

RIDING THE *PLESSY* TRAIN: REVIVING *BROWN* FOR A NEW CIVIL RIGHTS ERA FOR MICRO-DESEGREGATION

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INTRODUCTION

Decades after the United States Supreme Court’s *Brown v. Board of Education* decision,¹ America’s public schools remain segregated.²

¹ 347 U.S. 483 (1954) (*Brown I*). See also *Brown v. Board of Education* 349 U.S. 294 (1955) (*Brown II*) (discussing the remedial plan for enforcement of *Brown I*’s desegregation mandate). In this Article, references to both *Brown I* and *Brown II* will simply be referred to as *Brown* (or as *Brown I* and *Brown II*). For a fascinating discussion of the behind-the-scenes maneuvers in the *Brown I* and *Brown II* cases, see Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 *How. L.J.* 251, 266–76 (2008). For a critical review of *Brown I*, *Brown II* and their heritage, see generally Michael A. Middleton, *Brown v. Board: Revisited*, 20 *S. ILL. U. L.J.* 19 (1995), PETER IRONS, JIM CROW’S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION (2002), Dennis D. Parker, *Are Reports of Brown’s Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 *N.Y.L. SCH. L. REV.* 1069, 1070–72 (2004–2005), Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 *N.C. L. REV.* 787 (2010), and Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 *N.C. L. REV.* 1597 (2003).

² CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2011); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 *IOWA L. REV.* 1083, (2014); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 *WIS. L. REV.* 627, 712–13 (1993); Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 *N.C. L. REV.* 725 (2010); Sonia R. Jarvis, *And the Afrocentric Curriculum*, 101 *YALE L.J.* 1285, 1286–87 (1992); Josie Foehrenbach Brown, *Escaping the Circle by Confronting Classroom Stereotyping: A Step Toward Equality in the Daily Educational Experience of Children of Color*, 6 *AFR.-AM. L. & POL’Y REP.* 134, 135 (2004); JAMES E. RYAN, *THE REAL LESSONS OF SCHOOL DESEGREGATION*, IN *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION* 73, 73 (JOSHUA M. DUNN & MARTIN R. WEST EDs., 2009); Girardeau A. Spann, *Disintegration*, 46 *U. LOUISVILLE L. REV.* 565, 569 (2008); Patricia A. Broussard, *Brown Did Not Fail America, America Failed Brown*, 47 *How. L.J.* 829, 830–34 (2004); Derek W. Black, *Taking Teacher Quality Seriously*, 57 *WM. & MARY L. REV.* 1603 (2016); Preston C. Green, III, Bruce D. Baker, & Joseph O. Oluwole, *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 *STAN. J. C.R. & C.L.* 283 (2008). See Harold A. McDougall, *Brown at Sixty: The Case for Black Reparations*, 47 *How. L.J.* 863, 866–92 (2004) (providing a brief overview of the historical deprivation of education to minorities).

The unvarnished but often unspoken distressing truth is that America has never had a single year in its history when at least 50 percent of African American students attended majority White schools.³ Latino and African American students attend increasingly segregated schools with 43 percent of Latino students and 40 percent of African American students in schools with at least 90 percent minority students.⁴ It is disappointing that the progression of desegregation in school systems after the Supreme Court's short lived aggressive enforcement post-*Brown* has quickly evaporated.⁵ While enforcement of *Brown*⁶ focused largely on macro-segregation encompassing segregation between schools districts and between schools within districts, judicial enforcement has been lax or virtually nonexistent when it comes to micro-segregation regarding classrooms in individual schools.⁷

³ IRONS, *supra* note 1, at 338.

⁴ Erica Frankenberg, Genevieve Siegel Hawley, Jongyeon Ee, & Gary Orfield (2017). *Southern Schools: More Than a Half-Century After the Civil Rights Revolution*, CIVIL RIGHTS PROJECT AT UCLA AND CENTER FOR EDUCATION AND CIVIL RIGHTS AT PENN STATE, available at https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/southern-schools-brown-83-report/Brown63_South_052317-RELEASE-VERSION.pdf; Erica Frankenberg, *Assessing the Status of School Desegregation Sixty Years after Brown*, 2014 MICH. ST. L. REV. 677, 678, 688–90 (2014); George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 626 (2015); Robinson, *supra* note 1, at 789–90. This continued segregation violates the promise and spirit of the *Brown* decisions; after all, “[u]nder the United States Constitution, all races are equal and all children have an equal right to the invaluable asset of education.” Celia M. Ruiz, *Equity, Excellence and School Reform: A New Paradigm for Desegregation*, 101 ED. LAW REP. 1, 3 (1995). See also Spann, *supra* note 2, at 597–604, 606–09 (elucidating the Court’s historical tendencies to minimize the vitality of minority interests in desegregation litigation relative to the majority’s interests).

⁵ Frankenberg, *supra* note 4, at 678; Chemerinsky, *supra* note 1; Robinson, *supra* note 1, at 790. See also Joel B. Teitelbaum, *Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate*, 79 MARQ. L. REV. 347, 370 (1995) (“Integration was never intended to be solely about providing blacks the opportunity to simply attend school in an integrated setting—instead, it was hoped that wide-scale integration would improve the quality of life for blacks generally by improving the quality of the education to be received, which in turn would reduce unemployment and poverty rates. Up to this point, however, desegregation efforts have not accomplished these goals.”).

⁶ Note that this says *enforcement of Brown*; it is the enforcement (not *Brown I* and *Brown II* themselves) that has focused on macro-segregation. This is an important distinction for, as we discuss later in this Article, *Brown* affords constitutional rights for micro-desegregation; the judicial enforcement simply needs to catch up.

⁷ Michael L. Wells, *Race-Conscious Student Assignment Plans after Parents Involved: Bringing State Action Principles to Bear on the De Jure/De Facto Distinction*, 112 PENN ST. L. REV. 1023, 1038 (2008) (pointing out that “[i]n the early cases, the Court was preoccupied with undoing a century of state-sponsored white supremacy”). Accord David L. Kirp, *Schools*

A. *The Supreme Court Is Aware*

It appears the Supreme Court understands the distinction between macro-segregation and micro-segregation, having referred to “each school, grade or *classroom*” in *Milliken v. Bradley* while evaluating a desegregation remedy.⁸ More recently, in *Parents Involved in Community School v. Seattle School District No. 1*, Justice Kennedy acknowledged the importance of classroom diversity when he stated that “[i]n these cases two school districts in different parts of the country seek to teach that principle by having *classrooms* that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.”⁹ Justice Kennedy’s statement shows a recognition that micro-segregation has not been realized even though it is one of “our highest aspirations” as a nation.¹⁰ Indeed, researchers have found that micro-segregation

as Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. PA. L. REV. 705, 707–09 (1973). See also Elia V. Gallardo, *Hierarchy and Discrimination: Tracking in Public Schools*, 15 CHICANO-LATINO L. REV. 74, 75, 83–84 (1994); *id.* at 88 (“the legal system has not taken a firm stand against tracking and its damaging effects”). See Kimberly C. West, *A Desegregation Tool That Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567, 2568 (1994). See also *id.* at 2579–80 and Carla O’Connor, “I’m Usually the Only Black in My Class”: *The Human and Social Costs of Within-School Segregation*, 8 MICH. J. RACE & L. 221, 223, 228 (2002) (noting that the research on micro-segregation has not been as extensive). See also Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America’s Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 480 (1996) (“While school boards were forced to integrate the schools, they were not forced to integrate the classrooms.”). See also *id.* at 470 (“One of the results of the integration of school systems and the reintroduction of tracking immediately following *Brown* has been the racial resegregation of students within the same school based on ability level.”). Indeed, in-school segregation might be more impactful than between-school segregation. See, e.g., Charles T. Clotfelter, Helen F. Ladd, & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina’s Public School Classrooms*, 81 N.C. L. REV. 1463, 1482–83 (2003). In-school segregation also is most pronounced at the middle and high school levels. *Id.* at 1493.

⁸ 418 U.S. 717, 741 (1974) (internal quotation marks omitted). Thus, it is disappointing that the Court has not aggressively addressed this given the historical racial roots. See Kevin G. Welner, *Tracking in an Era of Standards: Low-Expectation Classes Meet High-Expectation Laws*, 28 HASTINGS CONST. L.Q. 699, 703 (2001) (stating that “its history is steeped in racism”).

⁹ 551 U.S. 701, 782 (2007) (Kennedy, J., concurring) (*Parents Involved*). The principle referenced here is strength from unity in pluralism. See *id.* (“The Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”).

¹⁰ *Parents Involved*, 551 U.S. at 782. This despite the fact that, as Justice Stevens correctly observed, “children of *all* races benefit from integrated classrooms.” *Id.* at 799, n.3 (Stevens, J., dissenting) (emphasis added). In *Fisher v. University of Texas at Austin*, the United States District Court for the Western District of Texas recognized micro-segregation as a problem even at the university level:

remains a concern even where school buildings appear integrated.¹¹ For instance, Professor Richard Ford found that, while Berkeley High School (California) had a racially integrated building—38 percent White, 35 percent Black, 11 percent Asian and Pacific Islander, 9 percent Hispanic and 7 percent mixed race—the classrooms were very segregated.¹²

B. *Tracking's Metamorphosis and Foothold*

Microsegregation practices have stealthily metastasized into tracking (also known as ability grouping, second-generation segregation,

Plaintiffs also criticize UT's [University of Texas] reliance on diversity statistics at the classroom level. In 2002, as the undisputed evidence shows, 79 percent of UT classes had zero or one African American students. UT offered over 5,631 classes that year, meaning approximately 4,448 classes had one or zero African American students. Similarly, 30 percent of these classes had zero or one Hispanic students; in other words, 1,689 classes had zero or one Hispanic students. Plaintiffs argue there has been no recognition of 'individual classroom diversity' as a compelling state interest. But Plaintiffs misconstrue the importance of the classroom diversity numbers. Defendants have not asserted a compelling interest in obtaining diversity in every single class—as the Plaintiffs argue, such an attempt would be largely unworkable without unreasonable and unheard of control over each student's schedule. Rather, the largescale absence of African American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits. The benefits *Grutter* [Grutter v. Bollinger] recognizes occur largely within the classroom; thus, the absence of minority students from a large number of classes demonstrates UT's ongoing need to improve diversity campus-wide. *Fisher*, 645 F. Supp.2d 587, 609 (W.D. Tex. 2013) *vacated and remanded by* 133 S.Ct. 2411, 2420 (2013). *Accord* Fisher v. University of Texas at Austin, 631 F.3d 213, 225 (5th Cir. 2011).

¹¹ As a school board member, Professor Patricia Broussard found that minority parents “believe that some of these educational practices and policies that have been adopted by local school systems are merely institutionalized attempts to thwart integration and are indicia of continued resistance.” Broussard, *supra* note 2, at 836. This should not be surprising given that, even the Supreme Court observed long after its *Brown I* decision that, “the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities.” Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971). School districts are well aware that they cannot get away with blatant disregard of desegregation orders so they try to delay implementation in subtle ways that can also be masked in institutionalized systems, practices or process.

¹² Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1320–23 (2004) (citing School Colors (PBS television broadcast, Oct. 18, 1994)). See JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 46–58, 233–35 (2d ed. 2005) (providing examples of schools with micro-segregation practices). See also *Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 859 (9th Cir. 1998) (discussing micro-segregation).

in-school segregation, or classroom segregation¹³) from its heyday as a form of resistance to *Brown's* mandate to desegregate the public school system.¹⁴ Veritably, tracking “helped to make desegregated school buildings more palatable to politically powerful middle-class White parents who otherwise might withdraw their support and children from the public schools.”¹⁵ In other words, tracking helped establish “a refuge for

¹³ See generally Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001), William Benjamin Bryant, *Doubting Thomasville's Ability-Grouping Program: Holton v. City of Thomasville School District*, 59 MERCER L. REV. 1391, 1393 (2007), and KENNETH J. MEIER, JOSEPH STEWART, JR., & ROBERT E. ENGLAND, RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION 9, 22–23 (1989) (discussing these terms which will be used interchangeably herein). Cf. Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. at 216 (describing first-generation segregation as between-school segregation within a particular school district). Tracking is also known as “contemporary segregation.” Charles T. Clotfelter, Helen F. Ladd, & Jacob L. Vigdor, *School Segregation under Color-Blind Jurisprudence: The Case of North Carolina*, 16 VA. J. SOC. POL'Y & L. 46 (2008).

¹⁴ Harvard Law Review, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318 (1989); Broussard, *supra* note 2, at 831–44. See also Matt Chayt, *Thirty-Five Years After Berkelman: Seeking A New Debate About Ability Grouping*, 37 HASTINGS CONST. L.Q. 617, 635 (2010) (“*Brown* directly correlated with the reintroduction of tracking as a system of academic classification. Indeed, in many school districts, intra-school tracking was a direct response to court-ordered desegregation.”). See Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. at 525 (stating that tracking is not offered in high-minority schools in the inner city because there is no need to because tracking has more utility in integrated schools where there are White flight fears). See generally Hayman, Jr. & Levit, *supra* note 2, Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 90–99 (2004), John Charles Boger, *Education's "Perfect Storm"?: Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. at 1385–86, Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 465 (1973), Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1486–1500 (2004), Jarvis, *supra* note 2, at 1289–90, Robinson, *supra* note 1, at 799–804, MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 46–47, and Ronald Turner, *Plessy 2.0*, 13 LEWIS & CLARK L. REV. 861, 889–95 (2009) (discussing various forms of resistance to desegregation). See Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 148 (2016) (“In the aftermath of the Supreme Court's decision in *Brown*, particularly during the 1960s, school districts in the South used many tools to resist desegregation.”). See also Dickens, *supra* note 7, at 472 (explaining that tracking was used in the South to suppress *Brown's* impact and in the North as a counter to mass African American migration North).

¹⁵ Mickelson, *supra* note 13, at 242; McDougall, *supra* note 2 at 879; OAKES, *supra* note 12, at 278; Welner, *supra* note 8, at 701–02, 708; MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 130–31. See also Chayt, *supra* note 14, at 637 (“tracking faded in the 1930s and 1940s because in the pre-*Brown* era schools could use explicit rather than implicit racism to fend off African-American enrollees.”). See also Dickens, *supra* note 7, at 472 (“After the decision

white students.”¹⁶ Wistfully, with the strong focus on macro-segregation in the judicial system, micro-segregation was able to gain a foothold and stronghold.¹⁷ The news media’s failure to report micro-segregation as it did macro-segregation has enabled both the foothold and stronghold.¹⁸ Due to its more subtle nature, micro-segregation has been able to skate attention. Unlike the open racism that pervaded for a long time, micro-segregation policies and practices represent “subtler forms of system bias against [minorities], residing more in cognitive than affective mechanisms, more unconscious than willingly avowed as such.”¹⁹ In fact, tracking helps sanitize any possible intent behind micro-segregation, muddling inquiry into intent or motives into a quasi-impossible task. This sanitization is part of an intricate process that has established institutionalized discrimination that allows discriminatory tracking practices and policies to avoid scruples.²⁰ This institutionalized discrimination in

in *Brown*, tracking, which had waned as a system of academic classification by the 1950’s as educators discovered that it offered few benefits and that in some cases it could harm students, became popular again in the American public school system. The *Brown* decision is directly correlated with the re-introduction of tracking as a system of academic classification.”). See *United States v. Board of Educ. of Lincoln Cty.*, 301 F.Supp. 1024, 1030 (S.D. Ga. 1969) (highlighting White students’ reluctance to attend minority schools).

¹⁶ *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 488 (1972).

¹⁷ MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 5–6, 9. There have been very few cases where micro-segregation has been specifically challenged. See, e.g., *Vaughns by Vaughns v. Board of Educ. of Prince George’s Cty.*, 758 F.2d 983, 991 (4th Cir. 1985); and *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F.Supp. 34, 37, 53 (N.D. Ca. 1983), *rev’d by* 896 F.2d 412 (9th Cir. 1990) (“A major goal of the provisions of this Consent Decree shall be to eliminate racial/ethnic segregation or identifiability in any S.F.U.S.D.[San Francisco Unified School District] school, program, or classroom and to achieve the broadest practicable distribution throughout the system of students from the racial and ethnic groups which comprise the student enrollment of the S.F.U.S.D.”).

¹⁸ Jack W. Londen, *School Desegregation and Tracking: A Dual System within Schools*, 29 U.S.F. L. REV. 705, 705 (1995).

¹⁹ Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 16 (2004). See also OAKES, *supra* note 12, at 247 (“It also reflects an extensive list of American biases around race, language, and poverty to cast doubt on the learning capacities of African Americans and of Latino immigrants.”). See, e.g., *United States v. Yonkers*, 123 F. Supp. 2d 694, 713–15 (S.D.N.Y. 2000) (discussing credible examples of subtle practices and policies).

²⁰ See, e.g., MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 30–31. The unfolding approach to tracking has been similar to the Supreme Court of California’s once-held unjust position regarding schools which might as well have applied to classrooms then as well: “Confining colored children to schools specially organized for them, does not impair or abridge any right, conceding that the right exists; it is a simple regulation of rights, with a view to the most convenient and beneficial enjoyment of them by all, and deprives no one of what is justly his own.” *Ward v. Flood*, 48 Cal. 36, 42 (1874).

tracking has been effectively licensed by ingrained indifference from the majority bred over several decades.²¹

C. *There Is Room in Desegregation Precedent*

Despite the lack of judicial attention to in-school segregation, there is room in the Supreme Court's desegregation cases to address this issue on the micro-level. This approach does not call for a radical reinterpretation of the precedents. This approach only calls for an extension of the precedents to apply on to micro-level segregation. This expanded interpretation would allow minorities to experience the promise of *Brown* on the micro-level.

As the Supreme Court once stated, the Equal Protection Clause of the Fourteenth Amendment “contain[s] a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy.”²² Dolefully, minority students have not had a lot to cheer about when it comes to their experiences inside desegregated buildings as the “emergence of second generation issues such as in-school segregation in the form of tracking and ability grouping . . . demonstrates that the basic goal of *Brown* remains unrealized in many respects.”²³ This calls for resurrection of *Brown's* promise. The mere fact that tracking might

²¹ Broussard, *supra* note 2, at 834. We must not discount the fact that “[i]t is beyond dispute that racism and bigotry continue to tear at the fragile social fabric of our national and local communities, and that our best efforts as citizens are needed to address this problem at many levels.” *Coalition to Save Our Children v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 756 (3d Cir. 1996). With regard to tracking, courts have essentially continued beliefs systemized over a century ago when the New York Court of Appeals wrote that “[t]he question here presented has also been the subject of much discussion and consideration in the courts of the various States of the Union, and it is believed has been, when directly adjudicated upon, uniformly determined in favor of the proposition that the separate education of the white and colored races is no abridgment of the rights of either.” *Ex Rel. King v. Gallagher*, 93 N.Y. 438, 453 (N.Y. Ct. App. 1883).

²² *Strauder*, 100 U.S. at 307–08. See also *Ex parte Commonwealth of Va.*, 100 U.S. 339, 344–45 (1879) (“One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.”). For a discussion of the history of the Equal Protection Clause jurisprudence, see JOSEPH OLUWOLE, *THE SUPREME COURT AND WHISTLEBLOWERS: TEACHERS AND OTHER PUBLIC EMPLOYEES* 135–50 (2008).

