

Thirty-five Years After *Berkelman*: Seeking a New Debate About Ability Grouping

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Introduction

Tracking and ability grouping are controversial educational strategies that have garnered substantial attention from social scientists, lawyers, and others. They emerged in the early twentieth century as outgrowths of a consensus that they would facilitate a future workforce enhanced by more focused preparation for particular fields or tasks.¹ Ability grouping is defined here as the use of testing and other criteria to identify “gifted” (i.e., intellectually above average) students for placement in accelerated and/or better-funded schools or programs. After a lull in its use, ability grouping returned in the mid-1950s.² A *Harvard Law Review* note offered several reasons for the resurgence:

The Cold War with the Soviet Union prompted a movement to separate gifted students in order to provide them with a special education. Many southern school districts adopted tracking as a means of circumventing desegregation orders. Finally, northern cities responded to a large migration of blacks by increasing the amount of ability grouping in their systems.³

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1. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 471 (1996).

2. Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1323 (1989).

3. *Id.* (footnotes omitted).

In other words, ability grouping made a comeback during a very specific political and racial moment in history.

The objective of this Note is to nudge school districts, parents, students, courts, and other stakeholders toward a more critical conversation about ability grouping, particularly the kind presently used to choose students for selective public high schools like Lowell High School in San Francisco, and Thomas Jefferson High School for Science and Technology (“Jefferson High”) in Virginia. I begin by offering background about a seminal case on school tracking. Next, I offer a brief overview of the litigation over the San Francisco Unified School District. Next, I explore one case, *Berkelman v. San Francisco Unified School District*,⁴ in depth to explore how it critiqued ability grouping on Fourteenth Amendment grounds. The Note continues with a discussion of Supreme Court jurisprudence on race and education—jurisprudence which I argue, in its efforts to be “color-blind,” has only managed to be blind to the persistent racial disparities that pervade American life. Finally, I argue that in light of contemporary insights about race (such as those from critical race theory⁵), we must continue to explore why and how we assess students for ability, and ask whether racially neutral ability grouping is actually possible.

This Note aims to explore the acknowledged dangers that ability grouping presents and its potential to run afoul of equal protection. As seen in the litigation over Lowell—and perhaps in the *absence* of litigation over Jefferson High—the benefits of ability grouping have long been assumed to outweigh any slight disadvantages.⁶ Nevertheless, the disadvantages, however “slight, are significant, and potentially violate the doctrine of equal protection. For example, in the mid-1980s, shortly after Jefferson High opened as an academically elite magnet school, Fairfax County conceded that as a result of the new school’s opening, small pockets of students left behind at other public schools in the district no longer had access to accelerated courses because identified eligible students no longer constituted a

4. *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974).

5. Though it is not susceptible of any one definition, Critical Race Theory has been described as the genre of critical legal scholarship that “focuses on the relationship between law and racial subordination in American society.” Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195, 213 n.7 (David Kairys ed., 1990).

6. *Id.* at 1268.

large enough group to form an honors class.⁷ The push in the 1980s to establish public, academically elite magnet schools and rigorous academic tracks existed in spite of studies at the time showing limited benefit to ability grouping.⁸

Virtually all the legal analysis in the arena of public education access hinges on the Fourteenth Amendment to the United States Constitution.⁹ The Fourteenth Amendment mandates that states not deny “equal protection under the laws” to persons within their jurisdictions.¹⁰ The landmark Fourteenth Amendment decision regarding education remains *Brown v. Board of Education*, declaring that racially segregated public schools are constitutionally unacceptable.¹¹ In the decades following *Brown*, courts have interpreted the Fourteenth Amendment and *Brown* in various ways—sometimes opposing racism, sometimes not.

Terminology is important in this discussion. The term “ability grouping” and the programs with which it is typically associated have become accepted features of public school systems in America. At the same time, ability grouping is sometimes referred to as “tracking,” which is perhaps typified in American educational history by the regressive programs struck down in *Hobson v. Hansen*, a successful 1967 suit filed against the Washington, D.C. school system.¹² Magnet schools were established in the 1960s and 1970s, largely with the goal of achieving desegregation by attracting students from throughout the district by offering special programs in the arts, technical arts, science, or rigorous academics.

This Note focuses on ability grouping and academically elite magnet schools. The goal of this Note is to ask whether tracking on a small scale (as in the selective public high school context) truly cures the problematic characteristics of tracking. The Note primarily uses Lowell High School, a selective public high school located in San Francisco, California, as a case study.

7. D’Vera Cohn, *Honors Courses Remain Strong, Va. Report Says*, WASH. POST, Oct. 15, 1986, at C12.

8. Note, *supra* note 2, at 1323.

9. U.S. CONST. amend. XIV.

10. U.S. CONST. amend. XIV, § 1.

11. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

12. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

Lowell became an academically selective high school in 1966.¹³ Lowell selectively admits students based on academic ability as measured in part by a standardized test administered to eighth graders. It is the foremost of several specialty high schools in San Francisco,¹⁴ and has been referred to as one of the country's top high schools.¹⁵ In 2008, over 2,000 students applied for the freshmen class at Lowell, and over 1,150 of those students were rejected.¹⁶ This practice is an example of what is referred to as ability grouping (or, by some, tracking). Despite the racially tinged history of ability grouping,¹⁷ courts have held that ability grouping is not a strict proxy for race and, therefore, have given the practice a wide berth.¹⁸ Courts apply strict scrutiny only to state actions that make distinctions based on suspect classes¹⁹ or interfere with fundamental constitutional rights, and ability is neither a facially suspect classification nor a fundamental constitutional right under the Fourteenth Amendment.²⁰

Also informing this Note is my own high school, Jefferson High in Alexandria, Virginia. Jefferson High is a selective public school established in Virginia in stages over the late 1980s. Like Lowell, Jefferson High uses a formal admissions process to admit students. Although funded primarily through public funds from the State of Virginia,²¹ Jefferson High is in a financial and curricular partnership

13. San Francisco Unified School District, Lowell History, <http://www.sfusd.edu/schwww/sch697/about/history>.

14. San Francisco Unified School District, School Information, http://portal.sfusd.edu/template/default.cfm?page=school_info.profiles.

