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Symposium: Twelfth Annual LatCrit Conference Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes: **Implication of the No Child Left Behind Act** for Educational Equity and Segregation

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BIO:

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SUMMARY:

... There are many good reasons for opposing the NCLBA accountability provisions and developing the position that NCLBA accountability provisions are in violation of the Spending Clause. ... One superintendent in Los Angeles stated that she would like to shut down low-performing schools but it would be hard to do considering that more than half of the schools in her district do not meet the NCLBA standards. ... Spellings contended that the law would weaken the NCLBA's effort to raise achievement level for poor and minority students. ... One issue for consideration under the NCLBA is whether a school rezoning plan can be defeated by construing the NCLBA as prohibiting school officials from moving minority students into low-performing schools. ... Many black parents believed that it is an arbitrary use of power that defies the purpose of the NCLBA to allow school officials to use school zoning laws to ship African-American students away from high-performing, racially integrated schools to low-performing, racially identifiable schools. ... Title I of NCLBA makes available the biggest separate source of federal education funding directed at assisting states in addressing the educational requirements that socioeconomically disadvantaged students must meet. ... The goal of the NCLBA contains the next statement, "closing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged and their more advantaged peers. . . ." ... Supporters of educational equity in Tuscaloosa, Alabama, may find it useful to follow Losen's advice and engage in a campaign to raise awareness that the NCLBA has "several race-conscious accountability provisions and requirements" that should prevent school officials from transferring black students out of a high-performing integrated school to a low-performing school with a majority of black students in order to increase the percentage of white students attending the high performing integrated school.

TEXT:

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Introduction

The issue to be addressed is whether the No Child Left Behind Act ("NCLBA") is a proper tool for advancing equity in education. Provisions of the NCLBA that require states to adhere to educational accountability have been construed as being seriously underfunded.ⁿ¹ These provisions have been argued as underfunded in not providing the states with adequate federal funding to compensate for the state's compliance with the Act's provisions.ⁿ² The prerequisites of NCLBA have also been viewed as conflicting with established desegregation orders in public schools.ⁿ³ However, some parents of public school students see NCLBA as an effective method of providing their children with better educational opportunities.ⁿ⁴ There are many good reasons for opposing the NCLBA accountability provisions and developing the position that NCLBA accountability provisions are in violation of the Spending Clause.ⁿ⁵ Laws that require public schools to expend more economic resources than they can reasonably afford should be considered unconstitutional.ⁿ⁶

This paper will include a brief discussion in Part I of the historical development of federal aid for public elementary and secondary education. Part II addresses the Spending Clause. Part III presents an evaluation of *State of Connecticut v. Spellings*. Part IV gives an analysis of the NCLBA [*102] accountability requirements. Part V reviews the 2007 Congressional debate about the NCLBA. Part VI explores the impact of the NCLBA on school integration.

I. A Historical Development

Since the 1960s, the United States has funded public school education through the Elementary and Secondary Education Act ("ESEA").ⁿ⁷ The ESEA authorizes the disbursement of federal aid to school districts and school systems.ⁿ⁸ In 1965, the Act came out of the efforts of President Johnson to combat poverty and Congress' quest to provide "educational rights that apply to all students."ⁿ⁹ Decades later in the 1980s, the government, under President Reagan, published *A Nation at Risk*, which reported on the weak reading skills of the nation's students and insisted on the need to reverse mediocre education in the nation.ⁿ¹⁰ The focus of education throughout the country then began to shift to higher standards and achievement.ⁿ¹¹

In 1994, President Clinton reauthorized the ESEA and set the stage for the accountability provisions that the NCLBA would later adopt.ⁿ¹² In 1994, Congress passed Goals 2000: Educate America Act ("Goals 2000"), which provided federal funds to states for the development of state standards and assessment systems.ⁿ¹³ As a compliment to Goals 2000, President Clinton authorized the Improving America's Schools Act ("IASA").ⁿ¹⁴ IASA "required that states assess all students at certain grade levels."ⁿ¹⁵ Together these two laws were "aimed at providing states with the capacities and incentives to engage in standards-based reforms."ⁿ¹⁶ Due to problems with the implementation of these laws, they were abandoned and never reautho [*103] rized.ⁿ¹⁷ A few years later, President George W. Bush signed into law the NCLBA, to achieve equal academic standards throughout the nation.ⁿ¹⁸

II. Spending Clause Analysis

The Spending Clause of the U.S. Constitution provides that "the Congress shall have Power . . . to provide for . . . the general Welfare of the United States."ⁿ¹⁹ Commentator Gina Austin believes that the federal government's regulation of the state's authority to maintain educational programming violates the Spending Clause by requiring states to follow national guidelines in order to receive financial support for schools.ⁿ²⁰ The Supreme Court identified four requirements in *South Dakota v. Dole* that allow for federal funding without the Spending Clause.ⁿ²¹ The funding must be exercised to promote the general welfare of the United States.ⁿ²² The condition for funding cannot be ambiguous.ⁿ²³ The money should have a relationship to a federal concern.ⁿ²⁴ Lastly, the conditional funding must not conflict with another constitutional provision.ⁿ²⁵

The four Spending Clause restrictions were designed to prohibit Congress from using federal funds to place an undue regulatory burden on the states.ⁿ²⁶ Most of the cases involving accusations of Spending Clause violations have resulted in federal courts upholding Congress' conditional spending legislation.ⁿ²⁷

