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Article: No Child Left Behind: Why Race-Based Achievement Goals Violate the Equal Protection Clause

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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 Article will argue 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 such 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.

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1 20 U.S.C. § 6311 (b)(2)(F)(2006). “Each State shall establish a timeline for adequate yearly progress [which] shall ensure that not later than 12 years after the end of the 2001–2002 school year, all students in each group … will meet or exceed the State's proficient level of academic achievement on the State assessments.” Id. See also Michele McNeil, 32 EDUC. Wk. 8, States Punch Reset Button With NCLB Waivers, 1, 1–2 (2012).
2 See McNeil, supra note 1, at 1–2. Subgroups include minorities, ESLs, and those with disabilities for example. 20 U.S.C. § 6301(2) (noting NCLB’s statement of purpose includes “meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children. . . .”). See also Id. §6311(b)(2)(C)(v)(II)(aa)–(dd).
Part I provides a short history of NCLB including some of the educational problems targeted and the states’ methods of implementation. Additionally, Part I will explain how states have used waivers to escape the inevitability of students failing 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 will argue that race-based goals violate the Equal Protection Clause because they are not the narrowest means of achieving NCLB’s proficiency requirements, which is supported by psychological studies on African American students. Lastly, Part III demonstrates the many equally-effective alternatives to race-based achievement goals.

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 high school-aged students in the United States.\(^4\) 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.”\(^5\) States had to set standards for all students regardless of subgroup to achieve 100 percent proficiency\(^6\) by 2014. Additionally, states were required to set challenging academic standards,\(^7\) annually test children,\(^8\) and develop and implement a statewide accountability system in

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\(^6\) Id. § 6311(b)(1)(B)–(C).

\(^7\) Id. § 6311(b)(1).

\(^8\) Id. § 6311(b)(3).
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 states’ AYP are “annual measurable objectives” (AMOs) which requires a percentage of schools’ students to attain minimum levels of proficiency.

A school’s entire student body and all its subgroups were required to meet their AMOs. 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 reach its 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.

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

9 Id. § 6311(b)(2)(A).
10 Id. § 6311(b)(2)(B)–(C).
11 Id. § 6311(b)(2)(G).
12 Id. §§ 6311(b)(2)(C)(i)(I), (G)(emphasis added).
13 Id. § 6311(b)(2)(C)(i)(I).
14 Id. § 6316(b)(1)(A).
15 Id. § 6311(b)(2)(I)(i)(emphasis added).
16 See McNeil, supra note 1, at 4–5.
difficult and many states applied for waivers\textsuperscript{18} to “soften the blow” of NCLB requirements.\textsuperscript{19} 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.\textsuperscript{20}

Before waivers, states unsuccessfully threatened lawsuits or adjusted academic standards and scoring systems to avoid sanctions.\textsuperscript{21} NCLB’s proficiency goals unintentionally drove states to lower testing standards\textsuperscript{22} or “backload” its largest AYP gains to later years.\textsuperscript{23} NCLB’s difficulty lies within the structure in which it is embedded: dual federalism.\textsuperscript{24} Depending on the scholar, NCLB has been described as a program implemented through either “cooperative” or “coercive” federalism.\textsuperscript{25}

Cooperative federalism focuses on the close relationship between state and federal

\textsuperscript{18} Kristina Doan, \textit{No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?}, 60 ADMIN. L. REV. 211, 216 (2008).


\textsuperscript{21} See Doan, supra note 18, at 214–215.


