

ACCESS DENIED: TRACKING AS A MODERN ROADBLOCK TO EQUAL EDUCATIONAL OPPORTUNITY

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It has been more than sixty years since Brown v. Board of Education, and our country still presents children with dual and unequal systems of education. Not only are students segregated between school districts, but segregation is happening within school buildings as well as through tracking. Tracking is the process by which students are placed into higher or lower subject-specific courses such as math or science—sometimes as early as elementary school—based on their perceived abilities. This practice prohibits many students from accessing high-level courses. Courses such as Advanced Placement (AP) and honors classes have become indispensable for applying to college, but under a tracked system, if students do not take advanced classes in middle school, they will likely not be able to take advanced courses before graduating high school. Proponents of tracking argue that it is an efficient model of education that allows students to learn based on their skill level, but research shows that students are tracked along racial and class lines rather than on “ability.” Tracking causes both academic and psychological harm to students in lower tracks, and the opportunities students in higher tracks receive, as opposed to their innate intellectual abilities, are what cause them to succeed. In this Note, I argue that tracking is an inherently inequitable system that should be abolished since it denies so many students the resources, learning opportunities, and access to higher-level courses needed to succeed in today’s society. The legal tools that have been employed to dismantle this system under federal law—the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act—have had limited success, so this Note points to state law as a possible solution. State constitutions contain educational mandates and equal protection clauses that together require states to provide children with an equal educational opportunity. Under this doctrine, many courts have established that states must provide students with the opportunity to gain the skills necessary to compete in a changing society. Although state equal educational opportunity litigation has primarily occurred in the school finance context, this legal tool could be extended to tracking. A finding that tracking violates a student’s right to an equal educational opportunity would require school districts to detrack and open the door so that all students, regardless of race, class, or parental influence, have the opportunity to succeed.

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INTRODUCTION	904
I. THE PROBLEMS WITH TRACKING	910
A. <i>Students Are Tracked Along Racial and Class Lines, Not Ability</i>	911
B. <i>The Academic and Psychological Harm of Lower Tracks</i>	915
C. <i>Debunking the Educational Necessity of Tracking</i> ...	918
II. UNSUCCESSFUL LEGAL CHALLENGES TO TRACKING	922
A. <i>Tracking Under Equal Protection</i>	923
B. <i>Tracking Under Title VI</i>	925
III. TRACKING AS AN EQUAL EDUCATIONAL OPPORTUNITY VIOLATION.....	929
A. <i>History of Equal Educational Opportunity Claims</i> ..	929
B. <i>Applying Tracking to the Equal Educational Opportunity Framework</i>	932
C. <i>Challenges with an Equal Educational Opportunity Claim</i>	937
D. <i>Detracking in Practice</i>	938
CONCLUSION	939

INTRODUCTION

“I went to Back-to-School night when my daughter was in fourth grade, and was quite pleased with the teacher and rich mix of parents in the room. Then the bell rang to send us to our children’s math and science class. All of the white parents got up and went in one direction and all the parents of color went in the other. My mouth dropped. I thought, ‘This can’t be happening in Montgomery County.’ I later discovered that all the white parents had been on their way to the [gifted and talented] science classroom.” —Anonymous Parent¹

“Now we arrive at the point—in 2014—where you can literally walk down a hallway in Columbia High School and look in a classroom and know whether it’s an upper-level class or a lower-level class based on the racial composition of the classroom.” —Walter Fields²

¹ MONTGOMERY CTY. EDUC. FORUM, SUCCESS FOR EVERY STUDENT? TRACKING AND THE ACHIEVEMENT GAP 7 (2002), <http://www.mcef.org/Position%20Paper%20PDF.pdf>.

² Sonali Kholi, *Modern-Day Segregation in Public Schools*, ATLANTIC (Nov. 18, 2014), <http://www.theatlantic.com/education/archive/2014/11/modern-day-segregation-in-public-schools/382846/>. Walter Fields is a New Jersey parent whose African-American daughter was denied entry to an upper-level high school freshman mathematics course. He joined the ACLU lawsuit against the South Orange and Maplewood School District. *See id.*

The School District of South Orange & Maplewood is a suburban district in Essex County, New Jersey with a diverse population.³ Much like any other suburban school district, it offers its students a wide range of opportunities, including Advanced Placement (AP) and honors courses, International Baccalaureate (IB) programs, Enrichment Programs, career-ready programs, and dual enrollment courses.⁴ But which students are actually able to take advantage of those opportunities? In 2014, the Department of Education Office of Civil Rights (“OCR”) found that the district’s tracking practices resulted in the gross underrepresentation of African-American students in these higher-level learning programs.⁵ At the elementary level, while white students made up only 54% of fifth grade students, they represented 82% of the students enrolled in the fifth grade math Enrichment Program.⁶ At the secondary education level, while Black students made up 51.5% of the high school and 42.9% of the middle school populations, only 18.7% were enrolled in AP learning opportunities and 11.7% in the middle school advanced math courses.⁷

This problem is not unique to Essex County. School districts across the nation continue to track, and many have even started tracking students at younger ages in response to the No Child Left Behind Act.⁸ Historically, tracking was the practice of segregating students based on perceived ability into “hard tracks,” such as advanced, vocational, and remedial tracks, where students would only take courses associated with their track and were limited in their future

³ See Letter from Timothy C. J. Blanchard, Dir. of N.Y. Office, U.S. Dep’t of Educ. Office for Civil Rights, to James G. Memoli, Acting Superintendent, Sch. Dist. of South Orange & Maplewood (Oct. 28, 2014) (on file with author) (“According to the data the District provided, as of June 2013, the District had a total of 6,622 students, 2,493 (37.65%) of whom were African American and 3,255 (49.15%) were white.”).

⁴ See *id.* (“OCR reviewed information regarding the District’s high school higher level learning opportunities, which consist of honors courses, AP courses, career-ready programs, and dual enrollment programs . . .”). OCR also reviewed the District’s International Baccalaureate (IB) Middle Years Program. See *id.*

⁵ See *id.* (“OCR determined that there is a statistically significant underrepresentation of African American students in the District’s high school AP courses.”).

⁶ *Id.*

⁷ *Id.*

⁸ See TOM LOVELESS, BROWN CTR. ON EDUC. POLICY AT BROOKINGS, THE 2013 BROWN CENTER REPORT ON AMERICAN EDUCATION: HOW WELL ARE AMERICAN STUDENTS LEARNING? 18 (2013) (presenting National Association Educational Progress data on tracking from 1990 to 2011 and finding that “it has remained commonplace in eighth-grade mathematics for the past two decades, with about three-fourths of students enrolled in distinct ability-level math classes”); Kholi, *supra* note 2 (“The No Child Left Behind Act of 2001 . . . prompted many schools to separate out children who were behind so they could provide targeted instruction. This led to an increase in de facto tracking in younger grades . . .”).

opportunities.⁹ Today, tracking is “subject-based,” where “a student might be in remedial math but regular English.”¹⁰ While less overt than “hard tracking,” the negative impacts new-age tracking can have on students are just as troubling. Tracking prohibits many students from accessing high-level courses, especially when they are tracked from a young age.¹¹ Courses such as AP and honors classes have become indispensable for applying to college,¹² but under a tracked system, if students do not take advanced classes in middle school, they will likely not be able to take advanced courses before graduating high school.¹³ While states have generally held that the education system must present all students with the opportunity to achieve their maximum potential and have a realistic chance to compete in today’s society,¹⁴ tracking limits those opportunities to a select few.

In this Note, I argue that tracking is an inherently inequitable system that should be abolished. By denying so many students the resources, learning opportunities, and access to higher-level courses needed to succeed in today’s society, tracking subverts the underlying purpose of education,¹⁵ as well as the Court’s conclusion in *Brown*

⁹ See Maureen T. Hallinan, *The Detracking Movement: Why Children Are Still Grouped by Ability*, 4 EDUC. NEXT 72, 73 (Fall 2004) (“In the early days of tracking, junior-high and high-school students were assigned to academic, general, or vocational tracks.”).

¹⁰ Jessica Kelson, *Is Your Child Being Tracked in Math?*, GREATSCHOOLS (Apr. 5, 2018), <https://www.greatschools.org/gk/articles/algebra-middle-school-math-track/>.

¹¹ See, e.g., Carol Corbett Burrell & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, 86 PHI DELTA KAPPAN 594, 596 (2005) (describing how in the Rockville Centre School District in Long Island “[w]hile high-track students enrolled in trigonometry and advanced algebra in the 10th grade, low-track students did not even begin first-year algebra until grade 10”); see also *infra* notes 70–73 and accompanying text (describing how early placements in lower tracks often foreclose students from ever having the ability to take higher-level courses).

¹² See *Honors & AP Courses*, COLLEGEBOARD, <https://professionals.collegeboard.org/guidance/prepare/honors-ap> (last visited June 1, 2018) (“The National Association for College Admission Counseling’s (NACAC) annual State of College Admissions survey consistently finds that student performance in college preparatory classes is the most important factor in the admission decision.”); see also *infra* notes 61–63 and accompanying text.

¹³ See, e.g., SHARON J. LYNCH, EQUITY AND SCIENCE EDUCATION REFORM 160–61 (2000) (describing how “variations in course selection of gateway science and math courses (e.g., chemistry, geometry, etc.) for females and underrepresented groups result in these students being locked out of upper level courses”); see also *infra* notes 66–70 and accompanying text.

¹⁴ See *infra* notes 155–64 and accompanying text (discussing states that have defined the educational mandate in terms of a student’s ability to compete in modern society).

¹⁵ See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 117 (1995) (reiterating the Court’s claim in *Brown* that education “is a principal instrument in awakening the child to cultural values, [and] in preparing him for later professional training”); David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*,

that education is a “right which must be made available to all on equal terms.”¹⁶ It is unacceptable that our society tolerates a system that limits the educational opportunities of minority children by disproportionately relegating them to lower tracks. But even assuming it were possible to get more minority representation in higher-level classes by using more “objective” criteria to track, tracking would still remain a serious issue.¹⁷ The very system of tracking, whether conducted in a racially discriminatory manner or not, is inequitable since it disadvantages *all* students in lower tracks by denying them access to the educational opportunities necessary to succeed and have a realistic chance to compete.¹⁸

In order to provide equitable educational opportunities for all students, school districts must abolish tracking and replace it with a detracked system, such as the one adopted in the Rockville School District. That district offers the advanced-track curriculum to all students from sixth through tenth grade, ensuring that all students have the tools necessary to opt into AP and honors courses beginning in the eleventh grade.¹⁹ By detracking, Rockville was able to provide all students with “the accelerated math curriculum formerly reserved for the district’s highest achievers,”²⁰ and the district has seen dramatic increases in the number of minority students enrolling in eleventh grade AP and IB courses and passing the New York State Regents exams.²¹

2014 MICH. ST. L. REV. 575, 576 (2014) (“A quality education is often seen as the potential equalizer in the pursuit of the ‘American Dream’ between the ‘haves’ and the ‘have-nots.’”).

¹⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁷ See *infra* Section I.B (describing the psychological harms of tracking that would not be solved with a more “objective” way of tracking since it still sends the message to students that they are “high” or “low” learners, and explaining why “objective” track placement is not a possibility). Education is also currently used as a positional good, so the very existence of high and low classes automatically designates some students as winners or losers and often sets the trajectory for the rest of their academic careers. See *infra* notes 81–84 and accompanying text.

¹⁸ See *infra* Sections I.B–I.C for a discussion on the harms of tracking that cannot be remedied with more minority representation.

¹⁹ See *Burris & Welner, supra* note 11, at 596–98. The district’s decision to voluntarily detrack stemmed from a goal set by the district’s superintendent, William Johnson, and the Rockville Centre Board of Education in 1993 that “[b]y the year 2000, 75% of all graduates will earn a New York State Regents diploma.” *Id.* at 595. In order to earn such a diploma, students must pass at least eight Regents examinations including two math examinations. *Id.* What the superintendent found, however, was that students in low tracks were unlikely to take two math Regents exams since they did not even take algebra until tenth grade. See *id.* at 596.

