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NO CHILD LEFT BEHIND ACT, RACE, AND PARENTS INVOLVED

JOSEPH O. OLUWOLE*

PRESTON C. GREEN, III**

Introduction

The No Child Left Behind Act of 2001 ("NCLB" or the "Act")¹ is an elaborate legislative scheme enacted to address, inter alia, the racial achievement gap in the American education system. Since the Coleman Report of 1966,² entitled Equality of Educational Opportunity, significant attention has been given to measuring and understanding racial achievement gaps. It is well understood that racial differences in student outcomes persist, even when controlling for schooling inputs and a variety of other student background characteristics.³ While NCLB seems to recognize the achievement gap, it fails to explicitly provide for race-conscious

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** Preston C. Green, III, J.D., Ed.D., is a Professor of Law and Education at The Pennsylvania State University Dickinson School of Law and the College of Education.


[271]
implementation. However, two of the Act’s requirements could pressure states to implement NCLB’s sanctions and remedies, as well as target funding provisions with a consciousness of race: (i) the requirement that states disaggregate achievement data for various demographic groups, including racial minorities; and (ii) the requirement that all students, including racial minorities, meet or exceed proficient academic achievement by 2014.

The Act also includes various escalating sanctions and remedies for schools failing to meet proficiency. Given the persistent racial achievement gaps in education, it stands to reason that schools with a large percentage of racial minorities are most likely to be the objects of the sanctions and remedies. Such race-conscious implementation of the sanctions and remedies might be subject to challenge under the Equal Protection Clause. With NCLB up for reauthorization, it is important to bring these issues into focus, especially in light of the recent United States Supreme Court decision in Parents Involved v. Seattle School District No. 1. Some of the remedies provided in NCLB may require different levels of funding for various groups, including minorities. Using cost function analysis, Jennifer Imazeki and Andrew Reschovsky found a positive and statistically significant correlation between the percentage of black and Hispanic students in a school and the costs of achieving outcome levels required under NCLB. Further, a review of literature on the black-white achievement gap and educational resources shows that “money directed at minority and disadvantaged students brings higher achievement scores, but

4. As used in this article, race-conscious implementation of the NCLB refers to both race-conscious implementation of the NCLB’s sanctions and remedies and race-conscious funding. When we refer to race-conscious implementation of the NCLB’s sanctions and remedies as distinct from funding, we add the qualifier “sanctions and remedies” after the phrase “implementation of the NCLB.”
6. Id. at § 6311(b)(2)(F).
7. See section I.B. infra for a discussion of the NCLB’s sanctions and remedies.
8. 127 S. Ct. 2738 (2007) (discussing various principles regarding the use of race-conscious measures). This case is examined in more detail in section IV below.
9. Cost function analysis is a statistical method, which determines the costs associated with attaining a particular set of outcomes given district and student characteristics. It can help predict the costs of achieving a specific set of outcomes in a district with average characteristics. It can also create a cost index for each school district that indicates the relative cost of achieving the desired outcomes in each school district. See also Lori L. Taylor et al., U.S. Department of Educ., Documentation for the NCES Comparable Wage Index Data Files (2006), http://nces.ed.gov/pubs2006/2006865.pdf?search=%22%22Documentation%20for%20the%20NCES%20Comparable%20Wage%20Index%20Data%20File%22.
money directed toward more advantaged students may have much smaller or negligible effect."  

This article addresses race-conscious implementation of NCLB’s sanctions and remedies and race-conscious targeted funding under the Act. In the first section, we provide an overview of NCLB’s goals, and its sanctions and remedies. In the second section, we examine the racial achievement gap in primary and secondary education. In the third section, we provide a historical overview of litigation seeking targeted funding in education because race-conscious targeted funding under NCLB would likely bring about another round of school finance litigation. In the final section, we examine race-conscious implementation of NCLB in light of the Parents Involved decision.

I. The No Child Left Behind Act

NCLB is the 2002 Congressional reauthorization of the Elementary and Secondary Education Act of 1965. The stated purpose of NCLB is “to ensure that all children have 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.” NCLB proposes to achieve this purpose by setting several goals for states. Some of these goals encompass increasing educational opportunities for disadvantaged children. For example, the Act seeks to meet “the educational needs of low-achieving children in our Nation’s highest-poverty schools.” Additionally, it aims to close “the achievement gap between high- and low-performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers.” In its attempt to close the achievement gap, the Act directs resources to those schools where students struggle the most, placing emphasis on “distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest.”

14. Id.
15. Id. at § 6301(2).
16. Id. at § 6301(3).
17. Id. at § 6301(5).
accomplish its purpose and goals is Title I funding. The Act also seeks to achieve educational equity by “improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged.” Thus, it is evident in its design that NCLB has noble goals of furthering educational equity by closing the achievement gap and targeting funding to this end.

A. NCLB’s Requirements

To accomplish its purpose and goals, NCLB imposes certain requirements on states accepting Title I funds. Each state must implement “challenging academic content standards” in at least mathematics, science, and reading or language arts. The content standards must spell out what students are expected to know, be rigorous, and foster “teaching of advanced skills.” Each state must also implement “challenging student academic achievement standards” aligned with the content standards. The academic achievement standards must track two levels of high achievement, (i) proficient and (ii) advanced — to assess students’ mastery of content, and one level of achievement, basic — to assess “progress of the lower-achieving children toward mastering the proficient and advanced levels of achievement.”

NCLB requires that each state establish an accountability system to ensure that its school districts and public schools are
making adequate yearly progress ("AYP") toward the state's implemented standards and "working toward the goal of narrowing the achievement gaps." Pursuant to its goal of closing the achievement gap for disadvantaged subgroups, NCLB requires that states disaggregate data on AYP for economically disadvantaged students, racial and ethnic groups, students with disabilities, and limited English proficient ("LEP") students. As part of this accountability system, states must implement annual academic assessments in mathematics, science, and reading or language arts "as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards." The assessments must be aligned with the content standards as well as the academic achievement standards. Starting from the 2005-2006 school year, states must annually assess student achievement against the content and achievement standards in grades three through eight and at least once during grades ten through twelve in mathematics, reading or language arts. Starting with the 2007-2008 school year, states must annually assess students in science at least once during grades three through five, grades six through nine, and grades ten through twelve.

By the year 2014, all students, including all the demographic subgroups, must meet or exceed proficiency on academic achievement based on the state's assessments. Each state's accountability system must include measures of proficiency on the state's assessments that are "based on the higher of the percentage of students at the proficient level in": (i) the lowest achieving subgroup of students identified above; or (ii) the school at the twentieth percentile, based on enrollment, after ranking all schools in the state by the proportion of proficient students at the schools.

Even if a demographic subgroup at a school does not make AYP as defined by the state standards, the school would still be considered

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29. Id. at § 6311(b)(2)(A).
30. Id. at § 6311(b)(2)(B)(ii)(II).
31. Id. at § 6311(b)(2)(C)(v)(II).
32. Id. at § 6311(b)(3)(A).
33. Id. at § 6311(b)(3)(C)(ii).
34. Id. at § 6311(b)(2)(C)(vii).
35. Id. at § 6311(b)(2)(C)(v)(I)(cc).
36. Id. at § 6311(b)(2)(C)(v)(I); Id. at § 6311(b)(2)(C)(vii).
37. Id. at § 6311(b)(2)(C)(v)(II).
38. Id. at § 6311(b)(2)(F). These subgroups are: the economically disadvantaged; racial and ethnic groups; students with disabilities; and LEP students. Id. at § 6311(b)(2)(C)(v)(II).
39. Id. at § 6311(b)(2)(E).
to have met AYP if the percentage of students in the subgroup not meeting or exceeding the proficiency level "for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more of the academic indicators." At least 95 percent of each demographic subgroup must take the state's annual academic assessments. This 95 percent requirement is not applicable, however, if "the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student." The Act's heavy emphasis on standards and assessments could make school districts shortsighted, causing them to focus more on satisfying the requirements of the Act than on providing a constitutionally adequate education.

B. NCLB's Sanctions and Remedies

Beyond the creation of standards and assessments, NCLB sanctions schools failing to make AYP. Ostensibly, NCLB's sanctions and remedies are designed to promote accountability, help close the achievement gap, and satisfy the other goals of the Act. These sanctions come in three forms: (i) school improvement; (ii) corrective action; and (iii) restructuring. In this article, we refer to these three as the "sanctions," and the measures schools are required to take under each of these in order to achieve NCLB's purpose and goals as "remedies."

