

COLOR-CODED CURRICULUM - HOW NORTH CAROLINA'S ACADEMIC TRACKING REGIME CREATES MICRO-SEGREGATION AND WHAT OUR STATE CAN DO TO REMEDY IT

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*"Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men - the balance wheel of the social machinery."*²

ABSTRACT

Black students in North Carolina are twenty-three percent less likely than their similarly-situated white peers to take an honors course. Black students' odds of being placed in a higher-level math course by the eighth grade are two thirds that of their similarly-situated white peers. More troubling, North Carolina school districts that engaged in robust school desegregation efforts in the past currently contain some of the most racially segregated classrooms in the state. The State's academic tracking regime has allowed the emergence of "micro-segregation" within our State's school buildings, and such a disparate impact in enrollment results in Black students receiving a sub-standard education. This policy brief attempts to explain this impact and propose a few solutions for individual school districts and the State Board of Education to curb the racially discriminative results of the State's tracking regime.

INTRODUCTION

On the first day of teaching a ninth-grade class entitled, "Introduction to High School Math,"³ I gave my students a task that was designed to encourage communication about mathematical concepts.⁴ After a brief moment of nervous silence, one student—a Black female—said, "Mr. Ferguson, don't you know we are in the *dumb* math class?" Of the 24 students in that class, the majority of them were Black, while the school's student population was less than 20% Black. When I looked around in my next period's honors math course, of the thirty-two students, only one was Black. Something was not only wrong with that disproportionate representation but also with the outrageous stigma students were forming in their minds—that white kids are smarter than Black kids.

Academic tracking is the practice of grouping students by their perceived ability or past performance.⁵ The idealistic theory behind a tracking system is that grouping students by ability allows teachers to provide differentiated instruction to separate groups and thus decrease the disparities between those groups.⁶ However, research has shown that lower-level classes in a tracking regime are typically taught by less-qualified and less-experienced teachers, and that the content offered is far inferior than that offered in higher-level classes.⁷ The result then is that students in those lower-level classes are receiving a substandard education when compared to their peers in high-level courses.⁸

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Worse yet, those lower-level courses are disproportionately comprised of minority students.⁹ That student composition has led to the emergence of what this Policy Brief will call “micro-segregation,” that is race-based segregation within a single school building.¹⁰ In North Carolina, a recent inquiry into micro-segregation revealed that the state’s Black students were significantly underrepresented in high-level courses, which means the State’s Black students on average are not receiving the same level of educational rigor as their white peers. Thus, Black students are suffering from an inadequate education at a disproportional rate.¹¹ This Brief will outline the disparate impact North Carolina’s tracking regime has on its Black students and will suggest possible solutions to rectify that impact.¹²

I. THE DISPARATE IMPACT OF NORTH CAROLINA'S "ACADEMIC" TRACKING REGIME

On its face, academic tracking (sometimes called ability-grouping) is the process of sorting students into different curriculum programs based on their perceived past academic performance. In application, however, such groupings often result in classrooms with high concentrations of one race or another.¹³

A. THE ORIGINS OF TRACKING

The United States’ educational tracking pedagogical theory first came about in the early 1900s, when eugenicists and educational reformers designed curricular programs based on the idea of differential intelligence.¹⁴ Reformers developed these in-school, group-sorting programs to respond to the influx of European immigrant children into American schools.¹⁵ These reorganizers believed

that such a tracking system would funnel individuals from certain socioeconomic classes into specific trades and vocations.¹⁶

With a strong industrialized economy, early twentieth-century American schools were thought of as “mechanisms for the efficient sorting of manpower,” reserving the “thinking work” for only an elite few.¹⁷ Because of that social engineering, U.S. schools entrenched the concept of academic tracking within their course structures, which has resulted in the modern-day rationing of high-quality curriculum to only a small proportion of students.¹⁸

That said, the concept of racial segregation in education certainly pre-dated the intellectual differentiation of the early 1900s in that most Black children were denied access to education outright.¹⁹

After the Civil War and during Reconstruction, newly freed slaves fervently sought an education that would teach them and their children how to read and write; however, poverty and overt racism resulted in all-Black schools, which received inferior resources than their white counterparts.²⁰ Even then, many white politicians simply tolerated Black education because of the belief that such instruction would create a “peaceful, hard-working Black population which knew its proper place in southern society.”²¹ Couple the history of intentionally racially segregated in education with the concept of intellectual differentiation of the early 1900s, it is no wonder that a system ultimately developed in which an academic tracking regime denies Black students the opportunities for educational rigor.

B. NORTH CAROLINA'S MODERN DAY TRACKING REGIME

In North Carolina, this process begins early on and is not only sanctioned but is required by the State. Starting in elementary school, some students are labeled as “academically or intellectually gifted” (“AIG”). That AIG designation is the responsibility of the Local Education Authorities (“LEAs”), as mandated by the state’s General Assembly,²² and LEAs are required to adhere to statewide AIG standards set by state legislation and executive policy.²³ However, the initial AIG determination is heavily weighted by teacher recommendation or referral to the program. That AIG distinction follows students through middle school, influencing their course placements and ultimately their grouping within the “middle school team” model of compartmentalizing.