²⁰ *Id.*

²¹ See *id.* at 597–98 (indicating that African-American and Hispanic students went from a 32% Regents diploma attainment rate to 82% after the district was detracked; and that

Although the Rockville School District made the decision to voluntarily detrack, that has not been the norm across the country.²² Most school districts are unlikely to detrack on their own initiative, given the pushback from “elite” parents, i.e., those with higher educational and socio-economic status who tend to vehemently oppose detracking.²³ In these districts, a legal remedy is the most likely avenue for relief. Unfortunately, the legal tools that have been employed to dismantle this system, the federal Equal Protection Clause and Title VI, have had limited success due largely to the heightened intent requirement for Equal Protection and private Title VI claims.²⁴

Scholars that have weighed in on the issue of tracking have proposed how it could be abolished under the current federal frameworks. One commentator argues that “academic tracking constitutes de jure segregation” and thus should fail under an Equal Protection analysis.²⁵ Another argues that education should indeed be considered a fundamental right under the Constitution, and tracking would then likely fail under Equal Protection strict scrutiny analysis.²⁶

the enrollment gap between minority and white students for AP Calculus decreased from 38% to 18% after detracking).

²² See LOVELESS, *supra* note 8, at 15, 17–18 (describing how despite the pushback against tracking in the 1990s, tracking has resurged in the 2000s and continues to be a major force, with over 75% of students enrolled in tracked math classes from 2007 to 2011). Factors that led to this resurgence and prevent school districts from detracking include accountability systems like No Child Left Behind that justify grouping low-performing students in order to provide targeted assistance, and teachers’ reluctance to teach heterogeneous classes. See *id.* at 20.

²³ See Bruce J. Biddle, *Poverty, Ethnicity, and Achievement in American Schools*, in SOCIAL CLASS, POVERTY, AND EDUCATION: POLICY AND PRACTICE 1, 21 (Bruce J. Biddle ed., 2001) (“Parents who are wealthy may favor policies—such as tracking systems . . . —that provide extra services for ‘more deserving’ students and will often become advocates for those policies or will seek election to school boards to promote them.”); Mary Hatwood Futrell & Joel Gomez, *How Tracking Creates a Poverty of Learning*, EDUC. LEADERSHIP, May 2008, at 75–76, <http://www.ascd.org/publications/educational-leadership/may08/vol65/num08/How-Tracking-Creates-a-Poverty-of-Learning.aspx> (discussing how “stakeholders who want to protect the privileged place their children enjoy in the current system” have resisted efforts to detrack); Alfie Kohn, *Only for My Kid: How Privileged Parents Undermine School Reform*, 79 PHI DELTA KAPPAN 569, 569–71 (1998) (describing how “the affluent parents of successful students, those whose political power is substantial to begin with” are “not concerned that all children learn; they are concerned that *their* children learn”).

²⁴ See *infra* Part II and accompanying text (describing how tracking has fared under the Equal Protection and Title VI frameworks).

²⁵ See Danielle Kasten, Note, *Modern Day School Segregation: Equity, Excellence, & Equal Protection*, 87 ST. JOHN’S L. REV. 201, 203 (2013).

²⁶ 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, 470–71 (1996).

Unless the Supreme Court changes its analysis of tracking to align with these proposals, however, a federal remedy remains unlikely.

Combatting tracking requires a new strategy, and this Note argues that the equal educational opportunity framework under state constitutional law is a possible solution. State equal educational opportunity litigation, which has been utilized as a legal tool for change in the school finance context,²⁷ could be extended to tracking. Equal educational opportunity jurisprudence has established that education must provide all students with the opportunity to gain the skills necessary to compete in a changing society.²⁸

This Note proposes that since tracking works as a hierarchal system in which students in lower tracks are foreclosed from ever being able to access the higher-level courses, pedagogy, and resources necessary to have a meaningful chance to compete in society, it violates a student's right to equal educational opportunity *regardless* of whether that student is able to meet the minimum learning standards set by the state. The strength of this strategy will vary based on how the court interprets an "equal educational opportunity," but if successful, it will provide a preferable remedy to a lawsuit alleging violation of Title VI or Equal Protection since it abolishes tracking entirely and places an affirmative duty on states to ensure that all students have meaningful access to the highest-level courses.

Part I of this Note analyzes the research that has been developed over the past three decades regarding tracking—research that debunks many of the mistakenly-held beliefs about tracking being an efficient model of education.²⁹ Part II explores two legal tools which have been used to address tracking under federal law—federal Equal

²⁷ See William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 557–60 (2006) (describing how state equal educational opportunity claims generated the "second wave" of school finance litigation).

²⁸ See *infra* notes 167–75 and accompanying text (discussing how various state courts have interpreted the equal educational opportunity requirement in terms of ability to compete). Kevin Welner discusses how the development of more rigorous state educational standards could lead to an equal educational opportunity claim because tracking undermines students' opportunities to learn at the level required under those state standards. See Kevin G. Welner, *Tracking in an Era of Standards: Low-Expectation Classes Meet High-Expectation Laws*, 28 HASTINGS CONST. L.Q. 699, 732 (2001) ("Such claims would build on states' own adopted standards, arguing to the court that schools now have a clear obligation to give every eligible student an opportunity to learn the curriculum designated and assessed by the state.").

²⁹ See George Ansalone, *Keeping on Track: A Reassessment of Tracking in the Schools*, 7 RACE, GENDER & CLASS 108, 111–12 (2000) (describing the view that since "school resources are limited, tracking is seen as the most efficient means of increasing cognitive achievement of students whatever their abilities" and that tracking allows students to "advance at an appropriate pace with students of similar ability" so that teachers would not

Protection and Title VI—and the limitations of each. Part III suggests that advocates use the state equal educational opportunity doctrine to bring claims against tracking, and analyzes how such claims might fare under that framework.

I

THE PROBLEMS WITH TRACKING

Tracking has a history rooted in racial bias and segregation.³⁰ In the 1910s and 1920s, during the height of the eugenics movement—when “science” was used to promote white supremacy³¹—tracking first developed in the United States in response to the introduction of testing that purportedly “could scientifically measure the abilities of all students and rank them accordingly.”³² The practice declined between 1935 and 1955 due to studies that showed the negative effects of tracking and its lack of effectiveness.³³ Following the desegregation mandate in *Brown v. Board of Education*, however, tracking resurged as a tool for school districts to maintain a system of separate education.³⁴ Students were grouped into hard tracks (such as academic tracks, general tracks, or vocational tracks) that dictated their course offerings and subsequent life opportunities.³⁵ Minority and immigrant children were disproportionately placed in the vocational tracks, while the academic, “college preparatory” courses were predominantly reserved for white children.³⁶

have to teach at an “average” level and not adequately reach the “slow” or “gifted” students).

³⁰ See generally Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1320–23 (1989) [hereinafter *Teaching Inequality*] (describing the history of tracking and how it has historically been used to advance and preserve a racial hierarchy).

³¹ See FACING HISTORY & OURSELVES NAT’L FOUND., RACE AND MEMBERSHIP IN AMERICAN HISTORY: THE EUGENICS MOVEMENT x (2002) (describing an era when many people “used a new branch of scientific inquiry known as eugenics to justify their prejudices and advocate programs and policies aimed at solving the nation’s problems by ridding society of ‘inferior racial traits’”).

³² *Teaching Inequality*, *supra* note 30, at 1322.

³³ *Id.* at 1323 (“In the late 1930’s, interest in tracking waned as educators responded to studies showing little or no achievement gains from ability grouping and to arguments that low placements could have negative effects on students.”).

³⁴ See *id.* (“Many southern school districts adopted tracking as a means of circumventing desegregation orders.”); Dickens, *supra* note 26, at 472.

³⁵ See Hallinan, *supra* note 9, at 73 (“At one extreme students were being groomed for college, while at the other they prepared to enter trades such as plumbing or secretarial work.”).

³⁶ See Kasten, *supra* note 25, at 207 (“Remedial and vocational education was considered most appropriate for minorities and immigrants, while college preparatory courses were considered appropriate for Anglo-American whites.”); see also Dickens, *supra* note 26, at 472 (“[A] study of . . . eighteen different school districts . . . [revealed]

Today, tracking takes on a different form. Instead of assigning students to “hard” tracks, schools now track students within specific subjects.³⁷ For instance, a student can be assigned to an advanced, regular, or remedial math course based on factors such as test scores and teacher recommendations.³⁸ Despite these attempts to improve the tracking system, tracking continues to operate in the shadow of its history of racial discrimination by segregating students. The research below (1) shows that students are tracked along racial and class lines, not ability; (2) highlights the academic and psychological harms of lower tracks; and (3) debunks the educational necessity of tracking. Under the current system, a “gifted” student has become synonymous with a “privileged” student, and parents with more social capital are able to ensure their children are placed in higher tracks with access to the best opportunities.³⁹ By continuing to provide a dual and unequal system of education, tracking is depriving many of our students of an equal educational opportunity, and it should not have a place in our society.

A. Students Are Tracked Along Racial and Class Lines, Not Ability

“Many schools that appear integrated from the outside are highly segregated within.”⁴⁰ This claim was made in 1997 in reference to Central High School, the historic “Little Rock Nine” school, which at the time was celebrating its fortieth anniversary of being one of the first schools to integrate after *Brown*.⁴¹ Based on the racial demographics of the school alone, the celebration made sense. But one look into the actual classrooms within the school reveals that segregation is still very much alive at Central High, with the majority of the students in homogenous classrooms. Despite the fact that the school is composed of roughly 57% Black, 31% white, and 8% Asian

evidence that the use of tracking and ability grouping increased as a result of court-required desegregation plans. The influx of African-American students into previously segregated school systems was also linked with placement of these students in lower educational tracks.”).

³⁷ See Hallinan, *supra* note 9, at 74 (“[T]racking in its modern form has come to mean grouping students by ability within subjects.”).

³⁸ See CAROL CORBETT BURRIS & DELIA T. GARRITY, *DETRACKING FOR EXCELLENCE AND EQUITY* 16 (2008) (describing how some schools track based on “IQ and early achievement tests” and others track based on “teacher recommendations, grades, and student motivation”).

³⁹ See *infra* note 56 and accompanying text; see also *supra* note 23 and accompanying text.

⁴⁰ Julian E. Barnes, *Segregation, Now: Forty Years After the Forced Integration of Little Rock's Central High School, Honors Classes Separate Black Students from White*, U.S. NEWS & WORLD REP. 22 (Sept. 1997).

⁴¹ See *id.*

students, only 16% of Black students are enrolled in an AP course compared to 71% of Asian students and 59% of white students.⁴² This phenomenon is found in “virtually all racially mixed secondary schools” with “mostly White and Asian students in the high academic tracks and mostly African American and Latino students in the low tracks.”⁴³

What is causing this disparity? The research shows that it is not based on ability. The problem is two-fold. On the one hand, standardized tests are not accurate measures of intellectual ability, especially for marginalized groups.⁴⁴ Standardized tests such as IQ tests, which are often part of the decisionmaking process in tracking students,⁴⁵ have been found to be biased along racial and class lines.⁴⁶ Since these tests tend to be normed off of the majority (i.e., white) population, their validity and reliability for “individuals of different cultural or linguistic groups who were not included in the standardization group are questionable.”⁴⁷ For instance, studies have shown that on the verbal section of the SAT, the use of “cultural expressions that are

⁴² See *Central High School in Little Rock, Arkansas*, STARTCLASS (last visited Oct. 21, 2017) (on file with author).

⁴³ See Amy Stuart Wells & Irene Serna, *The Politics of Culture: Understanding Local Political Resistance to Detracking in Racially Mixed Schools*, 66 HARV. EDUC. REV. 93, 96 (1996); see also Sean Kelly, *The Contours of Tracking in North Carolina*, 90 HIGH SCH. J. 15, 16 (2007) (“Recent evidence from North Carolina shows that by the 10th grade, around half of the total racial segregation among students is due to segregation within schools.”) (citation omitted).