A public school that fails to make AYP for two consecutive years must be identified by the school district for the sanction of school improvement. The school district must then give all students in the school the choice of transferring to another school "that has not been identified for school improvement." Pursuant to its goals of helping disadvantaged students, "lowest achieving

40. Id. at § 6311(b)(2)(I)(i).
41. Id. Academic indicators include graduation rates, achievement on additional state tests, decreases in grade-to-grade retention rates, attendance rates, changes in percents of students completing advanced placement and similar courses. Id. at 6311(b)(2)(C)(vi)-(vii).
42. Id. at § 6311(b)(2)(I)(ii).
44. Id. at § 6316(b)(7).
45. Id. at § 6316(b)(8).
46. We refer to school improvement, corrective action, and restructure as sanctions principally because stigma attends schools so labeled, as well as to the children attending those schools.
48. Id. at § 6316(b)(1)(E)(i).
children from low-income families” get priority in school transfers.\(^4^9\) The school district must provide transportation to the receiving schools.\(^5^0\)

Within three months after being identified for school improvement, a school must develop a two-year plan to enable it to come out of school improvement status.\(^5^1\) The plan must include “strategies based on scientifically based research that will strengthen the core academic subjects in the school and address the specific academic issues that caused the school to be identified for school improvement.”\(^5^2\) It must include policies dealing with the core academic subjects that will ensure that all students (including all demographic subgroups) at the school meet the proficiency level on the state academic assessment by 2014.\(^5^3\) In seeking to meet the proficiency level, “specific annual, measurable objectives for continuous and substantial progress” must be created for each of the subgroups of students.\(^5^4\)

Furthermore, as part of the plan, the school must provide assurance that it will spend a specific portion of its Title I funds for each year the school is in school improvement on professional development for teachers and the principal.\(^5^5\) In addition, the school must specify how the professional development funds will be spent in order to bring the school out of school improvement status.\(^5^6\) The plan must also include the following: a teacher mentoring program;\(^5^7\) methods for enhancing effective parental involvement;\(^5^8\) means for providing written notice of the school’s classification to parents in understandable format and language;\(^5^9\) and “as appropriate, activities before school, after school, during the summer, and during any extension of the school year.”\(^6^0\)

Additionally, the plan must detail the responsibilities of the school, the school district (including the school district’s technical assistance to the school), and the state educational agency as the

\(^{49}\) Id. at § 6316(b)(1)(E)(ii).
\(^{50}\) Id. at § 6316(b)(9).
\(^{51}\) Id. at § 6316(b)(3)(A).
\(^{52}\) Id. at § 6316(b)(3)(A)(i).
\(^{53}\) Id. at § 6316(b)(3)(A)(ii). These subgroups are: the economically disadvantaged; racial and ethnic groups; students with disabilities; and LEP students. Id. § 6311(b)(2)(C)(v)(II).
\(^{54}\) Id. at § 6316(b)(3)(A)(v).
\(^{55}\) Id. at § 6316(b)(3)(A)(iii).
\(^{56}\) Id. at § 6316(b)(3)(A)(iv).
\(^{57}\) Id. at § 6316(b)(3)(A)(x).
\(^{58}\) Id. at § 6316(b)(3)(A)(viii).
\(^{59}\) Id. at § 6316(b)(3)(A)(vi).
\(^{60}\) Id. at § 6316(b)(3)(A)(ix).
school attempts to come out of improvement status. The plan must be implemented at the very latest by the start of the school year following identification of the school for improvement. The only exception to this absolute time requirement are cases where the improvement plan is not approved by the school district prior to the start of the school year that follows the school’s identification for improvement. For the schools that do not make AYP “by the end of the first full school year after identification” for school improvement, the school district must continue to give students the choice to transfer, continue to give technical assistance to the school, and provide supplemental educational services, including tutoring, for students who remain in the school.

School districts must identify for corrective action schools that do not make AYP for four consecutive years. Corrective action is defined as action which “substantially and directly responds to”; (i) “the consistent academic failure of a school”; (ii) “any underlying staffing, curriculum, or other problems in the school”; and (iii) would “increase substantially the likelihood” that each demographic subgroup of students will meet or exceed the proficiency levels on the state’s academic assessments. NCLB requires the school district to take at least one of several corrective actions with respect to a school identified for corrective action. Corrective action can take several forms, including replacement of “school staff who are relevant to the failure to make adequate yearly progress,” significant reduction of the authority of management at the school, and extension of the school year or school day.

Corrective action also includes appointment of an outside expert to help the school in its efforts to make AYP based on its school plan and “restructure [of] the internal organizational structure of the school.” The two other forms of corrective action identified in the Act are the implementation of “a new curriculum”

61. Id. at § 6316(b)(3)(A)(vii).
62. Id. at § 6316(b)(3)(C).
63. Id. at § 6316(b)(3)(A).
64. Id. at § 6316(b)(3)(D).
65. Id. at § 6316(b)(5). The school district must provide transportation to schools receiving transfer students. Id. § 6316(b)(9).
67. Id. at § 6316(b)(7)(A)(i)-(ii). These subgroups are: the economically-disadvantaged; racial and ethnic groups; students with disabilities; and LEP students. Id. at § 6311(b)(2)(C)(v)(II).
69. Id. at § 6316(b)(7)(C)(iv)(III).
70. Id. at § 6316(b)(7)(C)(iv)(V).
71. Id. at § 6316(b)(7)(C)(iv)(IV).
72. Id. at § 6316(b)(7)(C)(iv)(VI).
and the provision of "appropriate professional development for all relevant staff . . . based on scientifically based research," which "offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress." 73 The school district must provide information to parents and to the public about the corrective action taken. 74 This information must be in an understandable format and language, 75 and available through various means like the media, the Internet, and public agencies. 76 In addition to taking corrective action, the school district must continue to give students the choice to transfer, 77 provide supplemental educational services, including tutoring, 78 and give technical assistance to the school. 79

Schools that fail to make AYP for five consecutive years must be identified by the school district for restructuring. 80 For such schools, the district must continue to give students the choice to transfer 81 and provide supplemental educational services, including tutoring. 82 In addition, the school district must implement one of several remedies: (i) convert the school to a charter school; (ii) "[replace] all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress"; (iii) contract with a private management company to run the school; (iv) takeover of the school by the state educational agency; and (v) "[a]ny other major restructuring of the school's governance arrangement that makes fundamental reforms, such as significant changes in the school's staffing and governance, to improve student academic achievement in the school and that has substantial promise of enabling the school to make adequate yearly progress." 83 Before implementing any of these restructuring remedies, the school district must provide prompt notice 84 and adequate opportunity to teachers and parents to comment. 85

School districts required to provide transportation and

73. Id. at § 6316(b)(7)(C)(iv)(II).
74. Id. at § 6316(b)(7)(E)(i).
75. Id. at § 6316(b)(7)(C)(ii).
76. Id. at § 6316(b)(7)(C)(iii).
77. Id. at § 6316(b)(7)(C)(i). The school district must provide transportation to the receiving schools. Id. § 6316(b)(9).
78. 20 U.S.C. § 6316(b)(7)(C)(iii)
79. Id. at § 6316(b)(7)(C)(ii).
80. Id. at § 6316(b)(8).
81. Id. at § 6316(b)(8)(A)(i). The school district must continue to provide transportation to the receiving schools. Id. § 6316(b)(9).
83. Id. at § 6316(b)(8)(B).
84. Id. at § 6316(b)(8)(C)(i).
85. Id. at § 6316(b)(8)(C)(ii)(I).
supplemental educational services under NCLB may use at most twenty percent of their Title I allocation on both. At a minimum, five percent must be spent on transportation and at least another five percent on supplemental educational services. Finally, federal funds may be withheld for failure to meet AYP. Given NCLB's scheme of escalating sanctions and remedies, and the overhanging threat of the loss of federal funds, schools that fail to make AYP could be in for a blue moon of adversities.

II. The Racial Achievement Gap

With the persisting racial achievement gaps in education, it is logical to expect that high-minority schools are the most likely to be subject to NCLB's sanctions and remedies. The National Assessment of Educational Progress' ("NAEP") Nation's Report Card on Student Achievement reveals that while 51 percent of white fourth-graders performed at or above proficiency levels in mathematics in 2007, only 15 percent of black students and 22 percent of Hispanic students were proficient. In 2000, two years before NCLB was enacted, only 5 percent of black students and 7 percent of Hispanic students, compared to 31 percent of white fourth-graders, performed at or above proficiency levels in mathematics. In 2003, the results were 43 percent for whites, 10 percent for black students and 16 percent for Hispanic students.

For eighth-graders, 42 percent of white students performed at or above proficiency levels on mathematics in 2007, compared to 11 percent of black students and 15 percent of Hispanic students. Similar to the statistics for fourth-graders, in 2000, two years before NCLB's enactment, the racial achievement gap for eighth-graders was evident in the results of the mathematics assessments. For example, while 34 percent of white students performed at or above proficiency levels in mathematics in 2000, only 11 percent of black students and 15 percent of Hispanic students were proficient. In 2003, the results were 43 percent for whites, 10 percent for black students and 16 percent for Hispanic students. Additionally, all statistics from this report have been rounded to the nearest whole number.