15. Terence Chea, *Asian-Americans wary of new college admissions standards* University of California system officials say they're widening the applicant pool, THE STAR-LEDGER, Apr. 26, 2009, at 27.

16. San Francisco Unified School District, Lowell High School Profile 2007–2008, <http://www.sfusd.edu/schwww/sch697/about/profile/08Profile.pdf>.

17. Dickens, *supra* note 1, at 471.

18. Note, *supra* note 2, at 1319.

19. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin).

20. *But see infra* Part V.

21. We will see that courts respond negatively to tracking programs that are racially tainted, as in *Hobson v. Hansen*. But often, constitutional jurisprudence on the state level, as well as the federal level, can make it more difficult to challenge the unequal distribution of educational resources. In Virginia, where Jefferson High is located, a 1994 state supreme court decision in response to a suit complaining of unequal funding for various school districts, *Scott v. Commonwealth*, held that while education was a fundamental right in the Virginia Constitution, “nowhere does the Constitution require equal, or

with industry. The school was originally planned to include a vocational element, but sponsoring companies persuaded Fairfax County to abandon vocational training.²² As mentioned above, Jefferson High does not explicitly seek, nor successfully achieve, any desegregative purpose. Indeed, what has been called “colorblind” jurisprudence has guaranteed that anyone trying to promote diversity at Jefferson High will be stymied by the interpretations of the Fourteenth Amendment that have held sway with the Supreme Court in recent years.²³ Later in this Note, I examine the current Supreme Court posture toward the Fourteenth Amendment and education.

I. *Hobson v. Hansen*: A Seminal Tracking Case

A central case in the history of educational tracking and diversity is *Hobson v. Hansen*,²⁴ which overturned an academic tracking practice in Washington, D.C. in 1967, on the grounds that it intentionally discriminated against students in violation of due process and of the Fourteenth Amendment.

Hobson considered a district-wide policy that separated students in the Washington, D.C. school system into four academic tracks: Honors, Regular, General, and “Special Academic.” Superintendent Dr. Carl Hansen argued that the tracking practice was a legitimate pedagogical strategy not motivated by racial concerns. According to Hansen, his tracking system was an expression of the principle that “[e]very pupil in the school system must have the maximum opportunity for self-development.”²⁵ Furthermore, District of Columbia school officials argued that this tracking system was flexible and encouraged students to move up.²⁶

But the circuit court rejected the school district’s arguments about ability grouping and held that this classification system was a proxy for segregation and discrimination.²⁷ Circuit Judge Skelly

substantially equal, funding or programs among and within the Commonwealth’s school divisions.” *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (1994).

22. David R. Gergen, *Sending Companies to School*, U.S. NEWS & WORLD REPORT, Nov. 6, 1989, at 112.

23. Online Chat with Robert Barnes, Final Cases of Session Resolved by Supreme Court, *Washingtonpost.com*, June 28, 2007, <http://www.washingtonpost.com/wpdyn/content/discussion/2007/06/27/DI2007062701764.html>. See also *infra* Part III.B.

24. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

25. *Id.* at 444.

26. *Id.* at 459 n.69.

27. *Id.* at 514.

Wright scathingly criticized Dr. Hansen's purported justifications of tracking as blatantly racist:

Although Dr. Hansen has maintained that the origins of the four-track curriculum 'clearly precede the event of desegregation,' there is no escaping the fact that the track system was specifically a response to problems created by the sudden commingling of numerous educationally retarded Negro students with the better educated white students.²⁸

The tracking program in District of Columbia public schools was clearly initiated in response to the presence of increased numbers of black students after federally mandated desegregation.²⁹

In order to test Dr. Hansen's claims, Judge Wright conducted statistical analysis that revealed that "[m]ovement between tracks border[ed] on the nonexistent."³⁰ Judge Wright found that "tracking tends to separate students from one another according to socioeconomic and racial status, albeit in the name of ability grouping. Students attending the lower income predominantly Negro schools—a majority of District school children—typically were confined to the educational limits of the Special Academic or General Track."³¹ Many schools with predominantly African-American enrollments did not even offer the Honors track.³² The court held that "[a]bility grouping is by definition a classification intended to discriminate among students, the basis of that discrimination being a student's capacity to learn."³³

At least one author has speculated that the clear racism of the tracking system in *Hobson* became a de facto standard of proof for later cases—and it was difficult to prove that any system, however problematic, was as bad as that in *Hobson*.³⁴ In any event, the tracking program ruled unconstitutional in *Hobson* is the program against which others are judicially measured. But as will be seen later, the Supreme Court takes a much less analytical approach to race and education.

28. *Id.* at 442.

29. Note, *supra* note 2, at 1323.

30. *Hobson*, 269 F. Supp. at 463.

31. *Id.* at 457.

32. *Id.* at 458.

33. *Id.* at 512.