III. An Analysis of *State of Connecticut v. Spellings*

A. Arguments Against Compliance with Accountability Standards: Emphasis on *State of Connecticut v. Spellings*

In *State of Connecticut v. Spellings*,ⁿ²⁸ the State challenged the U.S. Secretary of the Department of Education's ("DOE") interpretation of several [*104] eral key elements of the NCLBA. The State alleged that the Secretary's interpretation of the "Unfunded Mandates Provision" of the NCLBA is contrary to its plain language and Congress' intent in enacting it.ⁿ²⁹

In Count I of its complaint, the State sought a declaratory judgment that would compel the Secretary to clarify the meaning of the Unfunded Mandate Provision of the NCLBA.ⁿ³⁰ The State alleged that the Secretary's interpretation of the NCLBA violates the Spending Clause and the Tenth Amendment in Count II of the complaint.ⁿ³¹ Count III of the complaint challenged the Secretary's denial of waivers and alleged failure to comply with statutory requirements.ⁿ³² In Count IV, the State alleged a violation of the federal Administrative Procedures Act ("APA").ⁿ³³

Under Count I, involving the declaratory judgment claim, the parties challenged the Secretary's interpretation of the following three provisions of the NCLBA: (1) the requirement that special education assessments be conducted at grade level rather than instructional level; (2) the requirement that English-language-learning students receive mathematics assessments in their first year in the country and reading assessments in the following year; and (3) the requirement that non-formative annual testing occur in every grade.ⁿ³⁴ Although the Court held that the State of Connecticut

had standing to bring the action, the Court determined it did not have subject-matter jurisdiction to hear the case because the Secretary had not yet taken steps to enforce her interpretation of the NCLBA.ⁿ³⁵

1. Declaratory Judgment

The Secretary raised a number of objections to the State's claims in Count I (declaratory judgment claim). When deciding on a standing objection, the Court must presume the fact alleged, accept the truth of the plaintiff's allegations of jurisdiction, and construe all inferences in favor of the plaintiff.ⁿ³⁶ The Court found that the State met the requirement of standing because the State alleged that by denying the State's waiver requests, the Secretary was requiring the State to expend substantial sums in excess of federal funding to comply with the NCLBA provisions.ⁿ³⁷ The Court reasoned that if the current funding is inadequate, a declaratory judgment prohibiting the Secretary from requiring the State to expend more financial resources to comply with the NCLBA provisions would remedy the State's alleged injury.ⁿ³⁸

Although the Court found that the State had standing, the Court acknowledged that allowing the State to challenge the Secretary's interpretation of the NCLBA prior to any agency action against the State would undermine the comprehensive system for enforcement provided by Congress.ⁿ³⁹ The General Education Provisions Act ("GEPA") provides the Secretary with a variety of mechanisms for enforcing the terms of NCLBA.ⁿ⁴⁰ GEPA contains a comprehensive enforcement scheme that requires notice to the agency's Secretary and a hearing before the Administrative Law Judge, which is subject to a discretionary review by the Secretary.ⁿ⁴¹ After a final agency action, the complaint may be appealed to the United States Court of Appeals.ⁿ⁴² The Court found that it did not have jurisdiction over the matter until after concrete positions have been taken at the administrative level and a full administrative record has been developed; thus, formal and final agency action must have been taken prior to seeking judicial recourse.ⁿ⁴³

When deciding on prudential ripeness, a court evaluates both the fitness of the issues for judicial decision and the hardship to the parties of withholding court considerations.ⁿ⁴⁴ The Court considered that fitness entailed statutory construction and was fit for judicial review, but desired a further development of the record.ⁿ⁴⁵ The court found that because the State was in compliance with the NCLBA, the State was not in danger of imminent enforcement and thus not subject to any hardship.ⁿ⁴⁶ The Court stated that it would rather have a final action by an administrative agency before making a decision on the matter.ⁿ⁴⁷ The Court reasoned that the issue should be taken up with the DOE.ⁿ⁴⁸ The Court reasoned that in order for it to decide the matter at hand, both parties were required to take the issue up at the federal administrative level.ⁿ⁴⁹ [*106]

2. Spending Clause and Tenth Amendment Claims

The State's Spending Clause claim (Count II) focuses on the State's reasons for accepting federal funding under NCLBA.ⁿ⁵⁰ Under the Spending Clause, Congress may attach conditions on the receipt of federal funds provided to states, as long as the exercise of the spending power is in pursuit of the general welfare and the conditions on funding are laid out unambiguously.ⁿ⁵¹ The State understood that the federal government would pay for all of the costs that were associated with complying with the NCLBA.ⁿ⁵² The State claimed that the Secretary changed that condition as the State initially understood it to be.ⁿ⁵³