\textsuperscript{23} Id. (citing Evan Stephenson, Evading the No Child Left Behind Act: State Strategies and Federal Complicity, B.Y.U. EDUC. & L.J. 157, 158 (2006)). See Ben Wieder, \textit{No Child Left Behind: Not Dead Yet}, http://www.pewstates.org/projects/stateline/headlines/no-child-left-behind-not-dead-yet-85899410770 (last viewed Jan. 22, 2013) (commenting on the debate around waivers and its difficulties); Damon T. Hewitt, \textit{Policy Essay: Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown’s Promise}, 30 YALE L. & POL’Y REV. 169, 175 (2011) (noting when states backload, they “delay[y] the inevitable need to demonstrate significant improvement . . . adopted in nearly half of all states,” and “has resulted in increasing numbers of schools failing to make [AYP] in recent years.” Therefore, “sanctions [are triggered] under NCLB, and, therefore, schools are forced to endure NCLB’s strict accountability measures or seek waivers from NCLB’s accountability provisions.”).


governments. 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. 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. In turn, the federal government seeks “congressional authority to directly control education.” Therefore, NCLB is a federal policy caught between these two paradigms.

B. ERA OF THE NCLB WAIVER

Currently, thirty-three states and the District of Columbia have applied and are officially approved for waivers by the U.S. Secretary of Education. Waivers gave states three options to reset their AMOs: (1) reduce the achievement gap between at-risk subgroups and all students within five years; (2) achieve complete proficiency for all subgroups by 2020; or (3) employ “other” state-designated methods similarly rigorous to

See Schapiro, supra note 24, at 284.
the first option. In the end, states created race-based achievement goals through the third option. From a state’s perspective, waivers appeared a more 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 brought light to the “invisible” one million students ignored under NCLB by better tracking student performance. At least in the short-term, waivers proved beneficial to NCLB’s implementation.

During the waiver process, 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.

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32 See McNeil, supra note 1, at 3. Only Arizona has chosen the 100 percent proficiency by 2020. Id.
33 Id.
34 See Doan, supra note 18, at 214 (stating that “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 19, at 178.
35 See generally 20 U.S.C. § 7861; see Doan, supra note 18, at 216 (citing 20 U.S.C. § 1234 (c)(2000) (allowing the Secretary of Education to withhold funds)). See Wieder, supra note 23 (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.”).
36 See Wieder, supra note 23 (quoting Arne Ducan, “Collectively, these states are capturing more than 1 million additional students . . . [t]hese are students that were literally invisible under No Child Left Behind.”)
38 Id. § 7861(b)(1)(C).
39 Id. § 7861(b)(1)(E).
And, throughout the waiver’s duration, states must submit a report annually while LEAs submit a report at the end of the second year, and every year thereafter.

Waivers are problematic precisely because they are not long-term solutions. Some commentators argue waivers “undermine the progress . . . made toward accountability” by failing to improve the implementation of NCLB itself. This Article develops an altogether different critique: waivers act as a gateway for racial discrimination, allowing states to set different, race-based achievement goals between students, in turn signaling that African Americans and Latinos are inferior or less than capable learners.

C. The Recent Advent of Race-Based Achievement Goals

The use of racial classifications in schools is nothing new. In the recent judicial era, the Supreme Court tackled race in higher education cases like Grutter v. Bollinger, Gratz v. Bollinger, and in the hotly debated elementary school decision Parents Involved in Community School. v. Seattle School District. Number 1. However, nothing is more memorable in the American consciousness than Brown v. Board of Education. The Court unanimously held racial discrimination in public education unconstitutional,

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40 Id. § 7861(e)(2).
41 Id. § 7861(e)(1).
42 See Doan, supra note 18, at 223; see also Wieder, supra note 23 (noting that the current Secretary of the U.S. Department of Education recognizes waivers as a temporary fix).
44 539 U.S. 306, 326 (2003). The Supreme Court has granted certiorari in Fisher v. University of Texas, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S.Ct. 1536 (2012) (No. 11-345), in which the Court has explicitly agreed to reconsider Grutter.
45 539 U.S. 244, 270 (2003).
47 347 U.S. 483 (1952).
concluding once and for all that separate was not equal.\textsuperscript{48} \textit{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.”\textsuperscript{49} In the spirit of \textit{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.\textsuperscript{50} 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.\textsuperscript{51} Florida is only one of many states following this trend. Other states include Delaware, Minnesota, Mississippi, New Jersey, North Carolina, the District of Columbia, and Utah.\textsuperscript{52} Only eight states maintain the same target for all students: Arizona, Colorado, Michigan, Missouri, Nevada, New Mexico, South Carolina, and Oregon (with Wisconsin setting the same goal in 2017 for all different targets).\textsuperscript{53}