34. Note, *supra* note 2, at 1324 n.45.

II. Overview of Litigation Against San Francisco Unified School District

The San Francisco Unified School District ("SFUSD") has been embroiled in litigation over racial/ethnic diversity for decades. The SFUSD has faced many constitutional challenges to its policies regarding race and its efforts to desegregate a city-wide school district that serves a diverse population largely segregated by neighborhood.

In 1969, African-American elementary school students filed suit alleging illegal discrimination by the SFUSD against them.³⁵ The district court held that the SFUSD had practiced illegal segregation and directed the implementation of a desegregation plan.³⁶ The Ninth Circuit, however, vacated the ruling, holding that intervening case law had made clear that evidence showing de facto segregation only was not alone sufficient to support a court-ordered desegregation remedy.³⁷ The San Francisco NAACP initiated a lawsuit in 1972, *O'Neil v. San Francisco Unified School District*,³⁸ which plaintiffs voluntarily dismissed without prejudice in 1976.³⁹ Then, in 1978, the San Francisco NAACP filed a lawsuit, *San Francisco NAACP v. San Francisco Unified School District*,⁴⁰ alleging that a policy of segregation existed in San Francisco's elementary and secondary schools. After five years of litigation, the Northern District of California District Court crafted a consent decree to address the concerns about racial segregation in the SFUSD, instructing the district to implement a proportional quota system that admitted mandated percentages of students from each of several racial-ethnic groups.⁴¹

In the years following the consent decree, the demographics of San Francisco public schools shifted and Chinese Americans became

35. *Johnson v. San Francisco Unified Sch. Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971), vacated, 500 F.2d 349 (9th Cir. 1974).

36. *Johnson*, 339 F. Supp. at 1328.

37. *Johnson*, 500 F.2d at 351 (citing *Soria v. Oxnard Sch. Dist.*, 488 F.2d 579, 585 (9th Cir. 1973)).

38. *O'Neil v. San Francisco Unified Sch. Dist.*, No. C-72-0808-RFP (N.D. Cal. filed May 5, 1972).

39. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 37 n.4 (N.D. Cal. 1983).

40. *Id.* at 34.

41. 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. BLACKLETTER L.J. 39, 42 (2000).

the largest racial/ethnic group in the public school system.⁴² Litigants for Chinese-American students focused on Lowell and its ability grouping admissions process, arguing that the consent decree and its racial-ethnic enrollment caps imposed an unconstitutional requirement on Chinese-American students: In order to be admitted to Lowell, Chinese-American students were effectively required to have a substantially higher admission test score than any other ethnicity.⁴³ In response to vocal critics of the system, in the fall of 1993 the superintendent authorized Lowell to admit 153 additional Chinese-American children, while also honoring quotas for each other ethnic groups, as ordered by the consent decree, resulting in an overcrowded school and community dissatisfaction.⁴⁴

Subsequently, a group of Chinese-American parents filed suit for the modification of the consent decree, claiming it had harmed their children by excluding them.⁴⁵ As a result of *Ho v. San Francisco Unified School District*, the SFUSD was forbidden from using race as a “primary or predominant” factor in admissions at Lowell.⁴⁶ Since 2001, the SFUSD has been using a “diversity index” combining five different socioeconomic factors to determine where a student should be placed in the district.⁴⁷ At the end of 2005, the consent decree under which Lowell had operated for twenty-two years expired.⁴⁸

Meanwhile, a 1998 report on the ongoing efforts to desegregate Lowell concluded in particular that ability grouping “often result[ed] in a disproportionate number of African American and Latino students being placed in the ‘lower’ level classrooms.”⁴⁹ The report also noted, however, that “the majority of educators believe . . . that at least some grouping of students based on language skills and/or prior academic achievement will enable schools to more effectively

42. *Id.* at 55.

43. *Id.* at 56.

44. *Id.* (citing Nanette Asimov, *Lowell High Fails Desegregation Test*, S.F. CHRON., Sept. 9, 1993, at A13).

45. *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (9th Cir. 1998) (citing *Adarand Constr. Co. v. Pena*, 515 U.S. 200, 224 (1995)).

46. Levine, *supra* note 41, at 106.

47. Heather Knight, *Public Schools in S.F. Becoming More Segregated*, S.F. CHRON., Aug. 8, 2003, at A17.

48. Heather Knight, *New Challenges Await School Assignment Plan*, S.F. CHRON., Nov. 10, 2005, at B3.

49. Levine, *supra* note 41, at 84 (citing Stuart Biegel, *San Francisco Unified School District Desegregation*, Paragraph 44 Independent Review, Report No. 15, 1997–1998, at 30 [hereinafter *Monitor’s Report*]; *San Francisco NAACP* (N.D. Cal. filed July 31, 1998)).

meet the needs of the students and the community.”⁵⁰ The NAACP’s efforts twenty years earlier, which were among the first to challenge assumptions about ability grouping, diversity, and excellence in education, had largely gone unheard.

Similarly, on the other side of the country, Asian Americans comprise an increasing percentage of the student body at academically elite public schools—Thomas Jefferson High School being a recent example in the news.⁵¹ But Jefferson High, commonly referred to as the “number one high school in the nation,”⁵² fails to offer its educational opportunities to a diverse group of students. For example, in 2006, it enrolled nine African-American freshmen and ten Latina/o freshmen (each group comprising about two percent of the student class of 2010).⁵³

III. The *Berkelman* Case: A Missed Opportunity

As noted above, the history of ability grouping and tracking is difficult to separate from being a product of American racism in the twentieth century.⁵⁴ Specifically, ability grouping and tracking are linked with efforts to fight desegregation that resulted from *Brown v. Board of Education*.⁵⁵

In 1973, Wendy Berkelman and her daughter Pearl, brought a lawsuit alleging that the Lowell admissions policies regarding race and gender were unconstitutional.⁵⁶ *Berkelman v. San Francisco Unified School District* initially raised three questions:⁵⁷ (1) whether the school district could admit students to a preferred high school on the basis of past academic achievement if the resulting percentage of students of color is not disproportionately less than students of color in the school district as a whole;⁵⁸ (2) whether the school district, in order to maintain equal numbers of boys and girls in the school, could apply higher admission requirements to girls than to boys;⁵⁹ and

50. Levine, *supra* note 41, at 85 (citing Monitor’s Report, *supra* note 49, at 47).

51. *Id.*

52. *Jefferson is No. 1; Others in Area Make List*, WASH. POST, Dec. 6, 2008, at B3.