²³ Parker, *supra* note 1, at 1073 (internal quotation marks omitted).

have metastasized from its original form as resistance to the *Brown* cases should never excuse it.²⁴

This Article explores the Supreme Court's desegregation jurisprudence in order to make the case that courts should require micro-desegregation to reverse in-school segregation through tracking. To date, the desegregation jurisprudence has focused so much on macro-segregation that micro-segregation was barely enforced at any judicial level.²⁵ The judiciary has now effectively retreated from desegregation enforcement despite the resegregation in schools.²⁶ In dealing with macro-segregation, the judiciary steadily and firmly recoiled from championing the education rights of students to desegregated schools while ignoring segregated classrooms. In such a judicial milieu, minorities could feel the pressure from the courts to forsake their civil rights fight for desegregation.²⁷ This pressure adds insult to the injury of historical segregation as it leaves minorities powerless; all the while the core issue of micro-segregation laid victim to insouciance. As such, micro-segregation has thrived without benefit of *Brown's* promise. Accordingly, we call the judiciary to duty to restart the desegregation jurisprudence; this time for the benefit of micro-desegregation with the earnestness and urgency merited all along.

Part I of this Article presents a portrait of tracking to further the reader's understanding of the segregated state of affairs. This discussion encompasses the consignment of minorities to the lower tracks as

²⁴ See *Wright v. Council of City of Emporia*, 407 U.S. 451, 465–66 (1972) (allowing courts to consider timing of origin of school district action that compounds segregation or undermines desegregation). See also *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F.Supp. 487, 498 (N.D. Miss. 1987) (“Evidence that a district implemented a discriminatory assignment method at the time of desegregation justifies a court in finding that the school officials are attempting to continue to preserve the status quo in contravention of the law.”).

²⁵ In a sense, there has been a misplaced sole focus on macro-segregation in that the Supreme Court's desegregation jurisprudence failed to enforce micro-segregation since *Brown*.

²⁶ See Preston Cary Green, *Can State Constitutional Provisions Eliminate De Facto Segregation in the Public Schools?*, 68 J. NEGRO EDUC. 138, 141–42 (1999), Teitelbaum, *supra* note 5, at 355–61, 368–69, Chemerinsky, *supra* note 1, Robinson, *supra* note 1, at 791–92, 811–39, and Joe R. Feagina & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. at 1109 (discussing the judicial retreat).

²⁷ See Parker, *supra* note 1, at 1078 (“[E]ven if they were not aware of the shift in emphasis from the rights of those whose constitutional rights were violated to the rights of the violators to reassert control over the school systems, members of the class of plaintiffs consisting of minority children eligible to attend public schools certainly recognized the growing pressure to close out the cases even if, in the eyes of the minority communities, much work remained to be done.”).

well as the problematic and biased criteria used for the consignments. It presents some parallels between *Plessy v. Ferguson*²⁸ and micro-desegregation. It also shines a spotlight on the harm minorities suffer from low track placements as well as the vicious cycle thereby perpetuated. Part II examines the United States Supreme Court's desegregation jurisprudence for precedents that can provide the foundation for harbingering a micro-desegregation civil rights era. It includes discussions of *Brown I's* promise, *Brown II's* promise, and systemwide desegregation. Additionally, it discusses student assignment as a measure of coded racial identification in the Court's desegregation jurisprudence. This Part also argues, from this jurisprudence, that intent should not dictate court decisions in the micro-segregation era. It argues that colorblindness, quantification of race, judicial aversion to remedy of societal discrimination should not deter a micro-desegregation civil rights era. The Part provides ideas, such as race-as-a-plus factor, that schools can rely on for micro-desegregation without violating the current desegregation jurisprudence.

I. THE TRACKING STATE OF AFFAIRS: A TRACKING PORTRAIT

A. *Consigning Minorities to the Lower Tracks*

Tracking systematically creates segregated classes within an ostensibly integrated school building. This micro-level form of segregation deprives minority students of equal educational and career opportunities by relegating them to the lower tracks.²⁹ These minorities rarely get the opportunity to be assigned to gifted and talented tracks or upper tracks.³⁰ Instead, they are consigned to tracks with less challenging curriculum, instruction, and assessments as well as lower standards and expectations.³¹ These consignments interact to exacerbate the snares of low track placement, making it difficult to impossible to move into the higher tracks.

²⁸ 163 U.S. 537 (1896).

²⁹ Londen, *supra* note 18, at 705–06, 713; Losen, *supra* note 14, at 517; Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 LA RAZA L.J. 25, 33 (1995); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. at 1533.

³⁰ Losen, *supra* note 14, at 517; Mickelson, *supra* note 13, at 232–33; Schofield & Hausmann, *supra* note 14, at 98; OAKES, *supra* note 12, at 298–99; Mickelson, *supra* note 29, at 1549–51; MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 5, 82 (Table 4.1), 84 (1989); Londen, *supra* note 18, at 711–13; Brown, *supra* note 2, at 143; McDougall, *supra* note 2, at 893–94.

³¹ OAKES, *supra* note 12, at 1–13, 35, 40–92, 192–93; Losen, *supra* note 14, at 517, 545; Londen, *supra* note 18, at 713; Harold McDougall, *School Desegregation or Affirmative Action?*, 44

In the lower tracks, the “curricular coverage is comparatively sparse, time on task is truncated, and pedagogical practices are least engaging.”³² This is so despite the fact that students placed in lower tracks would similarly benefit from the challenging curriculum, pedagogies, and other resources provided to students in the upper tracks.³³ Prolific tracking expert Professor Jeannie Oakes found the following differences in the learning opportunities provided to upper track and lower track students:

TABLE 1: Track-based Learning Opportunities³⁴

Upper Track Advantages	Lower Track Disadvantages
Curriculum emphasizing concepts, inquiry, and problem solving	Curriculum emphasizing low-level facts and skills
Stress on students developing as autonomous thinkers	Stress on teaching students to follow rules and procedures
More time spent on instruction	More time spent on discipline or socializing
More active and interactive learning activities	More worksheets and seat-work
Computers used as learning tools	Computers used as tutors or electronic worksheets
More qualified and experienced teachers	More uncertified and inexperienced teachers
Extra enrichment activities and resources	Few enrichment opportunities
More engaging and friendly classroom environment	More alienating and hostile classroom environment
Hard work a likely classroom norm	“Not working” a likely classroom norm

WASHBURN L.J. at 71. See Willis D. Hawley, *The Need for a Comprehensive Multi-Year Strategic Plan for Ending Racial and Ethnic Discrimination: A Focus on Schools*, 67 OHIO ST. L.J. at 150 (highlighting the importance of teacher expectations to student motivation for success).

³² Carla O’Connor, “I’m Usually the Only Black in My Class”: *The Human and Social Costs of Within-School Segregation*, 8 MICH. J. RACE & L. at 224. See also Noguera, *supra* note 29, at 38 (“Many of the students that we interviewed connected the cultural bias of the curriculum to their placement in low ability classes.”).

³³ See, e.g., SANDRA L. SCHURR, *PRESCRIPTIONS FOR SUCCESS IN HETEROGENEOUS CLASSROOMS* (1995).

³⁴ OAKES, *supra* note 12, at 228 (Table 11.1) (citing Jeannie Oakes et al., *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science*, RAND (1990), available at <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3928.pdf>). See also OAKES, *supra* note 12, at 67–72, 85–90, 227 (further contrasting the learning experiences of upper track and lower track students).

When reflecting on her tracking data collection in the Charlotte-Mecklenburg Schools, Professor Mickelson observed that anyone with knowledge of the historical interaction between race and tracking could have looked at the racial configuration of classes to predict the academic level of an English, math, science and social studies course in the eleven high schools.³⁵ Another study of national sample data found that eighth-grade African American students were placed in low track English courses “at a rate 143% (or 2.43 times) higher than that of Anglo students.”³⁶ Similarly, compared to Anglo students, Latino students were placed in low track English courses “at a rate 107% (or 2.07 times) higher”³⁷ and American Indians “at a rate 150% (or 2.50 times) higher.”³⁸

Furthermore, in math, African American students were placed in low track courses “at a rate 133% (or 2.33 times) higher than the rate for Anglo students;”³⁹ for Latinos, the rate was 67 percent (or 1.67 times) while for American Indians, the rate was 127 percent (or 2.27 times).⁴⁰

Minority students are also consigned to vocational tracks as opposed to the collegebound tracks reserved for students in higher tracks.⁴¹ In their analysis of data representative of national school trends, Professors Jomills Henry Braddock II and Marvin P. Dawkins found that, in the tenth-grade, African Americans were 140 percent more likely to be in the vocational track than White students; Latinos 60 percent more likely, and American Indians 150 percent more likely.⁴² In his study of Lockwood Unified School District (California), Professor Pedro Noguera found that Latinos were disproportionately absent from college tracks and advanced placement classes at the junior high and high school levels; instead, they were disproportionately placed in the

³⁵ Mickelson, *supra* note 13, at 216.

³⁶ 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, 326 (1993).

³⁷ *Id.* at 328.

³⁸ *Id.* at 329.

³⁹ *Id.* at 328.

⁴⁰ *Id.* at 329.

⁴¹ MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 3–4; Dickens, *supra* note 7, at 473–74; Noguera, *supra* note 29, at 33. See OAKES, *supra* note 12, at 152–53 (discussing the discriminatory origins of vocational programs).

⁴² Braddock & Dawkins, *supra* note 36, at 331–33. See also Londen, *supra* note 18, at 711–12 (discussing disproportionate placement of Latino students in lower tracks).

lower track classes.⁴³ Educational deprivation of lower track students extends to extracurricular activities as these students are less likely to be involved in extracurricular activities.⁴⁴ Further, an illustrative study of North Carolina public schools found that in-school segregation is trending upwards for African Americans and Latinos.⁴⁵

B. Tracking, Racial-Identifiable Classrooms and Plessy Parallels

While it is difficult to isolate intentional discrimination in micro-segregation policies and practices, tracking creates racially-identifiable classrooms.⁴⁶ Justice Thomas recognized this in *Parents Involved* as reflected in his comment on racially-identifiable classrooms: “There is no guarantee . . . students of different races in the same school will actually spend time with one another. Schools frequently group students by academic ability as an aid to efficient instruction, but such groupings often result in classrooms with high concentrations of one race or another.”⁴⁷ Indeed, tracking has quintessentially been “antithetical to the process of school integration.”⁴⁸

⁴³ Noguera, *supra* note 29, at 30. See Londen, *supra* note 18, at 710–15 (finding similarly for Latinos in the San Jose Unified School District (California)).

⁴⁴ Tonya L. Nelson, *Tracking, Parental Education, and Child Literacy Development: How Ability Grouping Perpetuates Poor Education Attainment within Minority Communities*, 8 GEO. J. ON POVERTY L. & POL’Y 363, 365 (2001); OAKES, *supra* note 12, at 9.

⁴⁵ Clotfelter, Ladd, & Vigdor, *supra* note 13, at 55–56; Clotfelter, Ladd, & Vigdor, *supra* note 7, at 1479–81, 1484.

⁴⁶ See generally Mickelson, *supra* note 13; JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS 91, 113–14, 118, 144 (1991); David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 760–61 (1973).

⁴⁷ *Parents Involved*, 551 U.S. 701, 768 (2007) (Thomas, J., concurring).

⁴⁸ MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 26. Legal commentator Danielle Kastan notes that:

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

Danielle Kastan, *Modern Day School Segregation: Equity, Excellence, & Equal Protection*, 87 ST. JOHN’S L. REV. 201, 207 (2014). See also Hayman, Jr. & Levit, *supra* note 2, at 687–90, 695–97 (discussing the assumptions of racial inferiority and its errors). See *Hart v. Community Sch. Bd. of Brooklyn*, New York Sch. Dist. No. 21, 383 F. Supp. 699, 743–44 (E.D.N.Y. 1974) (“It is not only *Plessy v. Ferguson* providing the legal basis for imposed segregation, but the conspiracy—explicit and implicit—of an entire society and its local, state and federal governmental

The racial identification between classrooms within the same grade level mimics the legacy of *Plessy v. Ferguson*⁴⁹ which enforced racially-identifiable coaches.⁵⁰ In *Plessy*, the United States Supreme Court upheld, as reasonable, a Louisiana law that stated that “all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.”⁵¹

One need only substitute the word “tracking” for “statute” in the following Justice Harlan *Plessy* quote to see further parallels between tracking and the *Plessy* train:

It was said in argument that the statute . . . does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.⁵²

Further, like the *Plessy* train, proponents of tracking argue that this practice should be guided by “reasonableness” even though races

arms to impose social, political and economic segregation that has in large measure created the racial dilemmas our country now faces.” (internal citation omitted)).

⁴⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896). As Professor Ronald Turner stated, *Plessy* endorsed “American apartheid.” Turner, *supra* note 1, at 61.

⁵⁰ See Beatrice A. Moulton, *Hobson v. Hansen: The De Facto Limits on Judicial Power*, 20 STAN. L. REV. 1249 (1968) (“*Plessy* is more than anything else a reminder of the damage courts can do to such minorities.”).

⁵¹ *Plessy*, 163 U.S. at 540.

⁵² *Plessy*, 163 U.S. at 556–57 (Harlan, J., dissenting). It also continues the pervading notions that were institutionalized even before *Plessy* that natural racial distinctions dictate the classifications. See, e.g., *Ex Rel. King v. Gallagher*, 93 N.Y. 438, 450 (N.Y. Ct. App. 1883). (“A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights.”).

are separated; and that schools should be “at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”⁵³ Correspondingly, tracking proponents argue that homogeneous classification (tracking) is beneficial to those with higher academic achievement, ability, and interest and that heterogeneous classifications can be detrimental to those who belong in the lower tracks.⁵⁴ Thus, they effectively make a separate but equal proposition under the guise of reasonableness, centered on the notion that separate tracks provide equitable education for those in the lower tracks.⁵⁵ Further, the judiciary’s failure to confront the segregation is equivalent to the *Plessy* Court’s conclusion that “we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable.”⁵⁶

C. *Tracking and Plessy Parallels: Turning a Blind Eye to Injustice*

Tracking is a “significant source of inequalities in educational opportunities” which ends up limiting lifetime opportunities for minority students locked into low-ability classes.⁵⁷ It is as if educators play God rationing out

⁵³ *Plessy*, 163 U.S. at 550.

⁵⁴ Mickelson, *supra* note 13, at 221–22. This is likewise to the comfortability rationale the Supreme Court embraced in *Plessy* to allow pestiferous racial classification. There the Court stated that racially separate but equal passenger coaches could be used with “a view to the promotion of their comfort, and the preservation of the public peace and good order”; *Plessy*, 163 U.S. at 550, because the Equal Protection Clause was not intended to promote “a commingling of the two races upon terms unsatisfactory to either” *Plessy*, 163 U.S. at 544. See Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation after Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 508 (2008) (highlighting the fact that, under *Plessy*, the government was “free to ignore—or even codify—social prejudice against blacks so long as the government did not upset the existing pretense of institutional equality.”).

⁵⁵ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 45 (2004). See also Turner, *supra* note 14, at 37–40.

⁵⁶ *Plessy*, 163 U.S. at 550–51.

⁵⁷ Mickelson, *supra* note 13, at 222. See generally Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477 (2003) (discussing inequalities with North Carolina as an example). See also Jeannie Oakes et al., *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science*, RAND (1990), available at <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3928.pdf>; KEVIN WELNER, LEGAL RIGHTS, LOCAL WRONGS (2001); SAMUEL R. LUCAS, TRACKING INEQUALITY: STRATIFICATION AND MOBILITY IN AMERICAN HIGH SCHOOLS (SOCIOLOGY OF EDUCATION SERIES) (1999); Ford, *supra* note 12, at 1322–23. It is very disappointing that “students placed in lower ability groups rarely move into average or advanced ability groups.” Tonya L.

educational and lifetime opportunities.⁵⁸ The reality of tracking, as the reality in *Plessy*, is that what actually obtains is a “separate-and-unequal scheme” (or a “together-but-separate” system—a reference to the segregation within the same school building).⁵⁹ Tracking embodies the spirit of *Plessy* in which the “Court not only created a doctrinal justification for racist policies, but symbolically affirmed that whites were indeed superior to blacks.”⁶⁰ The inequities are perpetuated as students in lower tracks are provided less rigorous curriculum and instruction (and sometimes less experienced, less qualified, and less effective teachers) which essentially precludes them from upward mobility into the higher tracks.⁶¹ Thus, as in *Plessy*, these students are condemned to their own train coach.⁶²

Nelson, *supra* note 44, at 366 (citing Sara Lake, *Practitioner's Monograph #2, Equal Access to Education: Alternatives to Tracking and Ability Grouping*, November 1988, at 2).

⁵⁸ Welner, *supra* note 8, at 708. Cf. OAKES, *supra* note 12, at 24 (“advocacy of a curriculum differentiated to meet individual differences and to prepare students for life with an expression of his hope that people will refuse to believe that the American public intends to have its children sorted before their teens into clerks, watchmakers, lithographers, telegraph operators, masons, teamsters, farm laborers, and so forth, and treated differently in their schools according to these prophecies of their appropriate life careers. Who are we to make these prophecies?” (internal quotation marks omitted) (citing CHARLES ELIOT, *THE FUNDAMENTAL ASSUMPTION IN THE REPORT OF THE COMMITTEE OF TEN*, as quoted in Herbert M. Kliebard, *The Drive for Curriculum Change in the United States, 1890-1958.1—The Ideological Roots of Curriculum as a Field of Specialization*, 11 J. CURR. STUD. 191, 195 (1979))).

⁵⁹ KLARMAN, *supra* note 55, at 45 (2004). The “together-but-separate” coinage is a play on legal commentator Elia Gallardo’s use of the term “together-but-unequal system.” Gallardo, *supra* note 7, at 81–82 (1994). We can also refer to it as “congregated but separate” to capture the lack of integration within the same building where students are congregated just as people congregated and yet remained separated in the *Plessy*-era trains. See McDougall, *supra* note 31, at 65–66 (2004) and Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 6–10 (1999) (discussing the unequal reality of the *Plessy* era).

⁶⁰ Yudof, *supra* note 14, at 467–68.

⁶¹ KOZOL, *supra* note 46, at 91, 113–14, 118, 144 (1991). See also LINDA DARLING-HAMMOND, *INEQUALITY AND ACCESS TO KNOWLEDGE*, IN *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION* 465, 473–74 (JAMES A. BANKS & CHERRY A. MCGEE BANKS EDs., 1995); Mickelson, *supra* note 13, at 222 (noting that “tracking tends to reinforce the learning problems of socially and educationally disadvantaged students by providing them with less effective instructors who teach the least rigorous curricular using the methods least likely to challenge them to learn.”); Beth C. Rubin, *Tracking and Detracking: Debates, Evidence, and Best Practices for a Heterogeneous World*, 45 THEORY INTO PRACT. 4, 4 (2006); Elia V. Gallardo, *supra* note 7, at 80; Londen, *supra* note 18, at 713; Lawyers’ Committee for Civil Rights Under Law et al., *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591, 607 (2008); MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 3–4.