1. \textbf{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

\textsuperscript{48} \textit{Brown v. Bd. of Educ.}, 347 U.S. at 495.
\textsuperscript{49} \textit{Id.} at 494.
\textsuperscript{51} See Martin and Valencia, \textit{supra} note 31.
\textsuperscript{52} See McNeil, \textit{supra} note 1, at 1–2.
\textsuperscript{53} \textit{Id.}
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. As a potential means of rectifying the situation, states could choose to implement race-based goals because of the inherent flexibility of waivers. Proponents argue that race-based proficiency goals help struggling minorities by holding school districts accountable, requiring schools to accelerate academic progress yet not at the expense of decreasing expectations for minorities.

Although the rates at which different students reach proficiency are different, the end goal for each student is the same: complete proficiency. The result, not the means,
is what matters. Accordingly, race-based achievement goals can help close the achievement gap. Moreover, race-based goals are not permanent solutions but time-sensitive provisions that will exist only for a designated period of time.

Another argument in favor of race-based achievement goals originates from NCLB’s race-conscious nature. 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. In turn, race-conscious remedies like race-based academic goals are acceptable if they “might help boost achievement of the under-performing group.” By setting different standards for each race, policy makers recognize the histories of discrimination and impacts upon particular ethnic groups like African Americans.

2. Arguments Against Race-Based Achievement Goals

Opponents of race-based standards, however, argue that these goals send the wrong message to minority students. The message is that states and society expect less of children from certain races. All children can learn regardless of their ethnicity or
background. Setting lower bars for certain subgroups tells some children they must be inherently inferior.\textsuperscript{66}

Another problem many commentators have noted is that the real issue concerns resources. NCLB is insufficiently funded,\textsuperscript{67} a fact acknowledged by President Barack Obama.\textsuperscript{68} 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.”\textsuperscript{69} Therefore, the focus should be on schools’ lack of finances needed to meet NCLB’s standards.\textsuperscript{70} Many scholars

\textsuperscript{66}See McNeil, supra note 1, at 4 (quoting Nevada’s superintendent of public instruction, James W. Guthrie, “‘[W]e don’t have any need to distinguish among the subgroups. They all have got to come up . . . [w]e have to push up our expectations for all students.’”). Nevada is a state where goals for students are all the same. Id. (emphasis added).

\textsuperscript{67}To note just a few of these scholars: see Richmond, supra note 58 (noting “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 expensive academic opportunities.”); see also Joseph O. Oluwole and Preston C. Green, Article: 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); see 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); see McGovern, supra note 25, at 1546 (noting increased federal funds will help with state inequalities, though not sufficient in of itself), Jamie Gullen, Article: 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).

\textsuperscript{68}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.’”).

\textsuperscript{69}See Losen, supra note 55, 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) (noting 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.”).

\textsuperscript{70}See Dyson, supra note 69, 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 and Valencia, supra note 31 (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]his feels like resignation to me, saying we only expect so much for a certain kids’ race or ethnicity.”); see also Sangha, supra note 50 (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.’”).
suggest the best method of ensuring minorities meet their school’s AYP includes directing funds towards those students because of state revenue shortages aggravated by insufficient funding.\textsuperscript{71}

A different group of critics sees race-based standards as counter-intuitive. Although formally setting lower standards for Blacks and Hispanics, in reality, the plan effectively requires more improvement from these traditionally, lower performing groups.\textsuperscript{72} In Florida for example, the percentage of Black students who must score at or above grade level must increase 36 percent, translating into an overall 94.7 percent increase, and in comparison to White students which must increase 19 percent, an overall 27.5 percent increase.\textsuperscript{73} In turn, policy makers overlook the fact that race-based goals require more from lower performing groups than from their higher performing counterparts, seemingly contradicting the underlying assumption(s) for setting lower goals for Blacks and Latinos.\textsuperscript{74}

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

\textsuperscript{71}For a few of those commentators: see Farmer, supra note 55, at 454–55; see also Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, Article: Race-Conscious Funding Strategies and School Finance, 16 B.U. PUB. INT. L. J. 39, 53 (stating “[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 Dyson supra note 69, at 711.