Then, in high school, the State Board of Education has adopted the Honors Implementation Framework (“HIF”) to support varying “ability” grouped course instruction.²⁴ The State Board of Education adopted that current tracking regime in 2004, with the purpose of “guid[ing] the development and evaluation of honors courses and to ensure fidelity of implementation across the state.”²⁵ Honors courses, in theory, are meant to provide students with rigorous and high-quality instruction, “plac[ing] high expectations on the student[s and] demanding greater independence and responsibility.”²⁶ Under North Carolina’s current regime, there are over 500 honors level courses in the state’s public schools.²⁷ Typically, students gain access to the honors-level course track through a teacher recommendation process in fifth or sixth grade—widely influenced by the early AIG classification.²⁸ That early identification and ongoing ability tracking is inherently flawed

and not only places perceived low achieving students at an academic disadvantage but also does not benefit perceived high achieving students—recent studies have shown only marginal gains for perceived high students in an educational tracking system.²⁹ In fact, students of perceived low academic abilities seem to perform better when heterogenous ability grouping is used. In fact, students of perceived low academic abilities seem to perform better when heterogenous ability grouping is used. Thus, if the gains to perceived high students are marginal while perceived low students are disadvantaged—why continue this educational charade?

C. THE INJURIES OF ACADEMIC TRACKING

Schools begin tracking students early in their educational careers. Oftentimes beginning in kindergarten or first grade, teachers will organize students into different groups for instruction and will begin placing students into “remedial” or “gifted” programs.³⁰ By third grade, an elite group of students are designated AIG and then receive additional, more rigorous instruction outside their regularly-designated classroom. As students progress through the grades, schools continue to group students with peers that teachers assume share similar aptitudes.³¹ By fourth or fifth grade, students are placed in separate classrooms with different teachers in an effort to provide students of similar abilities with different curricular content.³² By the end of fifth grade, educators make course recommendations that place students on a specific track of classes, which further stratifies students throughout their middle and high school educations.³³ Such separation not only alters students’ course trajectories but also inherently creates unequal educational opportunity amongst the different tracks.³⁴

See the below example (*figure 1*) of course pathways back in 2016 from fifth to ninth grade in one of the State's largest school district.

In this example, fifth grade educators will separate students for math (either using in-class groupings or completely separate classes, called “compartmentalizing”). Those separations are explained as a means to educate seemingly similarly-abled students at their appropriate academic level. However, separate groupings in fifth grade math translate to students taking differentiated math courses in sixth grade.³⁶ As the above progression shows, students that are recommended for the accelerated “6 PLUS/7 PLUS” course (algebra-equivalent) in the sixth grade are able to finish their freshman year of high school with three high school math course credits under their belt. That greatly increases their likelihood of taking Advanced Placement (“AP”) courses in their junior and senior years of high school—which directly impacts their post-graduation opportunities.

As the example demonstrates, once stratified in sixth grade, students’ opportunities to learn higher levels of math in subsequent grades have already been determined.³⁷ That exclusion from learning more rigorous concepts is itself an injury³⁸; however, that lack of access also manifests an injury to lower-tracked students in the inevitable foreclosure of future educational

opportunities.³⁹ While evident in the State’s math courses, this phenomena is not unique to math instruction but rather is an issue throughout the subjects.

The courses that students are able to enroll in affect their academic performance and their post-secondary education opportunities. In North Carolina, honors courses are weighted heavier for the purposes of a student’s grade point average (“GPA”) and consequently their class rank.⁴⁰ Therefore, having access to more honors courses will increase a student’s GPA and their class rank, which positively influences a student’s favorability when being considered for admission to competitive colleges and universities.⁴¹

Additionally, a growing body of research suggests that tracking does not even substantially benefit upper-tracked students’ learning and tends to put lower-tracked students at a serious disadvantage.⁴² That said, “when students of similar backgrounds and initial achievement levels are exposed to more and less challenging curriculum materials, those given the richer, more demanding curriculum opportunities ultimately outperform those placed in less challenging courses.”⁴³

Moreover, a rigorous high school math curriculum, for example, leads not only to greater academic attainment levels but also

	6 TH GRADE	7 TH GRADE	8 TH GRADE	9 TH GRADE
5 TH GRADE	Common Core Math 6	Common Core Math 7	Common Core Math 8	Common Core Math I (for high school credit)
5 TH GRADE	Common Core Math 6 PLUS	Common Core Math 7 PLUS	Common Core Math I (for high school credit)	Common Core Math II Honors (for high school credit)
5 TH GRADE	Compacted 6 PLUS/ 7 PLUS	Common Core Math I (for high school credit)	Common Core Math II (for high school credit)	Common Core Math III Honors (for high school credit)

Figure 1 District-wide course-taking trajectories based on teacher recommendations or parental referral.³⁵

correlates to an increase in future income earnings—regardless of post-high school education.⁴⁴ That is to say that tracking students based on their perceived ability is not only hurting their future educational opportunities but is also stifling their future economic opportunities as well. More frightening, the course-enrollment data demonstrates that this foreclosure is not limited to students' perceived academic abilities but rather is drawn along racial lines—perpetuating an unfortunate social cycle of separating the American “classes” on the basis of race.