⁴⁴ See generally Amado M. Padilla, *Issues in Culturally Appropriate Assessment*, in HANDBOOK OF MULTICULTURAL ASSESSMENT: CLINICAL, PSYCHOLOGICAL, AND EDUCATIONAL APPLICATIONS 5, 5 (2d ed. 2001) (explaining that instruments, such as standardized tests, “normed on majority group populations or developed using Eurocentric approaches cannot be indiscriminately used with individuals who differ from the normative population”).

⁴⁵ See Daniel J. Losen, Note, *Silent Segregation in Our Nation’s Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 519 (1999) (“Many schools still track students primarily on the basis of test scores, but generally schools combine standardized tests and grade point averages.”).

⁴⁶ See Padilla, *supra* note 44, at 8 (“Research results have shown that because of varying cultural backgrounds, approximately five million students are inappropriately tested each year by standardized assessment instruments—including standardized achievement tests.”); see also *How Standardized Testing Damages Education*, FAIRTEST (last updated July 2012), <https://fairtest.org/how-standardized-testing-damages-education-pdf> (discussing how while standardized tests are used to track students, tests such as “[h]igh school graduation tests, used by 25 states, disproportionately penalize low-income and minority students, along with English language learners and the disabled”).

⁴⁷ See Padilla, *supra* note 44, at 6; Kyung Hee Kim & Darya Zabelina, *Cultural Bias in Assessment: Can Creativity Assessment Help?*, 6 INT’L J. CRITICAL PEDAGOGY 129, 130 (2015) (“In general, most tests are normed using the scores of majority group populations If the cultural or linguistic backgrounds of the individuals being tested are not adequately represented in the norming group, the validity and reliability of the test are questionable when used with such individuals.” (citation omitted)).

used commonly in the dominant (white) society,” give white students an edge, resulting in a racial gap between white and Black students of similar educational background and skill.⁴⁸ Experts have also found that the criteria used to measure intelligence and achievement are often “extremely biased toward the subjective experience and ways of knowing of elite students,” who have the ability to travel on family vacations and gain experiences and knowledge that are considered valuable in mainstream education, causing them to be “perceived to be more ‘intelligent’ than other students.”⁴⁹

African Americans and other marginalized groups also tend to experience stereotype threat when taking standardized exams. Stereotype threat is a phenomenon where, “when working on difficult material . . . understood to be ability diagnostic, [individuals] encounter[] the extra pressure of the stereotype” associated with their group.⁵⁰ Regardless of a student’s skills, capacities, motivation, or expectations to succeed, pressure to overcome a stigma about their group’s intellectual ability adds an additional burden on that student, which lowers performance.⁵¹ Moreover, to perform well on a standardized exam, a student must have not only explicit knowledge, but also the implicit knowledge of *how* to sit down and take the exam.⁵² Students from a

⁴⁸ See Scott Jaschik, *New Evidence of Racial Bias on SAT*, INSIDE HIGHER ED (June 21, 2010, 3:00 AM), <https://www.insidehighered.com/news/2010/06/21/new-evidence-racial-bias-sat>. Also, the different associations and interpretations various groups have on words such as “goals,” “desires,” “valuable,” “justice,” “progress,” “society,” and “class,” explain why African Americans do disproportionately worse on these types of analogy and antonym questions on SAT tests. See Roy O. Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1, 7 (2003). These studies indicate that minority students tend to do differentially worse on “easy” items of the SAT, since those items “use cues that introduce sufficient ambiguity of interpretation,” but the exact opposite phenomenon happens with “hard” problems, with African Americans responding differentially better when compared to matched-ability white students. *Id.* at 20. Unfortunately, minority students lose so many points on the “easy” questions that it is impossible for them to “regain sufficient ground when responding to the hard items to show their true ability.” *Id.*

⁴⁹ Wells & Serna, *supra* note 43, at 97.

⁵⁰ See CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 58 (2010).

⁵¹ See *id.* at 48–54 (describing a study conducted by Steele that showed Black students performing better when others’ views regarding their intelligence were not at stake). Claude Steele carried out a study where Black and white Stanford students of similar skill levels were asked to complete a difficult verbal section of the GRE. He found that white students outperformed Black students by getting an average of four or more answers correct. *Id.* However, when the stigma was eliminated by telling Black participants that the test was measuring problem solving strategies, rather than intellectual ability, Black students performed at the same level as white students. *Id.*

⁵² See Ansalone, *supra* note 29, at 126 (“While very explicit knowledge is required to answer questions on an IQ test, many social scientists agree that a student must also possess a high degree of implicit knowledge.”).

higher socioeconomic status tend to gain these problem-solving and critical thinking skills from their experiences and are deemed more “intelligent,” when in reality these skills can be learned.⁵³

Even when students are able to overcome stereotype threat and perform well on these exams, they still are not placed in higher classes. For instance, Preliminary SAT test scores from 2012 found that while 60% of Asian students who exhibited “AP readiness” went on to take AP math, only 30% of African-American students who exhibited the same readiness enrolled in an AP math course.⁵⁴ This indicates that a selection bias is occurring with respect to teacher recommendations and parental influence, keeping students who test at a high level out of high-level courses. Wells and Serna conducted a study on the detracking efforts of ten racially and socio-economically mixed schools and found that, at one school, some students identified as “non-gifted” scored in the 90th percentile while some students identified as “gifted” only scored in the 58th percentile.⁵⁵ This occurs largely because parents with elite status are able to use their social capital to get students who did not qualify for high-track programs into the high track anyway.⁵⁶ As a result, “students frequently end up

⁵³ See *id.* (describing how lower-class groups are at a disadvantage when they do not enter schools with these skills). Elite students also tend to benefit from test preparation and tutoring services that their parents can afford to provide, demonstrating that it is their access to opportunities, rather than their innate intellectual abilities, that is getting them ahead. See Michael Godsey, *The Inequality in Public Schools*, ATLANTIC (June 15, 2015), <https://www.theatlantic.com/education/archive/2015/06/inequality-public-schools/395876/> (discussing the disparities that occur when elite parents are able to purchase their children “private tutors or test-prep courses”).

⁵⁴ See COLLEGE BOARD, *THE 9TH ANNUAL AP REPORT TO THE NATION 2–3* (2013). Under this study of more than 300,000 students, a student was designated “AP ready” if she had a 60% or higher likelihood of success in an AP subject based off of her PSAT score. *Id.* at 2.

⁵⁵ See Wells & Serna, *supra* note 43, at 93, 105; Henry M. Levin, *On the Relationship Between Poverty and Curriculum*, 85 N.C. L. REV. 1381, 1401 (2007) (“[T]he overall system of social class stratification by specific course has been retained, largely because of the proactive role of middle class parents insisting that their children be placed in the higher-level courses despite lower placements recommended on the basis of official criteria.”).

⁵⁶ See ALAN R. SADOVNIK ET AL., *EXPLORING EDUCATION: AN INTRODUCTION TO THE FOUNDATIONS OF EDUCATION* 185 (Routledge 5th ed. 2018) (“[W]hen children of the elite who were identified as ‘highly able’ in elementary school did not make the test score cutoffs for high school honors classes, the parents found ways to get their children placed in these classes anyway . . .”); Rachel Leventhal-Weiner, *Affluent Children*, in *SOCIOLOGY OF EDUCATION: AN A-TO-Z GUIDE* 21 (2013) (“In adolescence, high schools are more likely to track affluent children into college preparatory courses. Affluent parents unhappy with their children’s placement in school will challenge authority, pushing schools to reconsider their assignments.”).

in particular tracks and classrooms more on the basis of their parents' privilege than of their own 'ability.'"⁵⁷

Teacher recommendations work in conjunction with parental influence to disproportionately keep minority and lower-class students out of accelerated programs. Teacher bias, whether implicit or explicit, often derives from stereotypes that "label minority students as slow learners and condemn them to lower educational tracks."⁵⁸ Teachers also tend to sort students based on "cultural norms" such as "language, dress, and behavior," which favor higher class, white students over minority or lower-class students.⁵⁹ In some cases, vague requirements such as "high level of self-motivation" and "inquisitive mind" further exacerbate teacher bias, resulting in a condition where "it may feel as if gaining entry into [advanced] courses [is] like gaining entry into an elite country club."⁶⁰

Teacher stereotypes, parental influence, and biased standardized testing have operated hand-in-hand to disproportionately place minority students in lower academic tracks. But what happens to these students once they are in those lower tracks? Part I.B explains that not only are these students subjected to inferior curriculums, teachers, resources, and academic opportunities, but they are also harmed on a deeper psychological level.

B. The Academic and Psychological Harm of Lower Tracks

Most people would agree that students in lower tracks are not allowed to tap into the same academic potential as students in advanced tracks, but they may be surprised by just how damaging and long-lasting the consequences of being placed in a lower track can be. First, in a society that grows more competitive each year, taking Advanced Placement and honors courses in secondary school has become a vital factor for acceptance into four-year colleges and uni-

⁵⁷ Wells & Serna, *supra* note 43, at 104 (arriving at this conclusion from their assessment of ten schools).

⁵⁸ See Dickens, *supra* note 26, at 475–76. Studies have also found that when teachers are presented with students who have the same academic profile, "students with immigrant backgrounds were judged as less academically competent." See Sabine Glock et al., *Beyond Judgment Bias: How Students' Ethnicity and Academic Profile Consistency Influence Teachers' Tracking Judgments*, 16 SOC. PSYCHOL. EDUC. 555, 556 (2013).

⁵⁹ See Ansalone, *supra* note 29, at 127.

⁶⁰ See Kelly, *supra* note 43, at 23–24. Studies have shown that "whites tend to evaluate African Americans less favorably than whites on subjective dimensions of work performance," and that "the more vague, subjective, and irrelevant judgment criteria are, the more bias" tends to result. KRISTIN J. ANDERSON, *BENIGN BIGOTRY: THE PSYCHOLOGY OF SUBTLE PREJUDICE* 296 (2010).

versities.⁶¹ One study of 1,523,546 high-school students across 17,142 high schools found that for students who took at least one AP exam, “the odds of attending a 4-year postsecondary institution increased by at least 171% as compared to students who did not take an AP Exam.”⁶² Another study of “962 four-year public and private colleges and universities showed that AP experience factors directly or indirectly into at least five of the top six criteria in college admissions.”⁶³ Second, in a job market that is becoming more competitive, “employers are increasingly requiring a bachelor’s degree for positions that didn’t used to require baccalaureate education.”⁶⁴ To make matters worse, students from lower tracks are not only underprepared for college but for basic career opportunities as well.⁶⁵ Thus, when a student is relegated to a low educational track, the door is all but shut on that student’s chances for post-secondary educational opportunities or economic sustainability.

Tracking would not have such drastic effects if it were possible for students to advance to higher tracks, but research shows that once a

⁶¹ See, e.g., Tanya Abrams, *Advice from a Dean of Admissions on Selecting High School Courses*, N.Y. TIMES: THE CHOICE (May 13, 2013, 5:53 AM), <http://thechoice.blogs.nytimes.com/2013/05/13/selecting-high-school-courses/> (quoting the Dean of Admissions and Financial Aid at St. Lawrence University, who explained, “If A.P. courses are offered, we would expect to see A.P. courses on the transcript. If honors courses are the highest level, then we would expect to see them.”); Ari Odzer, *Standards Are Getting Higher at State Universities*, NBC (May 6, 2015, 10:10 PM), <http://www.nbcmiami.com/news/local/Standards-are-Getting-Higher-at-State-Universities-302859441.html> (describing how the average Grade Point Average (GPA) of incoming freshmen at the University of Florida rose from 3.7 in 1994 to 4.3 in 2014, and indicating that universities expect students to take rigorous courses, such as AP classes).

⁶² See Michael Chajewski et al., *Examining the Role of Advanced Placement Exam Participation in 4-Year College Enrollment*, 30 EDUC. MEASUREMENT: ISSUES & PRAC. 16, 18, 20 (2011).

⁶³ Kristin Klopfenstein & M. Kathleen Thomas, *The Link Between Advanced Placement Experience and Early College Success*, 75 S. ECON. J. 873, 875 (2006).