\textsuperscript{72}See O’Connor, supra note 61.

\textsuperscript{73}Id. (noting “[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 scoring at or above grade level on the [state exam] must increase by 36 percentage points to meet state goals. That’s a 94.7 percent increase.”).

\textsuperscript{74}Id. One assumption though not conclusive, views minority students as unable to learn at comparable rates to other students. See supra Part I.C.1.
group are immediately suspect.”75 However, “[t]hat is not to say that all such restrictions are unconstitutional . . . [but] are subject . . . to the most rigid scrutiny.”76 Nor does it matter if these classifications are beneficial: they are always subject to strict scrutiny.77 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.”78 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].”79

As explained in Adarand v. Pena, courts in racial contexts are required to apply three principles regarding skepticism, consistency, and congruence.80 Therefore, “any person, of whatever race” has the “right to demand that any government actor” must “justify any racial classification subjecting that person to unequal treatment under strictest judicial scrutiny.”81 The strictest standard of review requires race classifications to be narrowly tailored to achieve the state’s compelling interest.82

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.

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.” Id.
76 Id.
78 Richmond v. Croson, 469 U.S. at 493.
79 Id.
80 Id. at 224.
81 Id.
82 Adarand v. Pena, 515 U.S. at 227.
B. RACE-BASED ACHIEVEMENT GOALS AND ANALYSIS AS A COMPELLING
STATE INTEREST

In the school setting, the Court has recognized two government interests as compelling: (1) diversity and (2) remedying past discrimination.\(^83\) Regarding the first, diversity is a compelling interest only in upper education, i.e. undergraduate or graduate schooling.\(^84\) For the second interest in elementary schools, the state’s harm must originate from segregation in order to satisfy remedying past discrimination.\(^85\) Where the Court is willing to accept the interest of remedying past discrimination, this is limited only to de jure segregation.\(^86\) 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.\(^87\) 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.\(^88\)

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.\(^89\)  With respect to districts

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\(^85\) Parents Involved, 551 U.S. at 721.
\(^86\) Id. at 749–750.
\(^87\) Id. (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971); see also Monroe v. Board of Comm'r's of Jackson, 391 U.S. 450, 452 (1968)).
\(^89\) Id. at 720.
previously segregated and subject to decree, once the District Court proclaimed unitary status remedying past discrimination no longer qualified as a viable interest.\footnote{Id. at 720–21.}

Using this precedent, states could argue a compelling interest exists in using race-based achievement goals to rectify past discrimination.\footnote{Diversity as a compelling interest will not be discussed further in this paper because it is unlikely a state would be able to successfully claim race-based achievement goals were instated to increase diversity in elementary schools.} Ultimately, however, such a conclusion depends highly on each school’s racial history. If a school district lacks a segregated history directly linking itself to de jure segregation this history is no longer compelling. As the Court noted racial imbalance through ‘innocent private decisions’ or de facto segregation is not unconstitutional.\footnote{Parents Involved at 749–750.} 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.\footnote{See supra note 89 and accompanying text.} Thus, whether a district under NCLB could use past discrimination as a compelling state interest depends mainly on its own, particular desegregation history.

1. **Educating America as a Compelling State Interest?**

Let us now assume that remediying past discrimination does not qualify as a compelling interest. States could then argue that educating America to meet NCLB’s reading and math proficiency is compelling. Existing case law does not recognize education as a fundamental right.\footnote{San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).} However, many advocates urge for a federal right to education.\footnote{For some of those scholars: see Robinson supra note 29, at 1712–16 (arguing Congress should recognize a federal right to education through spending legislation); Note, A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process, 120 HARV. L. REV. 1323, 1341–44 (2007) (arguing a right to education exists through substantive due process); Michael Salerno, Note, Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education, 5 CARDozo PUB. L. POLY & ETHICS J. 509, 538–40 (2007) (arguing NCLB makes education a fundamental right through state-compliance schemes); but see Daniel Greenspahn, A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case Out of...} 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 intelligently” in the United States’ political process.

