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NO CHILD LEFT BEHIND: WHY RACE-BASED ACHIEVEMENT GOALS VIOLATE THE EQUAL PROTECTION CLAUSE

Ayriel Bland

INTRODUCTION

No Child Left Behind (NCLB) was passed in 2002 under President George W. Bush with the goal of increasing reading and math proficiency for all children in the United States by 2014. However, as time progressed, meeting this goal appeared improbable. Many states reacted by using waivers to set race-based achievement standards, differentiating proficiency goals among student subgroups, including racial minorities. This note argues that race-based proficiency goals violate the Equal Protection Clause of the Fourteenth Amendment.

While race-based achievement goals may serve a compelling state interest in promoting educational proficiency, ultimately these goals are not narrowly tailored to achieve that interest and thus fail strict scrutiny. In part, these race-based goals are not narrowly tailored due to the potential negative psychological effects they cause minorities, particularly African and Latino Americans. Race-based standards act as state-approved stamps of inferiority on particular minority groups, which will likely have detrimental effects on their self-esteem and performance on standardized tests.

Part I provides a short history of NCLB, including some of the educational problems Congress targeted and the states’ methods of implementing NCLB. Additionally, Part I explains how states have used waivers to escape their students’ inevitable failure to meet NCLB’s complete proficiency and also discusses the rise of race-based achievement goals by presenting arguments for and against these goals. Part II argues that race-based goals violate the Equal Protection Clause because they are not the narrowest means of achieving NCLB’s proficiency requirements, which I support with psychological studies on African-American students. Lastly, Part III briefly introduces many equally-effective alternatives to race-based achievement.
goals that do not violate the Equal Protections Clause.

I. BACKGROUND

A. History of No Child Left Behind

Congress passed NCLB in 2002, resolving to increase reading and math levels among all elementary and secondary school-aged students in the United States. NCLB’s stated goal included giving all children a “fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” States were originally required to set standards for all students regardless of subgroup to achieve 100 percent proficiency by 2014. Additionally, states were required to set challenging academic standards, annually test children, and develop and implement a statewide accountability system in order to receive federal funds. As a method of holding schools accountable, states set “Adequate Yearly Progress” (AYP) measures as benchmarks for schools, indicating progress toward complete proficiency. Pertinent parts of a state’s AYP include “annual measurable objectives” (AMOs) and require separate AMOs for (1) “all public elementary school and secondary school achievement” and (2) a school’s subgroups. AMOs require that a “single minimum percentage of students” in each group “meet or exceed” proficiency goals in order to achieve complete proficiency by 2014. For example in California, AMOs include the percent of students that must meet or exceed English or math tests as dictated by California tests (e.g., California Standards Tests and the California High School Exit Exam).

If a school and its subgroups reached their AMOs, the school met its AYP. However, if a school failed to meet its AYP, it was given what amounted to a warning. If the same school failed two consecutive years it was “identified for school improvement.” Nevertheless, NCLB’s ‘safe harbor’ provision allowed schools or districts to escape sanctions if a particular subgroup failed to meet its

7. Id. §§ 6311(b)(1)(B)–(C).
8. Id. § 6311(b)(1).
9. Id. § 6311(b)(3).
10. Id. § 6311(b)(2)(A).
11. Id. §§ 6311(b)(2)(B)–(C).
12. Id. §§ 6311(b)(2)(C)(v), (G) (emphasis added). Subgroups include economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. Id. at § 6311(b)(2)(C)(v).
14. Annual Measurable Objective (AMO), EDSOURCE, available at http://www.edsource.org/1068.html (last viewed Dec. 10, 2013). For instance, the AMO for English in elementary schools in 2004-05 required “that 24.4% of its students... test proficient or above on the California Standards Test in that subject.” Id.
16. Id. § 6316(b)(1)(A).
AYP. Put differently, a school could still achieve its AYP even if one of its subgroups did not make its AMO, provided the subgroup made significant gains in closing the achievement gap.

Initially, states unsuccessfully threatened lawsuits or adjusted academic standards and scoring systems to avoid sanctions, and then implemented waivers to achieve the same purpose. NCLB's proficiency goals unintentionally drove states to lower testing standards or "backload" its largest AYP gains to later years. Some scholars argued that NCLB granted states complete discretion in determining the "content and rigor" of state assessments and standards, in turn determining proficiency thresholds. However, reaching complete proficiency proved difficult and many states applied for waivers to "soften the blow" of NCLB requirements. Waivers granted by the U.S. Department of Education allow states to disregard the 2014 complete proficiency requirement, instead holding states accountable by subgroup passing rates or by significant closures in achievement gaps.

**B. Era of the NCLB Waiver**

Currently, forty-two states, the District of Columbia, and Puerto Rico have applied and are officially approved for waivers by the U.S. Secretary of Education.

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17. *Id.* § 6311(b)(2)(I)(i) (emphasis added).
Waivers gave states three options to reset their AMOs: (1) reduce by half the achievement gap between at-risk subgroups and all students within six years, which requires “setting different performance goals for different groups of students”; (2) achieve complete proficiency for all subgroups by 2020; or (3) employ “other” state-designated methods similarly rigorous to the first option. In the end, most states created race-based achievement goals through the third option and designed their own AMOs with “varying goals among [] subgroups.”

For most states, waivers are a promising, flexible alternative to the failed judicial challenges and Congressional attempts to amend NCLB. Moreover, waivers allowed states to opt out of particular NCLB provisions while retaining NCLB funds. The current U.S. Secretary of Education, Arne Duncan, claimed that waivers spotlighted the “invisible” one million students, ignored under NCLB, by better tracking student performance. At least in the short-term, waivers improved states’ implementation of NCLB.

When applying for waivers, states and local educational agencies (LEAs) submit proposals describing how the waivers will “increase the quality of instruction” and “improve the academic achievement” of students. Additionally, states and LEAs must describe “specific, measureable educational goals” every school year for all affected schools and LEAs, including “methods used to measure [the annual progress] for meeting such goals and outcomes.” States and LEAs must also explain how schools would “continue to provide assistance to the same populations” for those waived programs. And, throughout a waiver’s duration, states must submit annual reports while LEAs submit a report at the end of the second year, and every year thereafter. Waivers issued in 2011 require that students be proficient in math and reading by 2014.


27. See McNeil, supra note 1, at 3. Notably, only Arizona is striving for 100 percent proficiency by 2020. Id.

28. Id.

29. See Doan, supra note 19, at 214 (“Congress has resisted large-scale changes during the past five years . . . [w]aivers also appear to be a safer alternative to expensive litigation that has a low success rate.”); see also Powell, supra note 24, at 178.