⁶⁴ Catherine Rampell, *The College Degree Has Become the New High School Degree*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-the-college-degree-has-become-the-new-high-school-degree/2014/09/08/e935b68c-378a-11e4-8601-97ba88884ffd_story.html. Graduating with only a high-school degree today also has worse implications than in the past, with 22% of young adults ages 25 to 32 with only a high-school diploma living in poverty, in contrast to 7% of similarly situated young adults in 1979. See *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>.

⁶⁵ See Anthony P. Carnevale, Andrew R. Hanson & Megan Fasules, *‘Career Ready’ Out of High School? Why the Nation Needs to Let Go of That Myth*, CONVERSATION (Jan. 1, 2018), <https://theconversation.com/career-ready-out-of-high-school-why-the-nation-needs-to-let-go-of-that-myth-88288> (describing how students who do not go on to higher education do not graduate from high school “career ready”); Linda Murray, *Gateways, Not Gatekeepers*, 69 EDUC. LEADERSHIP 60 (2012) (“By and large, non-college-bound students take a weak academic load As a result, far too many graduates are bound for low-level jobs prepared for neither college nor career.”).

student is placed in a track, there is little chance for upward mobility.⁶⁶ For many subjects, especially mathematics, “[t]he track placement for all four years of high school is determined by one’s placement in the 9th grade.”⁶⁷ When students are placed in lower tracks, they face less rigorous curriculums taught by less experienced teachers, and are therefore unable to keep up with their peers in higher tracks.⁶⁸ Students are hindered from “reach[ing] their full academic potential,” not because of lack of ability on the part of the students, but due to the inequitable system tracking creates.⁶⁹ The earlier these students are tracked, the greater the cumulative harms on their academic prospects.⁷⁰ Not surprisingly, tracking also contributes to the achievement gap between minority and white students.⁷¹ In fact, studies have found that when districts detracked, they “dramatically narrowed the achievement gap between white and minority students in their districts.”⁷²

Tracking not only negatively affects a lower-tracked student’s academic achievement, but also their self-concept. Studies show that students assigned to lower-track classes are often stigmatized as incapable learners who “cannot be expected to master the same kinds of skills that are demanded of other classes.”⁷³ When students internalize their track placement as being indicative of their value, it can cause

⁶⁶ See Ansalone, *supra* note 29, at 125 (describing how a tracking placement is “relatively permanent within a student’s career”).

⁶⁷ Kelly, *supra* note 43, at 22. Kelly goes on to explain that, “[e]ven if students have the choice to move, they are often implicitly discouraged from doing so” *Id.* at 24.

⁶⁸ See Wells & Serna, *supra* note 43, at 93 (“[B]eing placed in the low track often has long-lasting negative effects on these students, as they fall further and further behind their peers”); Welner, *supra* note 28, at 707 (“Another study found that teachers instructing classes at more than one ability level varied their instructional goals among those classes. Teachers placed much greater emphasis on higher-order thinking and problem solving in high-track classes.”).

⁶⁹ See Ansalone, *supra* note 29, at 127 (“Most studies also show that more learning takes place in higher tracks, even after researchers have controlled for presumed initial ability, gender, race and socio-economic status.”); see also *infra* note 82 and accompanying text (presenting the argument that it is the *opportunities* that tracking provides higher-tracked students, not the innate intellectual abilities of those students, that allows them to succeed).

⁷⁰ See Jomills Henry Braddock, II & Marvin P. Dawkins, *Ability Grouping, Aspirations, and Attainments: Evidence From the National Educational Longitudinal Study of 1988*, 62 J. NEGRO EDUC. 324, 325–26 (1993) (“Because the learning environments are weaker in the lower tracks, a student who is first assigned to a bottom-track class has an even poorer chance at the next grade level to move up to a higher level.”); Kelly, *supra* note 43, at 20 (describing how a “student will not progress beyond algebra II, even if a math course is taken every year” if that student does not begin ninth grade in the higher math track).

⁷¹ See Kasten, *supra* note 25, at 210 (“[T]he research consistently shows that tracking itself significantly contributes to the racialized-achievement gap.”).

⁷² *Id.*

⁷³ See Braddock & Dawkins, *supra* note 70, at 326.

them to check out of the educational process and see school as something that is not for them since they are not one of the “smart” kids.⁷⁴ Teachers also communicate lower expectations to students in lower tracks, and students tend to achieve accordingly.⁷⁵

C. *Debunking the Educational Necessity of Tracking*

Many parents operate under the assumption that the placement of students in high tracks needs to be selective in order for their children to receive a high-quality education.⁷⁶ They oppose detracking because they believe the presence of lower-track students in the same classroom as their children would pull their children down.⁷⁷ Proponents of tracking argue that “narrowing the range of student abilities within a classroom allows teachers to target instruction at a level more closely aligned with student needs.”⁷⁸ One study of 5948 tenth graders from across the nation concludes that “students placed in high-ability

⁷⁴ See Ansalone, *supra* note 29, at 122 (“If lower track students redefine their self concept as a function of track position, it is possible that this may lead to general dissatisfaction with education and the entire schooling process.”). One high-school student in California explains, “I would beg the counselors to let me take honors math. Despite my A’s in regular classes, . . . my mastery of skills, [and] my persistence to excel, the honors . . . classes were always full. Slowly but surely I would stop doing homework for math, because it was simply not worth my time.” Cole Cahill, *Educational Immobility: The Effects of Math Tracking on SPHS Students*, TIGER (Sept. 18, 2016), <http://tigernewspaper.com/wordpress/corrections-sept-16-2016-issue/>.

⁷⁵ See Ansalone, *supra* note 29, at 123 (“[T]eachers more often based their expectation for student’s academic performance on track placement and not on school records. . . . Teachers were also observed to be more friendly, supportive and encouraging to students labeled as bright.”). In the words of another high-school student, “My history teacher focuses more on her AP classes than on her lower level classes. Sometimes she’ll come to school just to go to her AP classes and won’t even come to ours.” Susan Yonezawa & Makeba Jones, *Students’ Perspectives on Tracking and Detracking*, 45 THEORY INTO PRACTICE 15, 18 (2006). Even the pedagogy used to teach lower-tracked students is substandard. Studies have found that “[f]or those marginal students expected to find employment in the lower sector of the work force, obedience and submission were stressed, while decisionmaking and independent thought were emphasized for students from ‘better’ families.” See Ansalone, *supra* note 29, at 112. Students notice these differences and receive the negative messages tracking sends about their perceived abilities, which can create a “self-fulfilling prophecy” where they end up behaving and performing accordingly. *Id.* at 121.

⁷⁶ See Wells & Serna, *supra* note 43, at 102 (describing how parents assume “if there was no selectivity in placing students in particular classes, then the learning and instruction in those classes could not be good”).

⁷⁷ See Amy Stuart Wells & Jeannie Oakes, *Potential Pitfalls of Systemic Reform: Early Lessons From Research on Detracking*, 69 SOC. EDUC. 135, 138–39 (1996) (describing how parents “couch their opposition to detracking mainly in terms of the low-track students’ ‘behavior’—lack of motivation to learn, lack of commitment to school or interest in higher education, tendency to act out, and so forth”).

⁷⁸ See David N. Figlio & Marianne E. Page, *School Choice and the Distributional Effects of Ability Tracking: Does Separation Increase Inequality?*, 51 J. URB. ECON. 497, 498 (2002) (discussing the argument that tracking allows teachers to teach “more

tracks gain about one-third of a standard deviation above similar students in heterogeneous classrooms,”⁷⁹ but “students in low-ability tracks experience achievement gains that are three-quarters of a standard deviation lower than similar students in heterogeneous classrooms.”⁸⁰

Other studies on tracking show that “high achieving students do equally well in both grouped and non-grouped schools,” and “all students, whether high-ability or not, seem to benefit from the types of special resources, opportunities, and support usually present in high level classes.”⁸¹ Many social scientists agree that it is the superior opportunities offered to students in higher-tracked programs, not the higher caliber of the students themselves, that enable those students to be successful.⁸² For teachers and parents who are still concerned about placing students with different “abilities” in the same classroom, differentiation *within* the classroom can provide a positive

challenging material” to “high ability students” and teach “less-able students” at a “slower pace” to their benefit).

⁷⁹ *Id.* at 505–06.

⁸⁰ *Id.* at 505. While the study also concluded that there is “no evidence that tracking programs are harmful to low-ability students,” this conclusion was reached by dividing the sample into high, middle, and low categories based on test score distribution and estimating the effect of attending a tracked school on each subsample, in an attempt to account for “unobserved differences in student characteristics” that affect their selection into particular tracks. *Id.* at 507, 509. When the sample considered the test scores of students in high, average, and low-tracked classes, as compared to the scores of students in schools that did not track, researchers found that tracking had a significant negative effect on students in lower tracks. *Id.* at 505–06.

⁸¹ See Welner, *supra* note 28, at 706; Press Release, Univ. of Sussex, Ability Groups Harm Children’s Education, Say Sussex Researchers (Sept. 14, 2007), <http://www.sussex.ac.uk/news/media-centre/press-releases/media/media640.html> (describing a study of 700 American teenagers over four years which found that “an approach that involved students not being divided into ability groups, but being given a shared responsibility for each other’s learning, led to a significant improvement in the achievements of high and low achieving students”).

⁸² Kohn, *supra* note 23, at 571; see Ansalone, *supra* note 29, at 125 (arguing that tracking itself “has no significant effect on cognitive achievement . . . except in cases where presumed ‘brighter’ youth seem to benefit from . . . an enriched and differentiated curriculum”); Welner, *supra* note 28, at 706–07 (“[R]esearch does not support the claim that high-ability students benefit simply from being in separate classes. Rather, separate classes for high achieving students only benefit participants when schools provide those students with an enriched curriculum that is different from that provided to students in lower groups.”). Even the National Research Council Institute of Medicine has released a report calling for the elimination of tracking, since it “makes inaccessible to students in the lower academic tracks a rigorous curriculum that prepares them for postsecondary education,” and “can also reinforce lower standards and engender in students the belief that they lack academic competence.” NAT’L RESEARCH COUNCIL INST. OF MED., ENGAGING SCHOOLS: FOSTERING HIGH SCHOOL STUDENTS’ MOTIVATION TO LEARN 219 (2004), <https://doi.org/10.17226/10421> [hereinafter NRC REPORT].

alternative to tracking where an entire class can learn the same concept in a manner that is tailored to their needs.⁸³

Scholars have also argued that education is a “positional good,” where “one’s position or relative standing in the distribution of education, rather than one’s absolute attainment of education, matters a great deal.”⁸⁴ This argument applies more than ever today with the use of AP and honors classes to differentiate students from one another largely for the purpose of applying to college, which has disadvantaged minority students.⁸⁵ It does not matter so much *what* you learned, as it does what level your courses were. Moreover, having an AP program “imposes ‘substantial opportunity costs’ on non-AP students in the form of what a school gives up in order to offer AP courses Schools have to increase the sizes of their non-AP classes, shift strong teachers away from non-AP classes, and do away with non-AP course offerings.”⁸⁶

Proponents of tracking might maintain that although it is harmful for students who are erroneously placed in lower tracks, the system can be fixed if more “objective” criteria were used to place students.⁸⁷ This argument fails for two reasons. First, testing is limited in its ability to truly and objectively test a child’s intelligence, cognitive ability, or potential to learn.⁸⁸ Second, even assuming there were a way to accurately measure a student’s ability to learn and place them

⁸³ See, e.g., Vivian Yee, *Grouping Students by Ability Regains Favor in the Classroom*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/education/grouping-students-by-ability-regains-favor-with-educators.html> (describing how grouping without stigma can “help [students] access the same content in a way that works for them”).

⁸⁴ See William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 549 (2006).

⁸⁵ See John Tierney, *AP Classes Are a Scam*, ATLANTIC (Oct. 13, 2012), <https://www.theatlantic.com/national/archive/2012/10/ap-classes-are-a-scam/263456/> (“Despite the rapidly growing enrollments in AP courses, large percentages of minority students are essentially left out of the AP game. And so, in this as in so many other ways, they are at a competitive disadvantage when it comes to college admissions.”).

⁸⁶ *Id.*

⁸⁷ For instance, Judge Posner has ruled that tracking is not a constitutional violation so long as school districts do not “manipulat[e] the tracking system to separate the races” and instead track students “in accordance with criteria that have been validated as objective and nonracist.” *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997).