Additionally, the Court has recognized public education as a vital instrument for inculcating democratic values into America’s youth, which supports proponents’ proposition for race-based goals and meeting NCLB’s academic goals. 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.

Moreover, 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. But through waivers’ flexibility approved by the U.S. Department of Education’s Secretary, an agent of the Executive, states could make necessary adjustments. The resulting argument

Education, 59 S.C. L. REV. 755, 756–57 (2008) (arguing that currently, it is not the time to argue for a federal right to education, and instead advocates should work with the state court, legislators, and local citizens).

96 Brown at 493.

97 Id.


100 Plyler, 457 U.S. at 221, 222.

101 See Powell, supra note 19, at 154.

is that race-based achievement goals should be considered a compelling interest in achieving NCLB’s proficiency goals because of the difficulties of implementing NCLB, the fact of executive approval, and the judicial recognition of education’s importance.

In conclusion, as an alternative to remedying 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 compelling would grant more states the opportunity to have legal standing to defend their interests.

C. 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.103 The Court has noted that “context matters” when reviewing race-based government action under the Equal Protection clause.104

1. PROPONENTS: RACE-BASED ACHIEVEMENT GOALS ARE NARROWLY TAILORED

The context surrounding race-based achievement goals and their temporary nature makes them narrowly tailored.105 In turn these goals are comparable to sunset provisions in race-conscious college admissions, increasing the probability that race-conscious methods will be upheld.106 For example, race-conscious policy admissions consider the

103 See Croson, 469 U.S. at 493.
104 See Grutter, 539 U.S. at 327 (citing Gomillion v. Lightfoot, 364 U.S. 339, 343–344 (1960)).
105 See supra text accompanying notes 18–20.
106 See Grutter, 539 U.S. at 342 (noting sunset provisions in college admissions have an end date terminating the racial policy, “Accordingly, race-conscious admissions policies must be limited in time.”).
use of race in admitting students into universities and colleges, requiring that the use of race be limited to a period of time, i.e., through the use of sunset provisions.\textsuperscript{107}

Ultimately, states are “laboratories for experimentation” which must be able “to devise various solutions where the best solution is far from clear.”\textsuperscript{108} Therefore states must have the opportunity to test out these goals, if only for a limited time. Again, due to NCLB’s challengingly complex nature many states applied for waivers to receive relief from the 2014 deadline.\textsuperscript{109} The U.S. Department of Education approved states’ waivers,\textsuperscript{110} 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.

2. The Reply: Race-Based Achievement Goals are Not Sufficiently Tailored

The Executive branch’s approval of state action, however, does not confer constitutionality. Under the separation of powers the judiciary determines whether state and federal actions are constitutional, not the Executive or the Legislature.\textsuperscript{111} The U.S. Department of Education’s approval of states’ waivers and use of race-based achievement goals, while demonstrating executive support does not demonstrate constitutional legitimacy.

\textsuperscript{106} 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.” Id.

\textsuperscript{107} Id.


\textsuperscript{109} See supra text accompanying note 20.

\textsuperscript{110} See supra text accompanying note 20.

\textsuperscript{111} 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.
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.”112 Moreover, “blacks [and Latinos] can achieve in every avenue of American life without the meddling,” in this case by state legislatures.113 And unlike Justice Anthony Kennedy’s concurring view 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.”114 Based on these considerations, race-based achievement goals are not sufficiently tailored to implement NCLB’s proficiency requirements.