86. Id. at § 6316(b)(10)(A).
87. Id. at § 6316(b)(10)(A)(i).
88. Id. at § 6316(b)(10)(A)(ii).
89. Id. at § 6311(g)(2).
proficiency, only 5 percent of black students and 8 percent of Hispanic students were proficient. This pattern would continue in 2003, with 37 percent of white students performing at or above proficiency, compared to only 7 percent of black students and 12 percent of Hispanic students.

In reading, the achievement gap patterns are comparable. In 2007, 43 percent of white fourth-graders performed at or above proficiency, with only 14 percent black students and 17 percent of Hispanic students achieving this. In 2000, the results were 38 percent for white students, 10 percent for black students and 13 percent for Hispanic students; and in 2003, 41 percent for white students, 13 percent for black students and 15 percent for Hispanic students. For eighth-graders, 40 percent of white students performed at or above proficiency levels in 2007, compared to 13 percent of black students and 15 percent of Hispanic students. In 2003, 41 percent of white students achieved at or above proficiency, but only 13 percent of black students and 15 percent of Hispanic students did.

Jaekyung Lee and the Harvard Civil Rights Project conducted a study examining the impact of NCLB on achievement gaps. The study found that NCLB has not had "a significant impact on improving reading and math achievement across the nation and states." Further, NCLB has not reduced the racial achievement gap and if this trend persists, the proficiency gap between white and black students, for example, "will hardly close by 2014." According to the study, "by 2014, less than 25 percent of [p]oor and [b]lack students will achieve NAEP proficiency in reading, and less than 50 percent will achieve proficiency in math." In fact, because of NCLB's reliance on high-stakes testing, racial achievement

95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. The NAEP does not report the data for eighth graders in reading for 2000.
101. Id.
103. LEE, supra note 102, at 22, 26.
104. Id. at 11.
105. Id.
106. "High-stakes tests are tests used to make important decisions about students.
gaps are often understated by states.\textsuperscript{107}

The racial achievement gap that existed prior to enactment of NCLB continues post-NCLB.\textsuperscript{108}

Table 1: National Pre-NCLB and Post-NCLB Trends in NAEP Grade 4 and Grade 8 Reading Achievement by Subgroups and their Gaps\textsuperscript{109}

<table>
<thead>
<tr>
<th>Post-NCLB Change</th>
<th>Increment</th>
<th>Same</th>
<th>Decrement</th>
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<tbody>
<tr>
<td>Pre-NCLB Growth</td>
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<td>Up</td>
<td>Hispanic(8), Asian(4)</td>
<td>White(8), Black(8)</td>
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<tr>
<td>Flat</td>
<td>White(4), Black(4), Hispanic(4), Asian(8), White-Black gap, White-Hispanic gap</td>
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Like the national figures cited above, the racial achievement gaps persist from state to state.\textsuperscript{110} Table 2 depicts the pre-NCLB and post-NCLB white-black achievement gaps for fourth and eighth graders in mathematics, confirming persisting racial achievement.

These include whether students should be promoted, allowed to graduate, or admitted to programs.\textsuperscript{9} The Education Alliance at Brown University, Teaching Diverse Learners High Stakes Testing, http://www.alliance.brown.edu/tdl/assessment/stndrdassess.shtml (last visited Mar. 31, 2008). See also RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION (Gary Orfield & Mindy L. Kornhaber eds., Century Foundation Press 2001) [hereinafter RAISING STANDARDS]. Because of the NCLB’s reporting requirements and the nature of high-stakes testing as evident in this definition, states and school districts would rather not report the scores of racial minorities who do not make AYP if it would impact their ability to meet AYP requirements.

107. LEE, supra note 102, at 11. For information on the impact of high-stakes testing on disadvantaged students, see generally RAISING STANDARDS, supra note 106 (finding that high-stakes testing has a negative impact on disadvantaged students).

108. LEE, supra note 102, at 26.

109. Id. at 29 tbl.1. “Numbers in parenthesis refer to grades in which different growth patterns are observed. When the same growth patterns apply to both grades 4 and 8 in each subgroup or gap, no numbers are shown after the group or gap name. For . . . each subgroup categories, ‘up’ means improvement of the average, whereas ‘down’ means decline of the average. For the racial . . . gaps, ‘up’ signifies widening of the gap, whereas ‘down’ signifies narrowing of the gap.” Id.

110. Id. at 39.
gaps across the nation.

Table 2: Classification of States in Pre-NCLB and Post-NCLB Trends of NAEP Grade 4 and Grade 8 Math White-Black Gap

<table>
<thead>
<tr>
<th>Post-NCLB Change</th>
<th>Increment</th>
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<td><strong>Pre-NCLB Growth</strong></td>
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<td>AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI(4), IL, IN, IA, KS, KY, LA, MD, MA, MI, MN(8) MS, MO, NE, NV, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, TN, TX, VA, WA, WV, WI</td>
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<td>Down</td>
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Unlike in mathematics where the white-black achievement gap decreased in the fourth grade in one state (Minnesota) post-NCLB, Jaekyung Lee and Harvard Civil Rights Project found no decrease in the black-white achievement gap post-NCLB, as set forth in Table 3 below:

111. Id. at 41 tbl. 6. “Numbers in parenthesis refer to grades in which different growth patterns are observed. When the same growth patterns apply to both grades 4 and 8 in each state, no numbers are shown after state code. ‘Up’ signifies widening of the gap, whereas ‘Down’ signifies narrowing of the gap.” Id.
Table 3: Classification of States in Pre-NCLB and Post-NCLB Trends of NAEP Grade 4 and Grade 8 Reading White-Black Gap

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<th>Post-NCLB Change</th>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>OK, OR,</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>PA, RI,</td>
<td></td>
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<tr>
<td></td>
<td>SC, TN,</td>
<td></td>
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<tr>
<td></td>
<td>TX, VA,</td>
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<tr>
<td></td>
<td>WA, WV,</td>
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<tr>
<td></td>
<td>WI</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flat</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Down</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In *Montoy v. Kansas*, various minority students and two school districts challenged the Kansas school financing system under the state’s constitution. Bruce Baker, in testimony for the plaintiffs, presented the findings on racial achievement gaps. Baker

112. Id. at 40 tbl. 5. “Numbers in parenthesis refer to grades in which different growth patterns are observed. When the same growth patterns apply to both grades 4 and 8 in each state, no numbers are shown after state code. ‘Up’ signifies widening of the gap, whereas ‘Down’ signifies narrowing of the gap.” Id.


presented the gaps in test scores between black and white students and Hispanic and white students on assessments in the state of Kansas, using student-level test scores and controlling for poverty and language proficiency status. For all grade levels in mathematics and reading, black and Hispanic students achieved at statistically significant lower levels than white students. Additionally, the black-white achievement gap was consistently greater than the Hispanic-white achievement gap.

As the statistics above indicate, there is a real racial achievement gap and NCLB has done little to change that. Scholars attribute the persisting achievement gap to two primary factors not adequately addressed by NCLB: segregation of public education and inadequate funding and resources.


Table 4: Black and Hispanic children’s test scores relative to White children’s scores, controlling for language proficiency, poverty (free or reduced lunch), excluding students with disabilities.\(^{117}\)

<table>
<thead>
<tr>
<th></th>
<th>Elementary</th>
<th>Middle</th>
<th>Secondary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Math</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>-5.99 (-.36)</td>
<td>-9.04 (-.55)</td>
<td>-7.16 (-.46)</td>
</tr>
<tr>
<td>1999</td>
<td>-5.47 (-.33)</td>
<td>-7.46 (-.45)</td>
<td>-6.98 (-.42)</td>
</tr>
<tr>
<td>2001</td>
<td>-4.60 (-.28)</td>
<td>-10.02 (-.61)</td>
<td>-8.53 (-.52)</td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>-11.58 (-.70)</td>
<td>-12.41 (-.75)</td>
<td>-10.82 (-.69)</td>
</tr>
<tr>
<td>1999</td>
<td>-9.75 (-.59)</td>
<td>-11.87 (-.72)</td>
<td>-10.85 (-.66)</td>
</tr>
<tr>
<td>2001</td>
<td>-11.98 (-.73)</td>
<td>-13.63 (-.83)</td>
<td>-11.91 (-.72)</td>
</tr>
<tr>
<td><strong>Reading</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>-5.54 (-.34)</td>
<td>-8.31 (-.51)</td>
<td>-5.41 (-.33)</td>
</tr>
<tr>
<td>1999</td>
<td>-5.00 (-.30)</td>
<td>-8.47 (-.27)</td>
<td>-6.21 (-.38)</td>
</tr>
<tr>
<td>2001</td>
<td>-3.78 (-.23)</td>
<td>-5.68 (-.35)</td>
<td>-5.95 (-.36)</td>
</tr>
<tr>
<td>Black</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>-9.73 (-.59)</td>
<td>-10.90 (-.66)</td>
<td>-9.24 (-.56)</td>
</tr>
<tr>
<td>1999</td>
<td>-10.16 (-.62)</td>
<td>-9.42 (-.57)</td>
<td>-8.74 (-.53)</td>
</tr>
<tr>
<td>2001</td>
<td>-7.26 (-.44)</td>
<td>-7.04 (-.43)</td>
<td>-8.43 (-.51)</td>
</tr>
</tbody>
</table>