The State's Tenth Amendment claim (also Count II) concerns the notion that the Secretary has the authority to withhold all Title I funding if the State does not comply with the NCLBA's testing requirements.ⁿ⁵⁴ This claim focuses on the penalties that the State would face, if the Secretary should find that the State was not in compliance with the NCLBA.ⁿ⁵⁵ The State alleged that the penalties for noncompliance, which would include the DOE's withholding of Title I funds and other school-related funding, would be harsh and unrelated to the State's initial acceptance of the federal funding.ⁿ⁵⁶ Similar to the State's declaratory judgment claim in Count I, the Court found that Count II allegations of Spending Clause and Tenth Amendment violations sought pre-enforcement declaratory rulings.ⁿ⁵⁷ The Court explained that such a decision on Count II would be directly tied to the Secretary's interpretation of the NCLBA.ⁿ⁵⁸ The Court determined that in order to decide on the Spending Clause claim, the Court would have to analyze the Secretary's interpretation of the NCLBA.ⁿ⁵⁹ The Court cited the State's compliance as a reason why the Secretary has not yet withheld funding.ⁿ⁶⁰ The Court concluded that it did not have subject-matter jurisdiction to hear the Count II claim.ⁿ⁶¹

The State's denial of waivers and abdication of statutory responsibility claim (Count III) focuses on whether the Secretary's denial of the waivers [*107] was arbitrary and capricious and whether the Secretary meaningfully considered the state waivers.ⁿ⁶² The Court found that Congress did not grant the Court any authority to consider a matter that is committed to the agency's discretion.ⁿ⁶³ Although the State alleged in its abdication of statutory responsibility claim that the Secretary flatly refused to consider waiver requests concerning a testing method, the Court found that there was

proof of the Secretary's reasons for refusing the State's requests, including the fact that the State and Secretary had a number of discussions about the matter.ⁿ⁶⁴

The State claimed in Count IV that the Secretary arbitrarily and capriciously denied the State's request for plan amendments and violated the APA in failing to provide an adequate hearing prior to rejecting the State's plan amendments.ⁿ⁶⁵ The Court found that a detailed analysis of the plan amendments and an administrative record would better enable the Court to make a decision on the denial of the State's request for plan amendments.ⁿ⁶⁶ The Court refused to dismiss the APA violation claim by the state because it believed that a detailed administrative record would be helpful to the Court.ⁿ⁶⁷ The Court believed that if the Secretary did violate the APA, the appropriate solution would be to remand the hearing of the plan amendment to the DOE.ⁿ⁶⁸ The State, however, stated in portions of its complaint and brief that it wanted the court, and not the DOE, to rule on the matter.ⁿ⁶⁹ Therefore, the Court found that the second part of the count, in which the State alleged that the Secretary violated the APA in failing to provide an adequate hearing prior to rejecting the State's plan amendments, was moot.ⁿ⁷⁰ The Court found the APA violation count moot because the State did not seek to remand the issue for a hearing, but rather wanted the Court to decide the merits of the plan amendments.ⁿ⁷¹

The State was able to continue with its claim that the Secretary's denial of the State's requests for NCLBA plan amendments was arbitrary and capricious in nature and in violation of the APA.ⁿ⁷² On appeal, the State motioned for entry of judgment on the dismissed Counts I (declaratory judgment) and II (Spending Clause and 10th Amendment), under Rule 54(b), [*108] which provides that where the district court has dismissed some, but not all claims in an action, certifying its judgment as final under Rule 54(b) is generally not appropriate if the same or closely related issues remain to be litigated.ⁿ⁷³ The Appeals Court denied the Rule 54(b) motion and held that because legal questions raised by Counts I (declaratory judgment) and II (Spending Clause and 10th Amendment) were inextricably intertwined, they were not appropriate for an entry of judgment under Rule 54(b).ⁿ⁷⁴

The legal battles are shaping up. I believe that the litigation landscape involving NCLBA is challenging. As indicated in *Connecticut v. Spellings*, one can anticipate a battle over jurisdiction about who has the power to hear disputes between the state and the DOE. These disputes clearly raise issues of accountability requested by the federal government and the state's reluctance to comply with federal requests because it believes that the federal government has issued an unfunded mandate. The *Connecticut v. Spellings* Court clearly indicated that it would rather not enter the NCLBA litigation thicket without the benefit of prior agency proceedings. When it comes to educational policies, I think it is fair to conclude that the battle for control over education policy has only just begun. I anticipate, in the absence of strong congressional intervention, that NCLBA litigation will be a persistent pattern for years to come.

IV. Analysis of the NCLBA Accountability Requirements

A. Arguments Against Compliance with Accountability Standards: Emphasis on Commentary

Professor Danielle Holley-Walker has noted that there are two important issues that are involved in the debate of the burdens that NCLBA imposes on states.ⁿ⁷⁵ One is the federal government's failure to provide sufficient financial resources for the statutory requirements.ⁿ⁷⁶ Holley-Walker cited *School District of Pontiac v. Spellings*, in which the state of Connecticut sued the DOE, alleging that the federal government's requirement that states use more money to pay for student testing than what the federal government provides is unlawful.ⁿ⁷⁷ Another burden is the notion that NCLBA imposes regulation that has traditionally been the responsibility of the [*109] states.ⁿ⁷⁸ Holley-Walker stated that before NCLBA was enacted, every state in the nation already had student testing systems in place.ⁿ⁷⁹ Professor Holley-Walker also provided information suggesting that some states have to expend their resources to pay for both state and federally mandated accountability standards.ⁿ⁸⁰