53. Mary Kimm, *Seeking More Diversity at TJ*, LAUREL HILL CONNECTION, July 30, 2008, <http://www.connectionnewspapers.com/article.asp?article=317923&paper=80&cat=110>.

54. Dickens, *supra* note 1, at 472.

55. *Id.* at 473.

56. *Berkelman*, 501 F.2d at 1266 n.2.

57. *Id.*

58. *Id.* at 1265.

59. *Id.* at 1266.

finally (3) whether the maintenance of an academic high school like Lowell was inherently unconstitutional.⁶⁰

A. Lowell High School as Inherently Unconstitutional

The *Berkelman* plaintiffs' initial brief to the Ninth Circuit argued that by being an academically elite public high school, Lowell was inherently unconstitutional because students who attended Lowell received "vastly superior" opportunities compared with students at other San Francisco public high schools. This discrepancy offended the Fourteenth Amendment not only through racial and gender discrimination, but also by "arbitrarily" denying "similarly situated and equally qualified students" the opportunities at Lowell.⁶¹ According to the Youth Law Center attorneys, "the School District has candidly admitted that there are many more students who are qualified and able to benefit from the Lowell curriculum than are permitted to enjoy such benefits."⁶² The plaintiffs reasoned that the denial of the benefits Lowell High offered to students who were not selected for admission in spite of their eligibility according to test scores, constituted a denial of equal protection.⁶³

As documented in the opening appellant brief, Lowell altered its admissions criteria frequently. Initially, the school extended offers of admission to any student with a recommendation from their principal. Later, it based admissions on grades from a semester of junior high school. Most recently, it created a matrix of factors by which to screen students and ultimately narrowed the large pool of eligible students through a lottery.⁶⁴ The plaintiffs in *Berkelman* alleged that however academic achievement was measured, there were troubling questions about the concept of admission standards because test performance was so directly related to the segregated elementary and middle schools from which the students came. *Berkelman* plaintiffs argued that "attendance at a segregated and inferior elementary school effectively and irrefutably handicaps such students in the competition for positions at Lowell."⁶⁵

60. *Id.* at 1266 n.2.

61. Brief of Plaintiffs-Appellants at 25, *Berkelman*, 501 F.2d 1264 (No. 73-1686). I would like to thank Charles L. Miller and his colleagues at the Pacific Regional Office of the National Archives for retrieving the briefs in the *Berkelman* case for me.

62. *Id.* at 29.

63. *Id.* at 25.

64. *Id.* at 8-14.

65. *Id.* at 51.

The *Berkelman* plaintiffs developed their equal protection argument by citing *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*,⁶⁶ a case from 1897 that held that a state classification “must always rest upon some difference which bears a reasonable and just relationship to the act in respect to which the classification was proposed.”⁶⁷ The *Ellis* holding may be inapplicable to this case because advocates of selective public schools can argue that ability grouping is a classification bearing a reasonable and just relationship to a legitimate government goal of promoting “educational excellence,” whether or not in the context of desegregative efforts.⁶⁸ But if ability grouping itself is a vestige of discrimination, then it should not be upheld.⁶⁹

Berkelman’s lawyers buttressed their argument that Lowell was discriminating unconstitutionally with cases such as *Hobson*,⁷⁰ *Ordway v. Hargraves*,⁷¹ *Mills v. Board of Education*,⁷² *Bolling v. Sharpe*.⁷³ But these latter two cases were less powerful because their factual situations were distinguishable and, in the case of *Bolling*, the Ninth Circuit deemed similar racial arguments inadequate in a decision released concurrently with *Berkelman*.⁷⁴

The argument about Lowell’s “inherent unconstitutionality” appears to have been unpopular; no *amicus curiae* briefs were submitted on it. By contrast, the NAACP submitted an *amicus curiae* brief on the racial discrimination argument, relying heavily on *Brown* and the findings in *Johnson v. San Francisco Unified School District*.⁷⁵

66. *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897).

67. *Id.* at 155.

68. As described in Levine, *supra* note 41, at 65–66, and in *Ho*, 147 F.3d 854, defendants argued that the goal of “educational excellence” necessitated keeping the 1983 consent decree in place in the SFUSD.

69. Dickens, *supra* note 1, at 493.

70. *Hobson*, 269 F. Supp. at 516–18 (holding in 1967 that tracking in the Washington, D.C. schools amounted to *de jure* segregation). See also *supra* Part III.A.

71. *Ordway v. Hargraves*, 323 F. Supp. 1155, 1157–58 (D. Mass. 1971) (holding that the Civil Rights Act forbids a school from excluding a pregnant, unwed student from enrollment without a showing of academic disruption).

72. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that the denial of public education to disabled and emotionally disturbed children violated due process).

73. *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the *Brown* sibling holding segregation unconstitutional in District of Columbia schools).

74. *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 351–352 (9th Cir. 1974). See also *infra* Part V.