⁸⁸ See Padilla, *supra* note 44 (discussing how cultural biases in how standardized tests are normed, written, and even administered call in to question their validity and reliability). See generally Nick Collins, *IQ Tests ‘Do Not Reflect Intelligence,’* TELEGRAPH (Dec. 19, 2012), <http://www.telegraph.co.uk/news/science/science-news/9755929/IQ-tests-do-not-reflect-intelligence.html> (discussing a study that found that IQ tests are inadequate at testing intelligence since “intelligence can only be predicted by combining results from at least three tests of . . . mental agility”); Valerie Strauss, *The Important Things Standardized Tests Don’t Measure*, WASH. POST (Mar. 1, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/03/01/the-important-things-standardized->

in a class that perfectly reflects their abilities, segregating students based on this information would necessarily create an unequal educational system where only a select few students truly have the opportunity to succeed.⁸⁹

How has tracking been allowed to continue for so long given all the data indicating its discriminatory effects and lack of academic utility? Part of the reason is due to the ability of parents with more social capital and political clout to block local efforts to detrack.⁹⁰ For instance, parents threaten to leave the school system altogether—and take their resources with them—if schools are detracked.⁹¹ One parent acknowledged that his daughter’s honors program at an integrated school “amounted to ‘a school within a school’ for the white and Asian students” and threatened that if detracking occurred, he would remove her from that school “in a nanosecond.”⁹² Another parent explained that “had her children not been accepted into the advanced program, she and her family would not have moved into [the] racially mixed school district.”⁹³ Unfortunately, despite all the data on how tracking is not an educational necessity and has the perverse effect of maintaining a social and racial hierarchy, people will still resist. Burris and Garrity describe this phenomenon best:

Still, no matter how carefully you share data . . . there will be those who resist. They will insist that the current tracked system can be fixed rather than altered. They will tell you to spread talented teachers around (as long as their child still winds up in a talented teacher’s class). They will say that the better answer for students who are doing poorly is additional remedial services, even as you present data documenting the ineffectiveness of remediation. . . .

tests-dont-measure/?utm_term=.D79e31e26294 (discussing how standardized tests are limited in their ability to measure “the quality of original thought”).

⁸⁹ See *supra* notes 82, 84–86 and accompanying text (describing the unfair advantage and opportunities students in higher-level courses receive and how tracking operates to maintain a social hierarchy).

⁹⁰ See Kohn, *supra* note 23, at 572 (describing how resistance from parents on detracking has often proved fatal); see also *supra* note 23 and accompanying text.

⁹¹ See Wells & Serna, *supra* note 43, at 113 (“[T]he threat of White elite flight has helped maintain the hierarchical track structure and an Advanced Placement curriculum that many teachers, students, and less elite parents argue is not creative or instructionally sound.”).

⁹² Kohn, *supra* note 23, at 571.

⁹³ Wells & Serna, *supra* note 43, at 101. This is not to say that all elite parents are necessarily operating with racial bias or a desire to keep their children out of classrooms with minority students. Many of these parents have attended college and thus “have a clear understanding of what their children’s high school transcripts should look like to ensure admission to the colleges of their choice.” See Wells & Oakes, *supra* note 77, at 140. Colleges are largely motivating this behavior by creating an “extremely competitive educational system in which winners and losers are identified as early as kindergarten.” *Id.* at 141.

Any 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.⁹⁴

Currently, tracking provides these mostly white, higher-class parents a “refuge” within the public-school system and keeps them from seeking private schools,⁹⁵ making school boards reluctant to enact policies which might push those parents out of the system or worse, threaten their positions as school board members.⁹⁶ Parents who stand to benefit from a detracked educational system are typically not able to combat the elite parents and advocate for a change in policy since they tend to have less social capital, might not have experienced high levels of success in the educational system themselves, and might “feel alienated from schools and the governance process.”⁹⁷

For these reasons, school districts cannot be expected to voluntarily cease this problematic practice and advocates should turn to court intervention. Part II explores the extent that tracking has been regulated under federal law and Part III presents the argument that a remedy under state constitutional law is still available.

II

UNSUCCESSFUL LEGAL CHALLENGES TO TRACKING

The two tools that have been used in the past to try to combat tracking, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, have been inadequate. Federal Equal Protection claims are limited due primarily to the fact that the Supreme Court has yet to recognize a fundamental right to education under the Constitution.⁹⁸ Also, Fourteenth Amendment Equal Protection claims require proof of discriminatory intent, which is diffi-

⁹⁴ BURRIS & GARRITY, *supra* note 38, at 61–62.

⁹⁵ See Welner, *supra* note 28, at 702 (“Given an integrated, heterogeneous school, then, high-track classes often present a refuge, offering comfort and reassurance to white parents who might otherwise flee to private schools . . .”).

⁹⁶ See BURRIS & GARRITY, *supra* note 38, at 52 (“Parents of students identified as gifted often exercise political clout and attempt to block the reform. The risk of ‘bright flight’ (and, in integrated districts, ‘white flight’) often leads supporters of detracking to back off or offer modifications to appease special interest groups.” (internal citation omitted)).

⁹⁷ See Wells & Oakes, *supra* note 77, at 139.

⁹⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

cult to prove in most cases.⁹⁹ Tracking is a facially neutral policy so despite its racially-charged history, without a smoking gun, it is difficult to prove that tracking is intentionally designed to resegregate students on the grounds of race.

Title VI is another inadequate solution since it also requires that private plaintiffs prove intent.¹⁰⁰ While administrative agencies like the Department of Education are exempted from having to prove intentionality under Title VI,¹⁰¹ these agencies would nonetheless have to show that tracking is not necessary for a valid educational goal or pedagogical purpose.¹⁰² Some scholars are hopeful about Title VI claims, explaining that “[g]iven the state of research on ability grouping and testing, schools will have trouble showing that ability grouping is a necessary educational practice.”¹⁰³ This argument ignores the fact that courts tend to defer to school districts on the “educational necessity” of their practices.¹⁰⁴ Also, since only an administrative agency can bring a disparate impact claim under Title VI,¹⁰⁵ relief can be contingent on the politics of a particular administration. This Section provides an in-depth analysis of detracking claims under Equal Protection and Title VI, revealing the limitations of each option.

A. Tracking Under Equal Protection

The initial tool courts used to analyze tracking is the Equal Protection Clause of the Fourteenth Amendment of the Constitution.¹⁰⁶ Prior to the intentional discrimination requirement established

⁹⁹ See *Washington v. Davis*, 426 U.S. 229, 248 (1976) (“A rule that a statute designed to serve neutral ends is nevertheless invalid . . . if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions . . .”).

¹⁰⁰ See *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (“Title VI itself directly reaches only instances of intentional discrimination.” (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985))).

¹⁰¹ See *infra* note 119 and accompanying text.

¹⁰² See *infra* notes 123–26 and accompanying text.

¹⁰³ See *Teaching Inequality*, *supra* note 30, at 1340.

¹⁰⁴ See Brencé D. Pernell, Note, *Aligning “Educational Necessity” With Title VI: An Enhanced Regulatory Role for Executive Agencies in Title VI Disparate Impact Enforcement*, 90 N.Y.U. L. REV. 1369, 1382–92 (2015) (describing how deferral to school districts tends to occur since judges do not have the capacity or guidance to determine what an educational necessity is).

¹⁰⁵ See *infra* note 119 and accompanying text.

¹⁰⁶ Under Equal Protection analysis, a claim is made that the state is acting in a discriminatory fashion. Courts will then decide whether the state action is constitutional by weighing the state’s interest against the individual’s liberty. Courts apply the lowest amount of deference to states if a “suspect class,” like race, has been discriminated against or if a fundamental right has been violated. In these instances, the state must show that it has a “compelling state interest” and its actions are necessary to meet that interest.

in *Washington v. Davis*,¹⁰⁷ tracking was successfully challenged on grounds that it had a discriminatory adverse effect on minority students.¹⁰⁸ Today, bringing an Equal Protection claim is more challenging since plaintiffs must prove that a school district intentionally uses tracking for a discriminatory purpose. Since tracking is a facially neutral policy, there have been few successful challenges to the practice.¹⁰⁹

So far, there has been only one case that has successfully alleged that tracking violated the Equal Protection Clause under an intentional discrimination framework: *People Who Care v. Rockford Board of Education*.¹¹⁰ In this case, the plaintiffs were able to prove that the

Johnson v. California, 543 U.S. 499, 505 (2005) (laying out the strict scrutiny standard in the context of race).

¹⁰⁷ 426 U.S. 229, 239 (1976).

¹⁰⁸ See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The Court abolished tracking in Washington, D.C. public schools as an Equal Protection violation due to the disparate impact tracking had on African American students. *Id.* at 443 (holding that “ability grouping as presently practiced in the District of Columbia school system is a denial of equal educational opportunity to the poor and a majority of the Negroes attending school in the nation’s capital, a denial that contravenes not only the guarantees of the Fifth Amendment but also the fundamental premise of the track system itself”). Under this system there were four “hard tracks,” including a “Basic” track and an “Honors” track with very little possibility for movement. *Id.* at 446–48. The tests that were used to assign children to tracks were “standardized primarily on and are relevant to a white middle class group of children,” and resulted in African American students disproportionately being assigned to lower tracks. *Id.* at 514. The placement in lower tracks created both a stigma of inferiority and a “self-fulfilling prophecy” based on misjudgments about Black students’ perceived deficient learning abilities. *Id.* at 491.

¹⁰⁹ One exception where a plaintiff need not prove intentional discrimination is if a school has a pre-existing desegregation order from the court since “that court order can act as a proxy for the intent element.” See *Losen*, *supra* note 45, at 530. The burden is shifted to the school board to prove that the “subsequent discriminatory impact is not a vestige of that original discrimination.” *Id.* For instance, in *McNeal v. Tate County School District*, the school district was under a court desegregation order and engaged in tracking practices which created segregated classrooms. 508 F.2d 1017, 1018–19 (5th Cir. 1975). The court held that ability grouping may be permitted, even if it results in segregation, if (1) there is a unitary system, and (2) the school can demonstrate that the tracking system is not a vestige of past discrimination, or (3) the school district can show that the ability groupings would remedy the past effects of segregation by providing students with “better educational opportunities.” *Id.* at 1020. This exception is not as relevant today, however, since many school districts have never engaged in de jure school segregation, and thus have never been under a court order to desegregate. See Will Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353, 353 (1961) (describing how only twenty-one states, and the District of Columbia, had statutes legally mandating, or permitting, school segregation). Therefore, for a tracking claim under the Equal Protection Clause to succeed against the majority of school districts, the plaintiff will need to prove there was intentional discrimination.

¹¹⁰ 851 F. Supp. 905 (N.D. Ill. 1994). This school district disproportionately tracked African American students in the lower tracks. The lower court found that the school district’s tracking practice “skewed enrollment in favor of whites and to the disadvantage of minority students,” and when students tested on the borderline between one track and

school intentionally used tracking to segregate students based on the findings of Dr. Oakes, an expert witness in the case who found that the school knew of the racial disproportions yet took “woefully inadequate efforts to correct them.”¹¹¹

Despite finding intentional discrimination and an Equal Protection violation, the Seventh Circuit held that abolishing tracking was not a valid remedy.¹¹² Judge Posner expressed concern that “[t]o abolish tracking is to say to bright kids, whether white or black, that they have to go at a slower pace than they’re capable of.”¹¹³ The court held that tracking as a practice is not an equal protection violation unless schools are misusing the system to segregate races and “twisting the criteria to achieve greater segregation than objective tracking alone would have done,” and ordered the district to revise its tracking practices so that all students would be tracked under the same “objective” criteria.¹¹⁴

People Who Care indicates the limits of bringing an Equal Protection claim against tracking. First, it is difficult to get over the first hurdle of proving that the school district intentionally discriminated. Second, even if a plaintiff is able to prove intent, courts are not likely to order detracking. Despite the research which shows that detracking does not cause “bright kids” to “go at a slower pace than they’re capable of,”¹¹⁵ courts tend to view tracking as a legitimate system so long as it is carried out “objectively.” The problem is, even assuming there were a way to track “objectively” with accurate testing, unbiased teacher recommendations, and no parents placing their thumbs on the scale, tracking still creates a system of unequal educational opportunity.¹¹⁶

B. Tracking Under Title VI

Another tool that has been used to address tracking is Title VI of the Civil Rights Act. Title VI prohibits any program that receives fed-

another, white students were more likely to be tracked up while Black students were more likely to be tracked down. *Id.* at 912, 915.