Points below White students outside of parentheses
Standard deviations below White students inside parentheses

III. Litigation for Targeted School Funding

The racial achievement gap that is patent from the disaggregated data required by NCLB is likely to spur states to target funding toward the racial groups deficient in meeting AYP in order for states to meet one hundred percent proficiency by 2014. The characterization of NCLB as an unfunded mandate\(^{118}\) by states might further fuel the targeted funding.\(^{119}\) For example, the

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117. BAKER, supra note 114, at 142 tbl. 44.
National Education Association ("NEA") states that "[c]ost studies in Ohio and Texas estimate that the price of the [NCLB] regulations to state taxpayers could run as high as $1.5 and $1.2 billion, respectively."\textsuperscript{120} The pressures to meet 100 percent proficiency by 2014 and avoid loss of federal funds for failures to meet NCLB's requirements could all lead to racially targeted funding. Additionally, funding to implement the sanctions and remedies of NCLB such as supplemental educational services, conversion to charter schools, and replacement of management could also necessarily be race-conscious, based on the disaggregated data.

In the Education Trust's 2003 \textit{Funding Gap} report, Kevin Carey identified thirty-seven states where school districts with the highest percentage of minority students receive less in cost-adjusted state and local revenue per pupil than districts with the lowest percentage of minority students.\textsuperscript{121} For example, for the 2000-01 school year in Alabama, per pupil funding for low-minority school and Vermont as well as the National Education Association and its affiliates in Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Pennsylvania, Texas, Utah, and Vermont sued Margaret Spellings, Secretary of Education in her official capacity. The plaintiffs claimed that enforcement of provisions of the NCLB against them without needed funding violated the unfunded mandates provision of the NCLB. That provision states that "Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter." 20 U.S.C. § 7907(a) (West 2000 & Supp. 2007). The federal district court for the eastern district of Michigan dismissed the case for failure to state a claim, finding that there was no violation of the unfunded mandates provision. On January 7, 2008, the Sixth Circuit Court of Appeals reversed and remanded, ruling that the plaintiffs did state an adequate claim for relief that they are not liable for the added costs of compliance with the NCLB. Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ., No. 05-2708, 2008 WL 60187, at *7-19 (6th Cir. 2008). \textit{See also} Connecticut v. Spellings, 453 F.Supp.2d 459 (D. Conn. 2006) (alleging a similar claim as in \textit{Sch. Dist. of Pontiac}, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545, but dismissed by the federal district court for the district of Connecticut for lack of subject matter jurisdiction). For more on the debate surrounding the NCLB as an unfunded mandate, see Bartman \textit{supra} note 118; Weeden, \textit{supra} note 118; Wenkart, \textit{supra} note 118.


districts was $6,150, but $5,078 per pupil for high-minority districts.\textsuperscript{122} In Arizona, funding was $5,875 for low-minority districts versus $5,113 for high-minority districts.\textsuperscript{123} In California funding was $6,233 versus $5,652; in Colorado $6,561 versus $5,834; in Illinois, $6,946 versus $5,594; in Kansas, $7,845 versus $6,033; in Montana, $7,197 versus $5,498; in Nebraska, $8,030 versus $6,254; and in New York, $9,283 versus $7,210.\textsuperscript{124} Nationally, the funding gap between low-minority districts and high-minority districts was $1,030 per pupil.\textsuperscript{125} In the Education Trust’s report for the 2001-02 school year, when NCLB was enacted, Carey found a funding gap for minority students in thirty-five states.\textsuperscript{126} The nationwide gap was $1,099.\textsuperscript{127} For the specific states identified herein, the numbers are as follows: Alabama ($6,112 versus $5,640); Arizona ($5,847 versus $4,885); California ($6,175 versus $5,602); Colorado ($6,964 versus $6,071); Illinois ($7,398 versus $5,536); Kansas ($8,115 versus $6,442); Montana ($7,593 versus $5,752); Nebraska ($8,475 versus $6,781); and New York ($9,739 versus $7,573).\textsuperscript{128}

The latest report from the Education Trust found enduring funding gaps between low-minority and high-minority districts in twenty-eight states.\textsuperscript{129} The report found a funding gap of $908 per pupil nationally.\textsuperscript{130} For all the states we list as examples in this article, funding gaps continue.\textsuperscript{131} These funding gap figures are as follows: in Alabama, low-minority districts receive $437 less funding than high-minority districts; in Arizona the gap is $680 California, $499; Colorado, $1,032; Illinois, $1,524; Kansas, $1,630; Montana, $1,838; Nebraska, $1,374; and New York, $2,636.\textsuperscript{132} Thus, where

\begin{itemize}
\item \textsuperscript{122} CAREY I, supra note 121, at 8 tbl. 4.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id. For a complete listing of the thirty-seven states, see id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} CAREY II, supra note 121, at 6.
\item \textsuperscript{127} Id. at 7 tbl. 3.
\item \textsuperscript{128} Id. For a complete listing of the thirty-five states, see id. The 2005 report, which covers 2002-03 school year, shows persistent funding gaps in thirty states, and finds the national funding gap between low-minority and high minority districts to be $614 per pupil. See THE EDUCATION TRUST, THE FUNDING GAP 2005: LOW-INCOME AND MINORITY STUDENTS SHORTCHANGED BY MOST STATES (2005), available at http://www2.edtrust.org/NR/rdonlyres/31D276EF-72E1-458A-8C71-E3D262A4C91E/0/FundingGap2005.pdf.
\item \textsuperscript{129} Ross Weiner & Eli Pristoop, How Most States Short Change the Districts that Need the Most Help, in THE EDUCATION TRUST FUNDING GAPS 2006 5, 6 (The Education Trust, 2006), available at http://www2.edtrust.org/NR/rdonlyres/CDEF9403-5A75-437E-93FF-EBF1174181FB/0/FundingGap2006.pdf.
\item \textsuperscript{130} Id. at 6.
\item \textsuperscript{131} Id. at 7. All figures from the Education Trust 2006 Report represent a 40 percent adjustment for low-income students.
\item \textsuperscript{132} For a complete listing of the funding revenue gaps per student in the twenty-eight states, see id.
\end{itemize}
states fail to implement targeted funding and minority students are being left behind, high-minority schools might try to make a case to their states and the federal government for race-conscious funding. In fact, as noted earlier, research shows that targeting funding and other resources toward minority students results in higher academic achievement. In this section, we examine the history of school finance litigation, recognizing that race-conscious implementation of NCLB, particularly its funding, could breed a new form of school finance litigation by high-minority school districts. NCLB’s purpose and goals discussed above embody themes of equity and adequacy advanced in the three waves of school finance litigation.

School finance litigation brought by plaintiffs challenging school funding systems as unconstitutional generally seeks “to increase the amount and equalize the distribution of educational resources and, in so doing, to improve the academic opportunities and performance of students disadvantaged by existing finance schemes.” Thus far, it has proceeded through three waves: (a) First Wave — Federal Equal Protection Clause Litigation; (b) Second Wave — Equity and State Equal Protection Clause and State Education Clause Litigation; and (c) Third Wave — Adequacy under State Education Clause.

A. First Wave — Federal Equal Protection Clause Litigation

The first wave of school finance litigation (1971-1973) involved challenges arguing that inadequate funding violated the federal Equal Protection Clause. Given the United States Supreme Court’s emphasis on the fundamental importance of education in Brown v. Board of Education, school finance advocates believed that courts would be receptive to Equal Protection challenges to unequal school funding. Specifically, in Brown, the Court had stated that:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic
society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.137

Mounting federal Equal Protection challenges in reliance on this language from Brown was no surprise, especially given the Court's emphasis on "equal terms" Regarding the availability of education to all138. Plaintiffs in first wave cases argued that horizontal equity (equal treatment of equals) should prevail in school funding. For example, in Serrano v. Priest, parents and students challenged California's school funding system under the federal Equal Protection Clause, arguing for horizontal equity.139 Specifically, the plaintiffs claimed that the state used "a financing plan or scheme which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts' educational programs."140 Accordingly, they argued that districts that had smaller tax bases were unable to spend as much per pupil as districts with larger tax bases, resulting in educational inequities.141 The Supreme Court of California held that:

[the] funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing, as we must that the right to an education in our public schools is a fundamental interest that cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing.142

The court recognized education as a fundamental right,143 and wealth as a suspect classification,144 and found the funding scheme violated the federal Equal Protection Clause because it failed to
provide horizontal equity.\textsuperscript{145} This was a major victory for school finance advocates.