⁶² See also Mickelson, *supra* note 13, at 222 (“educational advantages *cumulate* for those in the top tracks relative to those in the lower tracks” (emphasis added)). Accord OAKES, *supra* note 12, at 35. Indeed, “[t]racking has frequently been critiqued as providing inadequate and

Further, as on the *Plessy* train, tracking “socialize[s] students to accept their position in the school’s status hierarchy where the top tracks are the most highly valued” coupled with official license to dictate students’ destinies.⁶³ Moreover, similar to the Supreme Court’s declaration in *Plessy*, proponents of tracking would reject the proposition that “the enforced separation of the two races stamps the colored race with a badge of inferiority.”⁶⁴ Like in *Plessy*, they would argue that if any minority sees a badge of inferiority in tracking, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”⁶⁵ Tracking, however, undeniably serves as an instrumentality for affirming preconceived notions of racial capabilities.⁶⁶

Professor Kevin Welner’s tracking research in four districts—Rockford (Illinois), San Jose (California), Woodland Hills (Pennsylvania), and Wilmington (Delaware)—concluded that the “disproportionate placement of African American and Latino students in low-track classes, and the corresponding exclusion of these students from high-track classes, went *above and beyond* any effect attributable to prior measured achievement.”⁶⁷ In essence, track placements cannot simply be explained as performance-based. It is also curious that tracks in various school districts, supposedly designed to be homogenous, tend to include students across a spectrum of abilities; yet they are generally racially identifiable.⁶⁸ In some districts, tracking is even easier to manipulate since it is not written into school policy even though widely practiced.⁶⁹ Facts such as these fuel concerns that tracking obscurely and surreptitiously maintains racial hierarchy.⁷⁰

inequitable education to students in lower ability tracks, for separating students along race and class lines, and for perpetuating unequal access to a college-bound curriculum.”

⁶³ Mickelson, *supra* note 13, at 222; Kirp, *supra* note 7, at 719.

⁶⁴ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

⁶⁵ *Id.* at 551.

⁶⁶ Elia V. Gallardo, *supra* note 59, at 75, 76–77. See also Kirp, *supra* note 7, at 721 (“likelihood that such assignment will be viewed by school personnel as confirming judgments of stupidity, thus rendering the school’s initial judgment a self-fulfilling prophesy”).

⁶⁷ Kevin G. Welner, *Ability Tracking: What Role For The Courts?*, 163 ED. LAW REP. 565, 567 (2002) (emphasis added). See also *id.* (finding “a clear pattern of discrimination” in tracking in these four districts).

⁶⁸ *Id.* at 567–68; Welner, *supra* note 8, at 710.

⁶⁹ Lawyers’ Committee for Civil Rights Under Law et al., *supra* note 61; OAKES, *supra* note 12, at 176–77.

⁷⁰ This is predictable given that “many states, and not exclusively Southern states, enforced segregation in schools and elsewhere by force of law, and in this way embedded racist attitudes

Even Justice Harlan, often lauded for dissenting from the United States Supreme Court's separate but equal ruling in *Plessy v. Ferguson*, seemed to endorse the racial hierarchy in stating, "[t]he white race deems itself to be the dominant race in this country. *And so it is*, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for *all* time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty."⁷¹ In addition, he opined that the Chinese, who he derogatorily characterized as "Chinaman," are "*a race so different from our own* that we do not permit those belonging to it to become citizens of the United States."⁷² Education is a primordial mechanism to further this kind of dominance Justice Harlan referenced.⁷³ Legal commentator Elia Gallardo keenly amplifies this fact, noting that "[w]e live in a society stratified by wealth, income, power, and prestige. By creating (or frustrating) goals and opportunities, education is the principal institution used to allocate people across that hierarchy."⁷⁴

Furthermore, tracking imitates *Plessy's* classification error in assigning people to different tracks:

Even those who accept the basic premises of school sorting have reason to question whether schools can adequately do the job. Two retests of students assigned to classes for the retarded reveal notable system-made errors. In Washington, D.C., the system itself conducted the retesting; it found that two-thirds of the students placed in special classes in

in the collective psyche." Wells, *supra* note 7, at 1046.

⁷¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (emphasis added). See Robert L. Hayman, Jr. & Nancy Levit, *supra* note 2, at 699 ("The structures and the forces of American social life have been deliberately devised and maintained to enforce the hierarchical divisions of color."). See also Sharon E. Rush, *Identity Matters*, 54 RUTGERS L. REV. 909, 911 (2002) and Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. 1, 20–23 (2012) (discussing the racial hierarchies). Upper class track placement is a form of prestige. CAROL CORBETT BURRIS & DELIA T. GARRITY, *DETRACKING FOR EXCELLENCE AND EQUITY* 58–59 (2008).

⁷² *Plessy*, 163 U.S. at 561 (emphasis added).

⁷³ Indeed, *Brown I* recognized the cultural force of education, noting that education "is a principal instrument in awakening the child to cultural values." *Brown I*, 347 U.S. 483, 493 (1954).

⁷⁴ Elia V. Gallardo, *supra* note 59, at 74. See, e.g., Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 116 (2009) ("Most white and high-income parents will not send their children to 'black' schools, and most quality teachers will not teach in 'black' schools for any substantial length of time.").

fact belonged in the regular program. A study of 378 educable mentally retarded students from 36 school districts in the Philadelphia area concluded that “[t]he diagnosis for 25 percent of the youngsters found in classes for the retarded may be considered erroneous. An additional 43 percent [may be questioned]”. To the latter study’s authors, the findings yield cause for concern. One cannot help but be concerned about the consequences of subjecting these children to the ‘retarded’ curriculum. . . . The stigma of bearing the label ‘retarded’ is bad enough, but to bear the label when placement is questionable or outright erroneous is an intolerable situation.⁷⁵

Tracking has unfortunately provided a way to hide all the wrongs, inequities and injustice associated with micro-segregation as it is deemed to provide a race-neutral toolkit for schools.

D. *The Race-Neutrality Guise*

The primary race-neutral argument that has allowed tracking to thrive, despite its drawbacks, is that it optimizes student learning by tailoring instruction to student needs.⁷⁶ Educators know they can hide behind such an argument because race-neutrality tends to draw judicial deference to educators’ judgment. While there is some research supporting this race-neutral proposition for tracking, most of the research shows minimal benefit to tracking for students of all races.⁷⁷ Educators

⁷⁵ Kirp, *supra* note 7, at 719 (internal quotation marks omitted) (citing Garrison & Hamill, *Who Are the Retarded*, 38 EXCEPTIONAL CHILDREN 13, 18, 20 (1971)). See also MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 3 (providing an example of erroneous aptitude classification).

⁷⁶ Mickelson, *supra* note 13, at 222. Race-neutral measures allow schools to hide from judicial scrutiny. Raneta J. Lawson, *supra* note 55, at 41. See Ford, *supra* note 12, at 1328 (“There’s a reason that so many schools, in so many ways, endorse or at least acquiesce in segregation. Segregation is easier, at least in the short run. As long as one isn’t explicit about it, segregationist policies are popular and likely to meet with little resistance.”). Cf. Chayt, *supra* note 14, at 633 (“Ability grouping and even policies that strive to balance academic stratification with racial diversity, like those at Lowell [High School in San Francisco], are not racially neutral. Researchers cite empirical data suggesting that “race neutrality” is to some extent a myth and impossibility.” (citing Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005))). See also Jonathan Fischbach et al., *supra* note 54, at 500–01 (explaining how officials used race-neutral measures to avoid or minimize desegregation remedies in response to *Brown I* and *Brown II*).

⁷⁷ See OAKES, *supra* note 12, at 7–8, 175; Mickelson, *supra* note 13, at 221–22 (2001); MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 9–39. When race-neutral measures are used to address thorny racial injustice and segregation, “the results are predictable: segregation endures

also actively use facially race-neutral criteria such as standardized tests, student grades, teacher/counselor recommendations, and parent/student choices to determine track placement.⁷⁸ Unsurprisingly, any possible racial intent is latent and dissimulated in these criteria.⁷⁹

Despite any race-neutral argument, we must not deny the reality that tracking leads to racially-identifiable classes that normalize the harm to minorities.⁸⁰ “Tracking is the structural manifestation of a complex web of [institutionalized] norms (beliefs and assumptions) and power (politics) that make it anything but neutral.”⁸¹ Moreover, as Justice Kennedy eloquently stated in *Parents Involved*, “[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law.”⁸²

E. *Faux Intellectual and Ability Diagnosis and Prognosis*

Track classifications are supposedly based on intellectual ability.⁸³ Yet, minorities with similar abilities are consistently placed in different tracks from their White peers and questionable placements occur with regularity.⁸⁴ In their study of North Carolina public schools, Professors

race-neutral school assignment efforts.” Charles E. Dickinson, *Accepting Justice Kennedy’s Challenge: Reviving Race-Conscious School Assignments in the Wake of Parents Involved*, 93 MINN. L. REV. 1410, 1411–12.

⁷⁸ OAKES, *supra* note 12, at 9; *Harvard Law Review*, *supra* note 14, at 1318, n.2.

⁷⁹ Kasten, *supra* note 48, at 202. *See id.* at 209 (“That those notions of racialized-ability were part of the mainstream anti-integration discourse at the same time that tracking was being reintroduced calls into serious question the race-neutrality of tracking’s resurgence.”). *See also* Dickens, *supra* note 7, at 498 (stating that tracking “was waning as a system of student classification until the *Brown* decision. Tracking was reintroduced into American education not because of the merits of the system but because it was a way to segregate students that did not violate the equal protection guarantees of *Brown*.”). Historically, districts have used various means to mask segregative intent. Ruiz, *supra* note 4, at 5; Clotfelter, Ladd, & Vigdor, *supra* note 7, at 1467.

⁸⁰ *See* Kasten, *supra* note 48, at 202. (“While this practice is facially race-neutral, its effect is not”). *See also* Mickelson, *supra* note 29, at 1531 (“A growing body of research suggests that tracking assigns minority students unjustifiably and disproportionately to lower tracks and almost excludes them from the accelerated tracks; it offers them inferior opportunities to learn and is responsible, in part, for their lower achievement.”).

⁸¹ OAKES, *supra* note 12, at 244.

⁸² 551 U.S. at 795.

⁸³ OAKES, *supra* note 12, at 3; BURRIS & GARRITY, *supra* note 71, at 16–17, 52. *See* Regina Austin, *Back To Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-Brown Era*, 6 J. APP. PRAC. & PROCESS 79, 81–82, 85–86 (2004) (discussing intellectual and other stereotypes generally used to justify assigning minorities inferior status).

⁸⁴ Mickelson, *supra* note 13, at 219–20; OAKES, *supra* note 12, at 233; BURRIS & GARRITY,

Charles Clotfelter, Helen Ladd and Jacob Vigdor found racial bias in track assignments in various school districts.⁸⁵ For instance, in Rockford school district, they found that race impacted classroom assignments.⁸⁶ They observed that, even when White and African American students have similar aptitude test scores, Whites were disproportionately assigned to honors classes.⁸⁷ Sadly, as they noted, “[s]imilar racial bias in the assignment to tracks in other districts has also been documented.”⁸⁸

Appallingly, the “decision to classify students by some measure of intellectual ability today, where it has a foreseeable disparate impact, reflects current unconscious societal racism.”⁸⁹ This is rooted in the beliefs of minority inferiority and low intelligence that openly prevailed prior to and in the early twentieth century and more subtly today.⁹⁰ Under this “biological scheme, white is intelligent, black less so, and it becomes the inviolate assumption of the meritocratic order.”⁹¹ For instance, we know that, in 1991, 55 percent of White Americans believed that Latinos are not as intelligent as Whites while 53 percent of White Americans believed the same of African Americans.⁹² In another study, 37 percent

supra note 71, at 22–24, 56 (2008); Dickens, *supra* note 7, at 476–77. See also O’Connor, *supra* note 7, at 224 (“reduction in minority students’ opportunities to learn is, in part, a function of minority youth being regularly assigned to those lower-ability classrooms that are a part of a high school’s regular curricular program. Such assignments occur even when Black and other non-Asian minority youths have test scores equal to or higher than White students who are disproportionately assigned to higher-ability classrooms.”).

⁸⁵ Clotfelter, Ladd, & Vigdor, *supra* note 7, at 1467.

⁸⁶ *Id.* See Welner, *supra* note 8 at 716 (finding similarly in Rockford School District (Illinois)).

⁸⁷ Clotfelter, Ladd, & Vigdor, *supra* note 7, at 1467.

⁸⁸ *Id.*

⁸⁹ Losen, *supra* note 14, at 519 (internal quotation marks omitted). See *id.* at 521 (“The merits of programs intended to improve education by grouping students according to intelligence or other measures of academic ability are suspect because the original push for such programs was heavily rooted in racist conceptions of intelligence and jingoistic public education policy.” (internal quotation marks omitted)). See BURRIS & GARRITY, *supra* note 71 at 54, 56 (2008) (“Because so many of us were educated in tracked schools, we are comfortable with our intellectual prejudices, and we do not question whether tracking is fair or effective.”).

⁹⁰ Hayman, Jr. & Levit, *supra* note 2, at 661–64; LEON J. KAMIN, *THE SCIENCE AND POLITICS OF I.Q.* (1974); RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); *Board of Educ. of Lincoln Cty.*, 301 F.Supp. at 1027. See Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL’Y 201, 202, 207–09 (2002) (providing a brief overview of the history of testing).

⁹¹ Hayman, Jr. & Levit, *supra* note 2, at 697. Cf. OAKES, *supra* note 12, at 11 (discussing the absence of correlation between intelligence and race).

⁹² Kevin G. Welner & Jeannie Oakes, (*Li*) *Ability Grouping: The New Susceptibility of*

of White Americans professed that African Americans are incapable of being motivated to learn.⁹³ This is not surprising for, as Professor Sharon Rush deftly points out, “inequality is maintained from generation to generation by indoctrinating young children in the lessons of inferiority/superiority precepts.”⁹⁴

While schools consider standardized tests, grades, teacher and counselor recommendations, as well as parent and student choices in making tracking assignments, these criteria are not necessarily objective.⁹⁵ Because of these professedly race-neutral criteria, “we do not question a meritocracy that consistently places blacks [and other minorities] at the bottom because we regard the ordering as a natural and fair outcome.”⁹⁶ However, we do need to question the merits and integrity of these criteria. Choice, for instance, might be illusory because parents and students might not have the necessary information about the tracks to make informed decisions.⁹⁷ Additionally, any choices are short lived because, as students move from grade to grade, course prerequisites take away the opportunity for course choices.⁹⁸

School Tracking Systems to Legal Challenges, 66 HARV. EDUC. REV. 451, 451 (citing Sam Fulwood III, *Attitudes on Minorities in Conflict*, L.A. TIMES, Jan. 9, 1991, at A1).

⁹³ *Id.* (citing Janet Bingham, *37% of Whites Think Black Kids Can't Learn*, *Pollster Says*, DEN. POST, July 20, 1991, at 1A).

⁹⁴ Rush, *supra* note 71, at 911; West, *supra* note 7, at 2578–79. This inequality is also maintained through separatist legislation or policies such as tracking; however, shamefully, the “history of separatist legislation indicates that it was designed to relegate blacks to an inferior position in society, and in fact school segregation did operate as a vital component of a larger caste system.” Yudof, *supra* note 14, at 447.

⁹⁵ See, e.g., Gallardo, *supra* note 7, at 76–78, 80; Lawyers’ Committee for Civil Rights Under Law et al., *supra* note 61, at 607; Feagina & Barnett, *supra* note 26, at 1117; MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 28, 33; OAKES, *supra* note 12, at 12–13, 38, 177, 192–93; Welner, *supra* note 8, at 713. Professor David Kirp cautions that “sorting mechanisms may be defective, and consequently risk mistreatment of students. Identifying the nature of the risk, and the possibility of harm, requires an examination of the devices—tests, grades, teacher recommendations—employed to facilitate sorting.” Kirp, *supra* note 7, at 754.

⁹⁶ Losen, *supra* note 14, at 526.

⁹⁷ See generally OAKES, *supra* note 12; Lawyers’ Committee for Civil Rights Under Law et al., *supra* note 61, at 607.

⁹⁸ Losen, *supra* note 14, at 519.

Even standardized tests are not without bias.⁹⁹ They can also be abused or exploited for corrupted reasons.¹⁰⁰ These tests weaponize the institutionalization of “social strata” as they “alter life prospects dramatically across the lines of race, gender, national origin, economic status, and disability.”¹⁰¹ This affirms research showing that these tests “reward takers for using Eurocentric attitudes and narrative styles.”¹⁰² After all, as Professors Robert Hayman, Jr. and Nancy Levit observe, “[i]f Euro-Americans are, in general, exhibiting greater facility with the criteria and processes of academic achievement, it is because, in substantial part, Euro-Americans have devised them. Moreover, Euro-Americans have devised those criteria largely without the participation of African-Americans”¹⁰³ Accordingly, it is not astonishing that standardized

⁹⁹ KAMIN, *supra* note 90; KASTEN, *supra* note 48 at 205–07; JANET WARD SCHOFIELD, BLACK AND WHITE IN SCHOOL: TRUST, TENSION, OR TOLERANCE? (1989); MEIER, STEWART, JR., & ENGLAND, *supra* note 13; MUELLER, *supra* note 90 at 202, 205–07. See also DICKENS, *supra* note 7, at 476 (“the use of standardized and I.Q. tests to classify students dramatically increased after the *Brown* decision.”). A federal district court even found standardized tests hindered desegregation in a Louisiana school district. *Moses v. Washington Parish Sch. Bd.*, 330 F.Supp. 1340, 1340–41 (E.D. La. 1969) (*Moses II*).

¹⁰⁰ Kirp, *supra* note 7, at 756–59. See *Moses II*, 330 F.Supp. at 1345 (“It is equally apparent, given the obvious reluctance and recalcitrance of school boards to establish unitary schools, that the school board in deciding to use testing probably anticipated that most whites would score well and thus used testing to maintain as many segregated schools as possible.”).

¹⁰¹ Mueller, *supra* note 90, at 206. This is tragic given that schools’ use of the tests is based on assumptions rather than definitiveness; thus, assumptions are being relied upon to alter students’ life chances. See Kirp, *supra* note 7 at 710 (noting that students are tested “when they first arrive at school and at regular intervals thereafter in order to identify aptitude—i.e., capacity to learn. Although such capacity may not in fact be measured, and *may indeed be unsusceptible to measurement*, what is important for descriptive purposes is the fact that schools act on the assumption that tests can measure aptitude.” (emphasis added)).

¹⁰² Chayt, *supra* note 14, at 634; OAKES, *supra* note 12, at 11; Gallardo, *supra* note 7, at 76 (citing Michael S. Sorgen, *Testing and Tracking in Public Schools*, 24 HASTINGS L.J. 1129, 1170 (1973)). Besides, “[e]vidence also suggests that some of the purposes for which high stakes tests are used, such as retaining students or placing students into low track classes, have no justifiable educational benefit. Many of the tests being used have not been validated for their high stakes purposes; in other words, there is no proof that they produce the data that schools claim to be looking for.” Jennifer Mueller, *supra* note 90, at 205.

¹⁰³ Hayman, Jr. & Levit, *supra* note 2, at 705. See Renalia Smith DuBose, *New State Laws Reflect the Rethinking of Excessive Mandated Standardized Testing in America’s Public Schools*, 11 FLA. A & M U. L. REV. 209, 217 (2015) (“The Court later declared in *Brown v. Board of Education*, however, that ‘separate but equal’ has no place in public education. Nevertheless, public educators utilized standardized testing as a means to segregate students within schools by dividing a school’s population based on the results of standardized test scores.”). There is also the issue of stereotype threat when it comes to standardized tests. Professor Elizabeth Anderson points out, “[s]tereotype threat—stressful responses to situations in which blacks

tests are sometimes even used to overclassify minority students for remedial classes, or as learning disabled or educable mentally retarded.¹⁰⁴ Further, it does not take a leap of faith to appreciate that grades as well as teacher and counselor recommendations can be influenced by subjective judgments of teachers and counselors, including their expectations of the students being graded or recommended.¹⁰⁵ Minority students might also not have qualified counselors to help them make the appropriate decisions that would help them advance to the upper tracks.¹⁰⁶ Withal, the interaction of biased tests as well as biased subjective judgments of teachers and counselors can compound low track placements and the consequent unequal educational opportunities for minorities.¹⁰⁷

F. Tracking Hurts Minorities

Unequal educational opportunities show that tracking negatively impacts minority students' achievement.¹⁰⁸ For instance, low track

anticipate that their behavior might be judged as confirming a demeaning stereotype—impairs black performance on standardized tests and thereby limits their educational opportunities.” Anderson, *supra* note 19, at 18 (internal quotation marks omitted).