¹¹¹ *Id.* at 913–14.

¹¹² See *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (1997) (“[T]he remedy is obvious: forbid the district . . . to track students other than in accordance with criteria that have been validated as objective and nonracist.”).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *supra* Section I.C.

¹¹⁶ See *supra* notes 82, 84–86 and accompanying text (describing how education is a positional good where students in lower-level courses are denied meaningful opportunities to succeed in a competitive society); see also *supra* Section I.B (describing the psychological harms and subpar pedagogy tracking creates for lower-level students that would not be resolved with a more “objective” way of tracking).

eral aid from discriminating against individuals on the basis of race, color, or national origin.¹¹⁷ For a private plaintiff to bring a Title VI claim, that plaintiff must show that the school district intentionally discriminated on the basis of race or another impermissible classification.¹¹⁸ Administrative agencies, such as the Department of Education, do not need to prove intent and can bring claims against school districts under a disparate impact theory.¹¹⁹ Since tracking is a method of administration which disproportionately disadvantages minority students,¹²⁰ public enforcement of Title VI seems promising as a remedy at first glance.

In order to bring a Title VI claim under a disparate impact theory, the Department of Education must first demonstrate that there is a facially neutral policy which nonetheless results in a racial disparity. Courts tend to “use some form of statistical analysis” to determine if a racial disparity exists based on the proportion of students affected compared to the racial makeup of the population.¹²¹ In many districts, the Department will have little difficulty meeting this requirement given all the data on how tracking disproportionately results in Black and Latino students in lower tracks.¹²²

Next, the burden shifts to the defendant to prove there is an “educational necessity” for the policy.¹²³ To qualify as an educational necessity, the practice must “bear a manifest demonstrable relation-

¹¹⁷ 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹¹⁸ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”). Section 602 under Title VI applies to activities which “have a disparate impact on racial groups, even though such activities are permissible under § 601.” *Id.* at 281.

¹¹⁹ See 28 C.F.R. § 42.104(b)(2) (2014) (prohibiting federally funded programs from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin”). A disparate impact framework is preferable since it applies to “unintentional or indirect discrimination” which arises from policies that nonetheless have a discriminatory effect on certain racial groups. See *Pernell*, *supra* note 104, at 1375–76 (“Generally, a prohibition on disparate impact presumptively invalidates a policy that has a discriminatory effect on a protected racial group, regardless of the policy’s intent.”).

¹²⁰ See *supra* Section I.A.

¹²¹ *Pernell*, *supra* note 104, at 1383.

¹²² See *supra* Section I.A.

¹²³ See *Bd. of Educ. v. Harris*, 444 U.S. 130, 151 (1979) (“[T]he burden is on the party against whom the statistical case has been made . . . [and] could be carried by proof of ‘educational necessity,’ analogous to the ‘business necessity’ justification applied under Title VII of the Civil Rights Act of 1964 . . .”).

ship to the classroom education.”¹²⁴ Given the research discussed in Part I, which shows that tracking does not serve valid educational purposes,¹²⁵ it would seem that the school district should not be able to meet this burden with regard to tracking. The problem is that “judges are not education policy experts” and too often defer to the state’s proffered reasons for educational necessity.¹²⁶ Since these cases were decided in the late 1980s, however, there has been more research on the effective alternatives to tracking.¹²⁷ These studies indicate that tracking is not an educational necessity but rather a tool of administrative convenience—at best—which has devastating effects on minority and low-income students.¹²⁸ But while the Department of Education arguably has a better chance of bringing a Title VI claim against tracking today, Title VI remains inadequate as a legal tool.

The first issue with a Title VI claim is that it does not place an affirmative duty on schools to detrack. The vast majority of Department of Education Office of Civil Rights (OCR) investigations into tracking systems do not even reach a trial, but rather settle when

¹²⁴ See *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417–18 (11th Cir. 1985).

¹²⁵ See *supra* Section I.C.

¹²⁶ See *Pernell*, *supra* note 104, at 1385–86. In the past, courts have “relied on assertions that tracking is an ‘accepted pedagogical practice’” and deferred to the “professional expertise [of] school officials.” See *Teaching Inequality*, *supra* note 30, at 1337. For instance, *Quarles v. Oxford Municipal Separate School District* involved a school district that was grouping students beginning in the third grade to either high, middle, or low language arts and math classes based on standardized test scores. 868 F.2d 750, 754 (5th Cir. 1989). Note that this case predates *Sandoval*, so plaintiffs were able to proceed with a disparate impact theory under Title VI. Under the Title VI framework, the court found tracking was an educational necessity since “[a]chievement or ability grouping has been recognized by both courts and educators as an acceptable and commonly used method.” *Id.* at 753. Once the school district met their burden of proving an educational necessity, the plaintiffs needed to show that there were comparably effective alternatives to meet the educational goal. In *Quarles*, plaintiffs presented evidence from their expert witness Dr. Oakes that showed alternative methods of instruction existed, but the court found that these better models “were still in the experimental stage” and the issue should be left to the educators to decide. *Id.* at 755.

¹²⁷ For instance, a two-year study was conducted under which one school incorporated a cooperative learning model and the remaining three schools did not. See ROBYN M. GILLIES, *COOPERATIVE LEARNING: INTEGRATING THEORY AND PRACTICE* 19–20 (2007). Cooperative learning involves placing students in small, heterogeneous groups to accomplish shared goals. The results showed that all students made significant gains under the cooperative learning model compared to the traditional tracked schools, including the gifted children who “outperformed gifted children in the comparison schools on reading vocabulary, reading comprehension, language expression, and mathematics computation.” *Id.* at 20.

¹²⁸ See *Hallinan*, *supra* note 9, at 76 (describing how the detracking movement has pushed back on the necessity arguments surrounding tracking by “challenging widely held beliefs regarding the notion of ‘ability’ and the role it plays in determining the kind of curriculum to which students will be exposed”).

a discriminatory impact is found.¹²⁹ These settlements tend to require “school officials to implement a voluntary plan that will eradicate the *disparate effect* of the ability grouping practice,” rather than eradicate the grouping practice itself.¹³⁰ OCR is also aware that schools can choose not to comply with Title VI and just forfeit federal funds—a decision which ultimately hurts the students—so at times a “less-than-ideal” settlement may be reached to avoid these scenarios.¹³¹

The second issue with Title VI is that it does not provide a private right of action for disparate impact claims. Thus, plaintiffs must rely on the Department of Education for relief or be forced to prove intent. Depending on the political climate and federal administration’s goals, however, the Department of Education might not be pressed to target tracking, especially if competition, or choice, is valued over equity.¹³²

Under the current state of the law, Equal Protection and Title VI have been inadequate tools in eliminating tracking. Both require private plaintiffs to prove intentional discrimination—a difficult task when dealing with a facially neutral policy—and neither provides detracking as the remedy. Given the limitations of federal law and the power of privileged parents to cause lockup in the political process, the next logical place to look is state law. Part III suggests that the state equal educational opportunity framework could and should be extended to eliminate tracking.

¹²⁹ See Losen, *supra* note 45, at 540 (“Most schools, when confronted with the disparate impact of their system, offer no rationale. It is very rare that some sort of settlement is not reached.”).

¹³⁰ *Id.* (emphasis added). For instance, in 1999, the New Bedford School District in Massachusetts reached a settlement with OCR, under which the school district moved from a four-track to a two-track system and “intend[ed] to completely detrack by 1999.” *Id.* at 539. Today, not only do the New Bedford public schools still track, but they have exacerbated the inequities by introducing an Advanced Learning program for middle schools in Fall 2016 which “provid[es] pathways to advanced learning opportunities such as . . . Honors and Advanced Placement (AP) level coursework” but is only offered to fifth grade students who qualify based on grades, teacher recommendations, scores, and school attendance. Michael Silvia, *New Bedford School Officials Announce Expanded Accelerated Learning Program for Middle School Students*, NEWBEDFORDGUIDE.COM (June 22, 2016), <https://www.newbedfordguide.com/new-bedford-expanded-accelerated-learning-program/2016/06/22>.

¹³¹ See Losen, *supra* note 45, at 540 (“The second reason for OCR’s preference for settlements is that many of the same children who are hurt by the ability grouping practice would be harmed by withdrawal of federal funds.”).

¹³² See, e.g., Valerie Strauss, Danielle Douglas-Gabriel & Moriah Balingit, *DeVos Seeks Cuts from Education Department to Support School Choice*, WASH. POST (Feb. 13, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/12/devos-seeks-massive-cuts-from-education-department-to-support-school-choice/?utm_term=.A83726b765b3 (describing the Secretary of Education’s proposal to spend over \$1 billion on “private school vouchers and other school choice plans”).

III TRACKING AS AN EQUAL EDUCATIONAL OPPORTUNITY VIOLATION

The idea that schools must provide students with equal educational opportunities was solidified in *Brown v. Board of Education*, which stated that education is a “right which must be made available to all on equal terms.”¹³³ An education system that predetermines which students have a realistic shot at success through tracking is inherently unequal, especially given that education is largely a positional good where one person’s higher educational standing necessarily diminishes the value of another’s education—i.e., an honor’s class cannot be an honor’s class unless there is a regular class to compare it to.¹³⁴ This Part argues that since tracking creates an unequal system of opportunities for students within the same school building, advocates could bring a claim under the state equal educational opportunity framework to abolish tracking.

A. *History of Equal Educational Opportunity Claims*

A state equal educational opportunity claim is grounded in two provisions of state constitutions: education clauses and equal protection clauses.¹³⁵ Education clauses require states to establish education systems.¹³⁶ These education clauses typically require that states provide a “thorough and efficient,” “uniform,” or even “high quality” education.¹³⁷ State equal protection clauses essentially mirror the federal Equal Protection Clause.¹³⁸ State education clauses and equal

¹³³ 347 U.S. 483, 493 (1954).

¹³⁴ See *supra* notes 84–86 and accompanying text (making this argument).

¹³⁵ See Enrich, *supra* note 15, at 105 (“State constitutions vary widely, but they typically include two types of provisions that have provided the primary ammunition for post-*Rodriguez* education funding litigation.”).

¹³⁶ See *id.* (“[E]very state, with the arguable exception of Mississippi, includes in its constitution an ‘education clause’ that assigns to the state the responsibility for establishment of a public school system.”).

¹³⁷ See Koski & Reich, *supra* note 84, at 560 (first quoting N.J. CONST. art. VIII, § 4, cl. 1; then quoting Wis. CONST. art. X, § 3, cl; and then quoting ILL. CONST. art. X, § 1). Compare ARK. CONST. art. XIV, § 1 (requiring that the “[s]tate shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education”), with COLO. CONST. art. IX, § 2 (requiring that the state “provide for the establishment and maintenance of a thorough and uniform system of free public schools”), and FLA. CONST. art. IX, § 1(a) (providing that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education”).

¹³⁸ See Enrich, *supra* note 15, at 105 (“[M]ost state constitutions contain one or more provisions that either parallel the federal Equal Protection Clause or have been interpreted to impose substantially the same limitations.”).

protection clauses together require that states provide children with an “equal educational opportunity.” While state equal educational opportunity claims have typically focused on funding,¹³⁹ the same rationale courts have used to find funding programs unconstitutional and in violation of equal educational opportunity could also apply to tracking.