Two years later, however, in \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{146} the United States Supreme Court ruled that education was not a fundamental right\textsuperscript{147} and wealth was not a suspect classification\textsuperscript{148} under the United States Constitution. In \textit{Rodriguez}, the plaintiffs challenged the constitutionality of Texas' school financing system due to its reliance on local property taxation, which resulted in unequal funding and consequently educational inequities.\textsuperscript{149} Having found that education was not a fundamental right and that wealth was not a suspect classification, the Court applied the rational basis standard of review, finding the school funding scheme constitutional.\textsuperscript{150} Given the lenient rational basis standard of review that would be used in future cases, \textit{Rodriguez} dealt a blow to school finance advocates as they could no longer rely on the federal Equal Protection Clause as a basis for challenging school funding.

\textbf{B. Second Wave — Equity and State Equal Protection Clause and State Education Clause Litigation}

The second wave of school finance litigation (1973-1989) involved challenges to school funding schemes based on the equal protection clauses and education clauses in state constitutions.\textsuperscript{151} The first case in this wave was \textit{Robinson v. Cahill}.\textsuperscript{152} In \textit{Robinson}, plaintiffs challenged New Jersey's school financing system; a system largely based on local taxation, which was used to fund 67 percent of the costs of public education.\textsuperscript{153} This system of funding resulted in substantial disparities in per pupil funding and had no ostensible relation to the state constitutional requirement of equal educational opportunity.\textsuperscript{154} The Supreme Court of New Jersey found the state's funding scheme unconstitutional for failing to satisfy the education clause's requirement of a "thorough and efficient education."\textsuperscript{155} The court declined to rule on whether the funding disparities in the
funding system violated the state's equal protection clause.\textsuperscript{156}

However, even after Rodriguez, in Serrano \textit{v.} Priest, the California Supreme Court found the state's funding scheme violated the state's equal protection clause.\textsuperscript{157} The court stated that strict scrutiny applies to classifications on the basis of district wealth.\textsuperscript{158} Pursuant to this, the court held that such classifications are suspect and that education is a fundamental right under the state's constitution.\textsuperscript{159} The California school financing system which was dependent on school district wealth led to inter-district funding disparities.\textsuperscript{160} Equal educational opportunity was therefore a function of the taxable wealth of the district.\textsuperscript{161} Consequently, the court ruled that this funding system did not serve a compelling state interest.\textsuperscript{162}

These rulings provided a new way for plaintiffs to challenge school funding systems. Legal scholar Michael Heise describes this new basis for litigation:

\begin{quote}
The \textit{Robinson} decision raised many school reformers' expectations. Within a period of less than two weeks, one significant litigation tool was lost and another found. Despite a major defeat in the Supreme Court in \textit{Rodriguez}, the New Jersey Supreme Court in \textit{Robinson} demonstrated the amenability of state constitutions and that an equity approach could succeed in state court. Education clauses, alone or in conjunction with claims rooted in state equal protection clauses, provided a valuable tool to invalidate school finance systems and reduce per-pupil spending disparities.\textsuperscript{163}
\end{quote}

However, not all cases brought within this second wave – relying on state Education and Equal Protection Clauses – were successful. Legal scholar James Ryan states that "[c]ourt results in the second phase were mixed: Of the twenty challenges resolved by state supreme courts, thirteen were rejected and seven were successful."\textsuperscript{164} Additionally, successes in litigation did not always bring about change to the challenged funding systems. As Ryan writes, "[e]ven where plaintiffs secured court victories, state courts were often vague and deferential when it came to ordering remedies, and legislatures were often evasive or recalcitrant in

\begin{footnotes}
156. \textit{Robinson}, 303 A.2d at 283.
158. \textit{Id.} at 951-52.
159. \textit{Id.}
160. \textit{Id.} at 952-53.
161. \textit{Id.} at 53.
162. \textit{Id.}
164. Ryan, \textit{supra} note 115, at 266.
\end{footnotes}
response.” Robinson and the line of cases that followed were not as helpful as plaintiffs and their attorneys in school funding litigation hoped. As Heise observes, “the high expectations raised by the Robinson decision waned over time due to subsequent court decisions.”

C. Third Wave — Adequacy under State Education Clause Litigation

The third wave of school finance litigation (1989-present) involves challenges to school funding based on the requirement of adequate education in state education clauses. Compared to the first and second waves, “third wave decisions concentrate on state education clauses rather than state equal protection clauses or a blend of the two.” In the third wave, plaintiffs argue that a minimum level of educational outcomes is required under state education clauses and that states must provide funding to assure this minimum level of outcomes.

The third wave began with Rosen v. Council for Better Education, Inc., and Helena Elementary School District No. 1 v. State. In Rosen, the plaintiffs challenged Kentucky’s school funding system under the state’s education clause. The court found that the funding system created inter-district “wide variations in financial resources and dispositions thereof which result[ed] in unequal educational opportunities throughout Kentucky.” It explained that “[t]he local districts ha[d] large variances in taxable property per student... [such that] [e]ven a total elimination of all mismanagement and waste in local school districts would not correct the situation.” Given the consequent disparities in educational opportunities, the Kentucky Supreme Court found the funding system unconstitutional because it failed to provide for an adequate education as required under the state constitution.

In Helena, the plaintiffs challenged Montana’s school funding system under the state’s education clause. The funding system, which was dependent on district wealth, resulted in inter-district

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165. Id.
166. Heise, supra note 135, at 1160.
167. Id. at 1152.
168. Id. at 1162.
169. 790 S.W.2d 186 (Ky. 1989).
171. Rosen, 790 S.W.2d at 197.
172. Id.
173. See Rosen, 790 S.W.2d 186.
educational disparities. The state’s Supreme Court found the funding system “clearly and unequivocally established large differences, unrelated to ‘educationally relevant factors,’ in per pupil spending among the various school districts of Montana.” Accordingly, there were great disparities in educational opportunities in the districts. Consequently, the court held that the state’s funding scheme failed to satisfy the guarantee of adequate educational opportunity in the state’s education clause.

However, successes under the third wave of school funding litigation and the hopes raised by the successes of Rose and Helena were tempered by the nature of the decisions in many of these cases. Ryan observes that in this third wave:

> [t]he success of such suits rests on a number of contingencies, none of which will be easy to satisfy, including the establishment of standards or goals that are sufficiently high to be meaningful; some understanding on the part of the legislature and the courts regarding the inputs necessary to achieve the established standards; and a guarantee of enough funding to ensure that all students have a realistic chance of achieving the determined goals.

As evident from the discussion above, while NCLB itself strives to represent the ideas in Ryan’s observation about the third wave, the Act lacks meaningful goals for minorities due to the racial achievement gap. Characterizing NCLB is a seeming lack of understanding and guarantee of the inputs, including funding, needed to close the racial achievement gap — an important goal of the Act. Compounding the situation is the fact that the funding authorized in NCLB has consistently fallen short of the funding appropriated. Given the shortfalls in funding, the persistent racial achievement gaps, and NCLB requirement of 100 percent proficiency by 2014, high-minority school districts could seek to embark on a new form of school finance litigation based on race-conscious funding under NCLB.

