(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges

KEVIN G. WELNER
JEANNIE OAKES
University of California, Los Angeles

In this article, Kevin Welner and Jeannie Oakes assert that educators and education advocates have developed a greater awareness of the harmful effects and pedagogical indefensibility of tracking. They also note that detracking advocates are increasingly giving litigation serious consideration in their search for policy tools to promote reform. The authors argue that courts can play an important role in advancing detracking, and that educational researchers are vital to these efforts. They survey four recent cases and discuss the presentations made by the researchers who served as experts on the cases. Then, based on their review of case law, including these recent cases, as well as their review of desegregation literature, Welner and Oakes conclude that these top-down mandates, while unlikely to achieve all of their intended goals, can play an indispensable role in initiating detracking in schools and districts where such reforms are otherwise highly unlikely.

In 1991, roughly half of White Americans polled regarded African Americans and Latinos as likely to be less intelligent than Whites (Fulwood, 1991). In addition, 37 percent of White Americans polled believed that African Americans could not be motivated to learn (Bingham, 1991).[1] Such convictions about race and intelligence provide a sturdy foundation to support a public school tracking system that disproportionately allocates minorities to classrooms designed for less capable learners. In all likelihood, any effective reform of our tracking systems must ultimately confront and overcome these beliefs.

[1] Fifty-three percent thought Blacks less intelligent, and 55 percent thought Latinos less intelligent (Fulwood, 1991). Twenty-five percent said outright that Blacks cannot be motivated to learn, and another 12 percent agreed, but said so less directly (Bingham, 1991). In other results, 62 percent of Whites said that Blacks are likely to be less hard-working than Whites, and 56 percent thought Latinos more likely to be lazy. Seventy-eight percent of Whites thought Blacks more likely than Whites to prefer living on welfare, and 74 percent thought this of Latinos; 56 percent of Whites thought Blacks (and 50 percent thought Latinos) to be more prone to violence than Whites (Fulwood, 1991).

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Ideally, this confrontation would take place through a voluntary process of critical inquiry, engaged in by educators at their schools and extending outward to the community — an inquiry that carefully scrutinizes these and similar widespread beliefs about race, intelligence, and learning (Sirotnik & Oakes, 1990). However, a parent whose child has been placed in a lower track may not be content to wait patiently for such a voluntary process to commence. This parent may wish to turn instead to the courts. A court order mandating detracking will not necessarily change dominant beliefs about race and intelligence, but it will confront these beliefs and can provide some leverage to those change agents who would like to mitigate the power of these beliefs in the framing of school policies.

In this article, we consider the potential of courts to play an important role in advancing detracking. We begin by examining past legal challenges to tracking — in particular, those that are based on federal legal authorities and on allegations of the segregative and discriminatory effects of tracking. We then survey four recent cases that reveal the potentially central role of social science evidence in future cases.

We contend that courts have an important role to play in the nation's evolving detracking process. Based on our review of case law and of desegregation literature, we argue that the success of future detracking litigation depends largely on the ability of social scientists to effectively present comprehensive evidence of the moral, psychological, and sociological elements of tracking's discriminatory effects. This conclusion, however, is tempered with the warning that court-ordered remedies are highly problematic and are unlikely to achieve all of their intended goals.

Tracking Research Has Exposed an Ineffectual and Discriminatory Pedagogical Practice

In the wake of the progress towards school desegregation that followed *Brown v. Board of Education* (1954), those opposed to integration chose a variety of tactics. Some burned crosses or stood in schoolhouse doorways. Others pulled their children out of the desegregated public schools or moved to segregated neighborhoods whose public schools remained de facto segregated (Farley, 1977). Still others legislated "freedom of choice" plans designed to result in continued segregation (see *Green v. County School Board,* 1968). One of the most enduring remnants of this era, however, is the expanded use of ability grouping, also known as tracking, to maintain racial segregation (Oakes, 1985).

Since that time, mounting evidence has demonstrated that tracking is pedagogically ineffectual and subject to abuse by those who would racially discriminate. Research has convincingly demonstrated that tracking of our school children is poor pedagogical practice (Murphy & Hallinger, 1989; Oakes, Gamoran, & Page, 1992; Slavin, 1987). Related research has shown that tracking disproportionately harms students from non-White backgrounds (Moore & Davenport, 1988; National Center for Educational Statistics, 1985; Oakes, 1985, 1990, 1992; Oakes et al., 1992). Yet tracking persists.

Tracking Is Now Recognized as Poor Policy

Policymakers have reacted to the mounting empirical evidence against the fairness and the educational efficacy of ability grouping by increasingly joining the ranks of

those opposing the practice. For example, the National Governors Association has published a report entitled *Ability Grouping and Tracking: Current Issues and Concerns* (1993), in which the organization firmly stated its opposition to school tracking. Similarly, the Carnegie Council for Adolescent Development's *Turning Points: Preparing American Youth for the 21st Century* (1989) has identified detracking as central to reforming middle grades education. Also, The College Board has criticized the role of tracking in imposing barriers to minorities' access to college (Goodlad, 1989). One goal of The College Board's current Equity 2000 project is to eliminate mathematics tracking in high schools.

Others who have criticized present tracking practices include the National Education Association, the National Council of Teachers of English, the California Department of Education, the Massachusetts State Legislature, the Texas State Board of Education, the State of Alabama, and a variety of federal and state courts.

Largely as a result of this widespread condemnation of tracking, schools across the country have embarked on efforts to detrack. However, many other schools have steadfastly retained their tracking systems.[2] In those situations where political and/or normative forces in a community have resulted in the retention of inequitable tracking systems, some have turned to the courts for relief. This anti-majoritarian role of the courts (e.g., forcing change when the political majority demands stability) is a well-established principle of our governmental system (Bickel, 1962; Hamilton, 1788; *Marbury v. Madison,* 1803). Nevertheless, as discussed in greater detail below, convincing courts to exercise this role is by no means an easy task.

Past Legal Attacks on Tracking Have Had Only Limited Success

As stated earlier, the harmful effects of tracking extend far beyond its potential to racially segregate children. For example, by attempting to assess, predict, and target instruction to a student's "ability," tracking systems can arbitrarily deprive students of valuable learning opportunities. Other common flaws in tracking systems include rigidity and lack of mobility, stigmatization, and unequal distribution of resources (Oakes et al., 1992).

These non-racial factors may, in the future, provide crucial grounds for legal challenges based on a variety of legal theories.[3] In this article, however, we focus solely on the types of challenges that have, thus far, been most common: those based on federal authority and based on allegations of the segregative and discriminatory effects of tracking.

[2] Many schools and organizations that attempt to limit or eliminate tracking must confront strong constituencies that, for political or normative reasons that may or may not be explicitly segregative, oppose detracking (Wells & Serna, 1996). As a result, many people who would otherwise favor detracking decide to keep in place policies that support tracking (Oakes, 1992).