Benjamin Michael Superfine has cited the failure to provide states, districts, and schools with the needed capacities, such as financial resources, to comply with NCLBA mandates as one of the major problems plaguing the implementation of NCLBA.ⁿ⁸¹ States and state-level entities claim to have only a limited ability to implement NCLBA testing and accountability provisions effectively.ⁿ⁸² The courts have not constituted an effective venue for addressing these problems.ⁿ⁸³

Superfine believes that the NCLBA Adequacy Approach would allow courts to examine NCLBA implementation problems in terms of educational adequacy.ⁿ⁸⁴ The Adequacy Approach would allow courts to examine the NCLBA's implementation problems directly through the lens of educational adequacy.ⁿ⁸⁵ This will allow courts that use the approach to interpret the NCLBA accountability mandates as necessary for a state to fulfill its duties under the law.ⁿ⁸⁶ Courts would construe the effective implementation of NCLBA mandates regarding standards and accountability as

necessary for a state to fulfill its constitutional burden under the relevant education clause.ⁿ⁸⁷ The courts would use state standards to define education adequacy in the state.ⁿ⁸⁸ However, Superfine believes that the NCLBA Adequacy Approach would be problematic for states because courts would only consider the duty of a state under its constitution in solving the NCLBA's funding problems.ⁿ⁸⁹ The approach would not require the federal government to provide the states with additional funding to implement the NCLBA's provisions, but instead would leave the states with less financial resources for other areas of state funding such as health and housing.ⁿ⁹⁰ [*110]

B. Strain of NCLBA Meeting Accountability Requirements

A number of states have public schools that are failing to reach the goals of achievement set by the NCLBA.ⁿ⁹¹ The NCLBA is in its fifth year, which has been prescribed as the year in which penalties for non-achievement will be more severe.ⁿ⁹² The severe penalties include firing teachers and principals, shutting down schools, or a major change in the leadership of the school.ⁿ⁹³

However, many educational experts have stated that failing schools have not actually been penalized as prescribed under the law.ⁿ⁹⁴ The schools have been labeled as failing, but there has not been any action taken as a result.ⁿ⁹⁵ A federal survey reveals that failing schools have been able to avoid changes in leadership.ⁿ⁹⁶ As a result of the lack of serious penalties handed down, parents are upset about the lack of action being taken as required under the law.ⁿ⁹⁷

One superintendent in Los Angeles stated that she would like to shut down low-performing schools but it would be hard to do considering that more than half of the schools in her district do not meet the NCLBA standards.ⁿ⁹⁸ The NCLBA also would not allow removal of some teachers under the penalties provision because the NCLBA does not prevail over teacher union contracts that were in place before the law was enacted.ⁿ⁹⁹ Under union contract provisions of the United Teachers of Los Angeles, teachers are not allowed to examine their own student's scores if it would result in the teachers being evaluated based on the scores.ⁿ¹⁰⁰ One teacher at a school where teachers are not allowed to examine their own students' scores believes that students suffer as a result of the teachers not being evaluated.ⁿ¹⁰¹ A parent at that same school believes that teachers should teach a curriculum based on what the standardized tests will cover.ⁿ¹⁰² [*111]

V. The 2007 Congressional Debate About the NCLBA

The newest draft House Bill to renew the NCLBA has been criticized by civil rights groups and teachers unions.ⁿ¹⁰³ When the House Education Committee held its hearing in mid-September, the groups that voiced their criticisms included the Center for American Progress and Achieve Inc., the National Urban League, and the Citizens' Commission on Civil Rights.ⁿ¹⁰⁴ These groups all oppose a proposal that would allow school districts to create their own measure of student progress rather than use statewide tests.ⁿ¹⁰⁵ The groups claim that the intent of NCLBA to teach children of all races and income levels would be defeated.ⁿ¹⁰⁶ The new proposals in a House draft bill for NCLBA would no longer rely solely on math and reading test scores in determining the progress of a school.ⁿ¹⁰⁷ The new proposals would allow schools to show their academic strength by including test results in other subjects and other factors such as attendance, promotion, performance in advanced placement courses, and graduation rates.ⁿ¹⁰⁸ There is also a proposed draft that would allow schools to test non-English speakers in their native language for up to five years, rather than the current three.ⁿ¹⁰⁹

The proposal in the draft that would allow schools to test non-English speakers in their native language for up to five years, rather than the current three, has been criticized by DOE Secretary Margaret Spellings.ⁿ¹¹⁰ Spellings contended that the law would weaken the NCLBA's effort to raise achievement level for poor and minority students.ⁿ¹¹¹ Spellings also complained that the proposals would defeat the NCLBA's accountability efforts.ⁿ¹¹² Spellings particularly cited the testing of non-English speakers, saying that the law would allow such immigrant students to get as high as the 10th grade before they are ever tested in English.ⁿ¹¹³ [*112]

VI. Impact of NCLBA on School Integration/Segregation Issues

Holley-Walker also has suggested that some schools exclude minority students from the annual reports of student progress.ⁿ¹¹⁴ These schools request that they be exempt from NCLBA provisions that require a large number of minority students to be included in assessment results.ⁿ¹¹⁵ This action results in incentives to maintain a low percentage of minority students in those schools.ⁿ¹¹⁶ Holley-Walker disagreed with the argument that NCLBA fosters integration efforts through the NCLBA's provision that allows student to transfer out of low-performing schools and into academically superior schools.ⁿ¹¹⁷