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175. *Id.* at 690.
176. *Id.*
177. *See id.* at 691.
179. *See supra* Part I.
181. *See infra* Table 5.
Table 5: Funding Gap: No Child Left Behind Funding Promised in the Law vs. Funding Actually Received, FY 2002-08\textsuperscript{182}

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Promised Funding</th>
<th>Actual Funding</th>
<th>Change from Prior Year</th>
<th>Funding Gap: Yearly Cumulative</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Dollars</td>
<td>Dollars</td>
<td>Dollars</td>
<td>Actual</td>
</tr>
<tr>
<td>2008</td>
<td>39,442,400</td>
<td>24,596,773</td>
<td>$938,513,724</td>
<td>$(14,845,627)</td>
</tr>
<tr>
<td>2006</td>
<td>36,867,400</td>
<td>23,504,035</td>
<td>(1,016,805)</td>
<td>(13,363,365)</td>
</tr>
<tr>
<td>2005</td>
<td>34,317,400</td>
<td>24,520,839</td>
<td>57,770,724</td>
<td>(9,796,561)</td>
</tr>
<tr>
<td>2004</td>
<td>32,017,400</td>
<td>24,463,069</td>
<td>626,397,724</td>
<td>(7,554,331)</td>
</tr>
<tr>
<td>2003</td>
<td>29,217,400</td>
<td>23,836,672</td>
<td>1,641,835,724</td>
<td>(5,380,728)</td>
</tr>
<tr>
<td>2002</td>
<td>26,417,400</td>
<td>22,194,838</td>
<td>3,517,374,724</td>
<td>(4,222,562)</td>
</tr>
<tr>
<td>2001</td>
<td></td>
<td>18,677,464</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{182} National Education Association, Funding Gap: No Child Left Behind: Funding Promised in Law vs. Funding Actually Received FY 2002-09 2 (2008), available at http://www.nea.org/lac/funding/images/fundinggap.pdf. Based on U.S. Department of Education and House Appropriations Committee. FY 2008 reflects the Consolidated Appropriations Act. NCLB funding amounts represent all federal education programs authorized or otherwise amended by the No Child Left Behind Act of 2001 (P.L. 107-110). No specific authorization is provided in the No Child Left Behind Act beyond fiscal year 2007. The authorization level in fiscal year 2008 is based on the most recent year for which a specific authorization is provided in law.
IV. The Implications of Parents Involved for Race-Conscious Implementation of NCLB

Recall that NCLB requires disaggregation of data on AYP for various demographic subgroups, including racial minorities, and seeks the closure of "the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students." Presumably, if states find, consistent with current data, that high-minority schools are the deficient ones, they would implement NCLB sanctions and remedies as race-conscious measures in order to close the achievement gap and to attain the other goals of the Act.

However, if a state implements NCLB sanctions and remedies race-consciously or targets funding with a consciousness of race, such measures would likely be challenged under the federal Equal Protection Clause. This article suggests that the Parents Involved case, which involved race-conscious measures at the elementary and secondary education levels, informs the debate on what the Supreme Court would look for in an Equal Protection Clause challenge to a race-conscious implementation of NCLB. In this section, we present an overview of the Equal Protection Clause framework and then analyze race-conscious implementation of NCLB under Parents Involved.

A. Overview of the Equal Protection Framework

Cases brought under the Equal Protection Clause are determined under one of three tiers of review. These are (i) strict scrutiny; (ii) intermediate scrutiny; and (iii) rational basis review. Government classifications that infringe a fundamental right, or burden or benefit a suspect class, are subject to strict scrutiny. Such classifications are presumed unconstitutional, with the government bearing the burden to demonstrate that the classification is narrowly tailored to achieve a compelling interest. Fundamental rights are rights explicitly or implicitly guaranteed by the United States Constitution. Examples of fundamental rights include the rights to interstate travel; marriage and procreation;

187. Id. at 33-34.
188. Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745,
free association;190 privacy;191 and criminal appeals.192 The suspect classes are race, ethnicity, and national origin,193 and resident alienage.194

Intermediate scrutiny applies to classifications that benefit or burden a quasi-suspect class.195 Under this tier of review, the government bears the burden of establishing that the classification is substantially related to an important government interest.196 The government must establish an "exceedingly persuasive justification"197 for the use of quasi-suspect classifications: gender198 and illegitimacy.199 The rational basis standard of review is applicable when a classification involves neither a suspect (or quasi-suspect) classification nor a fundamental right. Plaintiffs bear the burden200 to demonstrate that the classification is not rationally related to a legitimate government interest.201 Classifications will be upheld under rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."202

Ostensibly, because race is a suspect class, race-conscious implementation of NCLB’s sanctions and remedies and racially targeted funding would attract strict scrutiny. Thus, to be upheld under the federal Equal Protection Clause, any race-conscious implementation of NCLB must be narrowly tailored to achieve a compelling state interest.

200. See, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it") (internal quotes omitted).
201. San Antonio Indep. Sch. Dist., 411 U.S. at 40 ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.").
202. Beach Communications, 508 U.S. at 313.
B. *Parents Involved* and Race-Conscious Implementation of NCLB

In *Parents Involved*, the United States Supreme Court reviewed the constitutionality of voluntarily adopted race-conscious school assignment plans in two school districts, Seattle and Kentucky. First, a Seattle school district implemented a racial tiebreaker for assigning students to its oversubscribed high schools. The school district implemented the racial tiebreaker to ensure racial balance within 10 percent of the white/nonwhite demographics of the district in its schools.203 The Court observed that the district had never operated segregated schools and had never been under court-ordered desegregation decree.204

Like the Seattle school district, the Kentucky school district implemented a racial tiebreaker to maintain racial balance.205 Specifically, the Kentucky school district sought a racial balance of between 15 percent and 50 percent of the total enrollment of its non-magnet elementary schools.206 Unlike the Seattle district, however, the Kentucky district had operated a segregated public school207 and been under a court-ordered desegregation decree from 1975208 to 2000.209 Both districts’ assignment plans were challenged as violations of the federal Equal Protection Clause. The issue presented to the Supreme Court was "whether a public school that had not operated legally segregated schools [the Seattle school district] or has been found to be unitary [the Kentucky school district] may choose to classify students by race and rely upon that classification in making school assignments."210

Consistent with the Equal Protection Clause framework laid out above, Chief Justice Roberts, writing for the Court, reiterated that government use of racial classifications to distribute benefits or

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204. *Id.* The dissenting Justices disagreed: "The plurality's claim that Seattle was 'never segregated by law' is simply not accurate." *Id.* at 2812.
205. *Id.* at 2749.
206. *Id.* at 2749-50.
210. *Parents Involved*, 127 S. Ct. at 2746. In essence, the holding is applicable to school districts that have never operated segregated schools or those which have been judicially determined to have attained unitary status.
burdens are always subject to strict scrutiny analysis. Applying this standard of review in its stringency, the Court found the race-conscious assignment plans violative of the Equal Protection Clause. The Chief Justice observed that elimination of past discrimination and diversity in higher education are the only two compelling interests for racial classifications in public education. The Court held that since the Seattle school district had never been segregated by law, nor under a desegregation decree, the district had no compelling interest in remedial use of race for past intentional discrimination. Additionally, the Kentucky school district, which had been segregated by law, and under a desegregation decree, could not rely on this remedial use of race either because of the dissolution of the desegregation decree in 2000. Thus, one implication of the holding in *Parents Involved* is that states can implement NCLB’s sanctions, remedies, and funding race-consciously in school districts previously segregated by law and currently under a desegregation decree. After attaining unitary status, however, this remedial use of race would no longer serve as a compelling interest for such school districts.

Based in the Equal Protection Clause framework, strict scrutiny analysis requires that means used to satisfy a compelling interest be narrowly tailored. Narrow tailoring principles explained in *Parents Involved* might guide race-conscious implementation of NCLB’s sanctions and remedies and race-conscious funding under the Act. For example, the Court found that neither race-based assignment plan in the case was narrowly tailored, in part because

211. *Id.* at 2751-52. To buttress his declaration that strict scrutiny applies to racial classifications used in the distribution of not only burdens but benefits as well, Chief Justice Roberts relied on *Adarand Constructors, Inc.*, 515 U.S. at 227. According to the dissenting Justices in *Parents Involved*, this holding in *Adarand* merely means that traditional strict scrutiny — i.e., strict scrutiny that is "strict in theory but fatal in fact" is applicable to exclusionary uses of racial classifications, while benign, beneficial or inclusionary uses of racial classifications are subject to strict scrutiny that is not "strict in theory but fatal in fact." Cf. *Id.* at 2816-17 (Breyer, J., dissenting).

212. *Id.* at 2752 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

213. *Id.* at 2753 (citing *Grutter v. Bollinger*, 539 U.S. 306, 324-25 (2003)).

214. *Id.* at 2752-53 (stating, “it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination . . . . The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education”).

215. *Id.* at 2752.

216. *Id.*

217. See *id.* at 2753.

218. *Id.* at 2752.
both plans had minimal impact on student assignments.\textsuperscript{\emph{219}} Under this principle, the Court stated the Kentucky school district’s racial classifications have “only a minimal effect on the assignment of students.”\textsuperscript{\emph{220}} Additionally, the Court declared that the Seattle school district’s “racial tiebreaker results, in the end, only in shifting a small number of students between schools.”\textsuperscript{\emph{221}} The Court ruled that when a race-conscious plan has minimal impact, the necessity of the racial classification used in the plan is questionable.\textsuperscript{\emph{222}} This reasoning would suggest that race-conscious implementation of NCLB’s sanctions and remedies and race-conscious targeted funding that have more than a minimal impact in closing the racial achievement gap, stand a better chance of surviving strict scrutiny.