[3] For example, the federal Due Process Clause (Fourteenth Amendment) may support some tracking challenges (*Goss v. Lopez,* 1975; *Hobson v. Hansen,* 1967; *Wisconsin v. Constantineau,* 1971). The educational rights granted in the various state constitutions should also not be overlooked. The California Constitution, Art. IX, Sections 1 and 5, imposes an affirmative duty on the State to provide all California students with a basic public education. Other states' courts have relied on similar education clauses to issue watershed rulings, primarily invalidating inequitable school funding laws and procedures. See, e.g., *Edgewood Independent School District v. Kirby* (Texas), 1989; *McDuffy v. Secretary of Education* (Massachusetts), 1993; *Rose v. The Council for Better Education* (Kentucky), 1989.

State constitutional equal protection clauses can also provide a useful legal basis for tracking challenges. For example, *Serrano v. Priest* (1976) and *Butt v. State of California* (1992) together maintain

Three Types of Federal Actions

Courts in the United States are, as a general rule, very hesitant to interfere with the operation of public schools. Beginning with a series of cases culminating in *Brown v. Board of Education* (1954), however, many courts have overcome this hesitancy upon being presented with convincing factual showing of racial discrimination. Through the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964, as well as a variety of other federal, state, and local legislative and constitutional provisions, our government has at least implicitly determined that racial discrimination presents a greater danger to our society than discrimination based on class, gender, or any other characteristic. Consequently, a district's tracking system that racially segregates students is subject to greater scrutiny by the courts.

While, as mentioned above, various state and local legal authorities have the potential to play important roles in tracking litigation, the weight of such litigation has relied on the federal Equal Protection Clause and (to a lesser extent) Title VI of the Civil Rights Act of 1964. Focusing on these two sources of law, there are basically three categories of legal challenge that can arise out of the discriminatory aspect of public school tracking: (a) Original Equal Protection actions (what we will call "Type-I" actions), (b) Equal Protection actions in districts operating under pre-existing desegregation orders (Type-II actions), and (c) Title VI actions (Type-III actions).

Type-I (Original Equal Protection) actions require evidence of intentional discrimination (*Washington v. Davis,* 1976). This means that the plaintiffs must prove to the court that the governmental action has a discriminatory effect *and* that this effect is intended by the government. Desegregation plaintiffs have successfully proven these elements in numerous districts around the country. However, as discrimination has become less overt and open, proving intent has become more problematic.

Type-II (Preexisting Desegregation Order) actions can only be pursued after plaintiffs have won a Type-I action and the subject district is, consequently, operating under a desegregation order. In the true sense of the term, these are usually not distinct legal actions but, rather, hearings within a larger Equal Protection action. However, given the long lifespan of desegregation actions, and given the fact that these hearings generally involve the testimony of witnesses and the introduction of substantial new evidence, it is helpful to view them as distinct actions. Despite the somewhat unique set of circumstances giving rise to such hearings/trials, these Type-II actions appear (based upon the sheer number of reported decisions) to be the most common forums for legal challenges to tracking.

Type-II actions require a lesser showing than Type-I actions: once a court has made the initial determination that a district has engaged in intentional discrimination, much of the burden is switched to the defendant district to show that subsequent discriminatory impact is *not* a vestige of that original discrimination. Thus, the intent requirement still exists, but the plaintiff benefits from a presumption of

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that education is a fundamental interest in California and that denial of education provides an independent basis on which to make an equal protection claim. Strict scrutiny is triggered under the California equal protection guarantee if the state discriminates on the basis of race or wealth *or if* the fundamental interest in education is denied or infringed. Moreover, the federal intent requirement set forth in *Washington v. Davis* (1976) is inapplicable to California constitutional analysis.

a connection between the earlier-proven discriminatory intent and the later-proven discriminatory impact.

The third type of action, based on Title VI of the 1964 Civil Rights Act, also requires a lesser showing (42 U.S.C. § 2000d, 1982).[4] Once the plaintiff has shown that a tracking system has a disproportionate and negative impact on a racial or ethnic group, the defendant district must respond by proving the educational necessity of the system. Actions under Title VI can be brought by private citizens (for injunctive relief) or by the Office of Civil Rights of the Department of Education, which may seek termination of federal assistance to the district. A private citizen can also seek monetary damages, but must prove discriminatory intent in order to be entitled to such a recovery (34 C.F.R. §100.7 ff, 1987).

Each of these types of legal actions has both strengths and weaknesses. Because proving intentional discrimination is extremely difficult, Type-I actions are quite problematic. Moreover, limitations on Type-I actions directly limit the number of districts potentially subject to Type-II actions. Thus, in the long run, Type-II actions have rather limited applicability.

Type-III actions avoid the aforementioned problems. However, the effectiveness of these actions is tied largely to the dependence of a district on federal money. (Title VI only bans discrimination by those institutions that receive federal funding.) If a district is willing to forego federal money, it is free to act in discord with the Act's provisions. Moreover, and as discussed below, Title VI actions have suffered from an apparent (and legally indefensible) hesitancy on the part of the federal courts to impose liability without evidence of intentional discrimination. Finally, because Title VI is a statute rather than a constitutional guarantee, it is subject to Congressional amendment or rescission.

Type-I Cases

Type-I actions are best represented by such well-known cases as *Brown v. Board of Education* (1954) and *Keyes v. School District No. 1* (1973). Also, *Hobson v. Hansen* (1967) was, in part, a Type-I case (the opinion was also based, in part, on the Due Process Clause). To the best of our knowledge, *Hobson* is one of only two officially published Type-I cases wherein the finding of intentional discrimination was grounded in significant part upon the use of tracking to intentionally segregate children.

The second case was handed down less than two years ago, by a federal district court in Illinois (*People Who Care v. Rockford Board of Education School District No. 205*, 1994). That court found that tracking was used in order to intentionally segregate racial groups and held that this intentional segregation constituted a violation of the Equal Protection Clause. (The *Rockford* case will be discussed in greater detail below.)

Type-II Cases

As mentioned earlier, Type-II actions challenging tracking appear to be much more common than Type-I tracking actions. Courts in successful Type-II cases have typically grounded their decisions in the recognition that ability grouping tends, as a

[4] Title VI provides that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

factual matter, to perpetuate segregation, and many courts have also noted that the tracking systems in question sprouted up at the time of, and in apparent reaction to, forced integration of schools (*Moses v. Washington Parish School Board,* 1972; *Simmons on Behalf of Simmons v. Hooks,* 1994). Similarly, many of these courts have denounced the use of testing as a basis for grouping or placement in recently desegregated schools (*Singleton v. Jackson Municipal Separate School District,* 1970; *United States v. Board of Education of Lincoln County,* 1969; *United States v. Tunica County School District,* 1970. See also *Hobson,* 1967, wherein the court questioned the validity and accuracy of the tests used for placement).

Type-II cases can be crudely divided into two categories: (a) motions for "unitary status," which are generally brought by the defendant school districts; and (b) motions to modify desegregation orders, which are generally brought by the plaintiffs.