¹⁰⁴ Losen, *supra* note 14, at 520; ASA G. HILLIARD III, MISUNDERSTANDING AND TESTING INTELLIGENCE, IN ACCESS TO KNOWLEDGE: AN AGENDA FOR OUR NATION'S SCHOOLS 145, 148–57 (JOHN I. GOODLAD & PAMELA KEATING EDs., 1990); MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 5; Noguera, *supra* note 29, at 26; Gallardo, *supra* note 7, at 80. See O'Connor, *supra* note 7, at 225 (“Within-school segregation and its accordant constraint on minority students' opportunities to learn is also a function of the fact that minority students are disproportionately identified as learning or behaviorally disabled and therefore find themselves in pull-out programs that are characterized by low teacher expectations and increased risk of educational failure. Importantly, Black students are three times as likely as White students to be labeled as retarded or behaviorally disturbed.”). See also McDougall, *supra* note 2, at 890 (“Special education, for some educators, has become a place to dump students who are low achievers, considered disruptive, or whose behavior simply does not comport with the majority's cultural norms.”). *Accord* Kirp, *supra* note 7, at 722 and Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 778 F.2d 404, 422 (8th Cir. 1985).

¹⁰⁵ See DARLING-HAMMOND, *supra* note 61, at 465, 474–75 (JAMES A. BANKS & CHERRY A. MCGEE BANKS EDs., 1995), London, *supra* note 18, at 711–12, OAKES, *supra* note 12, at 250, Kirp, *supra* note 7, at 762, Lawson, *supra* note 55, at 43, McDougall, *supra* note 2 at 894, and JOSEPH BRYSON, ABILITY GROUPING OF PUBLIC SCHOOL STUDENTS 22 (1980) (discussing possible subjective influences). See *Hobson v. Hansen*, 269 F.Supp. 401, 474 (D.D.C. 1967) (“the fundamental premise of the sorting process is the keystone of the whole track system: that school personnel can with reasonable accuracy ascertain the maximum potential of each student and fix the content and pace of his education accordingly. If this premise proves false, the theory of the track system collapses, and with it any justification for consigning the disadvantaged student to a second-best education.”).

¹⁰⁶ Lawyers' Committee for Civil Rights Under Law et al., *supra* note 61, at 607.

¹⁰⁷ MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 25 (1989).

¹⁰⁸ HUGH MEHAN, IRENE VILLANUEVA, LEA HUBBARD, & ANGELA LINTZ, CONSTRUCTING

placements impact students' grade point averages as well as their SAT scores.¹⁰⁹ A study also revealed a larger achievement gap between students in higher and lower tracks than between high school graduates and high school dropouts.¹¹⁰ The achievement gap and educational deprivation in the lower tracks relative to the upper tracks has a cumulative effect on the performance and aspiration gap between White and minority students.¹¹¹ For instance, Professor Mickelson found that "racially identifiable black schools and classrooms exert significant

SCHOOL SUCCESS: THE CONSEQUENCES OF UNTRACKING LOW ACHIEVING STUDENTS (1996); LUCAS, *supra* note 57; Maureen T. Hallinan & Warren N. Kubitschek, *Curriculum Differentiation and High School Achievement*, 3 SOC. PSYCHOL. OF EDUC. 41 (1999); Jeannie Oakes, Kate Muir, & Rebecca Joseph, *Coursetaking & Achievement in Mathematics and Science: Inequalities that Endure and Change*, Paper presented at the NAT'L INST. OF SCI. EDUC. (2000), available at http://archive.wceruw.org/nise/News_Activities/Forums/Oakespaper.htm. See O'Connor, *supra* note 7, at 228–45 (discussing the fact that tracking puts pressure on the few minority students who are lucky to get into upper track classes to represent their race so that they do not feed the stereotypes Whites have of them; indeed, only few are lucky). MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 24.

¹⁰⁹ Mickelson, *supra* note 13, at 230–31. See also *id.* at 234 ("Given that track placement is a powerful influence on high school grades, EOC [End-of-course] scores, and SAT scores net of other school, familial, and individual characteristics, the presence of racially correlated tracks is relevant to Black students' academic achievement, the racial gap in achievement, and the efficacy of school desegregation policies designed to affect these academic outcomes.").

¹¹⁰ Adam Gamoran, *The Stratification of High School Learning Opportunities*, 60 SOC. OF EDUC. 135 (1987); Nelson, *supra* note 44, at 365. See Welner, *supra* note 67 at 567–68, MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 28, OAKES, *supra* note 12, at 236–39, BURRIS & GARRITY, *supra* note 71 at 7, 14–15 (2008), and Adam Gamoran & Mark Berends, *The Effects of Stratification in Secondary Schools: Synthesis of Survey and Ethnographic Research*, 57 REV. OF EDUC. RES. 415, 430–32 (1987) (discussing how tracking impacts achievement gap). See also Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal for Redressing Problems with the Standardized Testing in Texas*, 33 ST. MARY'S L.J. 143, 191, MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 29, OAKES, *supra* note 12, at 9, and Welner, *supra* note 8, at 723–25 (illuminating the impact on dropout rates).

¹¹¹ See Braddock & Dawkins, *supra* note 36, at 325–26 ("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. Thus, the effects of tracking produces lower and slower rates of learning and lower and lower levels of motivation for those at the bottom and smaller and smaller chances of receiving better track assignments. The cumulative effect are greatest when the tracking process starts in the early elementary grades."). See also Mickelson, *supra* note 29, at 1529–30 ("The effects of early tracking cumulate over the course of each student's educational career. . . . Because of the pervasive practice of curricular differentiation, students are sorted into racially correlated educational trajectories soon after they enter school. . . . This leads to different educational careers: at each juncture or transition, the effects of the previous year's differentiated curriculum influence students' transitions to subsequent courses and schools.").

negative effects on both black and white students' academic outcomes;¹¹² and this will compound regression of minority students' achievement.¹¹³

Students in the lower tracks also tend to get the teachers with less or no credentials as well as the teachers with little or no experience; and whereas students in the upper tracks *always* get fully experienced and credentialed teachers, lower track students only *sometimes* do.¹¹⁴ A study of North Carolina public schools reveals that “[i]n math, for example, 11.3% of black 7th graders in North Carolina had novice teachers, compared to only 7.9% of whites. Some 43% of this difference can be explained by the fact that white and black students attend different schools, and another 31% is due to the fact that these groups tend to be in different classrooms within schools.”¹¹⁵ “A recent study examining factors responsible for teacher transfers in Texas public elementary schools found strong evidence that teachers systematically favor higher achieving, non-minority, non-low income students.”¹¹⁶ The minority students are also left with higher teacher absenteeism and attrition rate.¹¹⁷ In addition to these realities, low track teachers' skills diminish as time progresses.¹¹⁸ Beyond these data, “[u]nfortunately, insensitive educators are also more commonly found in low track classrooms, because few teachers want to educate these children.”¹¹⁹ Furthermore, teachers are less likely to give African American students constructive feedback to

¹¹² Mickelson, *supra* note 29, at 1513–14.

¹¹³ See, e.g., Welner, *supra* note 8, at 718–21, 725. Low track placement also leaves students without the prerequisites they need for other courses. Welner, *supra* note 67, at 567. Additionally, low track placements compromise students' opportunities to qualify for college admissions or financing. O'Connor, *supra* note 7, at 239; Elia V. Gallardo, *supra* note 7, at 80; Lawyers' Committee for Civil Rights Under Law et al., *supra* note 61, at 607–08. Even the College Board has chided schools' use of tracking because it limits college opportunities for minorities. OAKES, *supra* note 12, at 218. Those admitted might feel overwhelmed or unequipped for college. Dickens, *supra* note 7, at 478–79. Moreover, it negatively impacts the students' job prospects and earning potential. *Id.* at 479; Gallardo, *supra* note 7, at 76, 80.

¹¹⁴ Mickelson, *supra* note 13, at 238; OAKES, *supra* note 12, at 175; BURRIS & GARRITY, *supra* note 71 at 58.

¹¹⁵ Clotfelter, Ladd, & Vigdor, *supra* note 13, at 58.

¹¹⁶ Boger, *supra* note 14, at 1445–46 (internal quotation marks omitted).

¹¹⁷ Brown, *supra* note 2, at 136.

¹¹⁸ BURRIS & GARRITY, *supra* note 71, at 58.

¹¹⁹ Gallardo, *supra* note 7, at 79. See also Feagina & Barnett, *supra* note 26, at 1118 (stating that “[f]our experimental studies show that teachers are less supportive of black students than white students in situations where they are matched for ability or randomly assigned.”).

help them improve.¹²⁰ The teachers are also inclined to focus on disciplining the students, leading to disproportionate disciplinary issues in lower tracks.¹²¹

“In our interviews, [the] teachers tended to blame the students for what they perceived as shortcomings (i.e., lack of motivation, frivolous attitude toward school, low self-esteem, etc.) and generally explained the tracking patterns on that basis.”¹²² Teachers in the Lockwood Unified School District told Professor Noguera, in his study of the district’s tracking system, that low teacher expectations, embedded in wrong assumptions, explained the disproportionate placement of Latino students in lower tracks.¹²³ One teacher’s response was particularly poignant:

Many of the ESL students are quiet and well behaved in their mainstream classes. Many of their teachers mistake their quietness for intellectual deficiency. They assume that because a student has trouble with English that they must be slow mentally. A lot of the teachers and guidance counselors assume that it is in the student’s best interest to place them in classes that are less challenging, even though they realize that this will hold them back permanently.¹²⁴

Lower track students unfortunately feel the low teacher expectations, wrong assumptions, and racial isolation in their segregated classrooms even within their desegregated buildings.¹²⁵ Student interviews conducted in the Lockwood Unified School District were very telling in this respect:

¹²⁰ Feagina & Barnett, *supra* note 26, at 1118.

¹²¹ Gallardo, *supra* note 7, at 79.

¹²² Noguera, *supra* note 29, at 33. See also Steven W. Raudenbush, et al., *Higher Order Instructional Goals in Secondary Schools: Class, Teacher, and School Influences*, 30 AM. EDUC. RES. J. 523 (1993) (revealing how teachers adjust their teaching based on their judgments and expectations regarding student ability).

¹²³ Noguera, *supra* note 29, at 31. Accord BURRIS & GARRITY, *supra* note 71, at 34–35 (discussing teacher expectations as part of a study of a New York school district).

¹²⁴ Noguera, *supra* note 29, at 31. See OAKES, *supra* note 12, at 79–85, 98–99, 108–09, 122–23, 227, 233 (contrasting teacher expectations of student learning for upper track and lower track students in Professor Jeannie Oakes’ research study).

¹²⁵ Gallardo, *supra* note 7, at 79; OAKES, *supra* note 12, at 244; Kirp, *supra* note 7, at 762; BURRIS & GARRITY, *supra* note 71, at 35. See also O’Connor, *supra* note 7 (discussing the negative impact of segregated classrooms).

Chicano and Latino students consistently reported that they had experienced overt racism, discrimination and stereotyping within the classroom and the school. Examples of biased treatment included being ignored or neglected by teachers (e.g. not being called upon during class discussions, little eye contact, minimal attention except in the form of punishment, etc.) and being unfairly targeted for punishment and ostracism. Students also reported feeling as though their teachers looked down upon them and were not willing to give them needed assistance.¹²⁶

Low track placement also leads to emotional segregation for minority students who feel invalidated.¹²⁷ It leaves students dispirited with lower self-esteem, lower aspirations, loss of confidence, stigma, and less motivation.¹²⁸ It also makes students feel disconnected from the school.¹²⁹ Further, it perpetuates racial stereotypes and labeling of minority students, White superiority complex,¹³⁰ and minorities' sense of helplessness in effecting change.¹³¹ Low track placement also fosters a self-fulfilling prophecy that is self-defeating, exacerbating low

¹²⁶ Noguera, *supra* note 29, at 35.

¹²⁷ See generally Rush, *supra* note 71 and Sharon E. Rush, *Emotional Segregation: Huckleberry Finn in the Modern Classroom*, 36 U. MICH. J.L. REFORM 305 (2003) (discussing emotional segregation).

¹²⁸ OAKES, *supra* note 12, at 8, 143; Losen, *supra* note 14, at 522; Gallardo, *supra* note 7, at 79; Mickelson, *supra* note 13, at 233–34; Jarvis, *supra* note 2, at 1286; Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN ST. L. REV. 611, 623 (2015); Joseph Murphy & Philip Hallinger, *Equity as Access to Learning: Curricular and Instructional Treatment Differences*, 21 J. CURR. STUD. 129 (1989); BRYSON, *supra* note 2, at 22; Braddock & Dawkins, *supra* note 36, at 334, 326, 335. See Noguera, *supra* note 29, at 35–36 (discussing a Latino student who felt dispirited and consequently “gave up.”). See also Kirp, *supra* note 7, at 733–36 and OAKES, *supra* note 12, at 176 (describing the stigma of tracking for students).

¹²⁹ OAKES, *supra* note 12, at 9.

¹³⁰ This is the mindset that believes minorities are inferior. It is part of the hierarchical mindset discussed earlier and evident in our critique of Justice Harlan's *Plessy* statement earlier. See *Plessy*, 163 U.S. at 559 (“[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.”).

¹³¹ O'Connor, *supra* note 7, at 246; Nelson, *supra* note 44, at 365; OAKES, *supra* note 12, at 3; BURRIS & GARRITY, *supra* note 71, at 56; Gallardo, *supra* note 7, at 76, 79.

achievement.¹³² In total, tracking has these negative effects on minorities without having much of a positive meaningful impact.¹³³

G. A Vicious Cycle

When students are placed in lower tracks in the early grades, it creates a vicious cycle that predictably dictates their placements in the upper grades.¹³⁴ The vicious cycle of low track placements includes parents, who themselves were victimized by segregated education. Parents are unprepared to help their own children develop the skills for success to get them out of low track placements, so the cycle continues.¹³⁵

¹³²Nelson, *supra* note 44, at 368 (citing *Hobson*, 269 F. Supp. at 512–14); Gallardo, *supra* note 7, at 77 (citing *Larry P. v. Riles*, 343 F. Supp. 1306, 1312 (N.D. Cal. 1972)); Austin, *supra* note 83 at 89–90 (citing JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* xi, xiii–xix, 4–7, 15, 18, 86, 90, 259–60, 280 (2003)). Even Whites are negatively impacted as research shows that segregation leads to racial conflict, ignorance, and fear. Feagina & Barnett, *supra* note 26, at 1113.

¹³³See generally OAKES, *supra* note 12; Mickelson, *supra* note 29, at 1533–34; Kirp, *supra* note 7, at 718, 729; Nelson, *supra* note 44, at 365. See also Mickelson, *supra* note 29, at 1546 (“track placement contributes substantially to achievement over and above students’ family background, effort, and other individual characteristics”).

¹³⁴Braddock & Dawkins, *supra* note 36, at 333–34; Welner, *supra* note 67, at 624; Welner, *supra* note 8, at 712–13. See also Bryant, *supra* note 13, at 1406 (“the ‘die is cast’ as early as kindergarten, and the children will remain on the lower track throughout their academic careers, absent parental involvement to induce change.”). Unfortunately, parents of minority students do not feel equipped, welcomed, or heartened to induce change as the school system can be quite intimidating.

¹³⁵Nelson, *supra* note 44, at 363–64; Austin, *supra* note 83, at 90 (citing JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 147 (2003)). Legal commentator Tonya Nelson spotlights this fact:

Parents with limited educational backgrounds will rely on schools to advance their children’s literacy skills []. However, if a school segregates students by ability upon their entry into the school, these children will likely be placed in lower ability groups. In ‘remedial’ classes, these children will only be exposed to basic language and literacy skills, will fall behind the other children, and eventually will lose hope of any chance of academically advancing significantly further than their parents. Nelson, *supra* note 44, at 372.

See also *id.* at 371–74 (discussing the fact that parents’ experiences fuel perpetual inequities in future generations). Professor Elizabeth Anderson sagaciously describes the vicious cycle that can entrap generations of minorities. See Anderson, *supra* note 19, at 19 (“Centuries of massive state and private racial discrimination created the segregation and racial stigma that so gravely disadvantage [minorities] today. But once established, these mechanisms are individually self-sustaining. De facto job segregation, by isolating [minorities] from the social networks that could lead them out, begets more segregation. Racial stereotypes cause stereotype-reinforcing habits of perception: greater readiness to notice stereotype-confirming than stereotype-defying features of [minorities], lesser readiness to notice heterogeneity within the [minority] population.”).

Students trapped in the lower tracks continue the “cycle of impoverished economic conditions leading to lower academic ability.”¹³⁶

Parents look to teachers as experts so they seldom challenge placements of their children or the teachers’ assessments of their children’s intelligence.¹³⁷ Besides, poor minority students and parents might also feel intimidated by the school, or less equipped, to challenge tracking policies.¹³⁸ Indeed, “[m]inority parents traditionally have fewer resources for challenging a history of discriminatory tracking.”¹³⁹ Minority parents also find it challenging to deal with teachers “ensnared in the distorted mental frameworks imposed by segregation.”¹⁴⁰ In light of these facts, it is predictable that students likewise suffer low parental involvement in lower tracks.¹⁴¹

In a truly desegregated school and district, the vicious cycle would be eliminated or at least minimized. The classrooms would also be desegregated. This would represent systemwide desegregation in the spirit of *Brown I*. Students of diverse races would be learning from and with each other in the same classroom.¹⁴² Instead, for decades, courts have generally overlooked classroom segregation even as they addressed macro-segregation.¹⁴³ Accordingly, this has led to rampant classroom segregation even in schools that superficially appear desegregated because of what they look like at the building level.¹⁴⁴

The next Part of this Article reviews the Supreme Court desegregation jurisprudence to unearth extant grounds for a micro-desegregation

¹³⁶ Bryant, *supra* note 13, at 1406; Welner, *supra* note 67, at 567; Kirp, *supra* note 7, at 713. Trap is an appropriate word because there is generally limited, if any, mobility from the lower to upper tracks. Gallardo, *supra* note 7, at 79–80. See also *id.* at 80 (“low-tracked children are not taught the analytical and critical tools needed to question one’s role in society, nor are they given the tools necessary to examine ways for societal change that would service others like them.”).

¹³⁷ Gallardo, *supra* note 7, at 80. See *id.* (“When a teacher tells a parent that her child has been determined to be ‘average’ or ‘slow’ according to some ‘objective’ indicator, and then offers remedial aid, the statement carries the force of authority.”).

¹³⁸ Losen, *supra* note 14, at 525; Kirp, *supra* note 7, at 765–66.

¹³⁹ Lawyers’ Committee for Civil Rights Under Law et al., *supra* note 61, at 607–08.

¹⁴⁰ Brown, *supra* note 2, at 139. See *id.* (stating that these frameworks include a superiority complex).