If the academically superior schools are predominantly white, then the transfer option, when exercised by a minority, creates a more racially diverse student body at the predominantly white school.ⁿ¹¹⁸ When a high-performing student

leaves the low-performing school, the low-performing school suffers a loss both in intellectual achievement and intellectual diversity. When better performing students abandon low-performing schools, the low-performing school's risk of intellectual deficiency is expanded. A proper role for public officials under NCLBA is to provide incentives for low-performing schools to become competitive in the field of education without encouraging bright students to abandon them. However, data shows that few students are exercising the transfer option.ⁿ¹¹⁹ Contrary to the integration suggestion, Holley-Walker asserted that NCLBA may in fact cause a reversal of the desegregation efforts of the past 40 years.ⁿ¹²⁰ Professor Holley-Walker suggested that desegregation plans in some parts of the country will be undermined by the mix that can occur by implementing the NCLBA provisions.ⁿ¹²¹ The DOE requires that some schools districts follow NCLBA provisions in spite of possible conflicts with established desegregation plans and also advised school districts to ignore established desegregation plans.ⁿ¹²²

One commentator, Anita Hill, has suggested that forcing the integration of poor and minority students into more economically advantaged schools will increase the race and class problems that already exist.ⁿ¹²³ Hill [*113] also acknowledged that the provision of the NCLBA that allows students who attend non-performing schools to transfer to other public schools within the same school district will conflict with established desegregation orders.ⁿ¹²⁴ It is Professor Hill's position that school districts in both the South and the North will have their school desegregation efforts negatively impacted because of the NCLBA.ⁿ¹²⁵ Furthermore, some black parents in the South have actually turned to the NCLBA to prevent schools from becoming once again segregated by race. After white parents in Tuscaloosa, Alabama, objected to overcrowded schools, school officials approved a sweeping rezoning plan.ⁿ¹²⁶ Under the rezoning plan, a large majority of the hundreds of students commanded to rearrange their school plans during the fall of 2007 were black--and several were dispatched to virtually all-black, low-performing schools.ⁿ¹²⁷ Black parents have challenged the Tuscaloosa rezoning plan because they believe school officials are implementing the plan in order to resegregate the schools.ⁿ¹²⁸ In a new change of legal direction for an integration fight, Black parents in Tuscaloosa have asserted that the rezoning plan violates the spirit of the federal NCLBA.ⁿ¹²⁹ The NCLBA provides students in failing schools the right to enroll in a better performing school.ⁿ¹³⁰ Tuscaloosa is the city in which Governor George Wallace came to campus to prevent blacks from entering the University of Alabama as students.ⁿ¹³¹ As Sam Dillon observed: "Three decades of federal desegregation marked by busing and white flight ended in 2000. Though the city is 54 percent white, its school system is 75 percent black."ⁿ¹³² Civil rights lawyers maintain that Tuscaloosa's rezoning battle is somewhat novel because the NCLBA has become a primary issue.ⁿ¹³³ School districts are confronting "uncharted territory over whether a reassignment plan can trump the law's prohibition on moving students into low-performing schools."ⁿ¹³⁴ Even if the NCLBA may be used to help parents challenge a rezoning plan influenced by race in Tuscaloosa, Alabama, Professor Charles R. Lawrence, III, an ardent critic of NCLBA, has argued that the NCLBA is an ill-conceived law implemented to ignore the root causes of racial segregation [*114] in public schools.ⁿ¹³⁵ In his view, the NCLBA affirmatively hurts public policy in education by redirecting public attention and resources away from addressing the inequities of race and class while perpetuating, as well as reinforcing, social and racist practices that keep on preventing poor, working-class black and brown children from have equal access to educational opportunity.ⁿ¹³⁶

The NCLBA maximum injury is inflicted by ignoring the race and class history that created the conditions that have caused the educational achievement gap that it pretends to close.ⁿ¹³⁷ As Lawrence observed: "The NCLBA speaks often of race, requiring schools to keep separate data by ethnicity and holding schools accountable for improving the test scores of non-white students. But nowhere does it speak of ending racism or dismantling segregation."ⁿ¹³⁸ Supporters of NCLBA condemn the disproportionate harm that American schools impose upon poor black and brown children, but these defenders of NCLBA do not acknowledge any societal or governmental responsibility for that harm.ⁿ¹³⁹ In order to have moral credibility, Professor Lawrence contends that advocates of NCLBA must acknowledge the educational harm suffered by historically underrepresented groups in the political process originated in America's profound and entrenched separation involving white and black, rich and poor.ⁿ¹⁴⁰ Said Lawrence: "To listen to the discourse on No Child Left Behind is to hear a story of failing schools without a history--a history of segregation, of inadequate funding, of white flight, of neglect, of eyes averted and uncaring while the savage inequalities of American education grew ever wider."ⁿ¹⁴¹ The reworked justification for NCLBA erases history while relying on the modern myth of formal racial equality.ⁿ¹⁴² Formal racial equality is narrative conveyed by federal courts.ⁿ¹⁴³ In this narrative, school districts are confirmed as unitary under the Equal Protection Clause, despite the fact that black children go to schools without any white classmate; that they are institutions of learning where inequality does not exist, even though some children of color continue to attend schools with toilets that do not work and leaky roofs as other students study on campuses furnished with state-of-the-art science labs and [*115] Olympic-sized swimming pools. In reality, racially and economically segregated suburbs exist as havens for white flight without any legal or constitutional liability for the segregation staying alive in either the suburban schools or the inner city schools attended by their not-so-distant neighbors.ⁿ¹⁴⁴