30. See generally 20 U.S.C. § 7861; see Doan, supra note 19, at 216 (allowing the Secretary of Education to withhold funds); see also Wieder, supra note 21 (quoting Margaret Spellings, former U.S. Department of Education Secretary under George W. Bush, on the ability of states to continue receiving federal funds while opting out, “It’s going to mean more opaque systems . . . [t]he public is going to be ill-served by this.”).

31. See Wieder, supra note 21 (quoting Arne Duncan, “Collectively, these states are capturing more than 1 million additional students . . . [t]hese are students that were literally invisible under No Child Left Behind.”).


33. Id. § 7861(b)(1)(C).

34. Id. § 7861(b)(1)(E).

35. Id. § 7861(e)(2).

36. Id. § 7861(e)(1).

37. NCLB Waivers: A State-by-State Breakdown, EDUC. WK., http://www.edweek.org/ew/section/infographics/nclbwivers.html (Updated February 25, 2014) [hereinafter State-by-State Breakdown]. “The Obama administration announced in 2011 it would award waivers under the No Child Left Behind Act to states that agreed to adopt certain education ideas, such as teacher evaluations tied to student test scores. In exchange, states would get flexibility from some of the core tenets of the law, such as that 100 percent of students be proficient in math and reading by 2014.” Id.
Waivers are problematic precisely because they are not long-term solutions. Some commentators argue that waivers “undermine the progress . . . made toward accountability” by failing to improve the implementation of NCLB itself. This note develops an altogether different critique: waivers act as a gateway for racial discrimination, allowing states to set different, race-based achievement goals between students, and in turn signal that African Americans and Latinos are inferior or less-capable learners.

C. The Recent Advent of Race-Based Achievement Goals

Racial classifications in schools are not new: they have been used both successfully and unsuccessfully and are reviewed by courts on a case-by-case manner. Historically, the most well-known case on the use of racial classifications in education is Brown v. Board of Education. In Brown, the Supreme Court unanimously held racial discrimination in public education unconstitutional, concluding once and for all that separate was not equal. Brown’s most profound (and perhaps most debated) insight was segregation’s psychological impact on Black students, “generat[ing] a feeling of inferiority as to their status . . . that may affect their hearts and minds in a way unlikely ever to be undone.” In the recent judicial era, the Court tackled the use of racial classifications in higher education cases like Grutter v. Bollinger, Gratz v. Bollinger, Fisher v. Texas, and in the hotly debated elementary school decision Parents Involved in Community School v. Seattle School District No. 1. In the spirit of Brown, fervently scrutinizing race-based academic goals is necessary as they potentially carry a similar sting of ‘racial inferiority.’

In October 2012, Florida became the most recent state coming under fire for implementing race-based academic goals, stirring up a hotbed of national controversy. For example, by 2018, Florida will require 74 percent of African-American, 88 percent of Caucasian, 81 percent of Hispanic, and 90 percent of Asian students to be proficient in math and reading. Florida is only one of many states following this trend. In total, as of March 2013, twenty-three states approved for
waivers, including Florida and the District of Columbia, use race-based achievement goals. Only twelve states maintain the same target for all students.

1. Arguments in Favor of Race-Based Achievement Goals

Some supporters argue that race-based achievement goals realistically address the achievement gaps between ethnic groups, mainly between African Americans and others. A persistent achievement gap exists between African American students and their White counterparts. Through the use of race-based goals, states can take an “honest look” at the different starting points among students. For example, since NCLB’s conception, many educators incorrectly assumed that all children began from the same place educationally. States should have the option of exploiting the inherent flexibility of waivers in order to eliminate the achievement gap.

Proponents argue that race-based proficiency goals help struggling minorities by holding school districts accountable, requiring schools to accelerate academic progress without decreasing expectations for minorities. Although the rates at which students reach proficiency varies, the end goal for each student is the same: complete proficiency. The result, not the means, is what matters.

References


49. State-by-State Breakdown, supra note 37. Oregon, Arizona, Idaho, Ohio, Colorado, Louisiana, Michigan, Missouri, Nevada, New Mexico, South Carolina, and Oklahoma (with Wisconsin setting the same goal in 2017 for all different targets). Id.

50. See Martin & Valencia, supra note 26 (quoting Pam Stewart, Florida Department of Education’s commissioner, “...[I]t is very important for us to look at where our students are. We have very ambitious goals overall. If only our critics would look at how far we are looking at moving subgroups in that particular indicator.”).


52. See Sangha, supra note 46 (quoting Daren Briscoe, spokesperson for the U.S. Department of Education, “What Florida is being permitted to do is say ‘let’s take a look not at where we want to be but let’s take an honest look at where students are starting out from.’”).

53. See McNeil, supra note 1, at 1–2 (quoting Arne Duncan, Secretary of U.S Department of Education, “The fact is, many educators didn’t take NCLB seriously because it assumed all children start from the same place and learn at the same rate. That’s just not reality.”).

54. Emily Richmond, Are Schools Setting Achievement Goals Based on a Student’s Race?, NAT’L J. (Nov. 20, 2012), http://www.nationaljournal.com/thextra/small/education/are-schools-setting-achievement-goals-based-on-a-student-s-race-20121120 (quoting Amy Wilkins of Ed Trust, commenting on the misunderstanding of race-based achievement goals, “[Race-based goals] hold school and districts accountable for accelerating academic progress, not diminishing expectations for any individual student or groups of students.”). She also indicated that low income and students of color “get less of everything that matters” and are being “poorly served by their schools.” Id.

55. See McNeil, supra note 1, at 3 (quoting U.S. Secretary of Education, Arne Duncan, “Personally, I am less concerned about performance targets and goals . . . than I am about getting
Accordingly, because the result is what matters, race-based achievement goals can help close the achievement gap by focusing resources on minorities.\(^\text{57}\) Moreover, race-based goals are not permanent solutions but time-sensitive provisions that will exist only for a designated period of time.\(^\text{58}\)

Proponents of race-based achievement goals also argue that these goals are in line with a stated purpose of NCLB: closing the racial achievement gap. NCLB's statement of purpose lists “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students . . . and their more advantaged peers” as a legitimate goal.\(^\text{59}\) In turn, race-conscious remedies like race-based academic goals are acceptable if they “might help boost achievement of the under-performing group.”\(^\text{60}\) By setting different standards for each race, policy makers recognize the histories of discrimination and impacts upon particular ethnic groups like African Americans.\(^\text{61}\)

2. Arguments Against Race-Based Achievement Goals

Opponents of race-based standards, however, argue that these goals normalize the idea that certain students of color are incapable of learning at rates similar to other children, and in turn are academically inferior.\(^\text{62}\) All children can learn regardless of their ethnicity or background. Setting lower bars for certain subgroups tells some children they must be inherently inferior.\(^\text{63}\)

\(^\text{57}\) Sangha, supra note 46 (quoting Amy Wilkins, VP of the Education Trust, “To meet these goals for Latino and African-American students, schools will have to finally and quite deliberately focus more attention and resources on them.”).