Furthermore, in \textit{Parents Involved}, the Court emphasized that narrow tailoring requires “serious, good-faith consideration of workable race-neutral alternatives.”\textsuperscript{\emph{223}} However, “exhaustion of every conceivable race-neutral alternative,” is not a requirement.\textsuperscript{\emph{224}} Therefore, states must consider race-neutral alternatives before implementing the Act’s sanctions and remedies or funding with a consciousness of race. Because student achievement gaps continue to have a strong black-white racial component not entirely explained by race-neutral factors (such as socio-economic status), race-conscious measures under NCLB seem logically necessary.\textsuperscript{\emph{225}} Moreover, various studies demonstrate a positive relationship between race-conscious targeting of financial resources and

\begin{itemize}
  \item \textsuperscript{\emph{219}} \textit{Id.} at 2759. In this respect, the Court noted that “Seattle’s racial tiebreaker results, in the end, only in shifting a small number of students between schools.” \textit{Id.} This “minimal effect/impact” principle is evident in various parts of the Court’s opinion. \textit{See id.} (stating, for example, that “the tiebreaker’s annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools”) (emphasis added).
  \item \textsuperscript{\emph{220}} \textit{Id.} at 2760 (declaring that “Jefferson County estimates that the racial guidelines account for only 3 percent of assignments.”) (emphasis added).
  \item \textsuperscript{\emph{221}} \textit{Id.} at 2759 (emphasis added).
  \item \textsuperscript{\emph{222}} \textit{Id.} at 2760. The term “necessity” is the same as the narrow tailoring requirement of strict scrutiny.
  \item \textsuperscript{\emph{223}} \textit{Id.} (quoting \textit{Grutter}, 539 U.S. at 339).
  \item \textsuperscript{\emph{224}} \textit{Grutter}, 539 U.S. at 339. These principles should be considered along with those the Court identified in United States v. Paradise, 480 U.S. 149, 171 (1987): (a) flexibility and duration of the classification; (b) efficacy of race neutral alternatives; (c) relationship of the numerical goals to the applicable population; and (d) impact on third parties. Clearly, these are some of the principles discussed in \textit{Parents Involved}.
  \item \textsuperscript{\emph{225}} In other words, the racial achievement gap cannot be wholly explained by socio-economic factors. \textit{See, e.g.}, Baker, Keller-Wolff, & Wolf-Wendel, \textit{supra} note 3; Green, et al. \textit{Race-Conscious Funding, supra} note 120; Bruce D. Baker & William D. Duncombe, \textit{Balancing District Needs and Student Needs: The Role of Economies of Scale Adjustments and Pupil Need Weights in School Finance Formulas,} 29 J. OF EDUC. FIN. 195, 219 (2004).
\end{itemize}
outcomes for racial minorities.\textsuperscript{226} In essence, substantial evidence shows that race-conscious measures are necessary to closing the racial achievement gap. However, to pass narrow tailoring muster, before pursuing race-conscious measures, states must document their consideration of race-neutral alternatives and their reasons for concluding that these alternatives would not accomplish the ends desired.\textsuperscript{227}

In\textit{ Parents Involved}, a plurality of Justices\textsuperscript{228} found that the race-conscious assignment plans did not satisfy the narrowly tailoring requirement because racial balancing has no logical stopping point.\textsuperscript{229} To pass narrow tailoring muster, therefore, any race-conscious implementation of NCLB's sanctions and remedies and race-conscious funding under the Act must incorporate a logical end.\textsuperscript{230} The 2014 requirement of 100 percent proficiency could serve as this stopping point. However, it is unclear if merely requiring the closure of achievement gaps without including a specific timeline would suffice as a logical stopping point.

While rejecting the idea of racial balancing, Chief Justice Roberts emphasized that:

other means — e.g., where to construct new schools, how to allocate resources among schools, and which academic offerings, to provide to attract students to certain schools implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity — not even in dicta.\textsuperscript{231}

Thus, advocates of race-conscious funding under NCLB might be encouraged that "how to allocate resources among schools," was specifically excluded by the Chief Justice from the express holding of the case that found the race-conscious assignments unconstitutional.\textsuperscript{232}
In his concurrence, Justice Thomas made clear his opposition to any race-conscious measures. He declared that “all race-based government decisionmaking — regardless of context — is unconstitutional.” Furthermore, remedial uses of race must be justified with “a strong basis in evidence.” To meet Thomas’ standard, race-conscious implementation of NCLB would require findings about the extent of the government entity’s past racial discrimination; the scope of injury; and “the necessary remedy . . . [which] must be more than inherently unmeasurable claims of past wrongs.” Justice Thomas recognizes as compelling interests “only those measures the State must take to provide a bulwark against anarchy . . . or to prevent violence and a government’s effort to remedy past discrimination for which it is responsible.” Considering his narrow view, it is clear that Justice Thomas is unlikely to support race-conscious implementation of NCLB’s sanctions and remedies and race-conscious funding under the Act. In fact, it seems that it would be easier for a camel to go through the eye of a needle than to satisfy Justice Thomas’ stringent test, at least in education.

Justice Kennedy’s concurrence suggests he may be amenable to race-conscious implementation of NCLB. In his compelling interest analysis, Justice Kennedy stated that school districts can pursue an interest in equal educational opportunity; this interest should encompass closing the racial achievement gap. Justice Kennedy declared that:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

233. Id. at 2770-71.
234. Id. at 2772 (quoting Croson, 488 U.S. at 500).
235. Id. (quoting Croson 488 U.S. at 504).
236. Id. (quoting Croson, 488 U.S. at 505).
237. Parents Involved, 127 S. Ct. at 2772 (quoting Croson, 488 U.S. at 506) (internal quotes and citations omitted). Justice Thomas is amenable to upholding racial balancing “as a constitutionally permissible remedy for the discrete legal wrong of de jure segregation.” Id. at 2773 (emphasis in original).
238. Id. at 2782 (Thomas, J., concurring in part and dissenting in part) (quoting Grutter, 539 U.S. at 351-53) (emphasis added) (internal quotes omitted).
239. Id. at 2792.
240. Id. (emphasis added).
Kennedy may be receptive to race-conscious implementation of NCLB’s sanctions and remedies and race-conscious funding under NCLB, if designed to close the racial achievement gap. However, under Kennedy’s analysis, such race-conscious implementation of NCLB must address the racial achievement gap in a general way without *individual* typing by race.

As Justice Stevens stated in his dissenting opinion, the dissenting Justices\textsuperscript{241} would review benign race-conscious measures (such as race-conscious implementation of NCLB) under a less exacting standard than traditional strict scrutiny.\textsuperscript{242} Yet, even under a strict scrutiny analysis, the dissenting Justices still found the race-based assignment plans narrowly tailored to serve compelling interests.\textsuperscript{243} The dissenters gave examples of compelling state interests relevant to racial classifications in schools: the need to meet learning goals (including presumably, closure of the achievement gap) and the need to recruit and retain high quality teachers.\textsuperscript{244} They stated that school districts must have wide latitude so that they can experiment with several means and “gravitate toward those that prove most successful or seem to them best to suit their individual needs.”\textsuperscript{245} It is evident from their opinion in *Parents Involved* that the dissenting Justices would likely support race-conscious implementation of NCLB. For example, the dissent observed that “[a] longstanding and unbroken line of legal authority tell us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.”\textsuperscript{246} In essence, the dissent would allow states and school districts to implement certain voluntary race-conscious measures, even where such measures are not required by law.

The dissent in *Parents Involved* recognized remedial,\textsuperscript{247} educational,\textsuperscript{248} and democratic\textsuperscript{249} as three elements of compelling

\textsuperscript{241} Justices Ginsburg, Stevens, Souter, and Breyer.
\textsuperscript{242} See *Parents Involved*, 127 S. Ct. at 2816-17.
\textsuperscript{243} *Id.* at 2800, 2802, 2820-31.
\textsuperscript{244} *Id.* at 2811.
\textsuperscript{245} *Id.* (quoting Comfort v. Lynn School Comm., 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, C.J., concurring) (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring)), cert. denied, 546 U.S. 1061 (2005)).
\textsuperscript{246} *Id.* at 2811. Similarly, the dissenting Justices stated that it is a constitutionally valid legal principle “that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself.” *Id.* at 2814. This would favor race-based funding.
\textsuperscript{247} *Id.* at 2820.
\textsuperscript{248} *Id.* at 2820-21.
interest in racial integration. These elements are instructive for race-conscious implementation of NCLB. According to the dissent, the remedial element is the “interest in continuing to combat the remnants of segregation caused in whole or in part by these [legal or administrative] school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes.”