NCLBA made use of Marion Wright Edleman's Children's Defense Fund call for Americans to come together and 'Leave No Child Behind' in adopting its name.ⁿ¹⁴⁵ Professor Lawrence maintained that the Bush Administration has used the NCLBA to lay claims as champions of poor black children without honoring its duty to articulate the role that America has played in the oppression of a black child's right to educational equity.ⁿ¹⁴⁶

In Tuscaloosa, Alabama, many black parents energetically reject a rezoning plan that required black students to transfer to low-performing schools.ⁿ¹⁴⁷ Said Kendra Williams, a hospital receptionist whose two children were rezoned: "We're talking about moving children from good schools into low-performing ones, and that's illegal. It's all about race. It's as clear as daylight."ⁿ¹⁴⁸ Some key Tuscaloosa school officials defend the rezoning plan as a proper response to claims of overcrowded schools.ⁿ¹⁴⁹ Although school board members stated that the rezoning plan was not based on race, black members of the town believed that the plan was another attempt to return to separate-but-equal practice in education.ⁿ¹⁵⁰

One issue for consideration under the NCLBA is whether a school rezoning plan can be defeated by construing the NCLBA as prohibiting school officials from moving minority students into low-performing schools.ⁿ¹⁵¹ When the rezoning matter was challenged in Alabama, the Alabama state superintendent concluded that the rezoning plan did not violate federal law.ⁿ¹⁵² The Alabama state superintendent concluded African-American students could be transferred from a high-performing school to a lower performing minority school without violating NCLBA as long as the transferred African-American student had a right to retransfer back to the better schools under NCLBA.ⁿ¹⁵³ Many black parents believed that it is an arbitrary use of power that defies the purpose of the NCLBA to allow school officials to use school zoning laws to ship African-American students away from high-performing, racially integrated schools to low-performing, racially identifiable schools. Black parents in Tuscaloosa, Alabama, as well as other southern communities in Florida, Tennessee, and North Carolina, are attempting to use the NCLBA to assure that African-American children are not routinely assigned into those schools that have a reputation for being academically unsuccessful.ⁿ¹⁵⁴

Professor Lawrence fears that the NCLBA and formal-equality rationale may cause African Americans and others to forget that the continuing existence of racial inequality in education has not been realized in Tuscaloosa, Alabama.ⁿ¹⁵⁵ The debate about NCLBA benefits and faults, and lack of historical context did not cause supporters of educational equity in Tuscaloosa to "forget the deep structures of inequality that remain in place."ⁿ¹⁵⁶ In fact, parents in Tuscaloosa hope to use the NCLBA to breathe new life into *Brown v. Board of Education*, and to fight a segregation system designed to oppress children by teaching them that they are inferior because of the color of their skin.ⁿ¹⁵⁷ Professor Lawrence concluded: "We are segregated still, by race and by class, and segregation still achieves its purposes well. Can No Child Left Behind claim to be about equality without dismantling segregation, a system designed for inequality? I think not. But that is exactly the claim it makes."ⁿ¹⁵⁸ Daniel J. Losen, a Legal and Policy research associate with The Civil Rights Project (CRP) at Harvard University, asserted that "one new step toward fulfilling Brown's promise might be found in the principle of race-conscious accountability embedded within the NCLBA."ⁿ¹⁵⁹ The race-based accountability rationale advanced by the NCLBA may well provide an extraordinary array of novel tools for civil rights advocates seeking equity in education.ⁿ¹⁶⁰ Title I of NCLBA makes available the biggest separate source of federal education funding directed at assisting states in addressing the educational requirements that socioeconomically disadvantaged students must meet.ⁿ¹⁶¹ Every state must use Title I funds to enhance its own educational spending and is barred from using federal money to replace its expenditures.ⁿ¹⁶² Practically, each school district in the United States collects some of the roughly \$ 10 billion appropriated annually.ⁿ¹⁶³ To accomplish its objective, Title I also includes a variety of monitoring and enforcement constraints that place conditions on spending by the state, district, and school.ⁿ¹⁶⁴

While approving NCLBA, Congress explicitly added race-conscious accountability standards to Title I in an effort to equalize the terrible racial disparities in educational success between whites and other racial groups.ⁿ¹⁶⁵ The goal of the NCLBA contains the next statement, "closing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged and their more advantaged peers. . . ."ⁿ¹⁶⁶ NCLBA provides a different accountability system which embraces technical assistance,ⁿ¹⁶⁷ along with progressively more severe sanctions at the school and district level.ⁿ¹⁶⁸ The main goal of NCLBA is to advance the academic skills and aptitude of all students by means of subgroup accountability to prohibit school officials from ignoring racial disparities in achievement by not disclosing the subgroup achievement gap when the data is analyzed in the aggregate.ⁿ¹⁶⁹ Under the NCLBA, the constant failure of any focal, racial, or ethnic group and of socioeconomically disadvantaged students at the school or district level is capable of initiating an intervention that could lead to sanctions.ⁿ¹⁷⁰ Notwithstanding significant shortcomings with its execution,ⁿ¹⁷¹ and what scores of educators maintain is an inappropriately test-driven accountability plan,ⁿ¹⁷² Title I's changed accountability scheme on the whole is one of

the most race-conscious legislative remedies to address racial inequity in K-12 education ever since Congress passed Title VI of the Civil Rights Act of 1964 (Title VI).ⁿ¹⁷³