\(^\text{58}\) See Richmond, supra note 54 (citing Carla O’Connor, Associate Professor at the School of Education, University of Michigan, noting that because NCLB assumed all students would perform comparably, race-based achievement goals “suggest not all kids have that ability, and we shouldn’t even try . . . [o]nce we shift to different standards, we’re institutionalizing the notion that’s not even feasible.”); see also Martin & Valencia, supra note 26. But see McNeil, supra note 1, at 1–2 (reiterating a general consensus that NCLB’s 100 percent proficiency goal is “unworkable.”). The “message has changed from all students . . . achiev[ing] proficiency to one that is different, and seemingly more realistic: [a]cademic goals can vary, even by subgroup, as long as states significantly close achievement gaps.”) Id.
Additionally, many commentators have noted that the real issue stems from a lack of adequate resources. NCLB is insufficiently funded, a fact acknowledged by President Barack Obama. As long as children of color are “over-represented in inadequately funded schools,” the lack of funding “contributes in critical ways to racial disparities in achievement that could actually be exacerbated by NCLB.” Therefore, the focus should be on schools’ lack of finances needed to meet NCLB’s standards. Many scholars suggest the best method of ensuring minorities meet their school’s AYP includes directing federal funds towards those students because state revenue shortages have exacerbated insufficient funding.

A different group of critics see race-based standards as inherently paradoxical. While formally setting lower standards for Blacks and Hispanics, in reality, the plan effectively requires more improvement from these traditionally, lower performing groups. In Florida, for example, the percentage of Black students who must score at or above grade level must increase 36 percent from the previous year, translating into an overall 94.7 percent increase. Whereas, the percentage of students are all the same. Id. (emphasis added).

64. See, e.g., Richmond, supra note 54 ("Minority students are not just scoring lower than their white peers on high-stakes tests; they are also getting less access to the most qualified teachers, the best schools, and the most expansive academic opportunities."). Joseph O. Oluwole & Preston C. Green, No Child Left Behind Act, Race, and Parents Involved, 5 HASTINGS RACE & POVERTY L.J. 271, 295 (2008) (noting the actual differences between funds promised by NCLB versus funding actually received); Goodwin Liu, Interstate Inequality of Educational Opportunity, 81 N.Y.U. L. REV. 2044, 2061–63 (2006) (stating that the differences in education vary among state due to student demographics and differences in regional cost); Shannon K. McGovern, Note, A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy, 86 N.Y.U.L. REV. 1519, 1546 (2011) (noting increased federal funds will help with state inequalities, though not sufficient in of itself); Jamie Gullen, Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should be Put Back on the Reform Agenda, 15 U. PA. J.L. & SOC. CHANGE 251, 255 (2012) (noting the achievement gap is the widest in high segregated and poverty stricken schools).

65. See McNeil, supra note 1, at 3–5 (quoting President Barack Obama, “But the problem that [NCLB] had was, because it was under resourced . . . a lot of minority kids were coming into school, already behind . . . [schools] weren’t even coming close to meeting these standards.").

66. See Leson, supra note 51, at 285. See also Maurice R. Dyson, De Facto Segregation & Group Blindness: Proposals for Narrow Tailoring Under A New Viable State Interest in PICS v. Seattle School District, 77 UMKC L. REV. 697, 725 (2009). Other important school resources for race-conscious methods to be effective include “availability or lack thereof of special instructional methodologies (e.g., accelerated learning, curriculum compacting and multi-grade grouping), lab opportunities (e.g., computer, language, and science labs), or extracurricular performance activities.” Id.

67. See Dyson, supra note 66, at 711 ("Thus, if race-conscious remedies are to be effective, they cannot only target students of color, but also must attempt to allocate resources through the use of race-conscious remedies to students of color in a more nuanced fashion . . . ."). See also Martin & Valencia, supra note 26 (quoting Dennis Parker of ACLU, "If the kids aren’t getting the resources to address the standards, you should address that, but to lower standards really sends a bad message to children of all age . . . [t]he penalties contained in the statute may finally convince state legislatures to adopt voluntarily race-conscious school funding policies and to commission adequacy studies that include race variables."); see also Sangha, supra note 46 (quoting Amy Wilkins, VP of the Education Trust, “To meet these goals for Latino and African-American students, schools will have to finally and quite deliberately focus more attention and resources on them.").

68. See, e.g., Farmer, supra note 51, at 454–55; Preston C. Green III et al., Race-Conscious Funding Strategies and School Finance, 16 B.U. PUB. INT’L. L. J. 39, 53 (2006) ("[T]he penalties contained in the statute may finally convince state legislatures to adopt voluntarily race-conscious school funding policies and to commission adequacy studies that include race variables."); Dyson, supra note 65, at 711.

69. See O’Connor, supra note 58.

70. Id. ("[T]he percentage of white students scoring at or above grade level on the [state exam] must increase by 19 percent[. . . . [t]hat’s a 27.5 percent increase. The percentage of black students
White students who must score at or above grade level must increase 19 percent from the previous year, which translates into an overall 27.5 percent increase. In turn, policy makers overlook the fact that race-based goals require more from lower performing groups than from their higher performing counterparts in a short time span, seemingly contradicting the underlying assumption(s) for setting lower goals for Blacks and Latinos. Thus, race-based achievement goals are imperfect largely because of how the numbers are presented. And in order to meet these goals, within the short designated period, and usually with fewer resources, schools will have to "finally and quite deliberately focus more attention and resources" on Latino and African-American students. However, a major concern is whether schools will follow through and designate resources to achieve these proficiency goals.

**II. LEGAL ANALYSIS**

A. **Strict Scrutiny in Race and Public Schools**

The Supreme Court is extremely suspicious of any racial classification used by the government: "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." However, "[i]t is not to say that all such restrictions are unconstitutional . . . [but] are subject . . . to the most rigid scrutiny." Nor does it matter if these classifications are beneficial: they are always subject to strict scrutiny.