75. Brief for NAACP as Amicus Curiae Supporting Appellants at 1–2, *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F. 2d 1264 (No. 73-1686).

The brief argued that “the law . . . is quite clear that a school district may not perpetuate the effects of prior discrimination under the guise of assigning pupils on the basis of alleged ability.”⁷⁶ On the issue of gender discrimination, the ACLU submitted an *amicus curiae* brief arguing that the school unconstitutionally discriminated against female applicants.⁷⁷

There were also signs that the *Berkelman* plaintiffs understood that their “inherent unconstitutionality” argument was weak. In discussion of the appellees’ use of the Supreme Court’s affirmation of a pupil assignment statute in *Shuttlesworth v. Birmingham Board of Education*,⁷⁸ the appellants distinguished *Shuttlesworth* as a facial challenge.⁷⁹ This was one of several signals from the *Berkelman* plaintiffs that their case was becoming an “as applied” challenge to gender and race discrimination, and moving away from the broader constitutional argument put forward in the first brief.⁸⁰ And indeed, plaintiffs ultimately dropped the “inherently unconstitutional” argument.⁸¹

B. The Outcome of *Berkelman*

Ultimately, the Ninth Circuit upheld Lowell’s admissions procedure insofar as it furthered a racially diverse campus. The Ninth Circuit held that Lowell’s admissions practice “substantially furthers the purpose of providing the best education possible,” while also acknowledging the racial and ethnic disparities of which the plaintiffs complained.⁸²

But the Ninth Circuit was unwilling to permit the school to continue requiring higher test scores for female applicants than for males. In District Court, the SFUSD attempted to justify its policy of imposing higher criteria on female applicants by asserting that it was “common knowledge” that boys fare worse in middle school and then catch up to girls, and therefore boys should be admitted to high

76. *Id.* at 4.

77. Brief for ACLU as Amicus Curiae Supporting Appellants, *Berkelman*, 501 F. 2d 1264 (No. 73-1686).

78. *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101, 101 (1959).

79. Response Brief of Plaintiffs-Appellants at 31, *Berkelman*, 501 F. 2d 1264 (No. 73-1686).

80. *Id.*

81. *Berkelman*, 501 F.2d at 1266 n.2.

82. *Id.* at 1268.

school according to a lesser standard.⁸³ But the Ninth Circuit held that the practice violated the Equal Protection Clause.⁸⁴ This holding concerning gender equality in the Lowell admissions process is the one for which *Berkelman* is best remembered.⁸⁵

Although plaintiffs dropped their argument that Lowell's admission policy was inherently unconstitutional, the Ninth Circuit nonetheless chose to comment on it. The court distinguished the Lowell arrangement from the District of Columbia "tracking" system that had been held unconstitutional seven years earlier in *Hobson*.⁸⁶ The Ninth Circuit conceded that the Lowell admissions process was not ideal, but dismissed plaintiffs' argument that being denied admission to Lowell caused psychological injury. The court held "the district's legitimate interest in establishing an academic high school, admission to which is based upon past achievement, outweighs any harm imagined or suffered by students whose achievement had not qualified them for admission to that school."⁸⁷ But this cursory analysis neglected to confront the fact at the center of the plaintiffs' argument: Numerous students who are concededly capable of succeeding at Lowell were, and are, being denied the opportunity on the basis of a dubious classification.

Today, Lowell's admission policy and existence as an academically elite public high school remain controversial. As documented by local press, SFUSD still struggles with parents' perception and demands about racial and socio-economic diversity at public schools vis-à-vis individual students' school assignments.⁸⁸

The plaintiffs in *Berkelman* posed legal theories that, although effectively ignored by the Ninth Circuit, point the way to a broader discussion about ability grouping. That discussion should incorporate the arguments from *Berkelman* with current critical race theory while

83. Brief of Plaintiffs-Appellants at 57-58, *Berkelman*, 501 F.2d 1264 (No. 73-1686).

84. *Berkelman*, 501 F.2d at 1270.

85. See, e.g., Carrie Hoon, *Notes & Comments: The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213 (2001); Keri McWilliams, *Education Law Chapter: Single-Sex Education*, 7 GEO. J. GENDER & L. 919 (2006); Benjamin P. Carr, Note, *Can Separate Be Equal? Single-Sex Classrooms, The Constitution, and Title IX*, 83 NOTRE DAME L. REV. 409 (2007).

86. *Berkelman*, 501 F.2d at 1268.

87. *Id.*

88. Leslie Fulbright & Heather Knight, *With More Choice Has Come Resegregation: Board's Challenge: Reconcile Imbalance with Least Parental Uproar*, S.F. CHRON., May 29, 2006, at A1.

acknowledging the failings of present constitutional jurisprudence on race, which are discussed in the next section.

IV. The Supreme Court's Contemporary Approach to Race and Public Schools

Several Supreme Court justices' jurisprudence on race in public school admissions is presently marked by a one-step analysis: If racial classification in any form is present, the admissions practice will more than likely be declared unconstitutional. The majority of the Court has used that approach regardless of the goals of, or need for, the use of the racial classification.⁸⁹

One of the most recent and notable Supreme Court cases on education was *Parents Involved v. Seattle*,⁹⁰ which considered two school systems' policies that used race to determine children's school assignments. These policies were comprised of an intricate array of "tiebreakers" and "integration positives." The district court held that these policies were "narrowly tailored" and therefore permissible.⁹¹ The Supreme Court reversed the district court's decision, holding that the district's policies that used race as one factor to determine children's school assignments failed strict scrutiny.⁹² In a powerful dissent, Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, argued that the race-based assignments helped to combat prejudice.⁹³ Justice Thomas disputed the dissent's claim that racial integration of schools leads to cross-racial understanding:

There is no guarantee, however, that 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.⁹⁴

89. Neil Gotanda, *A Critique of "Our Constitution Is Color Blind"*, 44 STAN. L. REV. 1, 48 (1991).

90. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

91. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1240 (2001).