Even if No Child Left Behind was not intended to affirmatively dismantle racial segregation, I think it offends the goal and purpose of the NCLBA to allow public school officials to remove a black student from a high-performing school with racial diversity and send that student to a low-performing school that is virtually all black. Supporters of educational equity in Tuscaloosa, Alabama, may find it useful to follow Losen's advice **[*118]** and engage in a campaign to raise awareness that the NCLBA has "several race-conscious accountability provisions and requirements" that should prevent school officials from transferring black students out of a high-performing integrated school to a low-performing school with a majority of black students in order to increase the percentage of white students attending the high performing integrated school.ⁿ¹⁷⁴ "Although the accountability approach as represented by the NCLBA is far from ideal, the race-conscious accountability requirements increase the chance that racial disparities will be reported and discussed publicly. Despite the problems, the new principle that all should take responsibility for tackling unacceptable and inadequate achievement outcomes for every major racial and ethnic group is fundamentally sound and potentially transformative."ⁿ¹⁷⁵ Race-conscious accountability provisions are permissible only to achieve the race neutral objective of excellence in education for all students regardless of either race or class.

VII. Conclusion

The NCLBA places a constitutionally impermissible regulatory-funding burden on states and schools systems. Spending Clause regulation of state school educational systems violates a state's right to control its own local educational policy as authorized by the Tenth Amendment to the U.S. Constitution. However, a state is not free to adopt local educational polices that violate one's right to be free of racial discrimination under the equal-protection-of-law concept. Those underfunded, highly regulatory provisions of the NCLBA should rightfully be regarded by the courts as the government's exercise of power in violation of the Spending Clause. If Congress were ever to adequately fund the NCLBA, "the overarching question is whether the race-conscious accountability approach in NCLB provides any useful tools for advocates seeking racial justice."ⁿ¹⁷⁶ I believe that a properly funded and properly implemented NCLBA may be used as a tool to promote racial justice in education.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Administrative Law
 Judicial Review
 Administrative Record
 General Overview
 Civil Procedure
 Justiciability
 Ripeness
 Tests
 Constitutional Law
 Congressional Duties & Powers
 Spending & Taxation

FOOTNOTES:

n1 See *City of Pontiac v. Spellings*, 2005 WL 3149545 (E.D. Mich. 2005); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006).

n2 *Spellings*, 2005 WL 3149545 at *1.

n3 Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 148 (2007).

n4 See Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1.

n5 *Spellings*, 453 F. Supp. 2d at 459.

n6 *Id.*

n7 Kimberly D. Bartman, Public Education in the 21st Century: How Do We Ensure That No Child is Left Behind?, 12 TEMP. POL. & CIV. RTS. L. REV. 95, 110 n.133 (2002).

n8 Id.

n9 Benjamin Michael Superfine, Using the Court to Influence the Implementation of No Child Left Behind, 28 CARDOZO L. REV. 779, 785 (2006).

n10 John Heintz, Political Currency and Hard Currency: The No Child Left Behind Act Turns Three, 40 J. MARSHALL L. REV. 345, 346 (2006) (citing THE NAT'L COMM. ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983)).

n11 Superfine, supra note 9, at 786.

n12 Erin Archerd, Spanish-Language Test Accommodations: Recommended or Required by NCLB?, 9 HARV. LATINO L. REV. 163, 167 (2006).

n13 Superfine, supra note 9, at 786.

n14 Id.

n15 Archerd, supra note 12, at 167.

n16 Superfine, supra note 9, at 786.

n17 Id. at 787.

n18 L. Darnell Weeden, Essay, Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?, 31 T. MARSHALL L. REV. 239, 240 (2006) (citing 20 U.S.C. § 6301 (West 2002)).

n19 U.S. CONST. art. I § 8, cl. 1.

n20 Weeden, supra note 18, at 242 (citing Gina Austin, Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights, 27 T. JEFFERSON L. REV. 337, 352 (2005)).

n21 Id. at 243 (citing South Dakota v. Dole, 483 U.S. 203 (1987)).

n22 Id.

n23 Id.

n24 Austin, *supra* note 20, at 352.

n25 Id.

n26 Id.

n27 Id.

n28 Connecticut v. Spellings, 453 F. Supp. 2d 459, 464 (D. Conn. 2006).

n29 Id.

n30 Id. at 480.

n31 Id. at 491.

n32 Id. at 495.

n33 Id. at 501.

n34 Spellings, 453 F. Supp. 2d at 464 (citing 5 U.S.C. §§ 701-706 (2002)).

n35 Id. at 482, 489.

n36 Id. at 481.

n37 Id.

n38 Id. at 482.

n39 Id. at 484.

n40 Spellings, 453 F. Supp. 2d at 474; 20 U.S.C. § 1221-1240 (2002).

n41 Spellings, 453 F. Supp.2d at 483-84.

n42 Id. at 484.