Motions seeking a court determination that the defendant school district has achieved "unitary status" are a relatively new phenomenon. Relying on the recent U.S. Supreme Court cases of *Board of Education v. Dowell* (1991) and *Freeman v. Pitts* (1992), school districts are now flooding the courts with motions seeking to be released from court supervision on the grounds that they have achieved unitary status. In order to meet the burden of proof established in *Freeman,* these districts must demonstrate that they no longer operate a dual system (of segregated schools) and that no vestiges of the former dual system remain. If such a motion is successful, the school district becomes free to abandon any compensatory educational programs and/or student assignment systems that had been previously ordered by the court.

In opposing such unitary status claims, some plaintiffs have pointed to the districts' use of tracking systems as one such vestige of the earlier discrimination. Specifically, such plaintiffs have argued that the districts used tracking to undermine the intent of the original desegregation orders. Through tracking, African American or Latino students are taught apart from White students, even though the various racial and ethnic groups physically share the same school site (see *Vasquez v. San Jose Unified School District,* 1994; Oakes, 1995).

An older, related line of these Type-II cases concerns plaintiffs' motions to modify desegregation orders. In such challenges, a racially disparate grouping system in a previously segregated school system is generally held invalid unless the district can demonstrate that the tracking system was not based on the present results of past segregation (i.e., was not a vestige of past segregation) or would remedy such results by providing better educational opportunities. This type of analysis was originally set forth in *McNeal v. Tate County School District* (1975), and the court found the tracking system to be unconstitutional.

Despite the result in *McNeal* itself, several courts have used the legal test advanced in this case to conclude that — since the particular children now being tracked had never attended segregated schools — the earlier discrimination could not be blamed for the present disparate impact of the tracking systems (*Georgia State Conference of Branches of NAACP v. Georgia,* 1985; *Montgomery v. Starkville Municipal Separate School District,* 1987; *Quarles v. Oxford Municipal Separate School District,* 1989). Most recently, however, in *Simmons v. Hooks* (1994), the court applied the *McNeal* test in a much less deferential way. (The *Simmons* case will be discussed in greater detail below.)

Thus, the success of these Type-II cases has been mixed, but this option remains vital. Nonetheless, as the heyday of Type-I cases fades into the past, we can expect that successful Type-II cases will become fewer in number because the *McNeal* test

will become more difficult, thereby discouraging suits; and more districts will achieve unitary status and will be released from court supervision.

Type-III Cases

One alternative that may become increasingly attractive for those who wish to challenge school tracking systems is Title VI of the Civil Rights Act of 1964 (Type-III cases). Plaintiffs in a Title VI action should prevail if they are able to show a disparate racial or ethnic impact *and* the defendant district fails to respond by showing *both* (a) that the tracking system is necessary for the school to achieve its goals and (b) that the particular mechanism used to assess and place students is valid ("Teaching Inequality," 1989).

To date, however, these Type-III cases have not met with success. In both *NAACP v. Georgia* (1985) and *Quarles v. Oxford School District* (1989), for example, the plaintiffs supplemented their Type-II claims with Type-III claims, but to no avail. Notwithstanding the different legal analyses called for under the two types of causes of action, the courts dismissed both arguments on similar grounds. Specifically, the courts seem to have defied binding precedent and required a showing of discriminatory intent as an element of the Title VI claims (see "Teaching Inequality," 1989, for an excellent discussion of this issue). Thus, after having found a possible nondiscriminatory rationale for the tracking, the courts in these two cases deferred to the judgment of school officials who preferred to employ this particular pedagogical practice (see also *Montgomery v. Starkville Municipal Separate School District,* 1987).

These Legal Claims Can Be Made Cumulatively

While there are strategic reasons for failing to assert an available legal claim, the historical record of legal challenges to tracking strongly indicates that plaintiffs' attorneys have unnecessarily limited themselves to only the most obvious claims. Thus, Title VI claims are rarely added to Equal Protection claims. Due Process claims, as well as actions based on the various state constitutions, are still more infrequent.

Each of these legal bases for a challenge to tracking has advantages and disadvantages. Prospective plaintiffs would be well advised to consider each and to consider including claims for relief under as many as possible.

Educational Research Can Effectively Demonstrate to the Courts the Importance of Detracking

Whatever the legal basis chosen for an attack on tracking, the challenge must be supported by an effective demonstration to the court of the harm that tracking does to the children represented by the plaintiffs. We argue in this section that the success of such legal challenges to tracking can be enhanced through the more effective use of tracking research.

Defining the Goals of Desegregation and Detracking

Consider the task faced by a plaintiff attempting to convince a court to strike down a district's tracking system on the ground that it segregates children by race. At some point (hopefully rather early in the process), the plaintiff's legal team must decide on its message to the court concerning why tracking is harmful and why detracking

is necessary. As set forth below, we contend that this message of denial of equal educational opportunity should stress the psychological, sociological, and moral damage caused by tracking.

Educational researchers have historically performed the role of demonstrating to courts the damage caused by segregation, and this role has been the subject of considerable debate (Cohen, 1977; Cohen & Weiss, 1977; Wolf, 1977). Much of this debate has focused on the decision concerning the type of damage to be proven. Proof of the damage caused by segregation has important repercussions in at least two areas. First, it is necessary in order to prove liability. Second, such proof provides the basis upon which the remedy is formulated.

Desegregation has been generally accepted as the appropriate remedy for intentional segregation.[5] However, there is less agreement about the *goal* of desegregation. Hawley and Rist (1977) list four general goals of desegregation: (1) improvements in academic achievement; (2) increased access to educational resources and to post-educational opportunities; (3) improvements in self-esteem, aspirations, and other personality-related dispositions of minority students; and (4) reduction in interracial hostility and the elimination of racial intolerance (pp. 414–415). Each of these goals can easily be traced back to a particular type of damage that could be proven in a desegregation case.

The concern about the type of damage proven to the court and the choice of goals for desegregation is legitimate. Once one or more outcomes is accepted as the goal of desegregation, the value and the success of desegregation efforts become tied to measurement of the progress made toward achieving that goal. This has been problematic, because studies of the achievement of the various proposed goals have shown mixed results.

Weinberg (1977) reviewed the literature (much of it unpublished) concerning the relationship between desegregation and achievement (Hawley and Rist's Goal No. 1 — improvement in academic achievement), and he concluded that desegregation does indeed have a positive effect on minority achievement levels. He found agreement on several points: (a) the achievement levels of White majorities in desegregated schools do not decline; (b) the net effect of desegregation on the academic achievement levels of non-Whites, in most studies, is positive and in others is at least neutral; and (c) the instrument for obtaining integration — whether through busing, pairing of schools, or altering of attendance zones — has no direct bearing on the achievement of the children involved. Others, however, have argued that the

[5]It should be noted, however, that *Brown* and its progeny have been criticized for their basic premise that desegregation should be the remedy for such discrimination. Professor Derrick Bell (1977) has argued that "societal racism can disadvantage Black children as effectively (although more subtly) in integrated as in segregated schools" (p. 373). He contends that Black leadership should not be wedded to any particular goal or remedy. Instead, they should listen to what Black parents want from schools for their children, and then design strategies that utilize constitutional rights and political leverage to achieve these educational goals. If separate but equal schools is what Black parents want, then that should be the goal.