92. *Parents Involved*, 551 U.S. at 733–35.

93. *Id.* at 840–41.

94. *Id.* at 768.

In his concurrence, Justice Thomas thus acknowledged the reality of racially segregated ability grouping.⁹⁵

Parents Involved came close on the heels of *Gratz v. Bollinger* and *Grutter v. Bollinger*,⁹⁶ which, respectively, maintained an affirmative action program at the University of Michigan's law school on the condition that it would be ended as soon as possible, and rejected the use of affirmative action in the University of Michigan's undergraduate admissions policy.⁹⁷ In *Grutter*, the Court announced that all racial classifications—even those purported to advance racial integration and social justice, like affirmative action—would receive strict scrutiny.⁹⁸

Thus, for the present Supreme Court, “the evil of racism is no longer individual and institutional acts of white supremacy but, rather, [merely] the recognition of racial differences.”⁹⁹ Neil Gotanda, a law professor and critical race theorist, has called this viewpoint procedural colorblindness and critiques it as destructive and promoting racial subordination.¹⁰⁰ As the late Professor Chris Iijima wrote of the Supreme Court's “colorblind” jurisprudence in *Rice v. Cayetano*,¹⁰¹ the Court's way of thinking about race “underscores a fundamental lack of understanding of race's meaning and significance.”¹⁰² Georgetown Law Center's Charles R. Lawrence III argued that with regard to proof in racial discrimination cases, “racially disproportionate harm should trigger heightened judicial scrutiny without consideration of motive.”¹⁰³ Lawrence added that a better, alternative standard would “evaluate governmental conduct to

95. *Id.*

96. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

97. *Grutter*, 539 U.S. at 342.

98. *Gratz*, 539 U.S. at 270.

99. Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 112 (2000).

100. Neil Gotanda, *A Critique of “Our Constitution Is Color Blind,”* 44 STAN. L. REV. 1, 43 (1991).

101. *Rice v. Cayetano*, 528 U.S. 495 (2000) (dismantling voting laws designed to foster native Hawaiians' self-governance).

102. Iijima, *supra* note 99, at 112.

103. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 320 (1987).

determine whether it conveys a symbolic message to which the culture attaches racial significance.”¹⁰⁴

“Colorblind” jurisprudence is a relatively recent development on the Supreme Court. In decades past, the Court was more likely to look beneath the surface of racial classifications for racially linked injustice. In 1974, the year *Berkelman* was decided, the Supreme Court held that the SFUSD’s ability grouping had resulted in failing to provide English instruction to over half of the students in the district whose primary language was Chinese, thereby violating Section 601 of the Civil Rights Act of 1964.¹⁰⁵ According to the Court, by failing to provide adequate instruction to English Language Learners, the SFUSD’s ability grouping completely excluded English Language Learners from receiving the same education opportunities offered to others.¹⁰⁶

Lau v. Nichols in 1974 enforced a federal regulation promulgated by the Department of Health, Education and Welfare stating: “Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend [sic] or permanent track.”¹⁰⁷

When contrasted to Supreme Court decisions in the last ten years, *Lau v. Nichols* shows that the Supreme Court previously evaluated racial classifications more on the basis of whether they facilitated or thwarted equal educational opportunity.¹⁰⁸ In *Lau*, the Supreme Court held that requiring Chinese-speaking students to attend classes in English did not facilitate equal opportunity because the students could not understand the content; English instruction was only constitutionally required in order to meet the standard of equal opportunity set out by the Civil Rights Act of 1964.¹⁰⁹

V. Questioning Ability Grouping

It is not clear how much the establishment of academically selective high schools within a school district, like Lowell and

104. *Id.* at 324.

105. *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

106. *Id.*

107. *Id.* at 568.

108. Note, *supra* note 2, at 1338.

109. *Lau*, 414 U.S. at 569.

Jefferson High, differ from the “bad tracking” seen in *Hobson*.¹¹⁰ In light of the SFUSD’s concession that many more students are capable of enjoying the benefits of Lowell than are granted admission,¹¹¹ the harm of the District of Columbia’s school system’s tracking program in *Hobson* may have similarities to that of the elite high school in *Berkelman*. In both situations, some students are placed in an expressly inferior academic context on the basis of alleged lesser ability. The difference between the harms would seem to be quantitative or proportional rather than qualitative.

Given the parallels between the two tracking programs, *Berkelman* is arguably not consistent with *Hobson*. Both scenarios involve students being placed in inferior schools based on determinations about their capabilities, which are either putatively neutral but racially tainted, or putatively neutral but arbitrary. However dubious ability classifications may be, their use persists. As discussed above, the possibility exists that even Lowell-type tracking can function as a proxy for segregation. Indeed, there is both statistical and anecdotal evidence suggesting that eliminating academically elite magnet schools and exposing all students to “high track material” can break the cycle of reduced expectations for economically and socially disadvantaged groups of students.¹¹²

Ability grouping and even policies that strive to balance academic stratification with racial diversity, like those at Lowell, are not racially neutral. Researchers cite empirical data suggesting that “race neutrality” is to some extent a myth and impossibility.¹¹³ At least as early as *Hobson*, courts have found that even the facially neutral “ability” classification is racially problematic. The *Berkelman* plaintiffs, in making their case that an elite academic high school was unconstitutional, argued that ability classifications were inherently biased. For example, the *Berkelman* plaintiffs relied on *Larry P. v. Riles*,¹¹⁴ in which African-American plaintiffs challenged the SFUSD’s use of a facially neutral but actually biased IQ test to determine the

110. *Hobson v. Hansen*, 269 F. Supp. 401, 514 (D.D.C. 1967).