D. THE RACIAL RESULTS OF TRACKING IN NORTH CAROLINA'S PUBLIC SCHOOLS

Schools' deeply rooted tracking practices have caused racially desegregated schools to re-segregate at the building-level, resulting in “micro-segregation.” One could simply walk through a typical American high school and observe that “curriculum is generally color-coded.”⁴⁵ Honors and advanced placement courses tend to be made up of white and Asian students, while the lower track courses (sometimes referred to as “standard” or “academic” level courses) are disproportionately comprised of students of color.⁴⁶ That disparity is not coincidental.⁴⁷

As previously discussed, a student's academic track is typically determined by teacher recommendations. Teacher recommendations are purportedly based on students' previous academic performance.⁴⁸ However, studies have shown that, after controlling for students' test scores, race, and socioeconomic status (“SES”) race plays a significant factor in determining assignments to a particular track of courses.⁴⁹ While it may appear that past academic data is an objective criteria for course recommendations, “what constitutes the academic data becomes

complicated by habit, practice, culture, and judgment.”⁵⁰

In 2014, a group of North Carolina State University professors conducted a study, comparing a national data set of academic course placement in middle school with a local, North Carolina, data set.⁵¹ The study found that “Black students' odds of being placed in Algebra I [the higher-level math course] by eighth grade [were] two thirds that of their like-performing, like-SES White peers.”⁵² Even more striking, only “two out of five Black students who [were] performing at the highest level in mathematics” were placed in a higher level math class.⁵³ That means three out of five Black students, who were performing at the highest academic levels, were not afforded the opportunity to take the more rigorous math course.⁵⁴ The findings suggest that while some Black students were demonstrating a high-level of mathematical understanding, they were still not placed in the track of courses that would lead to the rigorous, honors-level courses their similarly-abled, white peers would eventually be placed into. Once placed in a certain track in middle school, students are stuck there throughout their secondary education.⁵⁵

In 2019, the Center for Racial Equity in Education (“CREED”) studied the racial trends of North Carolina students' high school course takings.⁵⁶ After analyzing honors level course enrollments across the state, the researchers found that “Asian and White students [were] over-represented in honors course-taking, while Black, Hispanic, American Indian, and Multicultural students [were] under-represented.”⁵⁷ Of all the qualifying students who took at least one honors course, “Asians and Whites averaged 3.1 and 2.9 [honors] courses respectively ... [while] [t]he remaining racial groups averaged between 2.3 and 2.8 honors courses.”⁵⁸ Put another way, if

high-performing Black students were to be proportionally represented in honors courses, then they would have taken over 2,700 additional honors courses statewide.⁵⁹ The CREED report determined that this disparity was statistically significant, meaning the results were unlikely due to chance.⁶⁰ The CREED report also found that the honors course enrollment disparity was largest for

Black students.⁶² Controlling for other factors, the report found “that Black students were 23% less likely than white students to take an honors course.”⁶³ Such a disparity in honors course enrollment demonstrates how the state’s academic tracking regime results in the separation of races within a single school building.