Most Black leaders, however, remain committed to desegregation. For example, Julius Chambers (1977), then-president of the NAACP Legal Defense Fund, rejected Professor Bell's suggestion that Blacks may want to use the *Plessy* "separate but equal" doctrine, rather than the *Brown* case, in order to achieve equal educational opportunity: "We are not told how equal educational opportunities will be accomplished under present-day societal racism even with new emphasis on separate but equal or representation on or control of local school boards" (p. 42).

evidence is inconclusive (Epps, 1977) or shows no improvement resulting from desegregation (Coleman et al., 1966).

Similar mixed results were yielded by a literature review by Epps (1977) concerning the impact of desegregation on certain aspects of personality that are generally considered to be important outcomes of schooling: aspirations, self-concept, sense of control over the environment, and achievement orientation (Hawley and Rist's Goal No. 3 — improvement in personality-related dispositions of minority students). For the most part, Epps found little convincing or conclusive evidence regarding these outcomes (although he did conclude that desegregation probably decreases anxiety and increases motivation).

A recent literature review by Wells and Crain (1994) produced more convincing data on three categories of possible effects of desegregation: the occupational aspirations of high school students, college choice and educational achievement, and occupational attainment and adult social networks (Hawley and Rist's Goal No. 2 — increased access to resources and opportunities). The studies reviewed concerned the long-term effects of desegregation in overcoming perpetual segregation and earning higher income. The authors suggest that current debates on the merits of desegregation need to refocus on long-term effects and the life chances of African American students, rather than overemphasizing test score comparisons.

Wells and Crain concluded that desegregated Black students set their occupational aspirations higher than do segregated Blacks, and desegregated Black students' occupational aspirations are more realistically related to their educational accomplishments and aspirations than those of segregated Black students. This finding suggests that African American students attending desegregated schools have access to social networks that inform them about connections between education and occupation. In addition, attendance at desegregated schools appears to lead African American students toward attendance at predominantly White colleges and to higher college attainment than those who attended segregated schools. Finally, African American students who attended desegregated schools are more likely to have desegregated social and professional networks later in life, are more likely to find themselves in desegregated employment, and are more likely to be working in white-collar and professional jobs in the private sector than Blacks from segregated schools.

While Wells and Crain (1994) argue for a "life chances" goal of desegregation, Levin (1977) argues that it is better grounded in "basic fairness" and a "just society." He concludes that it is impossible for social scientists to draw accurate inferences about the effects of differences in schooling on life chances (a term he apparently uses in a somewhat different way than Wells and Crain; for example, he incorporates academic achievement measures and does not necessarily look at long-term effects). Because of the inadequacy of present tools, he reasons, there is no social science consensus on the appropriate educational strategies for improving the life chances of children from low-income and minority backgrounds.

Levin also warns about goal displacement. He fears that the use of social science evidence, when used on both sides of a dispute, will be incorporated into the legal analysis and will tend to redefine the issues themselves. "The prima facie inequities are ignored as the courts are tortured with the convoluted arguments provided by social scientists" about the effects of the particular policy on "life chances" (Levin, 1977, p. 237). With regard to desegregation policy, Levin states, "Rather than con-

sidering what kind of educational policy regarding school racial patterns is consistent with our democratic ideals, the issue seems to be whether or not blacks and other minorities gain a few more points on a vocabulary or reading test" (p. 239). Levin concludes that "if social science findings increasingly are used to create what appear to be technical issues out of moral dilemmas, this presents a potential social danger" (p. 240).

Coons (1977) takes a slightly different approach than Levin. Coons argues that desegregation judgments *necessarily* boil down to the courts' moral judgments about a just society:

> I believe that the courts would never have reached the stage of citing Kenneth Clark or Christopher Jencks, unless they had already made a lusty normative leap unaided by anything more than their non-empirical values. These specimens of research were relevant only because judges had already accepted some notion of human equality as a value to be incorporated in the process of judicial rule selection. (p. 52)

As Coons explains, "history discloses how narrowly the equal protection clause guarantee could be constructed by a judiciary unconvinced of the moral claims of human equality" (p. 53). "Equality," he states, "is not an inference from data; it is an act of faith about intrinsic human worth" (p. 53).[6]

The elimination of racial intolerance (Hawley and Rist's Goal No. 4), while clearly not a short-term accomplishment of many attempts at desegregation, is a reasonable long-term goal. Brown (1992) argues that, while the Supreme Court's ideological framework has generally been founded on the assumption that racial isolation retards the intellectual and psychological development of African American children, the Court *should have* based its desegregation remedies on the well-accepted socializing role of our public schools. Brown argues that the principal harm of de jure segregation is the negative and stigmatic lesson that schools inculcate in all children that African Americans are inferior. Viewed from this perspective, the remediation of the de jure segregation benefits all children, not just African Americans (Brown, 1992).

The researchers discussed above present and examine a variety of possible goals for desegregation. Some goals are psychological, some are sociological, and some are moral. Interestingly, each researcher (with the apparent exception of Hawley and Rist, 1977) seems to accept, either explicitly or implicitly, the idea that the choice of one goal excludes the validity of the other goals. Levin (1977), for one, defends this either/or approach by pointing to the role of the other goals in distracting courts from the real (moral) issue.[7]

However, each court is different. Judges and juries are people, and they reflect many of the same backgrounds and perspectives that we find elsewhere in society. Consequently, some courts may be responsive to psychological evidence, some responsive to sociological evidence, and some only responsive to moral arguments.

[6] Craven (1977), a judge on the U.S. Court of Appeals for the Fourth Circuit, stated this idea (of the relative inability of social scientists to sway courts) rather eloquently: "Judges seem to have seldom allowed sociology to interfere with a good theory" (p. 156).

[7] Similarly, Wells and Crain (1994) point out the damage done by the over-emphasis on test score comparisons and measurements of short-term outcomes, Coons (1977) seems to believe that any social science evidence is just window dressing, and Brown (1992) argues that the goals focusing only on the benefits of desegregation for African Americans serve to perpetuate the stigmatization of African Americans as inferior.

Many courts can be expected to respond best to a combination of the three types of arguments.

Cases are frequently presented to courts "in the alternative." Just as a criminal defense attorney may be called upon to argue, "My client didn't do it, and, besides, it was an accident," a civil rights attorney should argue, "Desegregation is a moral imperative, and, besides, it is necessary to provide an equal opportunity for academic achievement, psychological health, and life chances." Those judges who do not feel that the moral argument provides a sufficient basis for desegregation may find that basis in one of the other arguments. Thus, future legal challenges to tracking would be stronger if they were built around all of these desegregation goals.