3. NOT NARROWLY TAILORED: REEXAMINING THE POTENTIAL NEGATIVE IMPACT OF RACE-BASED ACHIEVEMENT GOALS FROM A PSYCHOLOGY PERSPECTIVE

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, justifying race-based achievement goals.115 But 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

112 Grutter at 350 (Thomas, J., dissenting).
113 Id.
114 Parents Involved at 788.
115 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.’”).
African American students, as all nine Justices agreed segregation caused inferiority complexes among Black youth.\textsuperscript{116} Likewise, lowering achievement goals would have similar effects on African and Latin American youth today.\textsuperscript{117} Paralleling Brown, race-based achievement goals are unconstitutional as evidenced by psychology studies of stereotype threat on African-American students.\textsuperscript{118}

In the field of psychology, scholars established that stereotypes of minority students can contribute to their poor academic performance.\textsuperscript{119} As previously mentioned, Black students have consistently scored lower than their White counterparts on standardized achievement tests.\textsuperscript{120} 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.\textsuperscript{121} Once these harmful images are released Black students can internalize them, which can adversely impact their school performance.\textsuperscript{122}

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.\textsuperscript{123} Accordingly, these stigmatized groups become concerned with

\begin{itemize}
  \item \textsuperscript{116} See \textit{supra} text accompanying note 49.
  \item \textsuperscript{117} See \textit{supra} Part I.C.2.
  \item \textsuperscript{118} See \textit{Brown} at 494.
  \item \textsuperscript{120} See Steele, \textit{supra} note 118, at 615; see also Oluwole, \textit{supra} note 67, at 280–82.
  \item \textsuperscript{121} Jones Kellow and Brett D. Jones, \textit{The Effects of Stereotypes on the Achievement Gap: Reexamining the Academic Performance of African American High School Students}, 34 J. BLACK PSYCHOL., 94, 95 (2008).
  \item \textsuperscript{122} See Kellow, \textit{supra} note 120, at 95.
  \item \textsuperscript{123} Id. at 97; see also Patricia Devine, \textit{Stereotypes and prejudice: Their automatic and controlled components}, 56 J. PERSONALITY AND 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 of their parts).
\end{itemize}
giving “credence” to their group’s negative stereotypes through poor academic performance. 124 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.” 125

Research has indicated that even academically successful Black college students can be affected by what is known as stereotype threat. 126 While stereotype threat is neither the sole nor complete reason for Black students’ lower test scores, 127 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 or test-taking setting and interferes with or impedes their academic performance. 128 Generally, these are situations where a stereotyped group’s intellectual ability is relevant. 129 In turn, Black students (or other minorities similarly situated) bare an “extra cognitive and emotional burden” which is not applicable to

125 Joshua Aronson, Carrie B. Fried and Catherine Good, Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence, 38 J. Experimental Soc. Psychol., 113, 114 (2000).
128 See Steele, supra note 118, at 614; see also Kellow, supra footnote 120, at 95 (noting “[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.”).
129 See Aronson, supra note 124, at 114.
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.

However, 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 ability to succeed on standardized tests. This seems to communicate 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 for 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.

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130 Id.
131 See Steele, supra note 118, at 615, 617 (discussing other psychological studies that “rumors of inferiority” about Black students can become so pervasive that they are internalized (citing Howard, J. and Hammond, R., Rumors of inferiority, 72 NEW REPUBLIC, 18 (1985)). Minority student achievement gaps persist regardless of the socioeconomic differences of Black students. Id. at 615. See also Kellow, supra footnote 120, at 116 (stereotype threat triggered by high-stakes, statewide standardized tests causes blacks to perform lower due to associations with negative stereotypes in academic achievement).
132 See Kellow, supra note 120, at 112–113 (emphasis added) (stating that “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.”).
133 Id.
134 Id. at 99, 113 (emphasis added), but see Sackett, supra note 126, at 11.
135 See Walton, supra note 123, 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.” Id.
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.\textsuperscript{136} As mentioned previously, once students begin to internalize these negative stereotypes test scores respond accordingly.\textsuperscript{137}