111. Brief of Plaintiffs-Appellants at 29, *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (No. 73-1686).

112. See, e.g., Carol Corbett Burris et al., *Accountability, Rigor, and Detracking: Achievement Effects of Embracing a Challenging Curriculum As a Universal Good for All Students*, 110.3 TEACHERS COLLEGE RECORD 571 (2008); David P. Hale, *The Lowest Quartile African Americans Taking Advanced Placement Language and Literature*, 80.3 THE CLEARING HOUSE 123 (2007).

113. See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

114. *P. v. Riles*, 343 F. Supp. 1306, 1315 (N.D. Cal. 1972).

placement of children in programs for the mentally retarded.¹¹⁵ The *Riles* court held for the plaintiffs that the IQ tests produced inaccurate results and promoted racial imbalance, and the court held that the burden of proof was incumbent upon the school district “to demonstrate the rational connection between the tests and the purpose for which they allegedly are used.”¹¹⁶

Scholarship on the “score gap” and racial biases in standardized tests has revealed numerous problems that suggest that such metrics are ineffective measures of ability, particularly where students of color are concerned.¹¹⁷ Research has demonstrated that standardized tests reward takers for using Eurocentric attitudes and narrative styles.¹¹⁸ Racially biased standardized tests inevitably result in adverse consequences for students of color.

Students tracked according to standardized testing are denied the right to a higher level of academic achievement. In the Supreme Court case *Plyler v. Doe*, the Court held that denial of the right to equal education presents “unreasonable obstacles to advancement on the basis of individual merit.”¹¹⁹ UCLA Law School’s Stuart Biegel has criticized the utility of standardized testing:

Not only does the current multiple-choice format embody inherent limitations, but the predictive value of a given test score varies due to the idiosyncratic nature of standardized formats. Key “hidden variables,” such as an examinee’s personal background and her possible exposure to certain teaching styles, must be taken into account when attempting to make appropriate inferences from test scores.¹²⁰

115. *Id.* at 1311.

116. *Id.*

117. For a recent article on inadequacies and biases of standardized testing in the context of the No Child Left Behind Act, see Helen Moore, *Testing Whiteness: No Child or No School Left Behind?*, 18 WASH. U. J.L. & POL’Y 173 (2005). For an examination of the topic as it relates to law school admissions, see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997).

118. Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U.J. GENDER & L. 121 (1993).

119. *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

120. Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after *Kadrmas v. Dickinson Public Schools**, 74 CORNELL L. REV. 1078, 1102 (1989).

Academic tracking on the basis of standardized testing denies the right to equal education.¹²¹

The *Berkelman* decision was a missed opportunity for the Ninth Circuit to evaluate the limited utility of ability grouping and its racialized attributes. Under the present Supreme Court, the possibility for federal jurisprudence that examines ability grouping in its proper context seems increasingly unlikely. In the years to come, plaintiffs who test the constitutionality of academically selective high schools should consider history and the particular lessons offered by past litigation such as *Berkelman*.

For example, as noted above, tracking and ability grouping have a complicated relationship to the quest for racial integration. *Brown* directly correlated with the reintroduction of tracking as a system of academic classification.¹²² Indeed, in many school districts, intra-school tracking was a direct response to court-ordered desegregation.¹²³ The IQ test, one of the most common measures of intelligence, has been shown to be biased against African-American students.¹²⁴ Moreover, while IQ tests are biased against minority group members, individual biases may also serve to place a large number of minority students in the lowest groupings.¹²⁵

Critical race theory legal scholarship has not dealt with *Berkelman* in detail. Some authors have sought to explain the result upholding ability grouping as being because *Hobson* rejected such an extremely and obviously unconstitutional tracking system.¹²⁶ Thus, the Ninth Circuit could easily distinguish the policy at issue in *Berkelman* from that in *Hobson*.¹²⁷

Furthermore, although *Plyler v. Doe* held that although education is not a fundamental right, the importance of education “triggers a corresponding level of scrutiny that falls somewhere between the rational relationship standard and the strict judicial review afforded to state action that impinges upon fundamental

121. *Id.* at 1103.

122. Dickens, *supra* note 1, at 472.

123. *Id.*

124. See generally ELAINE MENSCH & HARRY MENSCH, *THE IQ MYTHOLOGY: CLASS, RACE, GENDER, AND INEQUALITY* (1991) (surveying the biases in IQ and other standardized tests).

125. *Id.* at 506 n.47.

126. Note, *supra* note 2, at 1324 n.45.

127. *Id.*

rights.”¹²⁸ This intermediate standard of review could be useful to litigants seeking remedies for equal protection violations in schools.¹²⁹ Plaintiffs could argue students placed in lower ability groups “may become locked in a pattern of test-driven instruction that perpetuates failure, when exposure to a more relevant and wide-ranging curriculum might have enabled them to develop their talents and leave school with skills that multiple-choice tests never measure.”¹³⁰ Since intermediate scrutiny requires more than a mere rational basis, it may have the potential to challenge education policies that unquestioningly accept shibboleths about ability grouping from a bygone era.