Effective Use of Tracking Research

Research concerning the negative effects of tracking is now sufficiently impressive that courts are hard pressed to defer to the pedagogical discretion of local educators who wish to continue the practice (see *Montgomery v. Starkville Municipal Separate School District,* 1987). For example, in *Simmons v. Hooks* (1994), not only did the plaintiff's expert testify about these negative effects, but the *defendant's own expert* "could not present a credible educational justification for grouping entire classes of children for all purposes as opposed to grouping children within a class for activities such as reading" (pp. 1302–1303).

One of the authors of this article (Jeannie Oakes) has testified in several tracking-as-segregation cases as a plaintiff's expert. In that capacity, she developed and refined an approach to these cases that is designed to clearly set forth the evidence in such a way that any discrimination will become apparent (see Oakes, 1995). In approximate order of presentation, and dependent upon the evidence, she demonstrates the following:

1. The district employs tracking.
2. The tracking has resulted in racial imbalances between classes.
3. The district has been aware of the problem.
4. Track placement decisions are arbitrary.
5. The placements do not result in homogeneous grouping, and the district's tracking system is, therefore, not consistent with theories intended to support tracking.
6. Even controlling for prior achievement, Whites are placed disproportionately in higher tracks.
7. The district's track placement is stable over time and between subjects.
8. Students placed in lower tracks receive a lower quality education, less qualified teachers, and are not prepared for college.
9. Students placed in lower tracks score lower on subsequent achievement tests.
10. The policy context in the district favors detracking.
11. The district has the technical capacity for detracking.

This package of testimony has demonstrated that the tracking systems under scrutiny have a discriminatory effect. It also provides considerable circumstantial evidence indicating that the intent behind the tracking is to segregate. The impact of

this comprehensive presentation was confirmed by the magistrate in *People Who Care v. Rockford* (1994), who referred to the tracking evidence as "devastating" (pp. 912, 940).

Importantly, this evidentiary approach includes moral, psychological, and sociological elements. While the testimony focuses, for the most part, on the specific facts of the particular case, these facts are presented in a research context that highlights relevant moral, psychological, and sociological issues.[8] To do otherwise would fail to recognize the entire scope of the effects of tracking and may deprive the plaintiff's attorneys of the opportunity to effectively present their complete case to the court.

Three Recent Cases Illustrate the Value of Convincingly Presenting Research Concerning the Harmful Effects of Tracking

In this section, we survey three recent cases, all of which resulted in detracking mandates.[9] Our focus is on those aspects of the cases that we feel best demonstrated to the courts the unconstitutional and harmful effects of tracking.

People Who Care v. Rockford Board of Education

Recall that *People Who Care v. Rockford* (1994) was a Type-I case. The plaintiff, therefore, needed to prove both discriminatory effect and discriminatory intent. At the most basic level, however, what the plaintiff had to demonstrate was that the system was unfair. It had to show the court that the minority students were denied a fair chance for success in the district's schools.

The plaintiff met this burden of proof in part via its tracking expert, who was able to spotlight inequities in the district's tracking mechanism. She used data supplied by the district, including curriculum guides, district reports, instructions and forms, enrollment figures (by grade, race, track, and school), standardized test scores, and teacher recommendations for course enrollment. In addition, she made use of the defendants' discovery responses, including deposition testimony.

From this data, she was able to build a logical trail of evidence, ultimately demonstrating the discriminatory nature of the district's tracking system. (Please refer to the eleven-step process discussed in the previous section.) This analysis contains two primary emphases: (a) the disproportionate placement of African American students in lower tracks, and (b) the highly subjective and inconsistent placement mechanism employed by the district.[10]

In particular, she showed that the higher tracks were disproportionately populated by White students, and the lower tracks were disproportionately populated by African American students. Placement decisions were allegedly made by relying on objective standardized tests, but these tests were of questionable predictive and analytical value and were arguably culturally biased. Moreover, the actual placements depended on a variety of subjective and inconsistent criteria. Further, classes that

[8] For example, Oakes's written reports in these cases cite Tyack (1974), Gould (1981), and Terman (1923) in an attempt to provide the courts with an overview of the racist origins and history of intelligence testing and tracking.

[9] In addition, we briefly discuss an ongoing case, which is presently awaiting a decision from a federal court of appeals.

[10] The published *Rockford* opinion sets forth a detailed presentation of the tracking analysis on pages 940–999.

were supposed to be designated for students at a particular, homogeneous ability level actually enrolled students who spanned a very wide range of measured ability. The resulting system placed a great deal of discretion in the hands of those making the placement decisions, and the expert analysis demonstrated that an African American student would more likely be placed in a lower class than a similar-scoring White student (*Rockford,* 1994, pp. 912–915, 940-999; see also Oakes, 1995).

This expert analysis convinced the court that the placement practices skewed enrollments in favor of Whites over and above that which could be explained by measured achievement. As the court itself explained,

> there is ample evidence to support the . . . conclusion [that it was the district's policy to use tracking to intentionally segregate White students from minority students], including, but not limited to: the assignment of minority students to lower track classes in consistently disproportionate numbers . . . , knowledge of these racial disproportions and woefully inadequate efforts to correct them . . . , placing black students whose achievement scores qualified them for two or more tracks in lower tracks . . . and corroboration by District personnel. (*Rockford,* 1994, pp. 913–914)

On this basis, the court ordered that "ability grouping and/or tracking will no longer be allowed in the Rockford schools" (Magistrate's Comprehensive Remedial Order, dated January 26, 1996, at p. 16; see also *Rockford,* 1994, p. 934).[11]

Vasquez v. San Jose Unified School District

Vasquez v. San Jose Unified School District (1994) was a Type-II case. The tracking issue was raised by the plaintiffs as an alleged vestige of the earlier discrimination, and it was raised in response to a motion by the defendant for a finding of unitary status.

The data available to the tracking expert in *Vasquez* was much more comprehensive than in *Rockford.* In particular, the enrollment data and student performance data (i.e., standardized test scores, grades, failures and retentions) could be linked. That is, the data included (in addition to the types of data listed above concerning *Rockford*) student identification numbers that could be matched with those on the files containing performance data. The data also allowed the expert to follow the students' enrollment and performance longitudinally over several years of school.

The expert applied a variety of statistical analyses to calculate the achievement range within each track, the distribution of students from various ethnic groups into various tracks, the characteristics of the teachers in each track (such as their academic preparation), the probability of placement of students from each ethnic group (controlling for prior achievement), and the impact of track placement on achievement gains of students with comparable prior achievement. She also applied chi square and regression analyses to determine if the observed results were chance occurrences.

The non-numerical data, such as course catalogues, were analyzed using "content analysis" techniques, in order to classify courses into various track levels, determine placement criteria and processes, and identify curricular goals and course content.