¹⁴¹ Bryant, *supra* note 13, at 1405.

¹⁴² West, *supra* note 7, at 2567.

¹⁴³ *Id.* at 2568.

¹⁴⁴ *Id.* at 2571. In buildings that are not as desegregated where White students attend predominantly African American schools, for instance, tracking can lead to creation of “virtually all-white enclaves within black schools.” *Id.* at 2575.

era. It critiques the jurisprudential deficiencies that have plagued macro-desegregation and calls on the court to redress these deficiencies in a micro-desegregation era. While some of the *Brown I*-progeny cases limit the promise of *Brown*, as the Supreme Court withdrew support for desegregation,¹⁴⁵ they are worthy of discussion for criticism as well as for identification of language that fulcrums enforcement of classroom desegregation.¹⁴⁶ Additionally, the next Part implores the Court to begin the classroom desegregation era as it is never too late to start; failure is not doing anything at all.

II. THE SUPREME COURT DECISIONS AND THE OLD NEW CIVIL RIGHTS PROGENY OF *BROWN*'S PROMISE

A. *Unpacking Brown I's Promise*

The subtitle's reference to "Old New Civil Rights" is an acknowledgment that *Brown I* has provided minorities the right to desegregated classrooms all along even though courts have failed to actively enforce this micro-desegregation.¹⁴⁷ *Brown I* represents a "promise of desegregation, integration, and equal educational opportunity for *all* children"¹⁴⁸ at the macro as well as micro-levels. The post-*Brown I* litigation focus on macro-segregation was, to an extent, understandable: since minority students were entirely excluded from certain schools,¹⁴⁹ they had to get

¹⁴⁵ See, e.g., Turner, *supra* note 1, at 282–85, 291–96, and Parker, *supra* note 1, at 1073–78 (discussing this withdrawal of support).

¹⁴⁶ Despite the withdrawal, we know that, for at least almost two decades after *Brown I*, the Court was firm on its promise. *Swann*, 402 U.S. at 11–12 ("Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At *no time* has the Court deviated in the *slightest* degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954 [*Brown I*]. . . . None of the parties before us questions the Court's 1955 holding in *Brown II*" (emphasis added)).

¹⁴⁷ Gallardo, *supra* note 7, at 83 ("yet *Brown* has received little if any attention in tracking cases.").

¹⁴⁸ Charles E. Dickinson, *supra* note 77, at 1414 (emphasis added).

¹⁴⁹ See, e.g., *Griffin v. County Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 220 (1963) ("This litigation began in 1951 when a group of Negro school children living in Prince Edward County, Virginia, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that they had been denied admission to public schools attended by white children."). See also e.g., *Green v. County School Board of New Kent Cty., Virginia*, 391 U.S. 430, 435–36 (1968) ("It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools.").

inside the schoolhouse gate first before thinking of micro-segregation. However, as *Green v. County School Board of New Kent County, Virginia*, rightly noted, macro-desegregation must only be the beginning of desegregation.¹⁵⁰ The *Green* Court underscored this directive: that we have “opened the doors of the former ‘white’ school to Negro children and of the ‘Negro’ school to white children merely *begins*, not *ends*, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated *system*.”¹⁵¹ This directive calls for systemwide desegregation and that integration should not be deemed a *fait accompli* unless the classroom part of the system is also desegregated. Despite this directive, the Supreme Court and lower courts have failed to prioritize micro-desegregation thus denying minorities the *Brown I* promise of equal educational opportunity.

Brown I's promise of equal educational opportunity for all is an antihierarchy promise. Legal commentator Gallardo makes a poignant observation that *Brown I* “alludes to the unjust nature of hierarchy”¹⁵² which tracking births and perpetuates, as discussed earlier herein. Even if *Brown I* “limited its criticism to early tracking,”¹⁵³ the *Brown I* anti-discrimination analysis below shows that the Court also disagreed with tracking in light of its discriminatory and desegregation imports.¹⁵⁴

Further, as Justice Harlan stated in *Plessy*, “in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.”¹⁵⁵ *Brown I* emphasized this same point when the Court ruled that the Equal Protection Clause of the Fourteenth Amendment means what it says:

[T]hat the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment

¹⁵⁰ *Green*, 391 U.S. at 437.

¹⁵¹ *Id.* (emphasis added).

¹⁵² Gallardo, *supra* note 7, at 83.

¹⁵³ *Id.*

¹⁵⁴ For example, in *Green*, the Court acknowledged *Brown*'s antidiscrimination promise when it explained that *Brown* “clearly charged” schools “with the affirmative duty . . . to convert to a unitary system in which racial *discrimination* would be eliminated root and branch.” *Green*, 391 U.S. at 437–38 (emphasis added).

¹⁵⁵ 163 U.S. at 559 (Harlan, J., dissenting).

was primarily designed, that no discrimination shall be made against them by law because of their color?¹⁵⁶

Thereby, the Court likewise acknowledged that the delegates to the Constitutional Convention principally intended the Equal Protection Clause to protect minorities from hierarchy and discrimination. Therefore, minorities must enjoy equal rights as Whites in and out of school. This means that segregation cannot qualify as enjoyment of equal rights.¹⁵⁷ In effect, *Brown I* “broke with *Plessy’s* analysis and refused to constitutionalize traditional and entrenched understandings and norms permitting and requiring the exclusion of African-Americans from certain spaces and places.”¹⁵⁸ Wherefore, the Court stated that equality must no longer be defined as merely equality of tangible factors but also intangible rights.¹⁵⁹

Brown I was a case of substitution jurisprudence whereby the Court replaced its *Plessy* focus on tangibles with a focus on intangibles such as interracial interactive learning.¹⁶⁰ In particular, the Court declared that “[w]e must look *instead* to the *effect of* segregation itself on public education.”¹⁶¹ Such effect includes creation of a permanent and likely irreversible damage to the minds and hearts of minority students due to feelings of inferiority from segregation.¹⁶² These *Brown I* rulings mean that tangible equality in tracked classrooms should not save tracking from constitutional fatality given that tracking has negative effects on the education of minorities. As discussed earlier in this Article, such effects include inferiority, stereotyping, limited college opportunities, lower academic achievement, and diminished job prospects. The rulings also mean

¹⁵⁶ *Brown I*, 347 U.S. at 490, n.5 (citing *Strauder*, 100 U.S. at 307).

¹⁵⁷ In this respect, the Court stated: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.” *Brown I*, 347 U.S. at 493.

¹⁵⁸ Turner, *supra* note 14, at 888.

¹⁵⁹ *Brown I*, 347 U.S. at 492–93.

¹⁶⁰ These intangibles are “qualities which are incapable of objective measurement.” *Brown I*, 347 U.S. at 493 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). See *Brown I*, 347 U.S. at 493–94 (“intangible considerations: . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. Such considerations apply with added force to children in grade and high schools.” (internal quotation marks omitted) (citing *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950)).

¹⁶¹ *Brown I*, 347 U.S. at 492 (emphasis added).

¹⁶² *Brown I*, 347 U.S. at 494.

that *Brown I* promised minority students equal educational opportunity free of an inferiority message which tracking's hierarchy promotes.¹⁶³

If we are to believe the Supreme Court, the primary purpose of the Equal Protection Clause is “the freedom of the African race, the security and *perpetuation* of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.”¹⁶⁴ *A fortiori*, the end of slavery is not the end of freedom for minorities but only the beginning.¹⁶⁵ For this reason, the Court called for perpetuation of freedom for minorities and security of those freedoms. Classroom segregation does not embody security or perpetuation of freedom for minorities; thus, breaking *Brown's* promise.

Accordantly, with respect to the Equal Protection Clause, *Brown I* specifically recognized that “[t]he words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race.”¹⁶⁶ In other words, the Equal Protection Clause protects minorities from segregation and inequality *and* it gives minorities the platform to affirmatively demand entitlement to certain rights which should include the affirmative right to detracking. In the spirit of these prohibitory and affirmative rights, the Equal Protection Clause entitles minorities to freedom from various nightmares of tracking that similarly held with segregated schooling in the days of *Plessy*. As recognized in *Brown I*, which liberated minorities from the nightmares of the *Plessy* era, this freedom encompasses “the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.”¹⁶⁷

¹⁶³ Now courts must enforce disdain for hierarchy. They must earnestly and unmistakably state regarding all minorities in tracking that “[w]e know that persons of African [and other minority] descent have been degraded by an odious hatred of caste, and that the Constitution of the United States has provided that this social repugnance shall no longer be crystallized into a political [or other] disability.” *Ward*, 48 Cal. at 39.

¹⁶⁴ *Slaughter-House Cases*, 83 U.S. 36, 37 (1873) (emphasis added).

¹⁶⁵ Similarly, elimination of invidious discrimination in schools is only the beginning of desegregation. See *Swann*, 402 U.S. at 18 (“When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions.” (emphasis added)).

¹⁶⁶ *Brown I*, 347 U.S. at 493, n.5 (citing *Strauder*, 100 U.S. at 307–08).

¹⁶⁷ *Brown I*, 347 U.S. at 493, n.5 (citing *Strauder*, 100 U.S. at 308).

Brown I could also be interpreted as a negative duty that school officials not segregate as well as an affirmative duty that they desegregate and integrate.¹⁶⁸ Contrastingly, in *Briggs v. Elliott* (a per curiam decision), the United States District Court for the Eastern District of South Carolina interpreted *Brown I* as merely imposing a negative duty:

[I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. . . . It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . [I]f the schools which it maintains are open to children of all races, no violation of the Constitution is involved. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination.¹⁶⁹

This kind of interpretation is unfortunate as it relieves schools of the affirmative duty to desegregate and it represents a form of judicial resistance to the spirit of *Brown I*. However, in its affirmation of *Brown I*, in *Green*, the Supreme Court asseverated that schools are “clearly charged with the *affirmative* duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”¹⁷⁰ *Swann v. Charlotte-Mecklenburg*

¹⁶⁸ Wells, *supra* note 7, at 1051; Broussard, *supra* note 2, at 832–33; Robinson, *supra* note 1, at 797; Turner, *supra* note 1, at 328–33. See also *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (*Brinkman II*) (“Part of the affirmative duty imposed by our cases . . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects.” (internal citation omitted)).

¹⁶⁹ 132 F.Supp. 776, 777 (D. S.C. 1955).

¹⁷⁰ 391 U.S. at 437–38 (emphasis added). See also *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 200, n.11 (1973) (“Our Brother REHNQUIST argues in dissent that *Brown v. Board of Education* did not impose an ‘affirmative duty to integrate’ the schools of a dual school system but was only a ‘prohibition against discrimination’ ‘in the sense that the assignment of a child to a particular school is not made to depend on his race . . .’ That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs v. Elliott*: ‘The Constitution, in other words, does not require integration. It merely forbids discrimination.’ But *Green v. County School Board* rejected that interpretation insofar as *Green* expressly held that ‘School boards . . . operating state-compelled dual systems were nevertheless clearly charged (by *Brown II*) with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and

Board of Education enucleated this affirmative duty when the Court ruled, in advancement of *Brown's* promise that, “[i]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked.”¹⁷¹

In other words, *Brown I* promises careful judicial scrutiny of segregation. Judiciary authority should be invoked to scrutinize tracking’s racial identifiability. It is indisputable that racial identifiability is a form of racial distinction and so it must be condemned like Justice Powell condemned racial distinctions in *Regents of University of California v. Bakke* when he stated that “[r]acial and ethnic distinctions of any sort are *inherently* suspect and thus call for the *most exacting* judicial examination.”¹⁷² This most exacting standard is the standard of review which requires that justifications of racial distinctions must be based on compelling ends and narrowly-tailored means.¹⁷³ The narrow-tailoring requirement is designed to ensure that race is not used for “illegitimate racial prejudice or stereotype.”¹⁷⁴ If this Court statement is to be believed, then the narrow-tailoring requirement should not be a means for precluding beneficial uses of race to remedy micro-segregation.¹⁷⁵ After all, the Court specifically stated that the narrow-tailoring requirement was created to target negative uses of race such as stereotypes and prejudice. The Court

branch.’ *Green* remains the governing principle.” (internal citations omitted) (citing *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969), *Swann*, 402 U.S. at 15, and *Kelley v. Metropolitan Cty. Bd. of Educ.*, 317 F.Supp. 980, 984 (D.C.1970)). A district gets unitary status when it no longer runs a dual segregated school system. See Joseph O. Oluwole & Preston C. Green, III, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK. L. REV. 1, 15 (2008).

¹⁷¹ 402 U.S. at 15.

¹⁷² 438 U.S. at 291 (Powell, J., concurring) (emphasis added). Justice Powell’s opinion was the controlling opinion in *Bakke* pursuant to the Supreme Court decision in *Marks v. United States*, 430 U.S. 188 (1977) regarding controlling judicial opinions where there are several individual opinions with no majority or plurality in a case. *Accord Grutter v. Bollinger*, 539 U.S. 306, 321, 323, 325. *Grutter* also emphasized that Justice Powell’s opinion endorsed “use of race to further only one interest: the attainment of a diverse student body.” *Id.* at 324 (internal quotation marks omitted).

¹⁷³ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). See *Grutter*, 539 U.S. at 326 (“We apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (plurality opinion))).

¹⁷⁴ *Grutter*, 539 U.S. at 333 (citing *J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion)).

¹⁷⁵ Sadly, as Justice Stevens pointed out in *Parents Involved*, the Court has been increasingly less faithful to *Brown I* as well as *Brown II* and less respectful of its own precedents. See *Parents Involved*, 551 U.S. at 803 (Stevens, J., dissenting). It is time the Court reverse this trend in order to perform its fiduciary duty protecting minority rights.

must stay true to this commitment as the citizenry needs to be able to trust that the judiciary will stay true to its words; otherwise our judicial system's integrity is at momentous risk.

While the Court now requires that both invidious and benign race-based distinctions be judged under this strict scrutiny standard, for decades after *Brown I* and *Brown II*, the Court allowed use of benign race-based distinctions in remedy of racial segregation.¹⁷⁶ Since micro-segregation has not benefitted consequentially from benign race-based distinctions, the Court should afford a similar period of decades for schools to use race to reverse the segregative and unequal-opportunity impact of tracking. Further, as the Court itself has stated, “[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”¹⁷⁷ This gives courts room to exercise discretion that minimizes invalidation of benign race-based distinctions.¹⁷⁸ If, as the Court repeatedly stated in *Grutter*, context really matters in strict scrutiny analysis, then the context of micro-segregation being deprived remedy for several generations must matter and be accounted for.¹⁷⁹ To

¹⁷⁶ See cases after *Brown I* and *Brown II*, discussed earlier herein, where the Court ordered race-based remedies. However, the Court made significant changes subjecting all racial distinctions to strict scrutiny in *Bakke*, 438 U.S. at 291–99 (Powell, J., concurring); and then more explicitly in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). For a solid explanation of the *Bakke* decision, see Turner, *supra* note 1, at 287–90. Justice Breyer discerningly, and sharply, criticized the *Parents Involved* plurality for increasingly using the narrow-tailoring requirement to strike down benign uses of race. Specifically, he carped at this disregard of precedent:

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause. *Parents Involved*, 551 U.S. at 803–04 (Breyer, J., dissenting).

¹⁷⁷ *Grutter*, 539 U.S. at 326–27.

¹⁷⁸ In fact, the Supreme Court recognized judicial discretion in *Grutter* when it stated: “As we have explained, whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.” 539 U.S. at 327 (internal quotation marks and citations omitted).

¹⁷⁹ *Grutter*, 539 U.S. at 327–43.

account for this context, the Court need only follow precedent, in the spirit of *Brown I*, that “[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”¹⁸⁰

Brown I could also be interpreted as imposing an antisubordination duty or an anticlassification duty.¹⁸¹ Anticlassification prohibits government action classifying people based on race while antisubordination prohibits government action that perpetuates pecking orders or subordinations based on race.¹⁸² In addition, anticlassification is dispassionate, applying strict scrutiny analysis to benign as well as invidious classifications, while antisubordination is more empathetic and primed to confront and remedy racial echelons, hierarchical distortions, as well as abuse or misuse of power that burden or hamper the advancement of minorities. Ergo, antisubordination would be the better approach for the judiciary if it seeks to enforce a new desegregation era in the spirit of *Brown* for desegregated classrooms.

¹⁸⁰ *Grutter*, 539 U.S. at 327.

¹⁸¹ For an excellent discussion of anticlassification and antisubordination, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) and Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. at 1–2. Here is a brilliant example of the workings of antisubordination:

Black inferiority and its complementary ideology, white supremacy, were very much at the heart of the matter of black political, social, and economic inequality as it existed in 1954. They supported not only segregated public schools, but also the entire system of Jim Crow laws which stigmatized and subordinated the entire black population. If black children did not feel branded and insulted because the law said that they could not go to school with white children, they were certainly supposed to. If black children did not feel branded and insulted by segregation, it was either because they stubbornly resisted internalizing the message white supremacy intended them to get (for which they should not be penalized) or they had so thoroughly absorbed its portent that they were incapable of recognizing the affront. Regina Austin, *Back To Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-Brown Era*, 6 J. APP. PRAC. & PROCESS at 80–81.

¹⁸² Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 CONST. COMMENT. at 1–2; Jonathan Fischbach, Will Rhee, & Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation after Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. at 497, 508–09; Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. at 314–23.

A shortcoming of *Brown I* is that, in focusing on the sufferable feelings of inferiority of minorities, the Court neglected to confront the need for reeducation to address the underlying superiority complex of Whites that had fueled the perceptions of minorities as diminished abilities.¹⁸³ *Brown I* failed in this regard despite premising the entire decision fundamentally on education's importance to the transmission of cultural values and to functional citizenry.¹⁸⁴ Yet, *Brown I* deserves praise for emphasizing the vitality of education; this emphasis in turn spun a needed focus on equal educational opportunities for minority students as essentiality to self-determination and positive prospects in a democratic society. This same educational vitality underscores the detrimentality of tracking's inequalities for minorities. If education is indeed, a "principal instrument in awakening the child to cultural values"¹⁸⁵ and self-determination, then tracking's inequities is depriving minorities. To reverse the injustice, the judiciary must solemnly embrace its role as guardian of educational accountability to ensure that the cultural values to which children are awakened are those that promote equality rather than the inferiority of minorities and/or superiority of Whites.

Brown I promised minorities that "in the field of public education, the doctrine of 'separate but equal' has no place."¹⁸⁶ That promise is clearly not limited to macro-segregation for the promise encompasses the entire field of education which includes micro-segregation. Moreover, *Brown I* promised minority students that educational segregation is innately unequal and therefore constitutionally infirm.¹⁸⁷ This has to apply to tracking since tracking is inherently a form of educational segregation. As *Green* stressed, *Brown I's* "constitutionally required end [is] the abolition of the system of segregation and its effects."¹⁸⁸

¹⁸³ *Brown*, *supra* note 2, at 139.

¹⁸⁴ See *Brown I*, 347 U.S. at 493 (discussing the importance of education).

¹⁸⁵ *Brown I*, 347 U.S. at 493. As the United States District Court, Eastern District of Louisiana, pointed out, "[c]ourts are not school boards and do not derogate unto themselves the formulation of educational policies. *But* courts are the vigilant protectors of the constitutional rights of every American. If any existing school board policy violates or impinges on the equal protection clause of the Fourteenth Amendment, then that educational policy is impermissible." *Moses II*, 330 F.Supp. at 1345 (emphasis added).