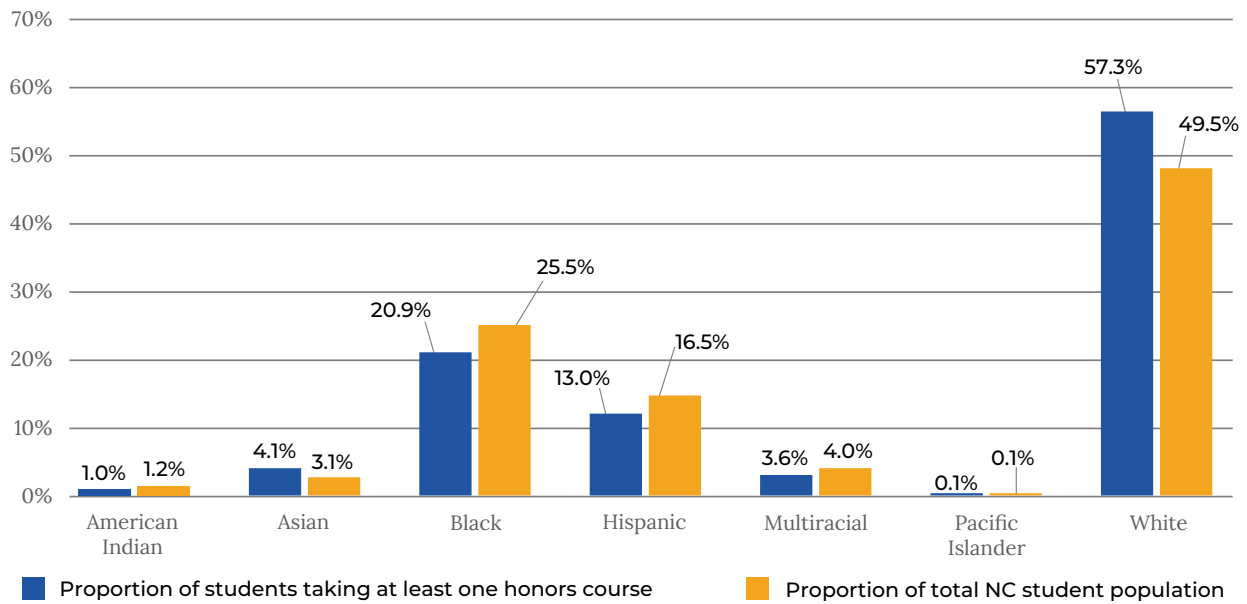


Figure 2 Proportion of Honors Courses Taken by Race/Ethnicity⁶¹

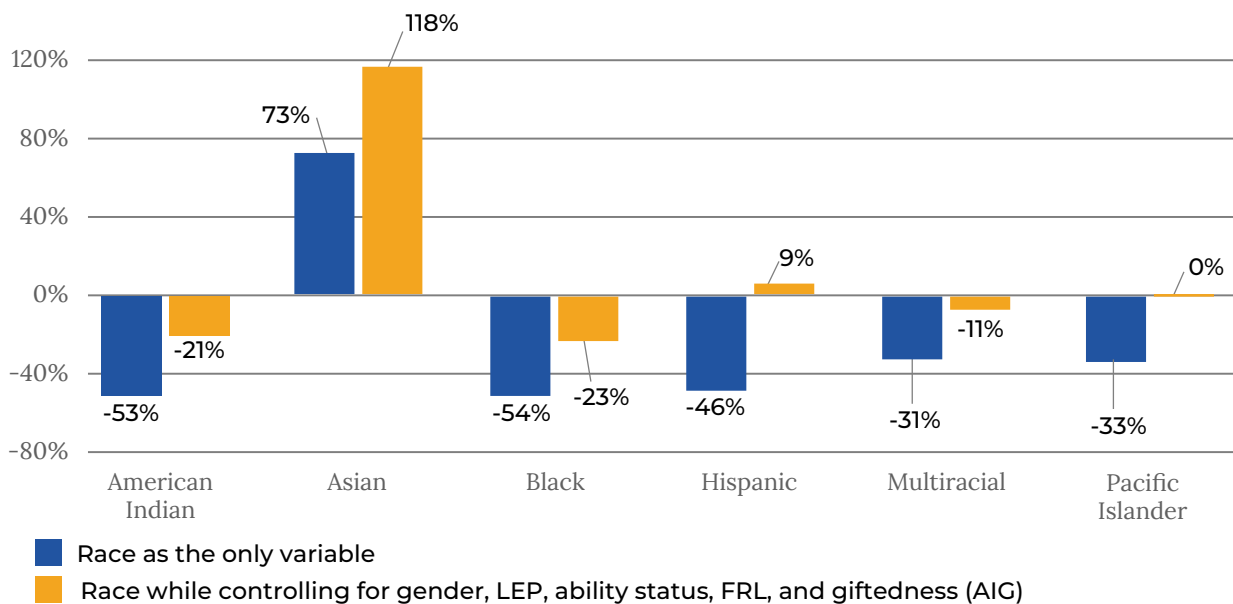


Figure 3 Likelihood of Taking at Least One Honors Course (Grades 9–12) by Race/Ethnicity⁶⁴

This trend is not limited to middle and high school. The elementary AIG mechanism, a precursor for honors course enrollment, has also proven to disproportionately favor white students over Black students at an alarming rate.⁶⁵

If Black students were selected for AIG Math in proportion to their share of the student population, over 6200 additional Black students would be classified.⁶⁶ Black students are 65% less likely to be designated AIG Math than their white peers, 55% when controlling for other non-race variables. This process is skewed by teacher recommendations. Though all third grade students in the State take an “abilities” examination for AIG eligibility, known as the CogAT, many schools allow second grade teachers to recommend students to an AIG preparatory program within the school that, essentially, prepares recommended students for the CogAT—greatly increasing their chances of being admitted into the school’s AIG program.⁶⁷ This process replaces true academic ability with an impermissible proxy—teacher recommendation, which is skewed by custom, practice, and individual biases.

More recently, in 2021, Duke University researchers boldly concluded in their longitudinal study on school integration efforts that “segregation within [North Carolina’s public] schools exists and ... is substantial.”⁶⁸ After surveying all of the state’s course enrollment data, Duke’s ongoing study only bolsters CREED’s research findings that Black students were often in separate classrooms from their white peers and that those classrooms tended to be less rigorous courses.⁶⁹ Interestingly, the Duke study found that in districts where school desegregation efforts had seemed to successfully integrate between schools, their classrooms within those schools were some of the most racially

segregated classrooms in the state.⁷⁰ Put another way, districts with robust school integration efforts have an increased likelihood of micro-segregation within individual schools. The result is the same—Black students are not receiving rigorous educational opportunities at the same rate as their white counterparts.

All of these studies suggest that the state’s tracking regime is not working to segregate students among perceived academic abilities but rather is working to segregate students by race. If tracking enables some students to receive the opportunity to receive high-level instruction, which it does, then this significant racial disparity amongst honors and non-honors courses generally results in Black students receiving an inferior education than their white and Asian peers.⁷¹

II. POSSIBLE SOLUTIONS

There are many proposed solutions to the racial academic tracking issue prevalent in our State’s (and Country’s) schools; however, it should be noted these discussions and solutions cannot be implemented in a vacuum. There are a host of other social issues that not only affect perceived low achieving students’ education but flatly encourages their relegation to the lower academic track, which should be addressed through the political process. While those tangential issues are outside the scope of this Brief, below are three potential solutions to curb the racial impact of academic tracking.