[11] Of course, it is incumbent upon plaintiffs in Type-I cases to supplement the expert analysis with concrete evidence of discriminatory intent. In *Rockford,* for example, the plaintiff presented testimony that Latino elementary school students, who were bussed to a White neighborhood school, were forced to wait on the bus until classes began, rather than to mix on the playground with the White children (*Rockford,* 1994, p. 1005).

As in *Rockford,* the expert applied the eleven-step analysis, and she again demonstrated that the placement practices skewed enrollments in favor of Whites over and above that which can be explained by measured achievement. However, because of the availability of more detailed, interlinked, and longitudinal data, she was also able to use statistical analyses to demonstrate more directly that the placement decisions were racially biased and that the lower track placements negatively impacted the minority students over time.

Following the submission of the Expert Report, and before the formal hearing date, the parties reached a settlement and entered into a "Stipulated Modified Remedial Order." In significant part, the Order requires the district to detrack its kindergarten through ninth-grade classes.

Simmons on Behalf of Simmons v. Hooks

Simmons on Behalf of Simmons v. Hooks (1994) was also a Type-II case, although it arose out of a slightly unusual set of circumstances. The *Simmons* action was brought separately from the original desegregation case, on behalf of three siblings who had been placed in lower track courses. The plaintiffs sought, among other things, monetary damages. Even though this was essentially a private action for damages, the court, in considering the charges of discrimination, recognized that the Augusta, Arkansas, district had not yet been declared unitary and applied the *McNeal* test.[12]

Importantly, while most of the earlier applications of the *McNeal* test had resulted in courts deferring to the judgment of local educators (*Georgia State Conference of Branches of NAACP v. Georgia,* 1985; *Montgomery v. Starkville Municipal Separate School District,* 1987; *Quarles v. Oxford Municipal Separate School District,* 1989), the *Simmons* court refused to do so. Instead, the court relied on expert testimony for the finding that the tracking system would not remedy the results of past discrimination by providing better educational opportunities. Here, the court cited plaintiff's expert Robert Slavin's testimony to the effect that educational researchers have concluded that tracking is not beneficial to students placed in the low group (p. 1299). The court also noted that even the *defendant's* expert "could not present a credible educational justification for grouping entire classes of children for all purposes" (pp. 1302–1303).

The court, therefore, ordered that the district cease its use of ability grouping by class.

Coalition to Save Our Children v. State Board of Education

We recently prepared an expert tracking analysis in another Type-II case, arising out of Wilmington, Delaware (*Coalition to Save Our Children v. State Board of Education,* 1995). In many ways, this Wilmington case was very similar to the San Jose case. As in *San Jose,* the plaintiffs argued that, even if the defendant districts (four districts were defendants) are found to be in compliance with the strict letter of the earlier desegregation order, the districts have avoided the spirit of that order by evolving from one type of discriminatory system into another.

[12] The *Simmons* court actually stated alternative bases for its decision. The court first held that the evidence supported a finding of intentional discrimination. The court then held, in the alternative, that the plaintiff (even assuming no intentional discrimination) had satisfied the *McNeal* test.

The report prepared for the Wilmington case closely resembles the reports prepared for *Rockford* and *San Jose.* However, we added an analysis to examine the short-term effects of track placement on students. We found that, controlling for earlier achievement test scores, later scores decreased significantly after placement in lower tracked classes for just one year. For example, a student placed in a non-advanced math class can be expected to score more than sixty-nine points lower on the math section of the Iowa Test of Basic Skills in the year following the placement than a (previously) identically achieving student placed in an advanced math class (a difference of approximately 15% with P=.0001).

However, notwithstanding this compelling evidence, the lead counsel in that case decided to frame the plaintiff's arguments in terms of disparate and discriminatory outcomes. The court, relying on *Board of Education v. Dowell* (1991), *Freeman* (1992), and *Missouri v. Jenkins* (1995), had no trouble rejecting these outcome arguments and granting the districts' motions for unitary status. The case is presently on appeal, but we anticipate that appellate courts will be no more enthusiastic about the outcome arguments. Thus, unless the appellate arguments successfully refocus attention on the discriminatory provision of opportunities, we see little chance of success.

Legal Challenges Such as These Offer the Potential to Alleviate Constitutional Violations

The preceding brief overview of these four cases hopefully affords some indication of the potential that our legal system, even in its present state, offers to those wishing to end tracking. Our experience tells us that many school districts in this nation are presently operating unconstitutionally discriminatory tracking systems, and these systems are denying important rights to African American and Latino children. These cases provide a means of alleviating these constitutional violations.

In addition, the introduction of evidence showing the discriminatory use of tracking can be — in the hands of skillful litigators — an extremely successful means of shifting the battle lines in the now-difficult Type-II cases. As seen in the *Dowell* (1991) line of unitary status cases, courts presently seem predisposed to release school districts from court supervision, and this predisposition can, we believe, be partially attributed to the disagreeable dynamics of much unitary status litigation.

These cases frequently boil down to an argument wherein the districts put forth evidence of the sufficiency of the positive actions that they have taken to remedy the earlier discrimination. The plaintiffs know that their children still are receiving an inadequate education, and they can point the courts to disparate outcomes, but the courts are now extremely hesitant to rely on such outcome evidence.

By introducing evidence of so-called second-generation discrimination (see Meier, Stewert, & England, 1989), including inequitable use of tracking and discipline, plaintiffs in unitary status cases can shift the court's focus from the districts' "good" remedial actions to the districts' "bad" ongoing discrimination. Doing so serves to deny the districts the ability to walk into court wearing the proverbial white hat. As seen in the Wilmington litigation, however, merely presenting the evidence is insufficient; the attorneys must use the evidence to reframe the issue away from merely outcomes. They must stress the ongoing and active discrimination.

Detracking Reforms Must Overcome Technical, Normative, and Political Forces

All detracking reforms, including court-ordered reforms such as those in Rockford, San Jose, and Augusta, must overcome significant barriers if they are to be successful. Tracking systems are extraordinarily resilient and resistant to change. Organizationally, tracking is interconnected to, and supported by, our schools' other practices. Politically, detracking efforts generally must overcome local opposition and build supportive communities both within and outside the school. Normatively, tracking is grounded in widespread negative beliefs about human capacity and ethnic and class-based discrimination (Oakes, 1992).

These technical, normative, and political forces help to explain both the necessity of the court-ordered reforms in the cases discussed herein *and* the hurdles that these reforms will have to clear. For example, the courts' involvement in each of the above-discussed cases was necessitated by political forces that prevented the reforms from otherwise occurring. In addition, these same political forces, as well as strong normative forces, have a great potential to undermine the ongoing detracking efforts.

Overcoming these barriers is never an easy task, but a court order can play an important and positive role, particularly (as noted above) with regard to the political barriers blocking the initiation of reforms. Also, the court can be useful to district administrators and board members as a political bogeyman, shouldering the burden of the blame for politically unpopular measures. Because of the court order, opponents of detracking are likely to be more inclined to resign themselves to the inevitability of the reform. Similarly, the court order shifts the "zone of mediation" (Oakes, Welner, Yonezawa, & Allen, in press) or "zone of tolerance" (Boyd, 1976), which outlines the boundaries of debate for any particular issue.