Ultimately, setbacks in the education of minorities translate into problems for society at large.\textsuperscript{138} More specifically, 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.\textsuperscript{139} 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.\textsuperscript{140} A one percent increase in high school graduation rates could reduce annual crime costs by $1.4 billion per year.\textsuperscript{141}

While stereotype threat does not account for \textit{all} the discrepancies between Black and White students on standardized testing, it is a key piece of the puzzle.\textsuperscript{142} It does not matter whether a student believes the stereotype to be true to be affected, only that he or

\begin{notes}
\item See supra notes and accompanying text 65–66.
\item See supra note and accompanying text 121.
\item \textit{Id.} (stating that 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).
\item \textit{Id.}
\item See Sackett, supra note 126, 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.”).
\end{notes}
she be aware of it.\textsuperscript{143} Other pieces of the puzzle include examining differences in educational and economic opportunities between these students, or put differently, looking at the standardized testing discrepancies comprehensively as opposed through a narrow lens.\textsuperscript{144}

With this information framing the discussion around NCLB, race-based achievement goals have a strong potential to contribute to stereotype threat that minorities like African Americans experience in the academic setting. 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. Either way, under the Equal protection clause these race-based goals are unconstitutional because they are not narrowly tailored to achieve the compelling state interest of achieving NCLB’s complete educational proficiency.

Based on the psychology studies surrounding stereotype threat for Black students, race-based achievement goals may actually exacerbate the achievement gap rather than fix it. 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.\textsuperscript{145} These perpetuations become internalized and a self-fulfilling prophecy of low performance results,\textsuperscript{146} contradicting the intended purpose of race-based achievement


\textsuperscript{144} See Sackett, \textit{supra} note 126, at 111; \textit{see also} Steele, \textit{supra} note 118, at 616 (noting the structural and cultural threats to Black students’ academic success).

\textsuperscript{145} See \textit{supra} text accompanying notes 120–121.

\textsuperscript{146} See \textit{supra} text accompanying note 121.
goals: increasing reading proficiency in these targeted groups.\textsuperscript{147} Race-based achievement goals are not narrowly tailored to effectively implement NCLB’s proficiency goals.

III. CONCLUSION: EXAMINING THE DYNAMICS OF IMPLEMENTING NCLB AND POTENTIAL REMEDIES AND ALTERNATIVE SOLUTIONS TO RACE-BASED ACHIEVEMENT GOALS

Authors have already commented that NCLB in its current state is unconstitutional.\textsuperscript{148} Compliance with NCLB causes states and schools to focus “obsessively” on annual student testing and shortsighted goals.\textsuperscript{149} While in theory NCLB is a federal spending program making participation optional, however the threat of withholding funds unconstitutionally coerces states to participate in NCLB.\textsuperscript{150} Additionally, because federal funding is inadequate to comply with NCLB the law unconstitutionally directs each state’s educational policy.\textsuperscript{151} And in practice NCLB has already been found unworkable: states turned to waivers due to inability and for

\textsuperscript{147} See supra Part II.C.3.

\textsuperscript{148} My note will not debate the validity of these claims, nor mention all of them, but will merely recite what some scholars have previously stated on the issue.


\textsuperscript{150} Id.

\textsuperscript{151} Id. (citing see, e.g., L. Darnell Weeden, Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?, 31 T. MARSHALL L. REV. 239 (2006); Gina Austin, Note, Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights, 27 T. JEFFERSON L. REV. 337 (2005); Michael D. Barolsky, Note, High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind, 76 GEO. WASH. L. REV. 725 (2008); Coulter M. Bump, Comment, Reviving the Coercion Test: A Proposal To Prevent Federal Conditional Spending that Leaves Children Behind, 76 U. COLO. L. REV. 521 (2005); but see generally Regina R. Umpstead, The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?, 37 J.L. & EDUC. 193 (2008)).
flexibility in attempt to satisfy NCLB’s proficiency goals. States continue to struggle with insufficient monetary resources needed to satisfactorily implement NCLB.