A. ELIMINATE THE TRACKING SYSTEM ALTOGETHER

The first proposal, which seems rather obvious, would be to completely “de-track” students and integrate them into one course. This proposal eliminates the honors and academic course distinctions altogether and

can occur in two approaches. The first is an “honors-for-all” approach that would require all students to receive the higher level of instruction that has historically been reserved for upper-tracked students. The second slows down the pacing of curriculum for all students, providing ample time for all students to absorb more complex concepts within a course. Last year, California’s Department of Education took the second approach in revising its Mathematics Framework, which faced substantial pushback (mainly from parents and advocates of the honors course distinctions).⁷²

What that pushback from California’s revised math framework makes abundantly clear is that any proposal is meaningless if it is not widely discussed with various stakeholders (teachers, administrators, parents, and students) ahead of implementation. Though the idea of eliminating honors course distinctions is less likely to yield initial buy-in from parents (and many teachers) of honors students, the reality is the current system of perceived ability grouping is not only hurting the state’s minority students but is not adequately benefiting perceived high-performing students to the extent many believe.⁷³

B. KEEP THE SYSTEM, BUT CHANGE THE RECOMMENDATION-BASED SELECTION PROCESS

A second proposal would be to change the teacher-recommendation process to ensure a more proportional representation of students in rigorous course instruction. This proposal maintains the honors and “academic” distinctions but requires a more reflective and involved student selection process. As discussed above, the teacher-recommendation process for honors course enrollments and earlier AIG designations, while well-intentioned, are

often informal, based on purely subjective areas of perceived achievement, and does not consider unintentional biases by individual recommenders. To be clear, teachers should have an active role in recommending students for future courses because they are likely the individuals most in touch with a child’s educational experience; however, teachers need clear, objective course recommendation criteria by which to follow throughout the recommendation process. That criteria should assist in curbing unintended biases and displace self-affirming designations.

Such objective criteria should utilize unbiased data-driven recommendations, coupled with an individual administrative review of each placement, and racial bias training for those engaged in that review process.⁷⁴ This change is one that an individual school district can adopt and implement, though unlikely,⁷⁵ but also a change that the State’s Board of Education could adopt statewide—after all the State’s School Board is the entity that created and currently implements the Honors Implementation Framework.⁷⁶

C. KEEP THE SYSTEM, BUT CREATE A STUDENT-BASED SELF-ENROLLMENT PROCESS

The easiest change, but likely the least effective, would be to allow any student—regardless of perceived ability—to self-enroll in honors courses and ensure those who struggle in the course have the necessary supports to succeed.⁷⁷ This change would provide an exit ramp for students from the rigid tracking regime while not actually changing the existing framework. The problem with this proposal, while likely the most politically palatable, is that the number of students that would take advantage of self-enrollment would likely be

too few to make any systemic impact. That is because many students would be deterred (intrinsically or extrinsically) from enrolling in a course against a teacher's recommendations, thereby maintaining the recommendation as the entry point for the upper-tracked course instruction. Thus, racial disparities would simply persist along with the status quo.

While the above proposals seek to remedy the current disparate impact of the State's tracking regime, it is important to note that the conversation around academic tracking and possible solutions cannot occur in a vacuum. There are underlying social issues, outside the classroom, and various student and teacher needs that need to be addressed alongside the issues inherent within the State's tracking regime for the above proposed changes to have any type of lasting impact.⁷⁸ That said, the status quo of providing inferior education to our State's students of color cannot continue. It is not only arguably unconstitutional, violating the qualitative

aspect of North Carolina students' fundamental right to education,⁷⁹ but is morally wrong—and policymakers must act to change the State's rigid tracking system to provide equal access to adequate education to all the State's students.

CONCLUSION

My former student, who spoke up on the first day of class to say she was in “the *dumb* math class” looked around and saw that the majority of faces in the room looked just like her—what does that do to a child's sense of intellectual and racial identity? She and her classmates deserved an equal access to the education her white peers were receiving, and tracking does not accomplish that.

¹Trey Ferguson is an Associate Attorney at Sumrell Sugg, P.A., in New Bern, North Carolina, prior to that he was a high school math teacher in Wake County. This Policy Brief is an abridged and modified version of a law review article on the constitutionality of the State's tracking regime. See James H. Ferguson, *Color-Coded Curricula: How North Carolina's Tracking Regime Creates Micro-Segregation and Violates the State's Constitution*, 44 N.C. Cen. Univ. L. Rev. __ (2022 forthcoming).

²Horace Mann, Report for 1848, in *Annual Reports on Education* 640, 669 (Lee & Shepherd eds., 1872), available at <https://babel.hathitrust.org/cgi/pt?id=njp.32101068983400;view=lup;seq=679>.

³ While many educators would refer to this course as a remedial course for “low-achieving” students, I intentionally omit that descriptor because these courses do not actually remediate students' educational knowledge of a subject but rather only foreclose students' opportunities to seek rigorous instruction on the subject in the future.