A court order can also assist in overcoming organizational barriers. These court orders invariably are directed at districts, rather than schools. Therefore, implementation of detracking at the school level is generally provided with district-level support (e.g., staff development and corresponding curricular reform). This support is particularly important in light of the district-level opposition to detracking encountered by many schools that attempt to detrack their classes.

Normative barriers are not so easily assisted by top-down mandates such as court orders. Wise (1977) discusses a hyperrationalization called "wishful thinking," which he defines as policymakers incorrectly believing that they can accomplish change simply by decreeing it (p. 45). A possible corollary to this wishful thinking hyperrationalization is that policymakers sometimes incorrectly believe that educators will accept the importance of a change simply because it has been decreed. This is also a corollary to the axiom that we cannot mandate what matters (Elmore & McLaughlin, 1988). Using as examples the specific cases discussed herein, the *Vasquez, Rockford,* and *Simmons* courts, while they could order the detracking of the defendant districts, could not concurrently order the districts' educators to believe in the importance of detracking for their students.

This presents a dilemma. We can expect that the detracking reforms in these districts will not be very successful if the defendant districts fail to engage their educators in a process of confronting and addressing the variety of serious and challenging issues raised by detracking. As Fullan and Miles (1992) point out, effec-

tive organizations embrace problems rather than ignore them: "We cannot develop effective responses to complex situations unless we actively seek and confront real problems that are difficult to solve" (p. 750). Particularly germane to the present discussion is Cuban's (1992) comment that "districts, schools and classrooms as organizations absorb external pressures for change and convert them into routine add-ons compatible with existing practices" (p. 217). Given this tendency of educators to avoid second-order (i.e., fundamental) change and to instead grudgingly accept reforms as superficial add-ons, there is a temptation to turn back to the courts for more prescriptive guidelines.

As a general matter, we have questioned Elmore and McLaughlin (1988), Wise (1977), and others to the extent that they contend that a court cannot mandate what matters (see Oakes et al., in press). More specifically, we do believe that a court can shift the "zone of mediation" and, in addition, can create incentives and situations that lead to a greater likelihood that the stakeholders themselves will change what matters. In other words, we acknowledge that court-ordered tracking reforms do not originate with educators and that this fact cannot be changed. We contend, however, that the subject districts can, and should, do the next best thing: involve educators at the implementation stage in such a way as to convince them of the desirability and worth of the reforms. Moreover, the courts can push the districts toward this policy.

In particular, we believe that the courts can move the districts toward a policy of critical inquiry. As set forth by Sirotnik and Oakes (1990), educators can, through a site-based critical inquiry process, come to understand and critique the normative beliefs that support practices such as tracking. This understanding can free the educators to critically reflect on the detrimental empirical effects of tracking, particularly if the critical inquiry is grounded in the value of social justice (Sirotnik & Oakes, 1990).

A potential order could, for example, require (1) a "critical inquiry process" addressing specified issues, (2) the appointment of a "critical friend" to assist[13] with the critical inquiry process, and/or (3) the submission to the court of reports from each school describing the school's progress with its inquiry. While it should be apparent that none of these proposals, nor even a combination of one or more, would guarantee the type of meaningful critical inquiry envisioned by Sirotnik and Oakes (1990), it should be just as clear that such an order would create a greater likelihood of such an inquiry.[14]

Ultimately, however, courts are not themselves capable of seeing their work through to completion. A court must, at some point, turn the reins of control over to the schools, trusting that educators will understand the rationale and importance

[13] Ted Sizer, professor of education and chairman of the Coalition of Essential Schools at Brown University, popularized the term "critical friend," meaning a "third party" or an "insider-outsider" who would ask tough questions, add an independent perspective, and provide both technical and political support to reforming schools.

[14] The Comprehensive Remedial Order (1996) signed by the magistrate in Rockford attempts to address some of these concerns by mandating a "Human Relations Program" in addition to ordinary staff development. The Order explains, "Because school districts that implement school desegregation plans often face major obstacles such as getting the community and the district employees to accept the fact that discrimination has occurred, the program is essential to effectively implement a desegregation plan" (p. 19). It will be interesting to see whether this Human Relations Program engages its participants in a critical inquiry or simply sensitivity training.

of the ruling and hoping that they act accordingly. Judge Doyle, who served on the 10th Circuit Court of Appeals and was one of the judges on the panel that decided *Keyes v. School District No. 1* (1975), wisely warned that desegregation cases such as *Keyes* could not be expected, acting alone, to solve educational problems: "The real challenge is in the individual schools and the real holders of responsibility are individual principals and teachers, together with the community" (Doyle, 1977, p. 19).

References

Bell, D. A., Jr. (1977). Waiting on the promise of *Brown*. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 341–373). New Brunswick, NJ: Transaction Books.

Bickel, A. M. (1962). *The least dangerous branch: The Supreme Court at the bar of politics.* Indianapolis, IN: Bobbs-Merrill.

Bingham, J. (1991, July 20). 37% of whites think black kids can't learn, pollster says. *Denver Post,* pp. 1, 18a.

Board of Education v. Dowell, 498 U.S. 237 (1991).

Boyd, W. L. (1976). The public, the professionals, and educational policy making: Who governs? *Teachers College Record, 77,* 539–577.

Brown, K. (1992). Has the Supreme Court allowed the cure for *de jure* segregation to replicate the disease? *Cornell Law Review, 78*(1), 1–83.

Brown v. Board of Education, 347 U.S. 483 (1954).

Butt v. State of California et al., 4 Cal. 4th 668 (1992).

California Constitution, Art. IX, §§ 1 & 5.

Carnegie Council for Adolescent Development. (1989). *Turning points: Preparing American youth for the 21st century.* Washington, DC: Author.

Chambers, J. L. (1977). Implementing the promise of *Brown:* Social science and the courts in future school litigation. In R. C. Rist & R. J. Anson (Eds.), *Education, social science, and the judicial process* (pp. 32–49). New York: Teachers College Press.

Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d *et seq.*

Coalition to Save Our Children v. State Board of Education, et al. 901 F.Supp. 784 (D. Del. 1995).

Cohen, D. K., & Weiss, J. A. (1977). Social science and social policy: Schools and race. In R. C. Rist & R. J. Anson (Eds.), *Education, social science, and the judicial process* (pp. 72–96). New York: Teachers College Press.

Cohen, E. G. (1977). The effects of desegregation on race relations. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 271–299). New Brunswick, NJ: Transaction Books.

Coleman, J. S., Campbell, E. Q., Hobson, C., McPartland, J., Mood, A., Weinfeld, F., & York, R. (1966). *Equality of educational opportunity.* Washington, DC: U.S. Government Printing Office.

Coons, J. L. (1977). Recent trends in science fiction: *Serrano* among the people of number. In R. C. Rist & R. J. Anson (Eds.), *Education, social science, and the judicial process* (pp. 50–71). New York: Teachers College Press.