As explained in *Adarand v. Pena*, in racial contexts, courts are required to apply three principles: skepticism, consistency, and congruence. Skepticism requires that any racial classification receive the "most searching examination;" consistency deals with the appropriate standard of review under the Equal Protection clause and that all racial classifications are "strictly scrutinized"; and finally, congruence requires that the application of Equal Protection analysis under the Fifth Amendment applies similarly to the Fourteenth Amendment. Therefore, "any person, of whatever race" has the "right to demand that any government actor" must

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71. *Id.*
72. *Id.* One assumption though not conclusive, views minority students as unable to learn at comparable rates to other students. See *supra* Part I.C.
73. O'Connor, *supra* note 58 ("[p]art of the problem is how the Department of Education presented the numbers.").
74. *Id.* (quoting Amy Wilkins of the Education Trust).
75. Korematsu v. US, 323 U.S. 214, 217 (1944); *see also* Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (Stewart, J., dissenting) ("Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.").
76. *Id.*
78. *Id.* at 223-34.
80. *Id.* at 224 (citing *Croson*, 488 U.S. at 494 and Regents of Univ. of Cal. v. Bakke, 438 U.S.265, 289-290 (1978)).
81. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976)).
"justify any racial classification subjecting that person to unequal treatment under strictest judicial scrutiny."82

The strictest standard of review requires race classifications to be narrowly tailored to achieve the state's compelling interest.83 Courts review benign classifications under strict scrutiny because without a more searching judicial inquiry, judges would have difficulty determining "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."84 In turn, strict scrutiny for "race-based measures" require that "the means chosen 'fit' [the state's] compelling goal so closely that there is little or no possibility that the motive for classification [is] illegitimate racial prejudice[s] or stereotype[s]."85

Therefore, even if courts recognize states' race-based achievement goals as benign or beneficial they are still subject to strict scrutiny. This Article argues that race-based achievement goals fail strict scrutiny.

B. Compelling State Interests and Racial Classification in Public Schools

In the school setting, the Court has recognized two government interests as compelling: (1) diversity and (2) remedying past discrimination.86 Regarding the first, diversity is a compelling interest only in higher education, i.e. undergraduate or graduate schooling.87 For the second interest in elementary and secondary schools, the state's harm must originate from segregation in order to satisfy remedying past discrimination.88 Where the Court is willing to accept the interest of remedying past discrimination, this is limited only to de jure segregation.89 The Court defined de jure segregation as "'carry[ing] out a governmental policy to separate pupils in schools solely on the basis of race,'" which does not include racial imbalance as a consideration.90 Unlike de jure segregation, de facto segregation, or racial imbalance, can result from such "innocent private decisions" as voluntary housing choices not linked to unconstitutional means.91

For example, in Parents Involved v. Seattle School District, a defendant school district failed to present evidence demonstrating Seattle districts were ever segregated by law or subject to court-ordered desegregation decrees.92 According to the Court, the districts that were initially segregated, and thus subject to court decree, could no longer use the goal of remedying past discrimination as a viable interest because these districts were no longer segregated.93

82. Id. at 224.
84. Richmond v. Croson, 488 U.S. at 493.
85. Id.
87. Id.; Grutter, 539 U.S. at 328.
88. Parents Involved, 551 U.S. at 721.
89. Id. at 749-50.
90. Id. 749-50 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) and Monroe v. Board of Comm'rs of Jackson, 391 U.S. 450, 452 (1968)).
91. Id. (citing Swann, 402 U.S. at 25-26, 31-32; Missouri v. Jenkins, 515 U.S. 70, 115-16 (1995) (Thomas, J., concurring); and Freeman, 503 U.S. at 494)).
92. Id. at 720.
93. Id. at 720-21.
Using this precedent, states could argue that a compelling interest exists in using race-based achievement goals to rectify past discrimination. Ultimately, however, such a conclusion depends highly on each school's racial history. If a school district lacks a segregated history directly linked to de jure segregation, no remedial measures are available to the district. As the Court noted, racial imbalance through 'innocent private decisions' or de facto segregation is not unconstitutional. Similarly, if a district once had a history of segregation, yet came to unitary status either in the past or recently, such history is no longer relevant. Whether a district under NCLB could use past discrimination as a compelling state interest depends mainly on its own, particular desegregation history. Thus, it appears unlikely that racial classifications within NCLB could stand for every state or LEA based on the compelling interest of rectifying past racial discrimination.

C. Alternative Compelling State Interests that Potentially Justify Racial Classifications

Let us now assume that remedying past discrimination does not qualify as a compelling interest. States could argue that race-based achievement goals should be considered a compelling interest in achieving NCLB's proficiency goals because of the judicial recognition of education's importance, the fact of executive approval, and the difficulties of implementing NCLB.

States could argue that educating America to meet NCLB's reading and math proficiency is a compelling state interest. Existing case law does not recognize education as a fundamental right. However, many advocates urge for a federal right to education. The Supreme Court in 1952 described public school as a "principal instrument in awakening the child to cultural values, in preparing [children] for later professional training, and in helping [children] to adjust normally to [their] environment." The Court in Brown viewed education as "perhaps the most important function of state and local governments" as demonstrated by compulsory education laws. Public education is so important because "some degree of education is necessary to prepare citizens" to participate "effectively and

94. Diversity as a compelling interest will not be discussed further in this note because it is unlikely a state would be able to successfully claim race-based achievement goals were instated to increase diversity in elementary schools.

95. Parents Involved, 551 U.S. at 749–750.
96. Id. at 720–21.
100. Id.
intelligently" in the United States' political process.\textsuperscript{101}

Additionally, the Court has recognized public education as a vital instrument for inculcating democratic values into America's youth, which supports the use of race-based goals to meet NCLB's academic goals.\textsuperscript{102} Even if public education is not a "right" granted by the Constitution, education has been recognized as necessary for "sustaining our political and cultural heritage" of America, through educating the youth.\textsuperscript{103}

Moreover, I suggest a novel argument that the complex nature of NCLB's implementation encourages the Court to view NCLB's proficiency goals as a compelling state interest. Under the original NCLB Act, states were unable to achieve complete proficiency by 2014. Since then, however, the U.S. Secretary of Education, an agent of the Executive, has empowered states to utilize waivers' flexibility to make necessary adjustments.

