopted by this Note effectually requires that a disproportionate impact be present.[282]

Similarly, segregation is a well-known "foreseeable consequence" of implementing academic tracking systems in diverse school districts.[283] This is even more true of the decision

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[279] *See Lansing Bd. of Educ.*, 559 F.2d at 1046 ("A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools."). Perhaps this Note's most controversial contention is that academic tracking systems are so inherently racialized that, much like segregation itself, they cannot be used without segregative intent. To put it another way, there are enough common characteristics between academic tracking systems in any district where such systems produce racial segregation that "the totality of the relevant facts" in every such district will always create an inference of segregative intent. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

[280] *See* Columbus Bd. of Educ. v Penick, 443 U.S. 449, 464 (1979).

[281] *See* Dickens, *supra* note 13, at 474; Losen, *supra* note 38, at 517; Note, *supra* note 23, at 1318.

[282] *See supra* note 271.

[283] *See* People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997) ("The well-known correlation between race and academic performance makes tracking, even when implemented in accordance with strictly objective criteria, a pretty effective segregator.").

to continue to use a system of academic tracking once it has been shown to have a segregative effect. While evidence of the segregative effect of academic tracking is alone insufficient to establish that academic tracking systems constitute de jure segregation,[284] a school board certainly cannot be heard to argue that it did not foresee the segregative effects of its continued use of academic tracking when segregation has already resulted from tracking in its district. Again, the requirement that an academic tracking system "result in within school segregation" to constitute a per se Equal Protection violation ensures that in all cases covered by this approach, the district will, at the very least, be able to foresee the segregative effects of the continued use of academic tracking. In this way, this approach ensures that every academic tracking system that constitutes a per se violation will involve both a disproportionate impact and a foreseeable segregative consequence.

However, the inference of segregative intent does not rely on disproportionate impact and foreseeable consequences alone. Several other factors strongly support an inference of intent or purpose to segregate. Perhaps most convincingly, "[t]he historical background of the decision"[285] discloses an express intent to segregate on the basis of race.[286] When academic tracking was first developed, its use was encouraged "to keep certain ethnic groups separated from Anglo-Americans in school."[287] Its purpose went beyond mere separation of the races, however; its explicit purpose was to prepare students of color for vocations by tracking them into remedial and vocational classes, while preparing white students for college by placing them in college preparatory tracks.[288] Thus, the purpose of the initial tracking systems went beyond the doctrine of "separate but equal" invalidated in *Brown I* to establish separate and *unequal* educational tracks for black and white students.[289]

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[284] *Columbus Bd. of Educ.*, 443 U.S. at 464–65.

[285] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

[286] *See supra* Part I.

[287] Losen, *supra* note 38, at 520–21.

[288] *See supra* Part I.

[289] *See supra* Part I.

An inference of segregative intent may fairly be drawn from the continued use of an educational system with such a highly racialized historical background,[290] especially when racially coded language and racialized notions of ability continue to pervade detracking discourse today.[291] The conveniently timed resurgence of academic tracking in the immediate post-*Brown* years[292] further strengthens that inference. Moreover, when one considers that the same criteria are used to track students today as were used at its inception, despite the well-documented and explicitly segregative purpose of the system at that time,[293] it becomes clear that the segregative intent on which tracking systems were premised has become embedded in the operation of the system itself.[294] Academic tracking was never a facially neutral practice;[295] it was intended to segregate students when it was first developed, and it continues to segregate students in schools across the country today.[296] Therefore, based on the above evidence of segregative intent, academic tracking systems that result in within school segregation constitute per se de jure segregation in violation of the Equal Protection Clause of the Fourteenth Amendment.

A finding of de jure segregation imposes upon those districts that track in violation of Equal Protection the "affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' "[297] This analysis enables courts to prohibit further use of academic tracking systems by school authorities.[298] At the same time, this approach allows the issue of how to restructure

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[290] *See Vill. of Arlington Heights*, 429 U.S. at 267. The historical background of a decision is particularly strong evidence of segregative intent when "it reveals a series of official actions taken for invidious purposes." *Id.*

[291] *See supra* notes 61–70.

[292] *See supra* notes 55–57 and accompanying text; *see also Vill. of Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up [sic] the challenged decision also may shed some light on the decisionmaker's purposes.").

[293] *See supra* Part I.A.

[294] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973) ("If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.' ").

[295] *See supra* Part I.

[296] *See supra* Part I.

[297] *Keyes*, 413 U.S. at 203 (quoting *Brown II*, 349 U.S. 294, 301 (1955)).

[298] *See* People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 534 (7th Cir. 1997) ("[D]ecrees which prohibit specified conduct are generally preferable to those that impose affirmative duties.").

student placement procedures in the absence of tracking to be left to the discretion of school authorities, so long as the procedures adopted are genuinely non-discriminatory.[299] In this way, the approach proposed by this Note maintains educational flexibility while more closely adhering to *Brown I*'s central holding than do current legal analyses of academic tracking systems.

CONCLUSION

Even if it were a race-neutral practice, academic tracking is an inappropriate pedagogy in today's society. Economically sustainable employment options increasingly require a college education, and the purpose of secondary education is now, primarily, to prepare *all* students to pursue a college education. In such a climate, an educational method premised on the belief that only *some* students should be prepared for post-secondary education is no longer viable. Thus, academic tracking affects students well beyond junior high and high school. It impacts their chances of success in college in a very real way, and for those students in the lower levels, it substantially limits their occupational choices and potential for financial mobility. When the racial effects of academic tracking are taken into account, it becomes clear that academic tracking perpetuates inequalities. Such a system not only segregates in violation of *Brown I*, but it fails to even meet the basic requirements of *Plessy*: Academic tracking sets up separate academic paths that are *explicitly* unequal and that lead to unequal life chances. If Equal Protection is to mean anything to the countless students currently deprived of a meaningful education, it must mean that these modern day systems of school segregation cannot be permitted to persist.

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[299] *See id.* at 536 (noting that school authorities are better equipped than courts to make decisions regarding educational policy). However, if a school district fails in its affirmative duty to "eliminate . . . all vestiges" of the segregation caused by tracking practices, the courts may appropriately order further remedies. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).