¹⁸⁶ *Brown I*, 347 U.S. at 495.

¹⁸⁷ *Brown I*, 347 U.S. at 495.

¹⁸⁸ 391 U.S. at 440 (emphasis added).

As evident from the above discussions, *Brown I*'s promissory note to minorities encompasses the right to micro-desegregation. So does *Brown II*'s, as discussed next.

B. *Brown II*'s Promise, Systemwide Desegregation, and the Green Factors

Brown II's promise of minority freedom from racial discrimination similarly comprehends tracking in declaring that “[a]ll provisions of federal, state, or local law *requiring* or *permitting* such discrimination must yield to [the fundamental principle that racial discrimination in public education is unconstitutional].”¹⁸⁹ Whether tracking policy is state-driven or district-driven, required or merely permitted, this ruling prohibits discrimination evident in racially-identifiable class groupings. The ruling includes no intent requirement for discrimination to be deemed unconstitutional.

In *Green*, the Supreme Court confirmed that both *Brown I* and *Brown II* denounced racial identification of a school system as unconstitutional;¹⁹⁰ so should the Court’s enforcement of micro-segregation. Further, in *Green*, the Court established that *Brown II* mandated transition from racial identification to an entirely racially-nondiscriminatory school system.¹⁹¹ *Green* accentuated this point in noting that “*Brown II* was a call for the dismantling of well-entrenched dual systems.”¹⁹² This dismantling of racial identification, the Court declared, must include student assignments, faculty, staff, extracurricular activities, facilities and transportation;¹⁹³ these are known as the *Green* factors. “The *Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*.”¹⁹⁴

Under *Brown*’s systemwide desegregation mandate, *Board of Education of Oklahoma City v. Dowell* allows courts to scrutinize school

¹⁸⁹ *Brown II*, 349 U.S. at 298 (emphasis added).

¹⁹⁰ 391 U.S. at 435–36.

¹⁹¹ See generally *Green*, 391 U.S. at 435. See also *id.* at 437 (“ . . . the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the ‘racially nondiscriminatory school system’ *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system.”).

¹⁹² 391 U.S. at 437.

¹⁹³ *Green*, 391 U.S. at 435.

¹⁹⁴ *Freeman*, 503 U.S. at 486. See also *id.* at 497 (“Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well. We have observed, for example, that student segregation and faculty segregation are often related problems.”).

district bona fides on the *Green* factors—one of which is student assignments which covers tracking.¹⁹⁵ This systemwide desegregation mandate should have applied to micro-segregation all along. While this lack of enforcement is inexcusable, it is time to enforce it holistically. This systemwide desegregation mandate encompasses “steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but *just schools*.”¹⁹⁶ Similarly, in the micro-desegregation era, we need to mandate *just classrooms*. Additionally, to ensure just classrooms, the judiciary should scrutinize tracking proposals as Supreme Court precedent did freedom-of-choice proposals which undermined desegregation: “If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.”¹⁹⁷

Brown II also called on courts to exercise equitable powers to remove obstacles that would preclude school systems from nondiscriminatory operation in compliance with the Equal Protection Clause.¹⁹⁸ The equitable powers includes “systematic and effective” removal of obstacles.¹⁹⁹ *Swann* affirmed these equitable powers noting that “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is *broad*, for breadth and flexibility are *inherent* in equitable remedies.”²⁰⁰ *Brown II*’s call for exercise of equitable powers is a favorable clarion call for detracking if courts indeed oblige *Brown II* and exercise their broad equitable powers.²⁰¹ Moreover, *Brown II* emphasized that these equitable principles are so important

¹⁹⁵ 498 U.S. 237, 250 (1991) (citing *Green*, 391 U.S. at 435). See also *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (“we have identified student assignments . . . faculty, staff, transportation, extracurricular activities and facilities as the most important indicia of a racially segregated school system.” (internal quotation marks omitted)).

¹⁹⁶ *Green*, 391 U.S. at 442 (emphasis added).

¹⁹⁷ *Wright*, 407 U.S. at 460.

¹⁹⁸ *Brown II*, 349 U.S. at 300.

¹⁹⁹ *Brown II*, 349 U.S. at 300.

²⁰⁰ 402 U.S. at 15 (emphasis added).

²⁰¹ Such equitable powers should allow the judiciary to move now on behalf of micro-desegregation even if it feels its desegregation jurisprudence has already sufficiently addressed macro-segregation (certainly macro-segregation remains though we use this sufficiency point for arguendo purposes). See *System Federation v. Wright*, 364 U.S. 642, 647 (1961) (“There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.”).

that they cannot be discounted simply because the judiciary or other party disagrees with them.²⁰²

The main flaw in *Brown II* was its imposition of the “all deliberate speed” requirement.²⁰³ In the paragraph just before imposing this requirement, the Court had stated that “the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954[*Brown I*] ruling.”²⁰⁴ There is no doubt that the requirement of promptness would help in enforcing micro-desegregation rights. However, the Court’s decision to include the promptness and deliberate speed requirements a paragraph apart is quite curious and confusing because the Court seemed to be encouraging alacrity on one hand and insouciance/hebetude on the other.

Professor Ronald Turner asserts that *Brown II*’s “all deliberate speed” requirement was purposeful slow-walking of desegregation.²⁰⁵ He argues that the requirement reflected “a manifestation of the Court’s concern that a vigorous and more robust remedy would raise the hackles of those who resented and would resist the Court’s invalidation of entrenched and state-sanctioned public school segregation.”²⁰⁶ In addition to the constraining language of all deliberate speed, *Brown II* entrusted the very districts that committed the sin of segregation with the latitude to implement desegregation remedies.²⁰⁷ This appeared highly irresponsible because it permitted districts to find new ways to continue their sins, making the judiciary’s retention of jurisdiction a farce. As the Court has elucidated, “[i]n light of the complexities inhering in the disestablishment of state-established segregated school systems, *Brown II* contemplated that the better course would be to retain jurisdiction

²⁰² *Brown II*, 349 U.S. at 300.

²⁰³ *Brown II*, 349 U.S. at 301. In *Freeman*, for instance, the Court stated that “DCSS [DeKalb County, Georgia, School System] initial response to the mandate of *Brown II* was an all too familiar one. Interpreting ‘all deliberate speed’ as giving latitude to delay steps to desegregate.” 503 U.S. at 472. See *Montgomery*, 665 F.Supp. at 490 (describing how school districts viewed “all deliberate speed” as “no speed at all”). The juxtaposition of speed and deliberate is oxymoronic.

²⁰⁴ *Brown II*, 349 U.S. at 300.

²⁰⁵ Turner, *supra* note 1, at 271.

²⁰⁶ *Id.* at 271. See also Robinson, *supra* note 1, at 795–96, 797 (characterizing “all deliberate speed” as an invitation from the court to school districts to delay desegregation). Accord Parker, *supra* note 1, at 1072.

²⁰⁷ See *Brown II*, 349 U.S. at 299 (“School authorities have the *primary* responsibility for elucidating, assessing, and solving these problems.” (emphasis added)).

until it is clear that disestablishment has been achieved.”²⁰⁸ While *Brown II* required courts to maintain judicial oversight over desegregation,²⁰⁹ the principal judicial oversight *Brown II* provided was review of “good faith implementation.”²¹⁰ Unfortunately, this would prove lethargic for desegregation enforcement in subsequent years as school districts craftily evaded implementation of macro-desegregation.²¹¹

The courts should not leave the desegregation of classrooms up to the school districts as happened in *Brown II*. Continued proactive judicial or court-appointed trustee oversight is important to ensure consistent periodic review of compliance. As the Court did in rejecting disguised resistance to macro-segregation, in *Griffin v. County School Board of Prince Edward County*, the Court must emphatically state in micro-segregation cases that “this is not a case for abstention.”²¹² Additionally, the Court must qualify any good faith requirement, as in *Green*, by insisting that “the availability to the [school] board of other more promising courses of action may indicate a lack of good faith.”²¹³ This availability of promising alternatives, at minimum, “places a heavy burden upon the board to explain its preference for an apparently less effective method.”²¹⁴ As pointed out earlier herein, detracking has proved more promising than tracking. Thus, plans such as tracking that overtly or covertly undercut desegregation should not be tolerated.²¹⁵

²⁰⁸ *Raney*, 391 U.S. at 449.

²⁰⁹ *Brown II*, 349 U.S. at 301.

²¹⁰ *Brown II*, 349 U.S. at 299, 300; *Green*, 391 U.S. at 439.

²¹¹ See generally e.g., *Griffin*, 377 U.S. 218; *Green*, 391 U.S. 430.

²¹² 377 U.S. at 229.

²¹³ *Green*, 391 U.S. at 439.

²¹⁴ *Green*, 391 U.S. at 439 (emphasis added). The Supreme Court could similarly construe its ruling in *Fisher v. University of Texas at Austin* that courts should scrutinize rather than defer to the school’s serious good faith analysis of race-neutral alternatives. 133 S.Ct. 2411, 2420 (2013). Another great approach is that in *Yonkers* where the United States District Court, Southern District of New York ruled that “when one begins with the premise that all children can learn, a ‘finding of present day racial differences in educational achievement’ creates a strong basis for inferring that, in some way, the school district is failing to teach minority students. Because the State Defendants have failed to come forward with any evidence that might rebut that inference, we find that some set of policies or practices in the Yonkers public schools, which inadequately serves the needs of minority students, must be responsible for the shortfall in minority achievement. The more closely that shortfall is correlated with the students’ racial or ethnic heritage, the more confident we are in the reliability of that inference.” 123 F. Supp. 2d at 706.

²¹⁵ Like Justice Kennedy has affirmed, “[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by

The *Griffin* case personifies model judicial enforcement of *Brown II*'s remedial mandate as the Supreme Court sanctioned discontinued public funds for schools in Prince Edward County (Virginia) until overt and camouflaged discriminatory and segregative practices were abandoned.²¹⁶ *Griffin* worked around the resistance to desegregation by repackaging plans as private choices of parents and students (as opposed to government action) as some tracking programs claim to be.²¹⁷ However, as the Court noted in *Green*, plans founded in private choices which result in segregation merely function to “burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board.”²¹⁸ Accordingly, the *Griffin* Court was right to eagerly exercise broad judicial power to ensure abandonment of these practices: “We have no doubt of the power of the court to give this relief to enforce the discontinuance of the county’s racially discriminatory practices.”²¹⁹ Relief from micro-segregation must garner the same remedial amplitude and flexibility.

Pursuant to *Brown II*'s promptness requirement, and the ineffectiveness of the “all deliberate speed” requirement, the *Griffin* Court recognized the urgency of addressing segregation:

law.” *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring).

²¹⁶ *Griffin*, 377 U.S. at 232–34.

²¹⁷ *Griffin*, 377 U.S. at 221–22. Similar repackaging occurred in the *Green* case, *Green*, 391 U.S. at 431–34, *Monroe v. Board of Com’rs of City of Jackson, Tenn.*, 391 U.S. 450, 452–55, 458 (1968), *Raney v. Board of Ed. of Gould Sch. Dist.*, 391 U.S. 443, 445–48 (1968), *Wright*, 407 U.S. at 455–56, 459, *Scotland Neck City Bd. of Educ.*, 407 U.S. at 485–86, *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), as well as *Milliken*, 418 U.S. at 727. See also *Freeman*, 503 U.S. at 472 (“DCSS’ [DeKalb County, Georgia, School System] initial response to the mandate of *Brown II* was an all too familiar one. Interpreting ‘all deliberate speed’ as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966–1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former de jure white schools, but the plan had no significant effect on the former de jure black schools.” (emphasis added)). However, as the *Green* Court iterated, “[f]reedom of choice is not a sacred talisman.” *Green*, 391 U.S. at 440 (internal quotation marks omitted) (citing *Bowman v. County Sch. Bd. of Charles City Cty.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring)). For nonprivate choice ways in which desegregation resistance was repackaged, see *Keyes*, 413 U.S. at 201–03.

²¹⁸ *Green*, 391 U.S. at 441–42; *Monroe*, 391 U.S. at 458.

²¹⁹ *Griffin*, 377 U.S. at 232–33. See also *id.* at 233–34 (“An order of this kind is within the court’s power if required to assure these petitioners that their constitutional rights will no longer be denied them.”). Further broad remedial judicial powers granted in *Griffin* is evident in the following: “if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.” *Id.* at 234 (emphasis added).

[W]e hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education*.²²⁰

Today's Court should bring this same attitude to enforcement of micro-desegregation especially in view of the fact that micro-desegregation has not experienced its own civil rights heyday.

As with the promptness requirement in *Brown II*, *Griffin's* edict of "quick and effective"²²¹ relief as well as *Green's* stern warning that "delays are no longer tolerable"²²² must drive the civil rights era of micro-desegregation. Besides, *Griffin* ended *Brown II's* "all deliberate speed" requirement so there is no reason for that requirement to proceed into a micro-desegregation era. That Court stated, "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying . . . school children their constitutional rights to an [equal] education."²²³ Today, the Court must make it difficult for schools to engage in micro-segregation or slow-walk micro-desegregation by iterating, as it did in *Green*, that "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."²²⁴

Amplification of *Brown I* and *Brown II* promises regarding race-neutral measures, in Supreme Court precedent, is apropos to tracking since micro-segregation often works through ostensibly race-neutral measures. *Griffin*, for instance, held that school officials cannot use race-neutral grounds to skirt their constitutional obligation to desegregate.²²⁵ Like-

²²⁰ *Griffin*, 377 U.S. at 229.

²²¹ *Griffin*, 377 U.S. at 232.

²²² 391 U.S. at 438.

²²³ *Griffin*, 377 U.S. at 234.

²²⁴ *Green*, 391 U.S. at 439 (emphasis added).

²²⁵ *Griffin*, 377 U.S. at 231–32. See *Wright*, 407 U.S. at 461 ("And where a school board offers nonracial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification."). It is unfortunate that the Court has at times allowed school officials to get away with claims of race-neutral measures even when it has a detrimental impact on desegregation and minorities' education. See, e.g., *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–37 (1976).

wise, *Swann* warned that a “[student] assignment plan is not acceptable simply because it appears to be neutral.”²²⁶ The Court affirmed this in *Keyes* in acknowledging that “[r]acially neutral assignment plans proposed by school authorities to a district court may be inadequate.”²²⁷ The Court also emphasized that “artificial racial separation” is indefensible.²²⁸

Green also shed light on *Brown I* and *Brown II* promises, stating that these promises include the constitutional right of minorities to a *unitary system* in which racial discrimination would be eliminated root and branch.²²⁹ *Green* punctuated this with the observation that *Brown II* commanded school boards to “*bend their efforts*” to this root-and-branch mandate.²³⁰ In other words, the true goal must be systemic elimination of racial discrimination. Further, school districts must bend their endeavors to ensure the creation of an entire *system* that is unitary. The root-and-branch requirement reflects the Court’s appreciation of the deep-seated nature of racism that fueled segregation.²³¹ The threat of White flight is not an excuse to avoid desegregating.²³² Thus, concerns such as community resistance to desegregation or unenrollment of Whites (articulated earlier as a motivating factor in the origins of tracking) cannot justify continued use of tracking.

²²⁶ *Swann*, 402 U.S. at 28.

²²⁷ *Keyes*, 413 U.S. at 212 (internal quotation marks omitted) (citing *Swann*, 402 U.S. at 28).

²²⁸ *Swann*, 402 U.S. at 28.

²²⁹ *Green*, 391 U.S. at 438.

²³⁰ *Green*, 391 U.S. at 438 (emphasis added). See also *Moore v. Tangipahoa Parish Sch. Bd.*, 304 F.Supp. 244, 247 (E.D. La. 1969) (“the United States Supreme Court has told us that the entire school system must be unitized ‘root and branch’. When racially identifiable under freedom of choice, it is not a unitized desegregated school, even if children of the opposite race attend elementary school classes in the same building.” (internal citation omitted) (citing *United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225 (1969))).

²³¹ *Feagina & Barnett, supra* note 26, at 1108. In fact, “roots and branches” would be another way to characterize vestiges. *Coalition To Save Our Child. v. Buchanan*, 744 F.Supp. 582, 588 (D. Del. 1990).

²³² See *Monroe*, 391 U.S. at 459 (“We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.” (internal quotation marks omitted) (citing *Brown II*, 349 U.S. at 300)). Accord *Scotland Neck City Bd. of Educ.*, 407 U.S. at 491; and *Hart*, 383 F.Supp. at 743 (“the threat of white disappearance cannot be used as an excuse for continuing segregated schools. . . . Concern over ‘white flight’, as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value.” (citing *Mapp et al. v. Board of Educ. of City of Chattanooga, Tenn.*, 366 F.Supp. 1257, 1260 (E.D. Tenn. 1973))).

C. *Effects Precedent and Vestige Redress Must Guide Micro-Desegregation Era*

In *Wright v. Council of City of Emporia*, the Supreme Court rejected the Fourth Circuit Court of Appeals' position that an educational policy or practice is constitutional if its primary purpose is pedagogical, nondiscriminatory and benign, even if the policy or practice leads to segregation.²³³ This ruling should cover tracking, which is often contended to be pedagogical, nondiscriminatory and benign. The Court rebuked the primary-purpose argument and said, "it is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators, and the same may be said of the choices of a school board."²³⁴ Therefore, courts should not even bother trying to determine the primary purpose because "an inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools."²³⁵

The *Wright* Court ruled that the constitutional viability of a proposal that furthers segregation must be judged by its effects; not the purpose.²³⁶ By extension, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."²³⁷ Recall from earlier discussions that tracking has inimical effects on minority students who are overwhelmingly consigned to the lower tracks. Even if nothing else arises from *Wright* for a detracking jurisprudence, the Supreme Court should embrace the damaging potency of the following ruling to tracking given its malefic impact on minorities: "Nor does a court supervising the process of desegregation exercise its remedial discretion responsibly where it approves a plan that, in the hope of providing better 'quality education' to some children, has a substantial adverse effect upon the quality of education available to others."²³⁸ Furthermore, as the Court highlighted in *Swann*, *Brown I* considered segregation "evil."²³⁹ This characterization was in no way limited to macro-segregation; after all, segregation is segregation is segregation. Accordingly, we must view micro-segregation as evil.

²³³ *Wright*, 407 U.S. at 461–62.

²³⁴ *Id.* at 462 (internal quotation marks omitted).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 463. This applies even when the effect is not "readily perceived." *Id.* at 463.

²³⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

Correspondingly, in the words of *Swann*, “[t]he objective today remains to eliminate from the public schools *all* vestiges of state-imposed segregation.”²⁴⁰ We know that a “vestige of segregation is a policy or practice which is traceable to the prior de jure system of segregation and which continues to have discriminatory effects.”²⁴¹ As such, this mandate on vestiges is a call to perustrate segregation’s lingering effects. *Dowell* expounded on the essence of “vestiges” as well as the interactive roles of “good faith” and “extent practicable” within the effects and desegregation calculus.²⁴² Particularly, the Court stated that, before a school district is deemed unitary, courts must scrutinize the district’s actions for good faith implementation of desegregation and need only inquire if the district has eliminated the past discrimination vestiges “to the extent practicable.”²⁴³ As evident in discussions above, classroom segregation is a vestige of past discrimination; ergo, micro-desegregation decrees need to be designed and declared to address this form of segregation.²⁴⁴ If the Supreme Court insists on retaining the good faith requirement, then it should similarly insist that, before relieving any school district from a classroom desegregation decree, courts must painstakingly probe whether the district’s schools have eliminated classroom segregation as practicable as possible and in good faith. Otherwise, the desegregation decree should neither be dissolved nor the district declared unitary.