NCLB's difficulty lies within the structure in which it is embedded: dual federalism.\textsuperscript{106} Depending on the scholar, NCLB has been described as a program implemented through either "cooperative" or "coercive" federalism.\textsuperscript{107} Cooperative federalism focuses on the close relationship between state and federal governments.\textsuperscript{108} Under cooperative theory, local governments implement national policy while simultaneously designing and implementing the program in a manner addressing "the needs and identity" unique to the locality.\textsuperscript{109} By contrast, coercive federalism focuses on the federal government's increased use of statutory mandates, conditional grants, preemption and administrative regulations in order to compel states' compliance with federal initiatives.\textsuperscript{110} In turn, the federal government seeks "congressional authority to directly control education."\textsuperscript{111} Therefore, NCLB is a federal policy caught between these two paradigms and this, in turn, explains the difficulty of its effective application.\textsuperscript{112}

\begin{itemize}
\item \textsuperscript{101} Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).
\item \textsuperscript{102} See Ambach v. Norwich, 441 U.S. 68, 76–77 (1979) (stating that public schools are important "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests."); Plyler v. Doe, 457 U.S. 202, 221 (1982) ("education has a fundamental role in maintaining the fabric of society."); see also Brown, 347 U.S. at 493.
\item \textsuperscript{103} Plyler, 457 U.S. at 221-22.
\item \textsuperscript{104} 20 U.S.C. § 7861(a).
\item \textsuperscript{105} See Powell, supra note 24, at 154.
\item \textsuperscript{106} See Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 IOWA L. REV. 243, 246 (2005). "Dual federalism refers to the concept that the state and national governments enjoy exclusive and non-overlapping spheres of authority." Id. (citing Robert Post, Federalism in the Taft Court Era: Can It Be "Revived"?, 51 DUKE L.J. 1513, 1526–37 (2002)).
\item \textsuperscript{107} McGovern, supra note 64, at 1523–24.
\item \textsuperscript{108} See Schapiro, supra note 106, at 284.
\item \textsuperscript{109} Patricia E. Salkin, The Quiet Revolution and Federalism: Into the Future, 45 J. MARSHALL L. REV. 253, 259 (2012).
\item \textsuperscript{110} See McGovern, supra note 64, at 1523 (citing Paul Posner, The Politics of Coercive Federalism in the Bush Era, 37 PUBLIUS 390, 391 (2007)).
\item \textsuperscript{111} Robinson, supra note 98, at 1726; see also Daniel J. Elazar, Cooperative Federalism, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUALITY IN AMERICAN FEDERALISM 65, 79 (Daphne A. Kenyon & John Kincaid eds., 1991); Joseph F. Zimmerman, National-State Relations: Cooperative Federalism in the Twentieth Century, 31:2, PUBLIUS, 15, 15, 17–18, 27 (Spring 2001).
\item \textsuperscript{112} See McGovern, supra note 64, at 1523–24; see also Kamina Aliya Pinder, Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy, 39 J.L. & EDUC. 1, 11–14 (2010) (noting that while NCLB is cooperative federalism, "most state and local
In conclusion, as an alternative to remediating past discrimination as a compelling interest, which would likely be limited to a number of states, the Court’s recognition of educating students to meet NCLB’s goals as a compelling state interest would grant more states legal standing to defend their interests.

D. Race-Based Achievement Goals are Not Narrowly Tailored

Even assuming the Supreme Court would find NCLB’s proficiency goal to be a compelling state interest, the use of race-based achievement goals is unconstitutional because it is not narrowly tailored to implement NCLB. Under strict scrutiny, racial classifications are upheld only if they are “narrowly tailored” to achieve the compelling government interest. The Court has noted that “context matters” when reviewing race-based government action under the Equal Protection Clause.

1. Race-Based Achievement Goals are Not Sufficiently Tailored

Proponents of race-based achievement goals should not confuse the U.S. Department of Education’s granting of waivers, which demonstrates the Executive branch’s approval of state action, as conferring constitutionality. Under the separation of powers, the judiciary determines whether state and federal actions are constitutional, not the Executive or the Legislature. The U.S. Department of Education’s approval of states’ waivers and use of race-based achievement goals, while illustrating executive support, does not demonstrate constitutional legitimacy.

African and Latin American students are capable of learning at rates comparable to any other race. While proponents define race-specific goals as benevolent discrimination, Justice Clarence Thomas has trenchantly observed that “[t]he Constitution does not, however, tolerate institutional devotion to the status quo . . . when such devotion ripens into racial discrimination.” Moreover, “blacks [and Latinos] can achieve in every avenue of American life without the meddling,” in this case, of state legislatures. And unlike Justice Anthony Kennedy’s concurring opinion in Parents Involved where race-conscious remedies could avoid strict scrutiny, these race-based achievement goals “lead to different treatment based on . . . classification[s] that teach each student he or she is to be defined by race.” Based on these considerations, race-based achievement goals are not sufficiently tailored to implement NCLB’s proficiency requirements.

education officers would assert that NCLB is far more coercive than it is collaborative”); James S. Liebman & Charles F. Sabel, A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

113. See Croson, 488 U.S. at 493.

115. See ESEA Flexibility, supra note 25 and accompanying text.

116. Marbury v. Madison, 5 U.S. 137, 177 (1803). “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” Id.

117. Grutter, 539 U.S. at 350 (Thomas, J., dissenting).

118. Id.

119. Parents Involved, 551 U.S. at 789.
Moreover, NCLB’s reading and mathematics proficiency goals can be implemented without using race-based academic standards. NCLB’s difficulty stems from the dual federalism structure in which it is embedded.\textsuperscript{120} By taking the best of the dueling cooperative and coercive federalism paradigms,\textsuperscript{121} the federal government should become more active in states’ affairs regarding variances among social, racial, and economic differences present within states’ school-aged population.\textsuperscript{122} Similarly, differences in states’ school-aged population exacerbate financial funding problems.\textsuperscript{123} For example, states with low finances have greater concentrations of low-income, minority, and English language learner students than states that do not.\textsuperscript{124} Problems with “fiscal capacity and equality” are “mutually reinforcing” because disadvantaged students require more funds for special services, including “English-language teachers, reduced-price lunches, and tutoring . . . than revenue-poor states can provide.”\textsuperscript{125} In turn, alternative solutions that address NCLB’s underlying problems, like funding inequality, would more effectively address the achievement gap without resorting to unconstitutional racial classification. Thus, race based-achievement goals are not narrowly tailored to achieve NCLB’s proficiency goals.

Race-based achievement goals fail to address NCLB’s underlying problems. For instance, close to sixty years after \textit{Brown}, public schools are more segregated than before, but through de facto as opposed to de jure segregation.\textsuperscript{126} Segregation in public schools is not a problem of the past. NCLB’s school choice provision, which supposedly allows students to transfer from low-performing to high-performing schools, could theoretically serve as an indirect remedy to continued segregation.\textsuperscript{127} In reality, however, this has not been the case.\textsuperscript{128} To ensure such provisions are implemented commentators suggest a right of action through judicial or administrative proceedings,\textsuperscript{129} functioning similarly to the enforcement mechanisms