In 1996, Angelia Dickens argued that in *Berkeleman* the Supreme Court essentially, and wrongly, rejected plaintiffs’ argument that strict scrutiny should be applied to academic tracking.¹³¹ Dickens argued that ability grouping in the *Berkelman* case was treated differently from instances of tracking like that in *Hobson* because the *Berkelman* plaintiffs had strategically argued for strict scrutiny, insisting that the Lowell admissions procedures involved race and economic status classifications.¹³² Consequently, the appellants argued that the burden shifted to the SFUSD to demonstrate a compelling interest for the use of the classifications.¹³³

These attempts to invoke strict scrutiny failed and as Dickens chose to put it, “[t]racking was upheld in *Berkelman v. San Francisco Unified School District*.”¹³⁴ Dickens offered this explanation for the *Berkelman* result:

Berkelman can be distinguished from the traditional tracking context for two reasons. First, the classification used to assign students to the special high school was past academic achievement. This is not a suspect classification. The level of scrutiny is much lower than if it had been determined that the criterion used to assign students to the special high school was a race-based practice. Thus the school system did not have trouble proving that the criterion of past academic achievement

128. Biegel, *supra* note 120, at 1087.

129. *Id.* at 1113.

130. *Id.*

131. Dickens, *supra* note 1, at 493.

132. Brief of Plaintiffs-Appellants at 53, *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (No. 73-1686).

133. *Id.*

134. Dickens, *supra* note 1, at 493.

furthered its interest in providing the most adequate education possible. . . . Second, the students denied admission to the special school still receive an adequate education at another school in the district. The court believed that an adequate education was still available to those students not accepted at the special school¹³⁵

But the Court was wrong, according to Dickens, because it failed to see academic tracking as a vestige of racial discrimination, and it failed to deem tracking a “racial classification” and thus deserving of strict scrutiny.¹³⁶

In dismissing Berkelman’s broadest claim against Lowell, the Ninth Circuit noted that “Lowell provides in one school a program which cannot economically be duplicated in ten other schools”¹³⁷ But Lowell students were concededly somewhat arbitrarily selected. Thus even assuming the rest of the SFUSD received an “adequate” education, would that truly inoculate the disproportionate funneling of resources to Lowell against a Fourteenth Amendment challenge? Historical evidence suggests that ability grouping is not such a clearly superior model that it has never been abandoned or criticized. Indeed, 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.¹³⁸ Furthermore, as mentioned *supra*, studies had shown little or no benefit to ability grouping.¹³⁹

Conclusion

Berkelman was a missed opportunity to address the racial impacts and overall validity of ability grouping to create elite high schools. The *Berkelman* appellants drew from cases involving several subordinated groups in order to construct a broad argument that Lowell itself violated the Fourteenth Amendment. These precedents were marshalled in support of a single contention: That depriving thousands of students of the advantages of Lowell, including many who were concededly capable of enjoying its benefits, violated equal protection.

135. *Id.*

136. *Id.*

137. *Berkelman*, 501 F.2d at 1267.

138. Note, *supra* note 2, at 1323.

139. *Id.*

SFUSD officials assessed applicants to Lowell based on their academic achievement. Yet, as the *Berkelman* plaintiffs pointed out in their brief to the Ninth Circuit, attendance at a segregated and inferior elementary school impacted—and almost pre-determined—students' ability to compete for positions at Lowell.¹⁴⁰ This begs a question that ought to be considered anew by today's legal scholars, policymakers and educators: Is racially neutral ability grouping possible? Even if it is, the semi-arbitrary granting to a select few students of access to special schools like Lowell could itself violate equal protection—and thus be “inherently unconstitutional.” This is what the *Berkelman* plaintiffs asserted before the district court thirty-five years ago.¹⁴¹

Over the course of the demographic, political, and jurisprudential shifts that have taken place since 1974, the quest to deliver educational excellence without promoting racism has had mixed success. On the one hand, critical race theorists have developed useful tools for examining tracking and other education practices with racial “taints.” For example, Charles R. Lawrence III's alternative standard¹⁴² for assessing racial discrimination cases offers a new way to adjudicate equal protection cases that “evaluate[s] governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance.” But in recent years, “colorblind” jurisprudence has gained traction in the Supreme Court and lower federal courts. As a result, injured parties cannot count on courts to issue rulings reflective of and sensitive to subordination of racial and ethnic minorities, women, and other groups.

At the beginning of this Note, I asserted that terminology is important. Beyond setting the parameters for discussion, it is important in other ways. The prohibition on use of racial terminology, i.e., classifications, currently hampers law's ability to assess the advantages and disadvantages of tracking and ability grouping. Likewise, the negative connotations of the term “affirmative action” may hamper discussion of those policies. Going forward, special attention should be paid to terms like “tracking” and “ability grouping” because of their ability to shape the debate before it has even begun.

140. Brief of Plaintiffs-Appellants at 51, *Berkelman*, 501 F.2d 1264 (No. 73-1686).

141. *Id.* at 53.

142. Lawrence, *supra* note 103, at 324.

Today, the concerns *Berkelman* raised regarding gender and race discrimination have arguably all been addressed. After all, the long *San Francisco NAACP* litigation, followed by the *Ho* suit and the eventual termination of the consent decree, ultimately stimulated a thorough conversation both within and outside the court system about diversity at Lowell and in the SFUSD—but there is more to explore. Courts should consider whether ability grouping is truly consistent with *Brown*. Controversy persists about diversity and proper allocation of resources in education, in San Francisco and throughout America. The *Berkelman* plaintiffs' argument regarding Lowell High School's unconstitutionality has been overlooked, but it could point the way to a new conversation about ability grouping. I hope that conversation will take place guided by opposition to injustice and a keen awareness of history.