Craven, J. B., Jr. (1977). Further judicial commentary: The impact of social science evidence on the judge: A personal comment. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 150–156). New Brunswick, NJ: Transaction Books.

Cuban, L. (1992). Curriculum stability and change. In P. Jackson (Ed.), *Handbook of research on curriculum* (pp. 216–247). New York: Macmillan.

Doyle, W. E. (1977). Social science evidence in the courts. In R. C. Rist & R. J. Anson (Eds.), *Education, social science, and the judicial process* (pp. 10–19). New York: Teachers College Press.

Edgewood Independent School District. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

Elmore, R. F., & McLaughlin, M. W. (1988). *Steady work: Policy, practice, and the reform of American education.* Santa Monica, CA: RAND.

Epps, E. G. (1977). Impact of school desegregation on aspirations, self-concepts and other aspects of personality. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 300–313). New Brunswick, NJ: Transaction Books.

Farley, R. (1977). Residential segregation and its implications for school integration. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 164–193). New Brunswick, NJ: Transaction Books.

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

Fullan, M. G.,& Miles, M. B. (1992). Getting reform right: What works and what doesn't. *Phi Delta Kappan, 73,* 745–752.

Fulwood, S. (1991, January 1). Attitudes on minorities in conflict. *Los Angeles Times,* sec. A, p. 1.

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

Goodlad, J. I. (Ed.). (1989) *Access to knowledge.* New York: College Entrance Exam Board.

Goss v. Lopez, 419 U.S. 565 (1975).

Gould, S. J. (1981). *The mismeasure of man.* New York: Norton.

Green v. County School Board, 391 U.S. 430 (1968).

Hamilton, A. (1892). Federalist No. 78. In J. C. Hamilton (Ed.), *The Federalist: A commentary of the Constitution by Alexander Hamilton, Jay and Madison.* Philadelphia: Lippincott.

Hawley, W. D., & Rist, R. C. (1977). On the future implementation of school desegregation: Some considerations. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 412–426). New Brunswick, NJ: Transaction Books.

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

Keyes v. School District No. 1, 413 U.S. 189 (1973).

Keyes v. School District No. 1, 521 F. 2d 465 (10th Cir. 1975).

Levin, H. M. (1977). Education, life chances, and the courts: The role of social science evidence. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 217–240). New Brunswick, NJ: Transaction Books.

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803).

McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545, 615 N.E.2d 516 (1993).

McNeal v. Tate County School District, 508 F. 2d 1017 (5th Cir. 1975).

Meier, K. J., Stewert, J. J., & England, R. E. (1989). *Race, class, and education: The politics of second-generation discrimination.* Madison: University of Wisconsin Press.

Missouri v. Jenkins, 115 S.Ct.2038 (1995).

Montgomery v. Starkville Municipal Separate School District., 665 F.Supp. 487 (N.D. Miss. 1987).

Moore, D., & Davenport, S. (1988). *The new improved sorting machine.* Madison, WI: National Center on Effective Secondary Schools.

Moses v. Washington Parish School Board, 456 F. 2d 1285 (5th Cir. 1972).

Murphy, J., & Hallinger, P. (1989). Equity as access to learning: Curricular and instructional treatment differences. *Journal of Curricular Studies, 21*(2), 129–149.

National Center for Educational Statistics. (1985). *High school and beyond: An analysis of course-taking patterns in secondary schools as related to student characteristics.* Washington, DC: U.S. Government Printing Office.

National Governors Association. (1993). *Ability grouping and tracking: Current issues and concerns.* Washington, DC: National Governors Association.

Oakes, J. (1985). *Keeping track: How schools structure inequality.* New Haven, CT: Yale University Press.

Oakes, J. (1990). *Multiplying inequalities: The effects of race, class, and tracking on opportunities to learn math and science.* Santa Monica: RAND.

Oakes, J. (1992). Can tracking research inform practice? Technical, normative, and political considerations. *Educational Researcher, 21*(4), 12–21.

Oakes, J. (1995). Two cities' tracking and within-school segregation. *Teachers College Record, 96,* 681–690.

Oakes, J., Gamoran, A., & Page, R. (1992). Curriculum differentiation: Opportunities, outcomes, and meanings. In P. Jackson (Ed.), *Handbook of research on curriculum* (pp. 570–608). New York: Macmillan.

Oakes, J., Welner, K., Yonezawa, S., & Allen, R. (in press). Norms and politics of equity-minded change: Researching the "zone of mediation." In M. Fullan & D. Hopkins (Eds.), *International handbook of educational change.* New York: Macmillan.

People Who Care v. Rockford Board of Education School District No. 205, 851 F.Supp. 905 (N.D. Ill. 1994).

Quarles v. Oxford Municipal Separate School District., 868 F.2d 750 (5th Cir. 1989).

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

Serrano v. Priest, 18 Cal.3d 728 (1976).

Simmons on Behalf of Simmons v. Hooks, 843 F.Supp. 1296 (E.D. Ark. 1994).

Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), vacated in part and reversed in part sub nom. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970).

Sirotnik, K. A., & Oakes, J. (1990). Evaluation as critical inquiry: School improvement as a case in point, *New Directions for Program Evaluation, 45,* 37–59.

Slavin, R. (1987). Ability grouping and its alternatives: Must we track? *American Educator 11*(2), 32–36, 46–48.

Teaching inequality: The problem of public school tracking. (1989). *Harvard Law Review, 102,* 1318.

Terman, L. (1923). *Intelligence tests and school reorganization.* New York: World Book.

Tyack, D. (1974). *The one best system.* Cambridge, MA: Harvard University Press.

United States Constitution, Amendment XIV.

United States v. Board of Education of Lincoln County, 301 F.Supp. 1024 (S.D. Ga. 1969).

United States v. Tunica County School District., 421 F.2d 1236 (5th Cir. 1970), cert. denied, 398 U.S. 951 (1970).

Vasquez v. San Jose Unified School District (N.D. Cal. 1994), unpublished stipulation, case no. C-71-2130.

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

Weinberg, M. (1977). The relationship between school desegregation and academic achievement: A review of the research. In B. Levin & W. D. Hawley (Eds.), *The courts, social science, and school desegregation* (pp. 241–270). New Brunswick, NJ: Transaction Books.

Wells, A. S., & Crain, R. L. (1994). Perpetuation theory and the long-term effects of school desegregation. *Review of Educational Research, 64,* 531.

Wells, A. S., & Serna, I. (1996). The politics of culture: Understanding local political resistance to detracking in racially mixed schools. *Harvard Educational Review, 66,* 93–118.

Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Wise, A. (1977). Why educational policies often fail: The hyperrationalization hypothesis. *Curriculum Studies, 9,* 43–57.

Wolf, E. P. (1977). Courtrooms and classrooms. In R. C. Rist & R. J. Anson (Eds.), *Education, social science, and the judicial process* (pp. 97–124). New York: Teachers College Press.