Courts have taken two different approaches to analyzing equal educational opportunity claims: the equity approach and the adequacy approach.¹⁴⁰ The equity approach focuses primarily on inputs with the view that all students should have an equal chance to succeed and that education should “counteract the differential effects of unequal social circumstances, particularly class barriers, so that those with the same level of talent and motivation face the same prospects.”¹⁴¹ These claims focused on inequities in inter-district funding which provided opportunities and high quality education to wealthier districts to the detriment of poorer districts.¹⁴²

During the late 1970s and early 1980s, however, courts started to shift from an equity approach to an adequacy approach in equal educational opportunity cases.¹⁴³ The focus was centered on standards

¹³⁹ See Koski & Reich, *supra* note 84, at 556–62 (explaining the history behind equal educational opportunity jurisprudence and its focus on school finance).

¹⁴⁰ See *id.* at 557–60 (describing the shift from equity to adequacy).

¹⁴¹ See Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 506 (2014).

¹⁴² In Texas for instance, the state is required to provide for an “efficient system of public free schools,” see TEX. CONST. art. VII, § 1, and the court found its funding system to be in violation of this constitutional requirement due to the inequalities it created. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (holding that “the state’s school financing system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide, and therefore that it violates article VII, section 1 of the Texas Constitution”). The court described how under the funding system, wealthier districts were able to provide “broader educational experiences” to their students such as “more extensive curricula, more up-to-date technological equipment, . . . , lower student-teacher ratios, . . . , [and] better facilities.” *Id.* at 393. Since roughly the same inequities exist under tracking systems where rigorous curriculum, smaller class sizes, and high-quality teachers are reserved for students in the advanced classes, an equity approach would appear to lend itself nicely to a detracking claim. Similar arguments were raised in Montana and Tennessee. See *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 688 (Mont. 1989) (crediting expert’s findings that inequitable spending between school districts in the state resulted in unequal educational opportunities for students due in part to the various opportunities students in wealthier districts received compared to their poorer counterparts, such as more advanced technology and more “hands on” learning experiences); *Tenn. Small Sch. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993) (striking down a funding system as unconstitutional under this clause for state’s failure to provide legitimate state interest to justify “granting to some citizens, educational opportunities that are denied to other citizens similarly situated”).

¹⁴³ See Weishart, *supra* note 141, at 518 (“[A]dequacy did not become a full-fledged litigation strategy until some state courts started to resist formal equality of educational opportunity in the late 1970s and early 1980s.”).

and accountability in response to reports of academic shortcomings, culminating with the passage of No Child Left Behind.¹⁴⁴ Problems with the equity approach arose due in part to the fact that focusing on equity pertaining to interdistrict funding did not have the trickle-down effect intended to address intradistrict or school-based spending disparities.¹⁴⁵ Adequacy attempts to remedy this by “linking school finance decisions explicitly and centrally to the quality of education provided to America’s schoolchildren.”¹⁴⁶ The adequacy approach “look[s] directly at the quality of the educational services delivered to children . . . and ask[s] evaluative questions about whether those services are sufficient to satisfy the state’s constitutional obligations.”¹⁴⁷

Due to this shift from equity, this Note analyzes the equal educational opportunity doctrine exclusively through the adequacy framework. Courts have interpreted the adequacy standard largely within the context of interdistrict finance in an attempt to ensure that each district has the funds necessary to provide an adequate education to its students,¹⁴⁸ but those efforts have been largely undermined by tracking.¹⁴⁹ What sense is there in requiring adequacy in interdistrict finance when tracking prevents certain children from accessing the resources that provide an adequate education? The next Section presents the argument that tracking violates a child’s right to equal educational opportunity under the adequacy framework.

B. Applying Tracking to the Equal Educational Opportunity Framework

To prevail on an equal educational opportunity claim, a plaintiff must show that the state failed to provide an adequate education as

¹⁴⁴ See *id.* at 520 (describing how adequacy emerged as “a response to persistent disparities in educational achievement and the failings of public school systems”).

¹⁴⁵ See COMM. ON EDUC. FIN., MAKING MONEY MATTER: FINANCING AMERICA’S SCHOOLS 99 (Helen F. Ladd & Janet S. Hansen eds., 1999) (arguing that a focus on interdistrict equity ignores school-based and intradistrict disparities); Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 227 (Timothy Ready et al. eds., 2002) (“Equalizing tax capacity does not by itself equalize education.” (internal citation omitted)).

¹⁴⁶ COMM. ON EDUC. FIN., *supra* note 145, at 101.

¹⁴⁷ Enrich, *supra* note 15, at 109.

¹⁴⁸ See Koski & Reich, *supra* note 84, at 565 (“The third wave of litigation has been marked by a wide variety of remedial schemes ranging from simply ‘vetoing’ the legislature’s operative finance plan and sending it back to the drawing board, to ordering that an expert consultant be retained to ‘cost out’ what would be an adequate education.”).

¹⁴⁹ See *infra* Section III.B (discussing the impact of tracking on district funding).

dictated by that state's constitution.¹⁵⁰ Due to the vague language within state educational clauses,¹⁵¹ courts have wide discretion in how they define what constitutes an adequate level of education. Many courts have focused on whether states are preparing students to be competitive in employment and higher education,¹⁵² which is promising for a tracking claim due to the limitations tracking places on students in lower tracks.

One such case is *Campaign for Fiscal Equity, Inc. (CFE)*, which can serve as a roadmap for a plaintiff wishing to bring a claim that tracking violates her right to an equal educational opportunity.¹⁵³ In that case, plaintiffs alleged that the New York City public school district failed to provide its students with an equal educational opportunity, citing unqualified teachers, deficient resources such as computers and libraries, and large class sizes.¹⁵⁴ The court determined that the state is constitutionally required to offer all children the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants."¹⁵⁵ This was not determined to be a fixed set of skills, but rather dependent on what the "rising generation" requires to meet the "demands of modern society" and be prepared for employment.¹⁵⁶ The court went on to say that preparation for employment requires more than just the mere "ability to get a job, and support oneself" since, given modern realities, "manufacturing jobs are becoming more scarce in New York and service sector jobs require a higher level of knowledge, skill in communication and the use of information, and the capacity to continue to learn over a lifetime."¹⁵⁷

Connecticut followed this same approach in defining the educational standard in *Connecticut Coalition for Justice*, stating that "[a] constitutionally adequate education [] will leave Connecticut's stu-

¹⁵⁰ See MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 841 (5th ed. 2012) (noting that an adequacy approach insists that state constitutions "guarantee children the right to a minimum level of public education").

¹⁵¹ See *supra* note 137 (comparing several state constitutions).

¹⁵² See Weishart, *supra* note 141, at 520 ("[A] considerable number of courts favoring adequacy have stressed the importance of preparing students to be competitive in higher education and/or in the job market.").

¹⁵³ *Campaign for Fiscal Equity, Inc. v. State (CFE)*, 100 N.Y.2d 893 (2003).

¹⁵⁴ See *id.* at 908–11 (describing the various factors the trial court considered in determining whether New York City schools provide "the opportunity for a sound basic education").

¹⁵⁵ *Id.* at 905 (quoting *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 316 (1995)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 906.

dents prepared to progress to institutions of higher education.”¹⁵⁸ The court here agreed with the plaintiffs that due to the changing economy, “an education suitable to prepare students for higher education is necessary because students without higher education are more likely to wind up unemployed.”¹⁵⁹ New Hampshire also defined an adequate education in terms of being able to compete in one’s society, stating that “[m]ere competence in the basics . . . is insufficient”¹⁶⁰ and that the state needed to provide students with “broad exposure to the social, economic, scientific, technological, and political realities of today’s society,” so they can be competitive and flourish.¹⁶¹ Washington and New Jersey follow similar approaches explaining that the constitutional mandate “goes beyond mere reading, writing and arithmetic”¹⁶² and requires “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.”¹⁶³

States such as New York, Connecticut, New Hampshire, and New Jersey, where courts have defined the equal educational opportunity standard in terms of preparing students to be competitive in the modern world, provide a friendly arena for a detracking claim. In today’s society, a college degree is necessary to be a competitor in the market,¹⁶⁴ and being able to take advanced courses in high school is indispensable for getting into college.¹⁶⁵ Plaintiffs can argue that tracking, which decides early on in children’s academic careers whether they will be able to take advantage of honors and other higher-level courses,¹⁶⁶ denies children who are not able to take those classes a meaningful chance at attending college, and thus an adequate level of education. If the court is not convinced by these data alone, plaintiffs can draw upon the ways tracking mimics the inequalities found within school districts such as the New York City public schools,

¹⁵⁸ Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 253 (Conn. 2010).

¹⁵⁹ *Id.* at 251.

¹⁶⁰ Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997).

¹⁶¹ *Id.* at 1359.

¹⁶² See Seattle Sch. Dist. v. State, 585 P.2d 71, 94 (Wash. 1978).

¹⁶³ Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973).

¹⁶⁴ See KATI HAYCOCK, PROMISE ABANDONED: HOW POLICY CHOICES AND INSTITUTIONAL PRACTICES RESTRICT COLLEGE OPPORTUNITIES 1 (2006), <https://edtrust.org/resource/promise-abandoned-how-policy-choices-and-institutional-practices-restrict-college-opportunities/> (“In the Information Age, education—particularly higher education—is key to a healthy income. Almost no amount of hard work will make up for the lack of it.”); see also *supra* notes 64–65 and accompanying text.

¹⁶⁵ See *supra* notes 61–63 and accompanying text (providing background information on advanced courses in high schools).

¹⁶⁶ See *supra* notes 11, 67–71 and accompanying text (discussing tracking and its impact on student success).

which courts have struck down as inadequate, to further prove that tracking deprives students of equal educational opportunities.

After the standard is defined, the court will look to the “inputs” students receive to determine whether the basic standards of education are being met.¹⁶⁷ The first input the court considered in *CFE* was teacher quality. The court relied on factors such as “teacher certification, test performance, experience and other factors [that] measure quality of teaching” to find that “New York City schools provide deficient teaching.”¹⁶⁸ Plaintiffs were able to produce studies that showed that students attending New York City schools were taught by “the least experienced teachers, the most uncertified teachers, the lowest-salaried teachers, and the highest rates of teacher turnover” and that student performance was directly correlated to their exposure to high or low quality teachers.¹⁶⁹

The same arguments plaintiffs made about the quality of teachers in the New York City public schools can be made about the types of teachers who teach lower-tracked courses in schools across the nation. Various scholars have found that students in lower-tracked classes tend to be taught by less-experienced and less-qualified teachers than students in higher tracks.¹⁷⁰ Moreover, even the pedagogy of teachers in lower-tracked courses is substandard when compared with advanced classes—pedagogy that focuses more on order and rote memorization than the discussion and critical thinking that advanced students receive.¹⁷¹ A strong course of action for a plaintiff bringing a

¹⁶⁷ Campaign for Fiscal Equity, Inc. v. State (*CFE*), 100 N.Y.2d 893, 908 (2003) (“To determine whether New York City schools in fact deliver the opportunity for a sound basic education, the trial court took evidence on the ‘inputs’ children receive . . .”).

¹⁶⁸ *See id.* at 909–11.

¹⁶⁹ *Id.* at 909.

¹⁷⁰ *See, e.g.,* William Tate & Celia Rousseau, *Access and Opportunity: The Political and Social Context of Mathematics Education*, in HANDBOOK OF INTERNATIONAL RESEARCH IN MATHEMATICS EDUCATION 271, 276 (2002) (“Both student achievement levels and type or track of class were related to access to qualified teachers. In each case, the pattern was the same—low-track and low-achievement classes frequently have more out-of-field teachers than do high-track and high-achievement classes.”); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> (“Research has found that both students and teachers are tracked: that is, the most expert teachers teach the most demanding courses to the most advantaged students, while lower-track students assigned to less able teachers receive lower-quality teaching and less demanding material.”).

¹⁷¹ *See* Judith Reed, *Shifting Up: A Look at Advanced Mathematics Classes in Tracked Schools*, 91 HIGH SCH. J. 45, 47 (2008) (discussing how lower expectations of students in low-track classes “have implications for teachers’ pedagogical and curricular choices” including providing high-track students with greater opportunities for “critical thinking and discussion”); Tate & Rousseau, *supra* note 170, at 282 (“Teachers in high-track classes

detracking claim would be to obtain specific data on the teacher inequalities within a particular school district that engages in tracking.