⁴ The task was giving students four numbers (9, 16, 25, 43) and asking them to explain which number in the list did not belong. There was no “right” answer. See generally Jo Boaler, *MATHEMATICAL MINDSETS: UNLEASHING STUDENTS' POTENTIAL THROUGH CREATIVE MATH, INSPIRING MESSAGES AND INNOVATIVE TEACHING* (2016).

⁵JANE L. DAVID & LARRY CUBAN, *CUTTING THROUGH THE HYPE: THE ESSENTIAL GUIDE TO SCHOOL REFORM* 73 (2010).

⁶ *Id.*

⁷ *Id.*; see also Charles T. Clotfelter et al., *School Segregation at the Classroom Level in a Southern 'New Destination' State* 22 (CEN. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RES., WORKING PAPER NO. 230-0220-3, 2021) [hereinafter CALDER Report].

⁸ DAVID, *supra* note 4, at 75.

⁹ *Id.* In fact, by the 1990s, the National Governors Association, the National Education Association, the National Council of English Teachers, and the California Department of Education all recommended that academic tracking be abolished. *Id.* at 75.

¹⁰See Joseph O. Oluwole and Preston E. Green III, *Riding the Plessy Train: Reviving Brown for a New Civil Rights Era for Micro-Desegregation*, 36 CHICANO-LATINO L. REV. 1, 10 (2019) (“Tracking systemically creates segregated classes within an ostensibly integrated school building. This micro-level segregation deprives minority students of equal educational and career opportunities by relegating them to the lower tracks.”) (citing Jack. W. Londen, *School Desegregation and Tracking: A Dual System within Schools*, 29 U.S.F. L. REV. 705, 705-06 (1995)).

¹¹ James Ford & Nicholas Triplett, *E(race)ing Inequalities: The State of Racial Equity in North Carolina Public Schools*, CEN. FOR RACIAL EQUITY IN EDUC. 25 (2019), <https://www.creed-nc.org/our-reports> (click “Read It” under the article named in this footnote) [hereinafter CREED Report].

¹² This policy brief deliberately focuses on the effects of tracking on Black students because that is the group of the state's students that suffers from the largest disparity in representation in honors courses; however, the effects are also felt by other minority students, who would also benefit from the solutions proposed below. This disparity could be explained, in part, due to a deeply-rooted history of racial discriminatory policies within the State, especially in the field of public education. For a discussion on that history as well as the constitutionality of North Carolina's tracking regime, see Ferguson, *supra* introductory footnote.

¹³See LINDA DARLING-HAMMOND, *THE FLAT WORLD OF EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 52 (2010) (“In racially mixed schools, curriculum tracks are generally color-coded. Honors or advanced courses are reserved primarily for White students, while the lower tracks (basic, remedial, or vocational) are disproportionately filled with students of color.”) (citing J. Oakes, *Can Tracking Research Inform Practice? Technical, Normative, and Political Considerations*, 21 EDUC. RESEARCHER, May 1992, at 12-21).

¹⁴ *Id.* at 53.

¹⁵ *Id.*

¹⁶ *Id.* (“Our city schools will soon be forced to give up the exceedingly democratic idea that all are equal and our society devoid of classes . . . and to begin a specialization of educational effort along many lines in an attempt to adapt school to the needs of these many classes.”) (quoting ELLWOOD P. CUBBERLEY, *CHANGING CONCEPTUALIZATIONS OF EDUCATION* 56-57 (1909)).

¹⁷ *Id.* DARLING-HAMMOND, *supra* note 12, at 53.

¹⁸ *Id.* at 54 (defining “high quality curriculum” as “a combination of ambitious, well-sequenced goals for learning enacted through intellectually challenging assignments, strong instruction, and supportive materials”).

¹⁹ See generally James D. Anderson, *The Education of Blacks in the South, 1860-1935* (1988).

²⁰ *Id.*; see also Ethan Roy and James E. Ford, *Deep Rooted: A Brief History of Race and Education in North Carolina* 10-14 (hereinafter *Deep Rooted*).

²¹ *Deep Rooted* at 11 (quoting Alexander, *Hostility and Hope* at 117).

²² The CREED Report, *supra* note 10, at 34 (citing N.C. GEN. STAT. § 115C-150.5 to .8 (Article 9B)).

²³ *Id.*

²⁴ The only authorization for the HIF is the legislature's statutory mandate that the Board of Education promulgate uniform policies for issuing course codes and transcripts, which is silent on the distinction between honors and non-honors courses. Thus, the creation and maintenance of the HIF is solely a creature of the North Carolina Department of Public Instruction, an executive branch agency.

²⁵ The CREED Report, *supra* note 10, at 29. Though this Article analyzes the most recent tracking regime, the 2004 framework was built on nearly a century of separating students based on perceived ability.

²⁶ *Id.* (quoting N.C. State Bd. of Educ. policy GRAD-009, *High School Transcript Standard*).

²⁷ *Id.* The CREED Report, *supra* note 10, at 29.

²⁸ See generally VALERIE N. FAULKNER, PATRICIA L. MARSHALL & LEE V. STIFF, *THE STORIES WE TELL: MATH, RACE, BIAS, AND OPPORTUNITY* 57-58 (2019) (describing the teacher recommendation process and how most districts also allow individual parent referrals or enrollment in a course higher than the one recommended).