Since micro-segregation is an intradistrict violation, the Supreme Court’s ruling on intradistrict redress should be extended to micro-segregation. For instance, the Court has ruled that “[t]he proper response to an intradistrict violation is an intradistrict remedy, that serves to eliminate the racial identity of the schools within the affected school district by eliminating, as far as practicable, the vestiges of *de jure* segregation

²⁴⁰ *Id.* (emphasis added).

²⁴¹ *United States v. Yonkers Bd. of Ed.*, 123 F. Supp. 2d 694, 700 (2000) (citing *United States v. Fordice*, 505 U.S. 717, 727–28 (1992) and *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992)). In *Yonkers*, the court explained that “[s]o long as the current policy had its roots in the prior regime, or had an antecedent in the prior regime, it may constitute a vestige of segregation if it has a segregative effect.” *Yonkers*, 123 F. Supp. 2d at 705.

²⁴² *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991). For a discussion of the *Griffin*, *Green*, *Swann*, *Keyes*, *Milliken*, *Dowell*, *Freeman* and *Jenkins* cases, see Fairfax, *supra* note 59, at 12–20, 24–27, 35–36, Turner, *supra* note 1, Robinson, *supra* note 1, at 805–33, and Boger, *supra* note 13, at 1385–95.

²⁴³ *Dowell*, 498 U.S. at 249–50.

²⁴⁴ *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (“We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation.”).

in *all* facets of their operations.”²⁴⁵ The word “all” should encompass classroom segregation since classrooms are a facet of school operations. Even when classroom segregation is not a vestige of past discrimination, courts should act to compel schools to desegregate classrooms so that minority students can benefit from the resources and opportunities, discussed earlier, afforded to White students in the upper tracks.²⁴⁶

In *Freeman v. Pitts*, the Supreme Court acknowledged that vestiges do not have to be tangible: “The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible.”²⁴⁷ As such, inferiority complexes imposed and perpetuated by classroom segregation should be considered vestiges. Indeed, the scrutiny of vestiges should encompass “any condition that is likely to convey the message of inferiority implicit in a policy of segregation. So long as such conditions persist, the purposes of the [desegregation] decree cannot be deemed to have been achieved.”²⁴⁸ Justice Marshall’s description conveyed, precisely, tracking’s oppressive nature as conveying minority inferiority.

D. *Stubborn Facts of History Linger*

The *Freeman* Court’s declaration about school segregation vestiges is also true today for *classroom* segregation as it was for school segregation in *Freeman*: “vestiges of past segregation by state decree do *remain* in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a *stubborn* fact of history. And stubborn facts of history *linger and persist*.”²⁴⁹ Professor Daniel Kiel agrees, noting that:

²⁴⁵ *Mo. v. Jenkins*, 515 U.S. 70, 90 (1995) (internal citations omitted).

²⁴⁶ See, e.g., David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco’s Public Schools: Notes From A (Partisan) Participant-Observer*, 16 HARV. BLACK LETTER L.J. 39, 84 (2000) (presenting an example where classroom segregation was not a vestige of past racial discrimination).

²⁴⁷ 503 U.S. 467, 496 (1992). See also *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring) (“From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.”).

²⁴⁸ *Dowell*, 498 U.S. at 261 (Marshall, J., dissenting). Justice Marshall made this statement in *Dowell* in critique of the majority’s willingness to excuse continued segregation.

²⁴⁹ 503 U.S. at 495 (emphasis added).

[M]odern American education already has a head start in achieving the effect of a caste system since it has the bones of a system initiated in order to create and maintain racial caste. Further, today's students have inherited both positive and negative legacies of previous caste systems, preserving many disparities of the past.²⁵⁰

The Supreme Court prohibited such a caste system in *Swann* as the Court ruled that “[t]he constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause.”²⁵¹ This prohibition most certainly covers tracking—a form of racial separation enforced by school districts. Court precedent encourages school districts to proactively confront such continued segregation as a stubborn fact of history. For example, in *Keyes*, the Court unequivocally stated that “[n]othing in this opinion is meant to discourage school boards from *exceeding* minimal constitutional standards in promoting the values of an integrated school experience.”²⁵²

Sadly, the judicial reliance on the distinction between de jure segregation and de facto segregation has created obstacles to addressing practices such as tracking.²⁵³ De jure segregation is defined as segregation that results from official or intentional state action whereas de facto segregation is segregation that occurs without such intentional state action.²⁵⁴ De facto segregation encompasses segregation that is more

²⁵⁰ Kiel, *supra* note 128, at 617.

²⁵¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971).

²⁵² *Keyes v. Sch. Dist.* 413 U.S. 189, 242 (1973) (emphasis added).

²⁵³ *See, e.g., Adams, supra* note 71, at 12 (stating, “[t]o be sure, the de facto-de jure distinction was (and is) a huge impediment to desegregation. As some members of the Court recognized, de facto segregation was often caused by state actors and the difficulty of ascertaining causation or assigning responsibility to a specific state actor should not constrain the reach of the equal protection clause.”). Cases such as *Keyes*, 413 U.S. at 208, 211–12, and *Milliken v. Bradley*, 418 U.S. 717, 721–22 (1974) gave de jure segregation and de facto segregation a voice in the desegregation jurisprudence. We are not here concerned with *Milliken's* other focus—interdistrict remedies—as micro-segregation is intradistrict.

²⁵⁴ *See Keyes*, 413 U.S. at 208 (“We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate”). *See also Wells, supra* note 7, at 1029; *Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 707 (E.D.N.Y. 1974) (describing the distinction between de jure segregation and de facto segregation). *Keyes* was the very first Supreme Court case to recognize a de facto versus de jure distinction. Kevin Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1585 (2004).

traceable to private action such as residential choices that perpetuate segregation.²⁵⁵ Whereas a terminus line between de jure segregation and de facto segregation might sound theoretically graspable, in reality, it is at best “thin, hazy, and ungrounded in any discernable distinction or diagnostic test in practice.”²⁵⁶ Justice Breyer highlighted this haziness, and the fugacious nature of the distinction, in *Parents Involved* in his incisive riposte to the majority: “a community under a court order to desegregate might submit a race-conscious remedial plan before the court dissolved the order, but with every intention of following that plan even after dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day?”²⁵⁷ Justice Kennedy has similarly acknowledged that the “distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact.”²⁵⁸

Effectively, in the guise of de jure and de facto distinction, the courts have chosen to be willfully blind to the fact that intentional state action created those de facto segregation conditions that manifest decades after the intentional action.²⁵⁹ Besides, as Professor Michelle Adams rightly observes, the law does not need to officially sanction segregation in order for it to cause harm.²⁶⁰ *Brown I* is in accord as the Court declared that the “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of the law.”²⁶¹ The implication of the word “greater”

²⁵⁵ See Fischbach, Rhee, & Cacace, *supra* note 54, at 504 (“De facto segregation, literally meaning segregation from facts”).

²⁵⁶ *Id.* at 494.

²⁵⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 821 (2007) (Breyer, J., dissenting).

²⁵⁸ *Id.* at 795 (Kennedy, J., concurring).

²⁵⁹ Wells, *supra* note 7, at 1033, 1038; Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 6 (1992). See Freeman v. Pitts, 503 U.S. 467, 503 (1992) (Scalia J., concurring) (“Only in rare cases . . . can it be asserted with any degree of confidence that the past discrimination is no longer playing a proximate role.”); Rush, *supra* note 127, at 359 (“While Whites of today do not own slaves, nevertheless, generation after generation of Whites continue to enjoy the privilege of Whiteness that gave their ancestors a significant 200 year head start.”).

²⁶⁰ Adams, *supra* note 71, at 20. Besides, “[c]ontemporary American education not only maintains the foundational structural elements of prior caste systems but also inherits generational impacts on students from intentional discrimination of the past.” Kiel, *supra* note 128, at 618.

²⁶¹ *Brown v. Bd. of Ed. (Brown I)*, 347 U.S. 483, 494 (1954) (emphasis added); Adams, *supra* note 71, at 10; John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown*,

is that there is still great harm done even when the law does not sanction the segregation. For instance, “segregation reifies and strengthens the underlying processes of social categorization, unequal allocation of resources and racial stigma.”²⁶² Justice Kennedy is on record approving judicial redress of de facto segregation effects (which effects of course do not need to originate from intent given the de facto nature).²⁶³

De facto segregation essentially allows stubborn facts of history to linger by victimizing minorities under “a new form of segregation that is both representative of and equally oppressive as the old dual systems.”²⁶⁴ By effectively immunizing de facto segregation from scrutiny, the Court is thereby “using the Constitution to protect passive resegregation from active integration,”²⁶⁵ which is very disappointing. At heart, the Court is “constitutionalizing the culture’s regression to the days of greater racial separation—a separation that *Brown* found to be inherently unequal.”²⁶⁶ In the spirit of *Brown*, courts should order remedial measures for de facto segregation with micro-desegregation.²⁶⁷ Otherwise the distinction between de jure and de facto segregation will continue to provide a “refuge for discrimination.”²⁶⁸

E. *Intent Is Not Reality*

The Court should adopt a standard of review that acknowledges reality—every school segregation has its roots in state action:

Schooling is compulsory, the public schools are supported almost entirely by the state, and school administrators annually assign all pupils and personnel to particular schools. Thus any

the Shadow of Plessy, 46 U. LOUISVILLE L. REV. 631, 638 (2008).

²⁶² Adams, *supra* note 71, at 20. See Black, *supra* note 74, at 116–17, 119–20.

²⁶³ Fischbach, Rhee, & Cacace, *supra* note 54, at 516. Justice Powell agreed in *Bakke*, 438 U.S. 265, 311–14 (Powell, J., concurring). Similarly, in *Grutter*, the Supreme Court stated, “today we endorse Justice Powell’s view that student body diversity is a compelling state interest.” *Grutter v. Bollinger*, 539 U.S. 306, 325. Cf. Fischbach, Rhee, & Cacace, *supra* note 54, at 533 (“In holding that the Equal Protection Clause forbids school systems from using race-based policies to address the effects of de facto segregation, the [*Parents Involved*] majority determined that *non*-minority students have a constitutional right not to be subject to race-based policies once their school system achieves unitary status.” (emphasis added)).

²⁶⁴ Teitelbaum, *supra* note 5, at 363.

²⁶⁵ Spann, *supra* note 2, at 566.

²⁶⁶ *Id.* (internal quotation marks omitted).

²⁶⁷ *Accord* Daniels & Pereira, *supra* note 4, at 635–36. See also Anderson, *supra* note 19, at 23 (concluding that “*Brown* found that de facto racial segregation was harmful to blacks, and that de jure segregation was stigmatizing.”).

²⁶⁸ Teitelbaum, *supra* note 5, at 363.

school segregation results from some degree of state action. Moreover, the state is responsible for the natural, probable, and foreseeable consequences of its policies and practices. Accordingly, proof of substantial segregation should create a *prima facie* case of state-imposed segregation. The state can rebut the *prima facie* case only by demonstrating that segregation is necessary to promote a compelling state interest that cannot be promoted by less segregative alternative actions.²⁶⁹

Intent should not be the litmus test. Focusing on intent ignores the ingrained and systematic racism that pervades institutions.²⁷⁰ Requiring intent is to “interpret and apply the [Equal Protection Clause] as if history had not occurred, to act as though the past is not connected to the current realities of racial segregation and resegregation, is to insulate entrenched racial hierarchy and the racial status quo from integrative change.”²⁷¹ It is to act as if the desegregation jurisprudence has historically been mere “temporary penance . . . that, once it had been paid, reversion to racially separate schools was perfectly acceptable as long as it had not been the explicitly discriminatory intention of local policy-makers.”²⁷²

²⁶⁹ Yudof, *supra* note 14, at 437–38 (citing Dimond, *School Segregation in the North: There is But One Constitution*, 7 HARV. CIV. RTS.-CIV. LIB. L. REV. 1, 4–6 (1972)).

²⁷⁰ This is also referred to as “institutional racism.” Dickens, *supra* note 7, at 482. See Fischbach, Rhee, & Cacace, *supra* note 54, at 496, 499 (reviewing the intent requirement); see also e.g., Black, *supra* note 74, at 129 (“The state, however, can stigmatize individuals without even intending to. . . . Racial stigma is a social construct that exists independent of the intentions or motivations of individuals.”). In fact, there is Supreme Court precedent agreeing that intent should not be the litmus test. See, e.g., *Dayton Bd. of Ed. v. Brinkman* (Brinkman II), 443 U.S. 526, 538 (1979) (“The Dayton Board, however, had engaged in many post-*Brown I* actions that had the effect of increasing or perpetuating segregation. The District Court ignored this compounding of the original constitutional breach on the ground that there was no direct evidence of continued discriminatory purpose. But the *measure* of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.” (emphasis added)).

²⁷¹ Turner, *supra* note 14, at 864. See Kirp, *supra* note 7, at 719. Robinson, *supra* note 182, at 316–17; see also Mickelson, *supra* note 15, at 1514 (noting that “tracking helps to maintain white privilege by placing whites disproportionately into higher tracks than their comparably able black peers.”). Requiring intent is to ignore serious problems with tracking. For a good summary of such serious problems, see Welner & Oakes, *supra* note 91, at 461. Yet, sadly, the Court has allowed intent to gain such foothold in macro-segregation cases. See, e.g., *Dayton Bd. of Educ. v. Brinkman* (Brinkman I), 433 U.S. 406, 413, 420 (1977). However, there is no reason to continue this practice when it will only hurt minorities in micro-segregation cases.

²⁷² Robinson, *supra* note 4 at 832 (citing RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF*

In addition, intent is a very challenging standard to meet even when official actions are driven by the requisite intent.²⁷³ Therefore, making it a requirement in cases of evident racially-identifiable discrimination only deprives or hurdles minorities of recourse and remedy for injustice. As ruled in *Hobson v. Hansen*, courts nationwide must “now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”²⁷⁴ Aside from this, it is blatantly unconstitutional to intentionally segregate so school officials would not even attempt to do so. Legal commentator Kimberly West aptly observes that “[i]ntentional racial segregation of students by classroom is, of course, unlawful per se. ‘If the rule were otherwise, school districts would be permitted to resegregate students within the confines of integrated school buildings and to undermine at least part of the basic purpose of *Brown v. Board of Education*.’”²⁷⁵ To the minority student afflicted by micro-segregation, the presence or absence of intent makes no difference. Professors Meier, Stewart and England’s rhetorical question amplifies this point acutely: “Do educators intend to discriminate against black students or is the discrimination institutional? From the perspective of the student, whether discrimination is intentional or institutional is irrelevant. Discrimination is equally harmful whether or not the intent is to discriminate.”²⁷⁶

The intent requirement is a veiled return to the spirit of *Cumming v. Richmond County Board of Education* where the Court rejected minority students’ contention that they were “lawfully entitled to the full benefit of any system of high schools organized or maintained by the

BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 772 (Alfred A. Knopf rev. & expanded ed., 2004)).

²⁷³ Schofield & Hausmann, *supra* note 14, at 91 (suggest intent is difficult to challenge because school districts were deemed unitary and presumed innocent of segregation); Nelson, *supra* note 44, at 367 (suggesting that because education experts believe tracking is helpful to minority students, it is inherently difficult to prove malicious intent); Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk*, 75 TEMP. L. REV. 863, 879 (2002) (suggesting intent is difficult to prove is because disparate impact is largely deemed insufficient to prove intent). The Supreme Court made this intent requirement burdensome in *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (for instance, the requirement of “an invidious discriminatory purpose” makes it more difficult to prove discriminatory intent).

²⁷⁴ *Hobson*, 269 F. Supp. at 497.

²⁷⁵ West, *supra* note 7, at 2584 (quoting *Vaughns v. Board of Educ.*, 574 F.Supp. 1280, 1314 (D.Md.1983)).

²⁷⁶ MEIER, STEWART, JR., & ENGLAND, *supra* note 13, at 138.

board.”²⁷⁷ Such judicial lethargy has similarly plagued tracking. In *Cumming*, the Court took an indulgent approach to segregated education by indomitably deferring to the state and school officials:

[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined.²⁷⁸

The *clear and unmistakable* reference was a façade standard to give the appearance of an exception to the indomitable deference; even though it was effectively unattainable. This was evident in *Gong Lum v. Rice* where, the Court responded with absolutism to a Chinese student’s request to attend a White school that this “decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.”²⁷⁹ Since the intent requirement has failed minorities, the Court should return the judiciary to the days of *Brown I* where minorities could eagerly “seek the aid of the courts”²⁸⁰ for desegregation remedy where the other branches of government provided no recourse. If judicial recourse is foreclosed what shall the helpless do? The judiciary must be that beacon of hope for those victimized by segregation as it was in *Brown I*.

E. Intent, Prima Facie Case, and the Clear and Convincing Standard

In any case where intent is used in analysis of micro-segregation, the Court should honor its *Keyes* holding that “a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious.”²⁸¹ This presumption should then

²⁷⁷ 175 U.S. 528, 530, 544–45 (1899) (emphasis added).

²⁷⁸ *Id.* at 545.

²⁷⁹ 275 U.S. 78, 87 (1927). Likewise, the Court stated that “it is the same question which has been many times decided to be within the constitutional power of the state Legislature to settle, without intervention of the federal courts under the federal Constitution.” *Id.* at 86.

²⁸⁰ *Brown I*, 347 U.S. at 487–88.

²⁸¹ 413 U.S. at 208. Further, as the United States Court of Appeals for the Fifth Circuit suggested, the Supreme Court (and other courts) should not allow districts to hide their intent behind use of bivariate ability grouping: “[W]e think that if the district court finds that the [district’s] ability grouping practices operate to confuse measures of two different characteristics,

lead to “a prima facie case of unlawful segregative *design* on the part of school authorities.”²⁸² As the Court warned, however, school districts are likely to vigorously resist this standard: “Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events.”²⁸³ Despite such resistance, for its own integrity, the Court must strike down systemwide micro-segregation in honor of its words about presumptions of intent:

[E]ven if it is determined that different areas of the school district should be viewed independently of each other . . . , even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.²⁸⁴

Along with this, the Court must require and enforce the difficult clear and convincing standard it endorsed in *Keyes* for desegregation review before school officials are allowed to overcome the prima facie case.²⁸⁵ In any review under the clear and convincing standard, the Court should heed its own ruling that there can be more than meets the eye with segregation: “We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that *close* examination is required before concluding that the connection does not exist.”²⁸⁶ This ruling is vital given that, in this day and age, school officials are less likely to be explicit with intent in their practices.

i.e., language and intelligence, with the result that predominantly Spanish speaking children are inaccurately labeled as ‘low ability,’ the court should consider the extent to which such an irrational procedure may in and of itself be evidence of a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.” *Castaneda v. Pickard*, 648 F.2d 989, 998 (5th Cir. 1981).

²⁸² *Keyes*, 413 U.S. at 208.

²⁸³ *Id.*

²⁸⁴ *Id.* at 208. See also *id.* at 208–09 (“But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only ‘isolated and individual’ unlawfully segregative actions.”).

²⁸⁵ See *id.* at 209–10 (discussing this standard).

²⁸⁶ *Id.* at 211.