\textsuperscript{120} See Schapiro, supra note 106, at 246.
\textsuperscript{121} See supra text accompanying notes 105-110.
\textsuperscript{122} See McGovern, supra note 64, at 1545.
\textsuperscript{123} Id. at 1544-45 (noting that student performance is strongly dependent on a state’s ability to fundraise). There exists no “clear” federal cause of action addressing “interstate inequality.” Id. at 1545. See also \textit{Rodrigue}, 411 U.S. at 37 (1973) (holding that education is not a fundamental right and furthermore federal government should not closely scrutinize the state government’s intrastate education inequality).
\textsuperscript{124} See Liu, supra note 64, at 2061-62.
\textsuperscript{125} See McGovern, supra note 64, at 1545.
\textsuperscript{126} See Hewitt, supra note 21, at 191 (2011) (citing James E. Ryan, \textit{The Real Lessons of School Desegregation, in SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION} 73 (Joshua M. Dunn & Martin R. West eds., 2009)); see also Sabrina Zirkel & Nancy Cantor, \textit{50 Years After Brown v. Board of Education: The Promise and Challenge of Multicultural Education}, 60 J. SOC. SCI., 1, 5 (2004) (noting that back in 2000, due to the demographic changes indicated by the 2000 census, de facto segregation is less possible than it used to be).
\textsuperscript{127} Hewitt, supra note 21, at 191 (citing Richard Lee Colvin, \textit{Public School Choice: An Overview, in LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS} 10, 13, (Frederick M. Hess & Chester E. Finn, Jr., eds., 2004)).
\textsuperscript{128} See Dyson, supra 66, at 729–31 (discussing school districts’ anxiety to “promot[e]” transfers of “special-needs minority students to high-performing schools” despite their right to, from schools “in need of improvement.”) Receiving schools have “incentive[s] to discourage at-risk minority student transfers” as a means “to omit” them from their AYP).
\textsuperscript{129} See Hewitt, supra note 21, at 193 (“the reauthorized law should offer parents and students the opportunity to enforce their rights to key provisions through administrative and/or judicial proceedings, particularly in federal court.”).
following Brown.  

Also, meaningful solutions to NCLB outside of unconstitutional race classifications include increasing the federal government’s role in the oversight of state expenditures to prevent NCLB funds from being used inappropriately.  

As a complement to this, the federal government could distribute federal funds to schools in “inverse proportion” to their fiscal ability—most similarly to federal Medicaid funds. Moreover, state education departments are limited in funding, so they are forced to focus “compliance capacity at the expense [of] policy expertise;” while a strong federal role is necessary, state cooperation is equally important. Again, the complexities of NCLB are exacerbated by the role of our dual federalist system.

Otherwise, retaining effective educators is perhaps the most feasible solution. The government can incentivize the best and brightest—those with a “personal sense of responsibility and compassion”—to teach at low performing schools through loan forgiveness programs. If not, continued efforts “by the [socioeconomically] privileged to maintain their privilege” will continue to exist and erect barriers against equal education. Having quality teachers is just as important. Ineffective teachers not only decrease student achievement but also correlate with increased dropout rates. Despite NCLB’s provision calling for “highly qualified” teachers, Congressional concessions to expand the definition has done more to hurt than help low-income, minority communities.

And at a structural level, NCLB lacks a holistic approach to addressing problems that typically fall outside the sphere of traditional education. Currently, schools require “essential programs and services” which include “not only adequate-school based sources . . . but also the full range of comprehensive services” like early education, extended learning time, health services, and family support.

130. Id.

131. See McGovern, supra note 64, at 1554; see generally Ryan, supra note 22, at 932 (discussing incentives for states to weaken test evaluations and superficially inflate test scores).

132. Goodwin Liu, National Citizenship and Equality of Educational Opportunity, 116 YALE L.J. POCKET PART 145, 150 (2006). Goodwin Liu suggests a three method NCLB policy reform: (1) Congressional approval for non-government organizations to develop national education standards and provide incentives for voluntary adoption by states, (2) Congress should reform Title I to allocate aid based on child poverty, adjusted for regional cost differences that are not proportional to each state’s per-pupil spending, and (3) federal government should finance interstate disparities and establish a national baseline for educational opportunity that no state or district may fall below). Id.

133. See McGovern, supra note 64, at 1547 (citing Paul Manna, SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA, 80, 107–08, 113 (2006)).


135. Id.

136. Id. at 193 (citing Spyros Konstantopoulos, Effects of Teachers on Minority and Disadvantaged Students’ Achievement in the Early Grades, 110 ELEMENTARY SCH. J. 92, 93 (2009)).

137. See Hewitt, supra note 21, at 189 (citing Julian Vasquez Heilig et al., Alternative Certification and Teach For America: The Search for High Quality Teachers, 20 KAN. J.L. & PUB. POL’Y 388, 409–10 (2011) (noting that Congress’ definition change of “highly qualified” teachers for states potentially allows those who are not state certified to disproportionately impact minority, low-income, and ESL and disabled students); see also Michael A. Rebell, The Right to Comprehensive Educational Opportunity, 47 HARV. C.R.-C.L. L. REV. 47, 67–68, 116 (2012) (noting that “essential” resources for low-income students include effective teachers, currently there is no federal standard and “highly qualified teachers” are only required to pass minimum competency state certification exams).

138. See Rebell, supra note 137, at 73–74; see also Dyson, supra note 134, at 233.
requires schools to have the necessary resources. A more individualized and tailored education that effectively addresses fundamental, broad-ranging needs of underperforming and predominantly majority-minority schools is needed. Improvements to standardized testing not only include removing "psychological threats embedded in academic environments," but also removing "other barriers to achievement including objective biases [and] the effects of poverty."

Finally, Congress needs to revise aspects of NCLB because it is plagued with loopholes that undermine NCLB's attempt to address funding disparities between schools within the same district. For instance, NCLB requires school districts to equitably fund all public schools on an "intradistrict basis." NCLB allows districts to apply for supplemental funds to address the educational needs of schools with student concentrations living in poverty, but only if districts demonstrate funding comparability between schools. However, a 'comparability loophole' in NCLB allows districts to maintain funding disparities, which undermines the very purpose of the comparability provision. For example, resource inequities between schools within the same district allows veteran teachers paid at higher salaries to move to low-poverty schools, "leaving novice teachers" who earn less to concentrate in high-poverty schools.

In conclusion, race-based achievement goals are not narrowly tailored as demonstrated by case law precedent and because alternative solutions exist that more effectively address the achievement gap. Moreover, race-based achievement goals fail to address the true underlying problems of NCLB, mainly a lack of funding and inequitable distribution of school resources.