²⁹ *Id.* at 11-17 (dispelling the myths of early identification for the purposes of academic tracking).

³⁰ DARLING-HAMMOND, *supra* note 12; FAULKNER, *supra* note 24, at 57.

³¹ FAULKNER, *supra* note 24.

³² *Id.* at 57.

³³ *Id.* at 58.

³⁴ See DAVID, *supra* note 4, at 74-75 (“Since the 1970s, stakeholders have debated the virtue of educational tracking systems because of the level of education it provides to the lower performing students as well as the segregation of students by race and social class. These debates reflect a social fact: American schools are not only about teaching and learning; they are also virtual ladders to good-paying jobs, higher social status, and a better life.”) (internal quotations omitted).

³⁵ Wake Cnty. Pub. Sch. Sys., *Placement Guidelines & Opportunities for Acceleration: A Presentation for our Parents* (Spring 2016), <https://www.wcpss.net/cms/lib/NC01911451/Centricity/Domain/9026/Middle%20School%20Math%20Placement%20Parent%20Sessions%20Presentation.pdf>. Today, these courses have different titles to reflect the state-specific standards rather than the Common Core standards in effect in 2016; however, the illustrative point remains the same.

³⁶ This is usually because students are enrolled in sixth grade math courses at the recommendation of their fifth-grade teacher. Therefore, if a student is in a “high group” in fifth grade, their teacher is likely to recommend them for a higher-level math course for the sixth grade. See generally FAULKNER, *supra* note 24, at 55-58.

³⁷ FAULKNER, *supra* note 24, at 58 (“Overwhelmingly, research shows that students who do not study algebra by eighth grade do not enroll in upper level mathematics once they enter high school.”) (citing J. Johnson and Lee V. Stiff, *Who takes honors and advanced placement math?*, EDSTAR ANALYTICS, INC.(2009)).

³⁸ See Kathryn S. Schiller et al., Author Manuscript: *Hidden Disparities: How Courses and Curricula Shape Opportunities in Mathematics During High School*, 43 EQUITY & EXCELLENCE IN EDUC., no. 4, 414 (2010) (“[I]n general, students in lower-level mathematics tracks tended to receive lesser amounts of cognitively challenging instructional material in their courses than those in regular or advanced tracks.”).

³⁹ See Jeffrey M. Warren & Camille L. Goins, *Exploring the Relationships Between High School Course Enrollment, Achievement, and First-Semester College GPA*, 9 J. OF EDUC. RSCH & PRAC. 386, 393 (2019) (“When demographics variables are controlled, honors courses, and AP courses are significantly related to first-semester college GPA accounting for 13% of the variances explained.”).

⁴⁰ James Ford & Nicholas Triplett, *E(race)ing Inequities: Students of color take fewer honors courses than white peers, new report find*, EDNC (Aug. 21, 2019), <https://www.ednc.org/eraceing-inequities-honors-courses/> (citing Honors Implementation Framework (HIF), N.C. Dep’t Pub. Instruction (v.4 2016), <https://files.nc.gov/dpi/documents/advancedlearning/cdm/2019/guidelines.pdf>).

⁴¹ *Id.*

⁴² DARLING-HAMMOND, *supra* note 12, at 60 (citing J. OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (2d 2005)). This is not to say that the tracking system does not benefit upper-tracked students. While these studies show tracking does not exceedingly benefit upper-tracked students’ learning of course material, those students are still given increased access to a rigorous education and,

thus, a higher probability of going to college and benefiting financially from their mere honors-level placement.

⁴³ *Id.* at 54.

⁴⁴ See generally Jon James, *The Surprising Impact of High School on Job Market Outcomes*, FEDERAL RESERVE BANK OF CLEVELAND (Nov. 1, 2013), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2013-economic-commentaries/ec-201314-the-surprising-impact-of-high-school-math-on-job-market-outcomes.aspx>.

⁴⁵ DARLING-HAMMOND, *supra* note 12, at 52.

⁴⁶ *Id.* (citing J. Oakes, *Can tracking research inform practice? Technical, normative, and political considerations*, 21 EDUC. RESEARCHER, no. 4, 12-21 (1992)).

⁴⁷ Sean Kelly, *The Contours of Tracking in North Carolina*, THE HIGH SCH. J. 15, 16 (2007) (“Recent evidence from North Carolina shows that by the 10th grade, around half of the total racial segregation among students is due to segregation within schools.”) (citing Charles T. Clotfelter, Helen F. Ladd, and Jacob L. Vigdor, *Segregation and Resegregation in North Carolina’s Public School Classrooms*, 81 N.C. L.

REV. 1463 (2003)) (emphasis added).

⁴⁸ Most school systems also allow parents to request their student’s enrollment in courses other than the one recommended by the student’s teacher, which may seem to ameliorate the racial disparity caused by tracking. However, that referral system also results in underrepresentation of students of color in higher-level courses because oftentimes minority parents are not aware of the opportunity to request a course enrollment change. FAULKNER, *supra* note 24, at 74-75. This is undoubtedly another byproduct of a system of racial segregation in educational opportunities.