In those schools where such remnants of segregation persist, NCLB sanctions and remedies as well as its funding could be implemented as race-conscious remedial measures to close the racial achievement gap. The remedial element encompasses cases of de facto segregation, not merely de jure segregation.

The educational element is the “interest in overcoming the adverse educational effects produced by and associated with highly segregated schools.” Race-conscious implementation of NCLB’s sanctions and remedies and race-conscious funding under the Act to close the racial achievement gap would embrace this element. As noted earlier, according to various scholars the racial achievement gap is a function of segregation. As an adverse educational effect that is the product of segregation, the racial achievement gap could be overcome by race-conscious implementation of NCLB, including funding targeted to that end. The democratic element is the “interest in producing an educational element that reflects the pluralistic society in which our children will live.” Race-conscious implementation of NCLB’s sanctions and remedies, as well as race-conscious funding under the Act, that would produce achievement levels for minorities comparable to that of their white counterparts should satisfy this element. Since race-conscious implementation of NCLB would satisfy each of the three articulated

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249. Id. at 2820.
250. Id. (emphasis added). This is not an interest in eliminating the remnants of general societal discrimination, “but of [eliminating the remnants] of primary and secondary school segregation.” Id. at 2823. Remedial interests do not “vanish the day after a federal court declares that a district is unitary.” Id. at 2824 (internal quotes omitted).
251. Id. at 2820.
252. While in Parents Involved, the three elements were included in the discussion of racial integration, nothing in the language of the discussion of the remedial and educational elements indicates that the Justices would necessarily limit their application to the cases of racial integration and not apply them to other race-based measures. Even if the language is somehow interpreted to limit their application, the same rationales underlying the elements would seem to apply to race-based measures beyond racial balancing. However, the democratic element, as discussed infra notes 253-59 and accompanying text, seems limited by its language and nature to racial balancing.
254. See, e.g., Ryan, supra note 115.
255. Parents Involved, 127 S. Ct. at 2821 (internal quotes omitted).
elements, it seems evident that the dissenters in *Parents Involved* would uphold race-conscious implementation of NCLB designed to close the achievement gap.

Considering the current Justices sitting on the Supreme Court, our analysis of *Parents Involved* reveals that the dissenting Justices (Breyer, Ginsburg, Souter, and Stevens) would likely be receptive to race-conscious implementation of NCLB’s sanctions and remedies and race-conscious funding under the Act. In contrast, Justice Thomas would clearly be opposed to such race-conscious measures given his stringent standard for strict scrutiny of racial classifications and his color-blind approach. Justice Kennedy would likely be the swing vote in the decision. Based on his concurrence in *Parents Involved*, Kennedy would likely support race-conscious implementation of NCLB as long as it is designed to close the achievement gap.\(^{256}\)

**Conclusion**

In this article, we have provided an overview of NCLB. We discussed NCLB’s purpose and goals as well as its sanctions and remedies. We also examined the racial achievement gap in public education that could provide an impetus for race-conscious implementation of NCLB’s sanctions and remedies and race-conscious targeted funding. Our analysis reveals a persistent racial achievement gap that makes it highly unlikely that high-minority schools would satisfy the one hundred proficiency requirement by 2014 under NCLB as currently enacted.

We presented a historical overview of litigation for targeted funding, identifying its three waves: (a) First Wave — Federal Equal Protection Clause Litigation; (b) Second Wave — Equity and State Equal Protection Clause and State Equal Protection Clause; and (c) Third Wave — Adequacy under State Education Clause Litigation, given NCLB’s embodiment of the themes of equity and adequacy in these waves. Finally, we presented the Equal Protection Clause’s three-tier framework and then analyzed race-conscious implementation of NCLB’s sanctions and remedies as

\(^{256}\) For example, Justice Kennedy stated that “[i]f school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.” *Id.* at 2790. Since race-conscious implementation of the NCLB’s sanctions and remedies and targeted funding designed to close the achievement gap occur at the school or district level, they would satisfy Justice Kennedy’s requirement of general typing by race.
well as race-conscious targeted funding under NCLB. Our analysis revealed that race-conscious implementation of NCLB could have a favorable future in the Supreme Court, even if with a 5-4 decision, in an Equal Protection Clause challenge.

As we have discussed extensively in this article, in spite of NCLB, racial achievement gaps persist. While there has been litigation for targeted funding, the three waves have not ameliorated inequities in funding.\(^{257}\) Perhaps what has not been achieved under the three waves could be achieved through school finance litigation under NCLB for race-conscious targeted funding. Given the enduring racial achievement gaps, it is wise for states and the federal government to target funding under NCLB with a consciousness of race. Indeed, social justice and equity demand this. It is illogical to keep targeting resources in ways that fail to address the underlying problem — racial inequity. As noted earlier, socioeconomic factors do not fully account for racial achievement gaps. Policymakers at the state and federal level need to examine the current system of allocation aid. While it may be politically controversial to target funding with a consciousness of race, the prohibitive costs of not doing so is the future of our country and our children. It is inequitable and inefficient to mistarget funds merely to be politically incorrect. With the Parents Involved decision indicating that at least five of the Justices would support race-conscious funding, now might be the time for the government to take the most effective route to meeting requirements under NCLB. The first step is to read the data on race as it correlates to achievement gaps as an uncontroverted mammoth.

Race-conscious funding under NCLB should be a civil rights issue. If NCLB is truly to close the achievement gap and lead to one hundred percent proficiency by 2014, a mere six years from now, we need to work with the demographic data gathered pursuant to the Act and that means targeting funding to groups that are being left behind, one of which is racial minorities. Without analyzing the data and changing policies based on that analysis, the requirement of disaggregation of data is futile. If we can truly achieve NCLB’s noble purpose and goals, reminiscent of Justice O’Connor’s goals stated in Grutter v. Bollinger,\(^{258}\) by 2028, race-conscious admissions would no longer be necessary to achieve diversity in higher education.\(^{259}\) It is social injustice to simply provide an equal amount of money to low-minority school districts (which consistently make AYP) and high-minority districts. Indeed, merely providing equal

\(^{257}\) The three waves have failed to address race-conscious funding.


\(^{259}\) Id. at 323-24.
financial inputs could actually handicap the ability of high-minority school districts to recruit and retain highly qualified teachers necessary to close the racial achievement gap.\textsuperscript{260}

Vertical equity requires that high-minority school districts should not merely get comparable funding, but relatively more resources because they have the greatest needs.\textsuperscript{261} In fact, for such districts to provide constitutionally adequate education in the modern era of standards and accountability, race-conscious targeted funding is a necessity. Otherwise, what would result is a great miscarriage of justice where NCLB's sanctions and remedies are disproportionately imposed on these schools, further exacerbating their situation. Is it really equitable to sanction those schools after failing to provide them with the resources to meet the standards? Moreover, the stigma and other consequences that attend being labeled as a school "in need of improvement," or in corrective action or restructure status for the students and the schools are untold. The repercussions of such stigmas will certainly serve to exacerbate the current difficulties of attracting highly qualified teachers and administrators who could help implement much-needed reforms in the schools. Indeed, as noted above, sanctioning schools under NCLB itself costs money for those schools already struggling financially to provide adequate education. In other words, the inequitable funding that currently exists under the Act, feeds even greater inequities when sanctions are disproportionately imposed on high-minority districts.

The vicious cycle must stop. It is most prudent to first target resources with a consciousness of race, in order to close the racial achievement gap, before we impose sanctions under the Act, something that is yet to be even tried. Management should be put in place to ensure that the targeted resources are spent efficiently and effectively, as corrupt administrators would undermine this reform. Achieving educational outcomes in the spirit of Brown, and closing the achievement gap under NCLB to avoid a wholesale sanctions regime on high-minority districts, requires we face the bleak educational present and future of students in high-minority districts now, though it may seem politically incorrect. To effectively address the problems with results under NCLB, we need to target funding. There is a racial achievement gap and we have six

\textsuperscript{260} Imazeki & Reschovsky, \textit{supra} note 10.

\textsuperscript{261} The discussion of vertical equity is beyond the scope of this article. Very simply, the concept means the unequal treatment of unequals which is what race-conscious funding under the NCLB would be in targeting funding to those who face unequal educational opportunities. For more on the concept of vertical equity, see ROBERT BERNE \& LEANNA STEIFEL, \textit{THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE} (The Johns Hopkins University Press 1984).
years (and in some cases less than six years)\textsuperscript{262} to avert an NCLB sanctions regime that could lead to an unmanageable and turbulent further downward spiral in the education of an invaluable segment of our nation.

\textsuperscript{262} Schools identified for school improvement or corrective action are already subject to the NCLB’s sanctions and remedies and many of them happen to be high-minority districts. When 2014 rolls around, schools that fail to meet one hundred percent proficiency face even greater sanctions.