2. The Reply: Race-Based Achievement Goals are Narrowly Tailored

Opponents of race-based achievement goals fail to consider the context surrounding these goals and that their temporary nature makes them narrowly tailored. These goals are comparable to sunset provisions in race-conscious

139. See Hewitt, supra note 21, at 184 (stating that schools with fewer resources are unable to retain the best teachers).
140. See Dyson, supra note 134, at 233.
142. See Hewitt, supra note 21, at 184.
143. Id.
145. Hewitt, supra note 21, at 185. Accordingly, these practices add up to hundreds of thousands of dollars at the district level. Id.; see also Roza, supra note 144, at 69–70.
146. See supra text accompanying notes 17-19.
college admissions, increasing the probability that race-conscious methods will be upheld.\textsuperscript{147} For example, race-conscious policy admissions consider the use of race in admitting students into universities and colleges, but require that the use of race be limited to a period of time, i.e., through the use of sunset provisions.\textsuperscript{148} Thus, the short span of these goals lends themselves to constitutionality.

Ultimately, states are “laboratories for experimentation” which must be able “to devise various solutions where the best solution is far from clear.”\textsuperscript{149} Therefore, states must have the opportunity to test out these goals, if only for a limited time. Many states applied for waivers to receive relief from the 2014 deadline because of NCLB’s challengingly complex nature.\textsuperscript{150} The U.S. Department of Education approved states’ waivers,\textsuperscript{151} in turn demonstrating federal support for race-based goals as a necessary expedient. In sum, given the difficulty surrounding NCLB’s implementation, race-based achievement goals are narrowly tailored to effectuate NCLB’s proficiency goals.

3. Not Narrowly Tailored: Reexamining the Potential Negative Impact of Race-Based Achievement Goals from a Psychology Perspective

However, even considering the proponents’ counter arguments, race-based achievement goals are still not narrowly tailored because they cause psychological harm and potentially exacerbate the achievement gap.

Paralleling Brown, race-based achievement goals are unconstitutional as evidenced by psychology studies of stereotype threat on African-American students.\textsuperscript{152} While acknowledging that states should be granted flexibility in implementing NCLB, the question remains to what extent. Some proponents argue results are more important than the means used to justify race-based achievement goals.\textsuperscript{153} However, policy concerns dictate a closer look at the psychological and emotional impacts of such decisions. A main concern for the Brown Court was racial segregation’s effect on African American students, with all nine Justices agreeing that segregation caused inferiority complexes among Black youth.\textsuperscript{154} Likewise, lowering achievement goals would have similar effects on African and Latin American youth today.

In the field of psychology, scholars have established that stereotypes of

\textsuperscript{147} See Grutter, 539 U.S. at 342 (noting that sunset provisions in college admissions have an end date terminating the racial policy). “Accordingly, race-conscious admissions policies must be limited in time.” Id.

\textsuperscript{148} Id. “In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”


\textsuperscript{150} See supra text accompanying note 19.

\textsuperscript{151} See supra text accompanying note 19.

\textsuperscript{152} See Brown, 347 U.S. at 494.

\textsuperscript{153} See McNeil, supra note 1, at 3 (quoting U.S. Secretary of Education, Arne Duncan “Personally, I am less concerned about performance targets and goals . . . than I am about getting results—and at the end of the day, the result that matters most is whether kids are learning and gaps are narrowing.”).

\textsuperscript{154} See supra text accompanying notes 41-42.

\textsuperscript{155} See supra Part I.C.2.
minority students can contribute to their poor academic performance. As previously mentioned, Black students have consistently scored lower than their White counterparts on standardized achievement tests. The media perpetuates this perception of Black students and in turn reinforces a view of them as lacking the intellectual ability to perform and succeed on standardized tests. Once these harmful images are released Black students can internalize them, adversely impacting their school performance.

Stereotype threat can be defined broadly as the process by which members of a "stigmatized group" come to associate themselves with negative stereotypes tied to their group as a whole. Accordingly, these stigmatized groups become concerned with giving "credence" to their group's negative stereotypes through poor academic performance. In other words, Black students experience "performance-disruptive apprehension" regarding the possibility of confirming "a negative racial inferiority" either "in the eyes of others, [their] own eyes, or both at the same time."

Research has indicated that even academically successful Black college students can be affected by what is known as stereotype threat. While stereotype threat is neither the sole nor complete reason for Black students' lower test scores, when framed in the context of state approved race-based achievement goals, it is possible and reasonable to see the connection between them.

In the case of minority students like African Americans, stereotype threat manifests itself in the classroom as well as test-taking settings and interferes with or impedes their academic performance. Generally, these are situations where a stereotyped group's intellectual ability is relevant. In turn, Black students (or other

156. Steele, supra note 4, at 613 (revealing the effects of stereotypes of women and African Americans); see generally Claude M. Steele & Joshua Aronson, Stereotype Threat and the Intellectual Test Performance of African Americans, 69 J. PERS. & SOC. PSYCHOL. 797 (1995).
157. See Steele, supra note 4, at 615; see also Oluwole, supra note 64, at 280-82.
159. See id. at 95.
160. Id. at 97; see also Patricia Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERS. & SOC. PSYCHOL. 5,12, 15 (1989) (noting that people who report having no negative biases about African Americans can make prejudiced assumptions, which can only be counteracted by active recognition on their parts).
161. Walton, supra note 141, at 1137 (comparing ACT, GPA scores of American women and Black students with White European students from the seventh grade to the collegiate level).
162. Joshua Aronson et al., Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence, 38 J. EXPERIMENTAL SOC. PSYCHOL. 113, 114 (2000).
165. See Steele, supra note 4, at 614; see also Kellow, supra note 158, at 95 ("[s]tereotypes related to testing are especially important to consider in this age of accountability given the unprecedented focus on standardized tests as a means to gauge student progress.").
166. See Aronson, supra note 162, at 160.
minorities similarly situated) bare an “extra cognitive and emotional burden” which is not applicable to people “for whom the stereotype does not apply.” Regardless of the socioeconomic status of a Black student, pervasive “rumors of inferiority” cause Black youth to internalize negative stereotypes, leading to self-fulfilling prophecies of low performance. Therefore, stereotypes have actual effects on minority students in the standardized testing arena.

Nevertheless, according to a 2008 study of American high school freshmen, while Blacks reported lower expectations of success in comparison to their White counterparts, they did not report lower self-perception in their ability to succeed on standardized tests. This seems to suggest that while African-American students are less optimistic regarding how well they will perform, there is less doubt concerning their ability to succeed. As such, freshman African-American students are aware of the negative stereotypes and in turn these stereotypes affect their expectations of success on standardized tests. It is interesting that, where test administrators fostered an environment that removed stereotype threat African Americans performed equal to if not better than their White counterparts.