⁴⁹ DARLING-HAMMOND, *supra* note 12, at 57; see also FAULKNER, *supra* note 24, at 57-58 (“[T]here is evidence to suggest that the differentiations are greatly informed by immutable and status characteristics of students themselves.”); the CREED Report, *supra* note 10. “It is also worth noting that [the disparity] in the access of students of color to honors courses has likely been an underappreciated side effect of the school re-segregation observed in many of NC’s largest school districts over the last two decades.” Ford, *supra* note 36 (citing Clotfelter, *supra* note 43).

⁵⁰ FAULKNER, *supra* note 24, at 88. Unfortunately, “implicit-bias” has become a politically-charged word for describing this phenomena, somehow implying teachers are perpetrating an intentional and nefarious decision-making process to segregate students; however, that is—generally—not the case. What is happening, however, is teachers are recommending students based on perceived ability and how teachers historically define what it means to be “a good student.” This definition is typically self-affirming, in which the teacher recommends students most akin to the teachers’ own image. While well-intentioned, this unintentional bias inevitably produces racially-divergent courses. See *Id.*; see also Tasminda K. Dhaliwal, et al., Educator bias is associated with racial disparities in student achievement and discipline, BROOKINGS.EDU (July 20, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/20/educator-bias-is-associated-with-racial-disparities-in-student-achievement-and-discipline/>.

⁵¹ Valerie N. Faulkner et al., *Race and teacher evaluations as predictors of algebra placement*, 45 J. FOR RSCH IN MATHEMATICS EDUC., no. 3 (2014).

⁵² FAULKNER, *supra* note 24, at 34 (“In other words, when controlling for other factors and then comparing odds of placement, a third less Black students end up in Algebra I than would be expected if they were White.”) (citing FAULKNER, *supra* note 47, at 288-311).

⁵³ *Id.* at 35 (emphasis in original).

⁵⁴ *Id.* That study suggests that the teacher course-recommendation system does not accurately consider students’ past academic achievement, but rather only mirrors the pre-existing achievement gap that exists between white and Black students. *Id.* at 75-76.

⁵⁵ For at least some students that fate was because of a faulty decision-making process by their fifth-grade teacher. *Id.* at 58.

⁵⁶ The CREED Report, *supra* note 10.

⁵⁷ *Id.* at 25.

⁵⁸ *Id.* at 31.

⁵⁹ *Id.* at 30.

⁶⁰ *Id.* at 31.

⁶¹ *Id.* at 30 (Figure 3.1).

⁶² *Id.*

⁶³ *Id.* at 31.

⁶⁴ *Id.* at 31 (Figure 3.3).

⁶⁵ *Id.* at 35-37.

⁶⁶ *Id.*

⁶⁷ See generally FAULKNER, *supra* note 24, at 57-58.

⁶⁸ CALDER Report, *supra* note 6 at 27.

⁶⁹ *Id.* at 28.

⁷⁰ *Id.* at 27 (noting “that Wake County, lauded for its efforts to balance schools by socioeconomic status actually had some of the most segregated 7th and 10th grade classrooms in the state of North Carolina.”).

⁷¹ *Id.*; see also DARLING-HAMMOND, *supra* note 12, at 52 (citing S.H. Pelavin & M. Kane, CHANGING THE ODDS: FACTORS INCREASING ACCESS TO COLLEGE (1990)) (“Unequal access to high-level courses and challenging curriculum explains much of the difference in achievement between minority students and White students, as course taking is strongly related to achievement, and there are large race-based differences among students in course taking from an early age, especially in the areas of mathematics, science, and foreign language.”).

⁷² See Joe Hong, *Revised California math proposal: Despite pushback, little change*, CAL MATTERS (Mar. 15, 2022), <https://calmatters.org/education/k-12-education/2022/03/california-math-framework-draft/>.

⁷³ See *supra* text accompanying notes 38-39.

⁷⁴ See FAULKNER, *supra* note 24, at 89-97 (discussing the decision-making processes that could help bridge the racial achievement gap in access to higher-level instruction).

⁷⁵ As individual school boards are becoming more politically-charged around the subject of race, many of them are less likely to affirmatively act on rectifying this racially disparate program for fear of the political ramifications. See T. Keung Hui, *NC school board passes strict rules for teaching about race after threat to cut funding*, THE NEWS & OBSERVER (Oct. 4, 2021), <https://www.newsobserver.com/news/local/education/article254657192.html>.

⁷⁶ The existing tracking regime is a creature of the Department of Public Instruction and the State Board of Education, sanctioned by vague statutory authority. See N.C. State Bd. of Educ. policy GRAD-009; N.C. GEN. STAT. § 116-11(10a) (requiring the Board of Education to promulgate uniform policies for issuing course codes and transcripts; however, the statute is silent on the distinction between honors and non-honors courses). As such, the State Board could simply change the honors recommendation process to more closely align with research-proven practices or could simply get rid of the course distinctions altogether.

⁷⁷ See DAVID, *supra* note 4, at 77 (“Structured study groups and tutoring have strong track records as effective ways to provide such help. Similarly, gathering students in need of special help or enrichment at certain times and disbanding such groups when the work is completed seems sensible.”).

⁷⁸ See generally, DARLING-HAMMOND, *supra* note 12, at 26.

⁷⁹ See generally Ferguson, *supra* introductory footnote.