Besides, the Court is on record acknowledging that current practices might be natural outgrowths of long past intentional discrimination: “Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation”²⁸⁷; as such, that tracking is not precisely traceable in certain cases to intentional discrimination does not mean it should be absolved. School officials should not be allowed to get away with the excuse that temporal remoteness vitiates intent. We already have Supreme Court precedent to this effect and so the Court need only enforce its own ruling now for micro-desegregation: “We reject any suggestion that remoteness in time has any relevance to the issue of intent.”²⁸⁸

Accentuating this ruling on time remoteness, the Court continued, “[i]f the actions of school authorities were to *any* degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less intentional.”²⁸⁹ The Court’s especial underscore of this ruling should quash temporal remoteness arguments in defense of tracking. Irrespective of time origins, Court precedent avers that “policy must give way when it operates to hinder vindication of federal constitutional guarantees.”²⁹⁰

G. *Micro-Desegregation Plans and the Quantification of Race*

Districts and courts must maintain perspective that micro-desegregation is not about racial ratios, quotas or racial balance; it is about desegregation.²⁹¹ It is about the right to equal educational opportunity.²⁹² It is about equity. So Supreme Court case rationales and judgments against racial balancing, quotas or racial ratios should not govern micro-desegregation.²⁹³ The instructive distinction between *Grutter* and

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 210.

²⁸⁹ *Id.* at 210–11 (emphasis added) (internal quotation marks omitted).

²⁹⁰ *Scotland Neck City Bd. of Educ.*, 407 U.S. at 488 (citing *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971)).

²⁹¹ See *Wright*, 407 U.S. at 465 (“Just as racial balance is not required in remedying a dual system, neither are racial ratios the sole consideration to be taken into account in devising a workable remedy.”).

²⁹² Justice Kennedy stated incontrovertibly in *Parents Involved* that “[s]chool districts can seek to reach *Brown’s* objective of equal educational opportunity.” 551 U.S. at 788 (Kennedy, J., concurring).

²⁹³ We are aware that the Court has disapproved racial quotas or any form of racial balancing. *Swann*, 402 U.S. at 24; *Milliken*, 418 U.S. at 740–41. Even if this disapproval is justified,

Gratz, for districts designing micro-desegregation plans quantifying race, is that “the quantified consideration of race in *Gratz* was not narrowly tailored and was therefore unconstitutional, while the unquantified recognition and use of race in *Grutter* did not run afoul of the Equal Protection Clause.”²⁹⁴

Even if micro-segregation were about racial ratios, there is Court precedent allowing use of such ratios:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.²⁹⁵

Since micro-desegregation has not had its own civil rights era, it surely deserves the use of racial balancing before racial balancing is restricted for micro-desegregation.²⁹⁶ After all, the Supreme Court has ruled that “[r]acial balancing in elementary and secondary school student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation.”²⁹⁷ However, it would be extremely wise for districts to always be prepared to show documentation that their race-conscious micro-desegregation plans are linked to pedagogical conceptualizations of diversity that would lead to educational benefits; rather than to mere racial demographics.²⁹⁸

though not necessarily so, those rulings were in the context of macro-segregation.

²⁹⁴ Turner, *supra* note 1, at 306.

²⁹⁵ Swann, 402 U.S. at 16. The Court’s argument that use of these ratios has been a traditional charge of school districts should carry significant weight for micro-desegregation since the legal principle of *stare decisis* expects respect of tradition and precedent.

²⁹⁶ This is true even though micro-desegregation is not about racial balancing or racial ratios. The argument here is that micro-desegregation must be entitled to the same full toolkit that macro-desegregation benefitted from before any tool is taken away from micro-desegregation’s toolkit.

²⁹⁷ Freeman, 503 U.S. at 497.

²⁹⁸ *Parents Involved*, 551 U.S. at 726 (plurality opinion). See also *id.* at 735 (“Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation’s history of using race in public schools, and requires

Districts should have documentation that details how (criteria and methods) their micro-desegregation plans work.²⁹⁹ Such details should include: when and how race is used in student assignments; who makes those decisions; how oversight is maintained over the plan to ensure its integrity; how race will factor into the student assignment decision when the choice is between two similarly-situated students; and an outline of the specific situations where race will not be factored into student assignments.³⁰⁰ These details must be thoroughly vetted to ensure there are no ambiguities or contradictions in the plan's operations.³⁰¹

H. *Voluntary Race-Conscious Measures and Colorblindness*

After the Supreme Court retreated from aggressive enforcement of desegregation, school districts voluntarily adopted race-conscious measures as a means to maintain desegregation gains, minimize racially-identifiable schools with few opportunities for interracial connections, and to ensure continued desegregation.³⁰² *Parents Involved* was a challenge designed to stop such voluntary race-conscious measures.³⁰³ In order to be viable as micro-desegregation measures, such measures must not rely on binary racial classifications such as “white/nonwhite” for the Supreme Court expects schools to appreciate that there are many racial groups and that true diversity acknowledges various races.³⁰⁴ Indeed, when racial categories are listed as Whites versus another race, as Professor Derek Black perspicaciously points out, there is a valid concern

more than such an amorphous end to justify it.”)

²⁹⁹ *Id.* at 784, 786 (Kennedy, J., concurring). The district must be prepared to provide a “convincing explanation for its design.” *Id.* at 787 (Kennedy, J., concurring).

³⁰⁰ *Id.* at 784–85 (Kennedy, J., concurring).

³⁰¹ *Id.* at 785–86 (Kennedy, J., concurring). *See also id.* at 745 (plurality opinion) (“If the need for the racial classifications embraced by the school districts is unclear, even on the districts’ own terms, the costs are undeniable.”).

³⁰² Districts adopted these measures voluntarily even though not compelled by law. *See, e.g., Parents Involved*, 551 U.S. at 828–29 (Breyer, J., dissenting). In *Parents Involved*, Justice Breyer observed that “[a] longstanding and unbroken line of legal authority tells us that the Equal Protection Clause *permits* local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not *compel* it.” 551 U.S. at 823 (Breyer, J., dissenting) (emphasis added).

³⁰³ 551 U.S. at 709–18, 842. For a good discussion of the *Parents Involved* discussion, see Joseph O. Oluwole & Preston C. Green III, *Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans, Parents Involved and Fisher*, 14 WYO. L. REV. 705 (2014), Spann, *supra* note 2, and William J. Glenn, *Altering Grade Configurations in Virginia Schools: Reducing School Segregation without Necessarily Considering Race in Light of the Parents Involved Ruling*, 88 N.C. L. REV. 1091 (2010).

³⁰⁴ *Parents Involved*, 551 U.S. at 723–24.

of messaging inferiority for minorities.³⁰⁵ It institutionalizes the perception that every race needs to measure itself against the gold standard of Whiteness.³⁰⁶ In other words, “[o]ne’s similarity or dissimilarity to whites is a measure of value.”³⁰⁷

Pursuant to *Parents Involved*, the use of race must have more than a minimal impact on micro-segregation; otherwise, the judiciary will conclude that there are race-neutral alternatives that can achieve micro-desegregation more effectively and thus more narrowly tailored.³⁰⁸ *Parents Involved* has created a “chilling effect” on school district efforts to achieve diversity and desegregation through race-conscious measures

³⁰⁵ Black, *supra* note 75, at 109.

³⁰⁶ *Id.* This is a part of a belief system that permeated various school districts even before *Plessy*. For instance, a Kansas school district argued:

The grievance is, not that they have not an equally comfortable room and an equally qualified instructor and similar studies, but that they are denied the pursuit of knowledge in the company of white children. If this companionship is an educational facility which the public is under obligation to furnish them, as it furnishes rooms and teachers, this writ was properly allowed; if not, it should have been refused. We claim that whatever the subtle and indeterminate influence may be which is exercised by the company of the white children with the colored, it is not one which the latter are entitled to demand as of right. It can only be claimed on the ground that the Caucasian youth is brighter and quicker than his dark-skinned brother, and that the contact would tend to sharpen and inspirit the latter. Suppose this is true, does it follow that we are ready to reorganize our school system and classify pupils on the basis of relative mental keenness and vigor? The intellectual difference is just as great between individual whites as it can be between the average intelligence in the white and colored races. So the man whose child is eager to learn and quick to acquire can insist that his boy shall be placed in a room with those only who are his equals intellectually, while the white man whose children do not pant for knowledge will insist with the same propriety that this claim is pressed here that his child shall have selected for his room-mates those who will help, by their emulation, to inspire him with love for the pursuit of knowledge. It is utterly impracticable to require that any such basis for classification shall be regarded by those who administer our educational trusts. *Board of Educ. of City of Ottawa v. Tinnon*, 26 Kan. 1, 5–6 (1881).

³⁰⁷ Black, *supra* note 75, at 109.

³⁰⁸ *Parents Involved*, 551 U.S. at 733–35 (plurality opinion). See also *id.* at 790 (Kennedy, J., concurring) (“In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III-C of the Court’s opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”).

as they are afraid of violating the law.³⁰⁹ As such, school districts increasingly turn to race-neutral measures which are less effective.³¹⁰ Under current jurisprudence, school districts must be prepared to present evidence to the courts that race-neutral alternatives are not effective in addressing micro-segregation.³¹¹ Professors John Powell and Stephen Menendian are right to critique the *Parents Involved* decision in its overly stringent application of the narrow-tailoring requirement to undermine race-conscious measures.³¹² They point out that “*Parents Involved*, like *Plessy*, serves to protect segregation and to preclude efforts to bring the races together.”³¹³ This is, for instance, evident in Chief Justice Roberts’ *Parents Involved* colorblind statement that equated invidious use of race pre-*Brown I* with the benign voluntary race-conscious measures.³¹⁴ Justice Roberts stated, “[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should *allow this once again*—even for very different reasons.”³¹⁵

Contrary to the majority’s colorblind approach in *Parents Involved*, the Equal Protection Clause has elements of colorblindness and race-consciousness. The United States Court of Appeals Fifth Circuit explained quite brilliantly how colorblindness and race-consciousness can coexist in the Constitution:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that *denies a benefit, causes harm, or imposes a burden* must not be based on race. In that sense, the Constitution is color

³⁰⁹ Frankenberg, *supra* note 4, at 704.

³¹⁰ *Id.* at 684, 687, 696, 703–04; Spann, *supra* note 2, at 567–68.

³¹¹ *Parents Involved*, 551 U.S. at 735 (plurality opinion).

³¹² Powell & Menendian, *supra* note 261, at 684.

³¹³ *Id.* at 684. *See also id.* (“In terms of the meaning of the text of the Equal Protection Clause and the doctrinal test used to implement it, *Parents Involved* is even more radical than *Plessy*. The Court in *Plessy* acknowledged the asymmetric nature of the constitutional provision. By reading *Brown* as a blanket prohibition on all racial classifications rather than a response to the harms of racial segregation, Chief Justice Roberts and the plurality marshal *Brown* for an anti-*Brown* reading. . . . Just as the Court in *Plessy* refused to recognize that enforced racial separation signified black inferiority in the context of a social caste system, the Chief Justice here refuses to credit the serious harms that motivate these plans.”).

³¹⁴ *Parents Involved*, 551 U.S. at 747 (plurality opinion).

³¹⁵ *Id.* (emphasis added).

blind. But the Constitution is color conscious *to prevent discrimination being perpetuated and to undo the effects of past discrimination*. The criterion is the relevancy of color to a legitimate governmental purpose.³¹⁶

However, reliance on colorblindness to avoid judicial remedy of segregation is a feeble though consequential decision. This decision discounts structural issues that perpetuate unequal educational opportunity or educational inopportunity.³¹⁷ The *Parents Involved* decision “legitimized a contemporary form of racism, in which the concept of equality itself can be used to sacrifice the interests of racial minorities for the benefit of disgruntled whites.”³¹⁸

I. Restrictive Jurisprudence: Societal Discrimination and Unitary Status

In *Bakke*, Justice Powell declared that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”³¹⁹ Likewise, the *Parents Involved* plurality stated that schools could not use race to redress societal discrimination.³²⁰ This is a rethread of *Plessy* where the Supreme Court, in discussing *social* equality, stated:

The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.³²¹

The Court’s failure to remedy societal discrimination is a big mistake for “societal discrimination perpetuates tacit beliefs in racial caste inferiority, and promotes unthinking racial oppression through inertia.”³²²

³¹⁶ *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966) (emphasis added).

³¹⁷ Besides, as Justice Kennedy aptly observes, even if colorblindness is an ideal, it is not functional in reality: “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.” *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

³¹⁸ Spann, *supra* note 2, at 592.

³¹⁹ *Bakke*, 438 U.S. at 276 (plurality opinion).

³²⁰ *Parents Involved*, 551 U.S. at 731 (plurality opinion).

³²¹ *Plessy*, 163 U.S. at 551. This is frustratingly an echo of pervading sentiments from the *Plessy* era. See, e.g., *Martin v. Board of Educ.*, 26 S.E. 348, 349 (W.Va. 1896) (holding similarly).

³²² Spann, *supra* note 2, at 625. Moreover, the caste system in segregation policies is “rooted

As such, the weight of the Equal Protection Clause should be wielded against societal discrimination in the spirit of *Brown I*.³²³

With the restrictive nature of decisions such as *Parents Involved*, courts need to weigh, with great solemnity, the implications of declaring school districts unitary since it is practically impossible for districts in post-unitary status to use race to address segregation.³²⁴ Lamentably, however, Honorable United States District Court Judge George Daniels and Philadelphia Assistant District Attorney Rachel Pereira found that such solemnity has been lacking:

[T]here have been twenty-four judicial cases since 2007 where decisions were published with respect to unitary status motions. These cases involved desegregation orders in twenty-three school districts in ten different states. Of the twenty-four cases, fifteen motions were granted unitary status, four were granted unitary status with prejudice, three were granted partial unitary status, and two were denied unitary status.³²⁵

There is language in Court precedent that allows the Court to modify its unitary status practices. In *Freeman*, for instance, the Court ruled that “[t]he term ‘unitary’ does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles.”³²⁶ The equitable power also enables the judiciary to exercise authority to restore those victimized to the state they would have been without the segregative action.³²⁷

J. Race as a Plus Factor in Micro-Desegregation Plan Designs

In his controlling opinion in *Bakke*, Justice Powell stated that race can be considered *as a plus factor* in student assignment plans/educational decisions.³²⁸ A majority of the *Parents Involved* Justices agreed,

in the institutions of slavery and 80 years of legalized subordination.” *Parents Involved*, 551 U.S. at 867 (Breyer, J., dissenting).

³²³ Spann, *supra* note 2, at 625.

³²⁴ Daniels & Pereira, *supra* note 4, at 649.

³²⁵ *Id.* at 655. Recall that *Parents Involved* was decided in 2007 and so the 2007 timeline reference here is thus significant.

³²⁶ *Freeman*, 503 U.S. at 487.

³²⁷ *Jenkins*, 515 U.S. at 88, 90.

³²⁸ *Bakke*, 438 U.S. at 314–20 (Powell, J., concurring). See *id.* at 317 (“race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats.”). See also *id.* at 318 (“race or ethnic background is simply one element—to be weighed fairly against other

noting that, race can be constitutionally considered in student assignments as long as racial diversity is only one of the factors considered in the holistic review of a student.³²⁹ According to Justice Kennedy, race-as-a-plus factor means that “[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”³³⁰ Justice Powell’s more elaborate vision of race-as-plus factor student assignment plans is worthy of note here as it is informative for courts and schools designing micro-desegregation plans and remedies:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, . . . [a] program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although *not necessarily according them the same weight*. Indeed, the weight attributed to a particular quality may vary from year to year depending

elements—in the selection process.”). In *Grutter*, the Supreme Court explained that, even though *Bakke* had several opinions, the “only holding for the Court in *Bakke* was that a State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” 539 U.S. at 322–23 (internal quotation marks omitted). Despite “this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.” *Id.* at 323.

³²⁹ *Parents Involved*, 551 U.S. at 783, 788, 798 (Kennedy, J., concurring); *id.* at 846 (Breyer, J., dissenting). See also generally *id.* at 803–68 (Breyer, J., dissenting). See *id.* at 865 (Breyer, J., dissenting) (“Just as diversity in higher education was deemed compelling in *Grutter*, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest. Even apart from *Grutter*, five Members of this Court agree that ‘avoiding racial isolation’ and ‘achieving a diverse student population’ remain today compelling interests. These interests combine remedial, educational, and democratic objectives.” (internal citations omitted)).

³³⁰ *Parents Involved*, 551 U.S. at 788, 798.

upon the ‘mix’ both of the student body and the applicants for the incoming class.³³¹

We should not necessarily endorse the race-as-a-plus factor approach since it would minimize the remedial role of race in addressing racial identifiability, which has been a staple of tracking. However, should courts choose to continue the race-as-a-plus factor approach, they should seize on Justice Powell’s language that allows for different weightings for different factors. Given the harmful role racial identification has played in tracking, race should *a fortiori* be accorded greater weight relative to other factors. In other words, you remedy race with race.³³²

CONCLUSION

This Article examined the state of tracking today to highlight the importance and urgency of addressing persistent segregation in America’s classrooms. It pointed out that minority students suffer harm in a vicious cycle as they are consigned to lower track placements. The Article emphasized that courts should not require intent when reviewing desegregation cases in the micro-segregation era since it only presents an obstacle to desegregation and precludes remedies for vestiges of micro-segregation. If an intent requirement is imposed, it must be to create a presumption of unconstitutionality which can only be overcome with stringent enforcement of the clear and convincing standard. Moreover, the Article revealed how colorblindness and quantification of race

³³¹ *Bakke*, 438 U.S. at 317–18 (Powell, J., concurring) (emphasis added). Justice Powell further explained the race-as-plus factor approach:

The applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. *Id.* at 318.

³³² Justice Kennedy was wrong when he stated, in the context of a macro-segregation case, that “[t]he idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.” *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). At the time Justice Kennedy made this statement, he did not have full appreciation for the detrimental nature of tracking and of the fact that micro-desegregation has not had its own due civil rights era; after all, the parties did not focus their briefs on these facts nor did the judicial opinions in the case.

have served as convenient judicial vehicles to discourage the use of voluntary race-conscious measures. The Article argued that there is room in the Supreme Court's desegregation jurisprudence for a micro-desegregation civil rights era and that it is never too late to do the right thing. This Article is the first of a two-part publication on micro-desegregation. A forthcoming article in the *Chicanx-Latinx Law Review* will examine micro-desegregation in the lower courts. This first part focuses on micro-desegregation and the Supreme Court.

The Court has already recognized promotion of cross-racial understanding and the breaking down of racial stereotypes as vital reasons that can elevate the importance (weight) of race in student assignments.³³³ Additionally, the Court agrees that there are educational benefits from diversity, including increased student achievement, better career preparedness as professionals, as well as more effective preparation for citizenship and a more diverse society and workplace.³³⁴ In fact, the Court decidedly stated that “[t]hese benefits are not theoretical but real.”³³⁵ The Court thus need only enforce these interests in micro-segregation cases. Moreover, the Court agrees with a core foundation of micro-desegregation as the Court made clear when it declared that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”³³⁶

With such immense benefits to racial desegregation, we must not wait another day to ensure that students are racially integrated in America's classrooms. In *Grutter*, Justice O'Connor stated that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”³³⁷ Even though classroom segregation has not adequately faced its due *Brown* civil rights era, this twenty-five-year timeline could provide an experimental timeframe to use racial preferences in order to desegregate America's classrooms.

³³³ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

³³⁴ *Id.* at 330–32.

³³⁵ *Grutter*, 539 U.S. at 330.

³³⁶ *Id.* at 330 (internal quotations omitted).

³³⁷ *Id.* at 343.