Race-based achievement goals are problematic because they continue to reinforce the perception that minorities like Blacks (and Latinos who are similarly situated) are unable to learn at rates similar to others. Once students begin to internalize these negative stereotypes test scores respond accordingly. While stereotype threat does not account for all the discrepancies between Black and White students on standardized testing, it is a key piece of the puzzle. It does not matter whether a student believes the stereotype to be true to be affected by it, only that he or she be aware of it. Other pieces of the puzzle include examining differences in educational and economic opportunities between these

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167. See supra note 4, at 615, 617 (discussing other psychological studies which also conclude that “rumors of inferiority” about Black students can become so pervasive that they are internalized) (citing Jeff Howard & Ray Hammond, Rumors of Inferiority, NEW REPUBLIC Sept. 9, 1985, at 17, 18-23). Minority student achievement gaps persist regardless of the socioeconomic differences of Black students. Id. at 615; see also Kellow, supra note 158, at 116 (noting that stereotype threat triggered by high-stakes, statewide standardized tests causes blacks to perform lower due to associations with negative stereotypes in academic achievement).

168. See Kellow, supra note 158, at 112–113 (emphasis added). “African American students reported lower proximal expectancies for success than White students (in the same condition) on the task-specific item (related to their spatial ability), but did not report lower self-perceptions of ability and expectancies for success in the domain of mathematics.” Id. at 112.

169. Id. at 112-13.

170. Id. at 99, 113 (emphasis added). But see Sackett, supra note 164, at 11.

171. See Walton, supra note 141, at 1137 (“[W]e obtained evidence for latent ability. In treatment conditions, African American students performed better at the mean level of prior performance than European American students.”).

172. See supra notes 42, 46 and accompanying text.

173. See supra Kellow, note 158, at 95.

174. See Sackett, supra note 164, at 11 (emphasis added) (expressing concern about the misrepresentation of Claude Steele and Joshua Aronson’s 1995 stereotype threat experiment). “[The misrepresentation] has the potential to wrongly lead to the belief that there is less need for research and intervention aimed at a broad range of potential contributing factors, such as differences in educational and economic opportunities of African American and White youth.”) Id.

students, or put differently, looking at the standardized testing discrepancies comprehensively as opposed to through a narrow lens.\(^{177}\)

As viewed broadly from a consequentialist constitutional stance,\(^{178}\) setbacks in the education of minorities translate into problems for society at large.\(^{179}\) Essentially, constitutional consequentialists argue that individuals are "never morally required" to behave in a manner that "produces worse consequences."\(^{180}\) The goal is to "secure a state of affairs that is superior according to principles . . . in our practice [and] to alternatives.\(^{181}\) Democratic principles of liberty and equality are policy values "in the sense that debates over policy invoke them."\(^{182}\) Therefore a policy that promotes equality and liberty "usually commends its adoption."\(^{183}\)

Returning to the statistics, states with large numbers of failing schools end up paying for increased incarceration costs, higher crime rates, and less economic growth for a nation needing greater skilled labor.\(^{184}\) In 2005 for example, Columbia researchers determined that health-related losses for high school dropouts amounted to $58 billion a year with annual tax losses exceeding $50 billion.\(^{185}\) A one percent increase in high school graduation rates could reduce annual crime costs by $1.4 billion per year.\(^{186}\)

With this information framing the discussion around NCLB, race-based achievement goals have a strong potential to contribute to the stereotype threat that minorities like African Americans experience in academic settings. Regardless of the explanations given, states' use and the Executive branch's acceptance of race-based achievement goals suggest that Blacks and Latinos cannot perform at standards similar to Whites. States and the federal government have institutionalized second-rate expectations for Black and Latino students by setting lower reading and math proficiency goals. In turn, the stereotype that these minorities are unable to academically achieve is perpetuated.\(^{187}\) These perpetuations become internalized and a self-fulfilling prophecy of low performance results,\(^{188}\) contradicting the intended

\(^{177}\) See Sackett, supra note 164, at 11; see also Steele, supra note 4, at 616 (noting the structural and cultural threats to Black students' academic success).

\(^{178}\) See Philip Pettit, Consequentialism and Respect for Persons, 100 ETHICS 116, 119 (1989). "The consequentialist holds that the proper way for an agent to respond to any values recognized is to promote them: that is, in every choice to select the option with such prognoses that it is . . . the best gamble with those values." Id.

\(^{179}\) Dyson, supra note 134, at 231–232.

\(^{180}\) Ronald, Dworkin, In Praise of Theory, 29 ARIZ. ST. L.J. 353, 364 (1997). There are nuances to this theory that this note will not address.

\(^{181}\) See id.

\(^{182}\) Robert Cooter, Constitutional Consequentialism: Bargain Democracy Versus Median Democracy, 3 THEORETICAL INQ. L. 1, 3 (2002).

\(^{183}\) See Cooter, supra note 182, at 3.

\(^{184}\) Dyson, supra note 134, at 231–232. Opponents of "restorative school finance" may end up dealing with higher incarceration and crime rates and opponents of "educational tuition benefits" for undocumented immigrants may result in less economic growth in a nation needing more specialized skills. Id.


\(^{186}\) Id.

\(^{187}\) Kellow, supra note 158, at 95.

\(^{188}\) See id.
purpose of race-based achievement goals: increasing reading proficiency in these targeted groups. These race-based goals are unconstitutional under the Equal Protection Clause because they are not narrowly tailored to achieve the compelling state interest of achieving NCLB’s complete educational proficiency.

III. CONCLUSION

Authors have already commented that NCLB in its current state is unconstitutional on grounds unrelated to the Equal Protection Clause. Compliance with NCLB causes states and schools to focus “obsessively” on annual student testing and shortsighted goals. While NCLB is a federal spending program, making states’ participation optional, Congress’s threat of withholding funds unconstitutionally coerces states to participate in NCLB. Additionally, because federal funding is inadequate to comply with NCLB, the law unconstitutionally directs each state’s educational policy. And, in practice, NCLB has already proven unworkable: states turned to waivers for flexibility in their attempts to satisfy NCLB’s proficiency goals. States continue to struggle with insufficient monetary resources needed to satisfactorily implement NCLB.

However, I argue that states’ use of race-based achievement goals are unconstitutional because they are not sufficiently and narrowly tailored to satisfy strict scrutiny. Race-based achievement goals fail to address the actual underlying issues: lack of funding, inadequate teachers, and poorly written legislation, to name a few. Studies in psychology demonstrating the problem of stereotype threat and its effects on Black students further support the claim that race-based achievement goals are not narrowly tailored. Moreover, race-based achievement goals can reasonably contribute to stereotype threat. While stereotype threat is not the sole reason for consistent achievement gaps between Black and White students, states and courts

189. See supra Part I.C.1.
190. This note will not debate the validity of these claims, nor mention all of them, but will merely rectie what some scholars have previously stated on the issue.
192. Consiglio, supra note 191, at 368.
194. See supra text accompanying note 19.
should consider this threat as further support for why race-based goals are not precisely tailored to implement NCLB's proficiency goals. Accordingly, race-based achievement goals are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.