However, NCLB’s reading and mathematics proficiency can be implemented without using race-based academic standards. NCLB’s difficulty stems from the dual federalism structure in which it is embedded. By taking the best of the dueling cooperative and coercive federalism paradigms, the federal government should become more active in states’ affairs regarding variances among social, racial, and economic differences present within states’ school-aged population. Differences in states’ school-aged population exacerbate financial funding problems. For example, states with low finances have greater concentrations of low-income, minority, and English language learner students than states that do not. 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.”

The federal government’s role requires more state oversight of expenditures to ensure NCLB funds are not being used inappropriately. As a complement to this the

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152 See supra text accompanying note 20.
154 See Schapiro, supra note 24, at 246.
155 See supra text accompanying notes 24–29.
156 See McGovern, supra note 25, at 1545.
157 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 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 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).
158 See Liu, supra note 67, at 2061–62.
159 See McGovern, supra note 25, at 1545.
160 Id. at 1554; see generally James, supra note 17, at 932 (discussing incentives for states to weaken test evaluations and superficially inflate test scores).
federal government could distribute federal funds to schools in “inverse proportion” to their fiscal ability—most similarly to federal Medicaid funds.161 Because states’ education departments’ are limited in funding and are forced to focus “compliance capacity at the expense [of] policy expertise,” therefore “a strong federal role” is necessary but requires state co-operation.162

Segregation continues to plague public schools. It is not a problem of the past. Close to sixty years after Brown public schools are more segregated than before, but through de facto as opposed to de jure segregation.163 Potentially as an indirect remedy for this, NCLB has a school choice provision that supposedly allows students to transfer from low-performing to high-performing schools.164 In reality, however, this has not been the case.165 To ensure such provisions are implemented commentators suggest a

161 Goodwin Liu, National Citizenship and Equality of Educational Opportunity, 116 YALE L.J. POCKET PART 145, 150 (2006) (suggesting 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).
164 Id. (citing Richard Lee Colvin, 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).
165 See Dyson, supra 69, 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).
right of action through judicial or administrative proceedings, functioning similarly to the enforcement mechanisms following Brown.

Perhaps the most feasible solution at the moment is retaining good educators. 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. Otherwise, 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.

At the structural level, NCLB lacks a holistic approach addressing problems that typically fall outside the sphere of traditional education. Presently, 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

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166 See Hewitt, who is one such commentator, supra note 23, at 193 (noting “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.”).
167 Id.
168 See Dyson, supra note 137, at 227.
169 Id.
170 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)).
learning time, health services, and family support. Again, this 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 are needed. Improvements to standardized testing not only include removing “psychological threats embedded in academic environments,” but removing “other barriers to achievement including objective biases [and] the effects of poverty.”

Finally, Congress needs to revise some aspects of NCLB. For example, NCLB requires school districts to equitably fund all public schools on an “intradistrict basis.” NCLB does allow 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

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172 See Rebell, supra note 170, at 73–74; see also Dyson, supra note 137, at 233.
173 See Hewitt, supra note 23, at 184 (stating that schools with fewer resources are unable to retain the best teachers).
174 See Dyson, supra note 137, at 233; see supra text accompanying notes 69, 158–159.
175 See Walton, supra note 123, at 1132–1139.
177 Id. (citing No Child Left Behind Act of 2001 sec. 101, § 1120A(c)(1)(B)).
low-poverty schools, “leaving novice teachers” who earn less to concentrate in high-poverty schools.\textsuperscript{179}

In conclusion, states’ 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. As further support that race-based achievement goals are not narrowly tailored, studies in psychology demonstrate the problem of stereotype threat and its effects on Black students. In turn, 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 should consider this as further support for why race-based goals are not precisely tailored to implement NCLB proficiency goals. Accordingly, race-based achievement goals are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

\textsuperscript{179} \textit{Id.} at 185. Accordingly, these practices add up to hundreds of thousands of dollars at the district level. \textit{Id. See also} Roza, \textit{supra} note 178, at 69–70.