Another factor of inadequate education a plaintiff can raise, which the court in *CFE* considered, is overcrowding in classrooms.¹⁷² The court was then able to infer, based on the data indicating the advantages of smaller class sizes to student learning, that the large classes in New York City schools correlated with negative student outputs.¹⁷³ Discrepancies in class sizes between advanced and regular classes are common occurrences in schools that track.¹⁷⁴ The court in *CFE* also considered deficient “instrumentalities of learning,” such as outdated library books and lack of technology as supportive of plaintiffs’ claims that New York City public schools were supplying an inadequate education.¹⁷⁵ Similarly, students in lower-track classes tend to have lower-quality resources and limited access to technology.¹⁷⁶ A plaintiff bringing a detracking claim can point to these data to bolster her argument that tracking provides an inadequate education for students who are not fortunate enough to be in the high-track classes.

Once a plaintiff is able to demonstrate the deficient inputs students in low-track classes receive, the next step is to introduce evidence regarding the “outputs” of those students. The school district is likely to argue that despite the inadequate inputs, students in low tracks are still receiving an adequate education, so the plaintiff must be able to point to outputs such as test results to prove that the educa-

hoped to develop competent and autonomous thinkers, whereas the emphasis in low-track classes was on conformity to rules and expectations.”).

¹⁷² See *CFE*, 100 N.Y.2d at 911 (“[P]laintiffs presented measurable proof . . . that New York City schools have excessive class sizes, and that class size affects learning.”).

¹⁷³ See *id.* at 912 (finding that “[p]laintiffs’ education evaluation statistics expert Dr. Jeremy Finn showed . . . smaller class sizes in the earliest grades correlate with better test results,” and further concluding “that plaintiffs’ evidence of the advantages of smaller class sizes supports the inference sufficiently to show a meaningful correlation between the large classes in City schools and the outputs” such as test scores).

¹⁷⁴ See, e.g., Scott Jaschik, *AP: Good but Oversold?*, INSIDE HIGHER ED. (Mar. 30, 2010), <https://www.insidehighered.com/news/2010/03/30/ap> (discussing how AP programs “almost always have smaller class sizes and some of the best teachers in a school” and how “these same facts mean that the rest of a school’s students have larger classes and less time with the best teachers”); Tierney, *supra* note 85 (describing how due to advanced courses, “[s]chools have to increase the sizes of their non-AP classes”).

¹⁷⁵ See *CFE*, 100 N.Y.2d at 913.

¹⁷⁶ See, e.g., MONTGOMERY CTY. EDUC. FORUM, *supra* note 1, at 5 (describing the differences in high versus low classes where high classes benefit from advantages such as “computers used as learning tools” and “extra enrichment activities and resources”); Darling-Hammond, *supra* note 170 (describing how tracking “leave[s] minority students with fewer and lower-quality books, curriculum materials, laboratories, and computers; significantly larger class sizes; less qualified and experienced teachers; and less access to high-quality curriculum”).

tion received is in fact inadequate.¹⁷⁷ The court in *CFE* considered standardized test results such as the Pupil Evaluation Program (PEP) and State Reference Point (SRP), including data that showed thirty percent of sixth graders and thirty-five to forty percent of third graders were scoring below the SRP for that particular grade level,¹⁷⁸ to conclude that “New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education.”¹⁷⁹ With tracking, plaintiffs can rely on data that show the negative performance of students in low-track classes as compared to their higher-tracked counterparts,¹⁸⁰ to show that the education those students receive does not meet the constitutional requirement.

Finally, to succeed on an equal educational opportunity claim, a plaintiff will need to meet the causation requirement. In *CFE*, plaintiffs had to establish “a causal link between the present funding system and any proven failure to provide a sound basic education.”¹⁸¹ The court in *CFE* found that plaintiffs met this requirement due to evidence that “improved inputs yield better student performance.”¹⁸² In the tracking context, a plaintiff must show that there is a causal link between tracking and the negative outputs students in lower tracks experience. School districts are likely to argue that it is outside forces such as demographic factors, and not tracking, that causes poor student performance. Plaintiffs can rebut this argument by pointing to data showing that students in higher-tracked classes achieve gains due to the type of instruction they receive, even controlling for outside factors such as “parental education and income, prior grades, and test scores.”¹⁸³ This supports the argument that it is the *opportunities* children receive from being in higher-level classes, rather than their innate intellectual abilities or outside demographic factors, that cause them to succeed.¹⁸⁴ Moreover, the court in *CFE* rejected a similar argument raised by New York, stating that “[W]e cannot accept the

¹⁷⁷ See *CFE*, 100 N.Y.2d at 914 (considering the outputs of students attending New York City schools and describing how “[a] showing of good test results and graduation rates among these students—the ‘outputs’—might indicate that they somehow still receive the opportunity for a sound basic education”).

¹⁷⁸ See *id.* at 916.

¹⁷⁹ *Id.* at 919.

¹⁸⁰ See *supra* note 80 and accompanying text (discussing data that show tracking has a significant negative effect on students in lower tracks).

¹⁸¹ *CFE*, 100 N.Y.2d at 919 (internal citation omitted).

¹⁸² *Id.*

¹⁸³ Kate Garris, *Tracking: Focusing on the New Talented Tenth*, CITIES, SUBURBS & SCH. CHOICE (May 6, 2016), <https://citysuburbsschoolchoice.wordpress.com/2016/05/06/tracking-focusing-on-the-new-talented-tenth/>.

¹⁸⁴ See *supra* notes 81–82 and accompanying text (discussing data that show students in high-tracked classes do not benefit simply from the makeup of their classes).

premise that children come to the New York City schools ineducable, unfit to learn.”¹⁸⁵

Once the court in *CFE* found that the New York City public school district was denying students an equal educational opportunity, it ordered the state to “ascertain the actual cost of providing a sound basic education in New York City.”¹⁸⁶ This called for “[r]eforms to the current system of financing school funding and managing schools [to] address the shortcomings of the current system by ensuring, as a part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education.”¹⁸⁷ The remedy for tracking is less demanding of states and requires simply that they abandon the system of tracking to ensure that all students have access to the resources, high-quality teachers, and curricula necessary to compete in today’s society. Rather than focusing on the funding that school districts receive, the focus is instead on what is happening with that funding, i.e., which students are benefitting and which are still being denied an equal educational opportunity.

C. Challenges with an Equal Educational Opportunity Claim

There is one potential obstacle to bringing a claim that tracking violates a student’s equal educational opportunity. Some courts have taken a different approach from the courts in New York, New Jersey, Connecticut, and New Hampshire in defining what level of education is required. The “different approach” courts focus less on a student’s ability to compete or uniformity and instead use “criterion-referenced adequacy standard[s],” requiring that students be provided with “sufficient” skills in various areas.¹⁸⁸ This is where bringing a tracking claim would be the most difficult. Under a standards-based approach, states can successfully argue that students in low tracks are receiving the *minimum* skills required and thus are receiving an adequate edu-

¹⁸⁵ *CFE*, 100 N.Y.2d at 921.

¹⁸⁶ *Id.* at 930.

¹⁸⁷ *Id.*

¹⁸⁸ Koski & Reich, *supra* note 27, at 564; *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (listing out the “sufficient” skills required in Kentucky). For instance, South Carolina determined that a minimum adequate education required only that students obtain the “ability to read, write, and speak the English language” along with other “academic and vocational skills.” *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999). Kansas also adopted a standards-based approach in *Unified School District No. 229 v. State*, requiring simply that an assessment technique be established to monitor student achievement and that students be able to “think creatively and problem-solve in order to live, learn and work in a global society.” 885 P.2d 1170, 1187 (Kan. 1994).

cation even though they do not have the same opportunities as students in higher tracks.

Despite these differences in interpretation, a major theme arising from state equal educational opportunity claims is that state educational systems must provide students with a meaningful opportunity to excel. The fact that a few courts have determined that providing the bare minimum skills is sufficient to meet this requirement is simply one of the limitations in invoking a state solution. Another limitation is that elected state judges, unlike federal judges, might be susceptible to public pressure from elite parents and other proponents of tracking, much like elected school boards officials likely are. Some students, especially those in states with the lowest educational standards, will be left without a remedy. But until the federal framework changes and a national solution becomes tenable, advocates should consider using equal educational opportunity as one tool to combat tracking, especially in the states that have determined students need to be able to compete in a changing society.

D. Detracking in Practice

If advocates are successful in bringing an equal educational opportunity claim against tracking, what would detracking look like in practice? This Note advocates for school districts to follow Rockville's lead and offer what formerly was the "high-track" curriculum to all students, thus affording everyone the opportunity to take AP and IB classes by the time they reach eleventh grade.¹⁸⁹ Students would no longer be foreclosed from a high-quality curriculum or educational opportunities based on a low-track determination early on in their educational career.

Another possibility is that school districts might detrack by simply allowing all students to opt-in to higher level courses, if they so choose. While that solution would be preferable to the current system of tracking, "allowing choice is not enough to eliminate the status quo with course-taking patterns differentiated along social class and race lines."¹⁹⁰ There is still the problem of teacher bias in suggesting to students which courses they should take based on their perceived abilities,¹⁹¹ and "[s]tudents who have a history of poor achievement or who were previously excluded from challenging courses often do not

¹⁸⁹ See *supra* notes 19–21 and accompanying text (describing Rockville's detracked school system).

¹⁹⁰ NRC REPORT, *supra* note 82, at 111.

¹⁹¹ See *supra* notes 62–65, 77–79 and accompanying text (describing how teachers communicate lower expectations to students in lower tracks).

have the confidence to take [] more challenging courses.”¹⁹² We might end up very close to where we started with little substantial change in the racial demographics of higher- versus lower-track classes. Moreover, if students decided not to take higher-track classes in middle school, they likely will not be able to opt-in to higher-level classes in high school, especially in subjects such as math and science.¹⁹³ For these reasons, the Rockville model, which eliminates self-selection bias up until eleventh grade, is preferred.

No matter which form of detracking a school decides to engage in, school administrators must be intentional about providing support to students to ensure they are able to succeed in higher-level courses. Teacher training, especially in “individualized and peer group learning strategies that have been shown to be effective in promoting learning in a heterogeneous class” should also be adopted.¹⁹⁴ While there might be pushback from parents, including those who might even decide to leave the public school system altogether and seek refuge in private education, school districts can alleviate these concerns with data that show high-tracked students are not harmed by being in heterogeneous classrooms.¹⁹⁵ Regardless, pushback from elite parents is a risk we should be willing to take when the alternative is our current system of tracking that denies so many students the education needed to be successful in today’s society.

CONCLUSION

Tracking is an inequitable system through which higher-caliber teachers, challenging curriculums, unique learning experiences, and meaningful opportunities to succeed are reserved for higher-tracked students. While proponents might argue that tracking is a valid instructional tool which differentiates students based on their ability, numerous studies show that students are tracked along racial and class lines rather than by ability, and that assigning a student to a lower track harms that student’s self-concept and prospects for attaining higher education or meaningful career opportunities.

The legal tools that have been used to address tracking—federal Equal Protection and Title VI—have both been limited, indicating the need for a different legal strategy. This Note argues that state equal educational opportunity doctrine can be a potential remedy. A plain-

¹⁹² NRC REPORT, *supra* note 82, at 118.

¹⁹³ See *supra* notes 13, 66–70 and accompanying text (describing how class placements at the middle school level impact placements in high school).

¹⁹⁴ See NRC REPORT, *supra* note 82, at 219.

¹⁹⁵ See Welner, *supra* note 28, at 706 (“[R]esearch does not support the claim that high-ability students benefit simply from being in separate classes.”).

tiff can draw from the ways inequitable funding has been found to deny students an adequate level of education—especially in states that have defined the educational standards in terms of ability to compete in modern society—and extend those arguments to tracking. Tracking is antithetical to an equal opportunity to compete since it predetermines who the “winners” and “losers” of society will be by creating inequities between high and low tracks and hindering lower-tracked students’ abilities to compete. Upon a finding that tracking violates a student’s equal educational opportunity, school districts would be mandated to detrack, and the door would finally open for all students, regardless of race, class, or parental influence, to have an opportunity to excel.