n43 Id. at 489.

n44 Id. at 490.

n45 Id.

n46 Spellings, 453 F. Supp. 2d at 491.

n47 See id. at 490.

n48 Id. at 482, 484.

n49 Id. at 489.

n50 Id. at 491-94.

n51 Spellings, 453 F. Supp. 2d at 491.

n52 Id.

n53 Id. at 492-93.

n54 Id. at 493-94.

n55 See id. at 493.

n56 Spellings, 453 F. Supp. 2d at 493.

n57 Id.

n58 Id.

n59 Id.

n60 Id. at 494.

n61 Spellings, 453 F. Supp. 2d at 494.

n62 Id. at 495.

n63 Id.

n64 Id. at 501.

n65 Id.

n66 Spellings, 453 F. Supp. 2d at 502.

n67 Id.

n68 Id.

n69 Id. at 503.

n70 Id.

n71 Spellings, 453 F. Supp. 2d at 503.

n72 See id. at 501, 503.

n73 Connecticut v. Spellings, No. 3:05CV1330(MRK), 2007 WL 329118, at *1 (D. Conn. Feb. 1, 2007).

n74 Id. at *1-2.

n75 See Danielle Holley-Walker, The Importance of Negotiated Rulemaking to the No Child Left Behind Act, 85 NEB. L. REV. 1015, 1024-25 (2007).

n76 Id. at 1024.

n77 Id. at 1024-25.

n78 Id. at 1025.

n79 Id.

n80 See id. at 1026.

n81 Superfine, supra note 9, at 781.

n82 Id. at 782.

n83 Id. at 842.

n84 Id. at 834.

n85 Id. at 835.

n86 Id. at 834.

n87 Id.

n88 Id. at 835.

n89 Id. at 840.

n90 Id.

n91 See Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES, Oct. 16, 2007, at A21.

n92 Id.

n93 Id.

n94 Id.

n95 Id.

n96 Id.

n97 Schemo, *supra* note 91.

n98 See *id.*

n99 See *id.*

n100 See *id.*

n101 Id.

n102 Id.

n103 Diana Jean Schemo, *Teachers and Rights Groups Oppose Education Measure*, N.Y. TIMES, Sept. 11, 2007, at A25.

n104 Id.

n105 Id.

n106 Id.

n107 Id.

n108 Id.

n109 Diana Jean Schemo, Secretary of Education Criticizes Proposal, N.Y. TIMES, Sept. 6, 2007, at A18.

n110 Id.

n111 Id.

n112 Id.

n113 Id.

n114 Holley-Walker, *supra* note 75, at 1028.

n115 See *id.*

n116 See *id.* at 1028-29.

n117 See *id.* at 1029.

n118 See *id.*

n119 Id.

n120 Id.

n121 Id.

n122 See id.

n123 See Hill, *supra* note 3, at 147

n124 Id. at 148.

n125 See id.

n126 Sam Dillon, Alabama School Rezoning Plan Brings Out Cry of Resegregation, N.Y. TIMES, Sept. 17, 2007, at A1, available at 2007 WLNR 18155451.

n127 Id.

n128 Id.

n129 Id.

n130 Id.

n131 Id.

n132 Dillon, *supra* note 126.

n133 Id. at A16.

n134 Id.

n135 Charles R. Lawrence III, Who is the Child Left Behind?: The Racial Meaning of the New School Reform, 39 SUFFOLK U. L. REV. 699, 706 (2006).

n136 Id.

n137 See id.

n138 Id. (citations omitted).

n139 Id.

n140 See id.

n141 Lawrence, *supra* note 135.

n142 Id. (citations omitted).

n143 Id.

n144 Id.

n145 Id.

n146 Id. at 706-07.

n147 Dillon, *supra* note 126.

n148 Id.

n149 Id.

n150 Id.

n151 Id.

n152 Id.

n153 Id.

n154 Id.

n155 Lawrence, supra note 135, at 707.

n156 Id.

n157 Dillon, supra note 126.

n158 Lawrence, supra note 135, at 707.

n159 Daniel J. Losen, Challenging Racial Disparities: The Promise and Pitfalls of No Child Left Behind Act's Race-Conscious Accountability, 47 HOW. L.J. 243, 244 (2004) (citation omitted).

n160 Id. at 247.

n161 Id. at 244.

n162 Id. at 244-45 (citations omitted).

n163 Id. at 245

n164 Id. (citing 20 U.S.C.A. § 6301 (West 2000 & Supp. 2003)).

n165 Losen, supra note 159, at 245.

n166 Id. (citation omitted).

n167 Id. (citing See 20 U.S.C.A. § 6316(b)(4)(West 2000 & Supp. 2003)).

n168 Id. at 245.

n169 Id.

n170 Id.

n171 Id. at 246. (citation omitted).

n172 Id. (citation omitted)

n173 Id. citing 42 U.S.C. § 2000d (2002)).

n174 Id. at 295.

n175 Id. at 295 n.286 ("More specific suggestions for advocacy on No Child Left Behind will be included in a video and guidebook currently in production at The Civil Rights Project at Harvard, www.civilrightsproject.harvard.edu. CRP also has posted issue-specific 'action kits' for community groups, which are currently available at this address, in the areas of special education and school discipline.").

n176 Id. at 295-96.