

COMMENT

STAR-CROSSED LOVERS: THE DEPARTMENT OF EDUCATION AND THE COMMON CORE

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INTRODUCTION

In 2009, a working group of state governors and superintendents of education convened to develop a set of common education standards, which were released in 2010 as the Common Core State Standards (Common Core).¹ The development of the Common Core was a breakthrough—the culmination of decades of national attention on public education and the use of education standards.² The Common Core provided a new direction in education after seven years of lessons learned about standards and assessments mandated by the No Child Left Behind Act of 2001 (NCLB).³ NCLB obligated a state to develop its own grade-level standards and standards-aligned assessments independent from the other states.⁴ The development of the Common Core established an agreed-upon set of standards for students in all of the states that adopted them.⁵ Initially, the states adopted the Common Core without controversy.⁶ Fears of parents and politicians alike soon began to grow,

1. See generally *Development Process*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/development-process> (last visited Apr. 22, 2015) (providing the history of the development of the Common Core State Standards (Common Core) as initiated by the National Governors Association and the Council of Chief State School Officers).

2. See generally Janet Y. Thomas & Kevin P. Brady, *Chapter 3: The Elementary and Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 REV. OF RES. IN EDUC. 51 (2005), available at <http://rrc.sagepub.com/content/29/1/51.full.pdf+html> [hereinafter Thomas] (outlining the development of the Elementary and Secondary Education Act (ESEA) from 1965 to the beginning of implementation of the No Child Left Behind Act (NCLB) in 2002, focusing on the growing involvement of the federal government in shaping public education policy).

3. See *Development Process*, *supra* note 1 (recounting how the development of the Common Core recruited teachers and experts with experience in standards for the purpose of creating standardization between the states).

4. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

5. See *Development Process*, *supra* note 1.

6. See *Fifty-One States and Territories Join the Common Core State Standards Initiative*, NAT'L GOVERNORS ASS'N (Sept. 1, 2009), http://www.nga.org/cms/home/news-room/news-releases/page_2009/col2-content/main-content-list/title_fifty-one-states-and-territories-join-common-core-state-standards-initiative.html (heralding the near-universal participation by states and territories in the state-led development of common standards first envisioned in *A Nation at Risk*); *c.f.* Catherine Gewertz, *Final Version of Common Standards Unveiled*, EDUC. WK.

arguing that the Common Core was a federal overreach and a violation of states' rights.⁷ Although Congress and a long line of presidents have played an active role in education policy,⁸ the Tenth Amendment precludes the federal government from directly controlling education systems, standards, or curriculum. Since education is not an enumerated power of the federal government, education is the province of the states.⁹

At the time the National Governors Association and the Council of Chief State School Officers were developing the Common Core, NCLB was already two years past reauthorization.¹⁰ NCLB's core provision that one hundred percent of students would be proficient on assessments aligned to state standards by the 2013–2014 school year was proving unworkable as the financial penalties for failing to meet this target were taking their toll on states, districts, and schools.¹¹ While NCLB passed with significant bipartisan support in fall 2001, the possibility of passing a bipartisan education bill in 2009 was dim.¹² With the development of the Common Core, the longstanding effort to create common state standards in the United States had come to fruition.¹³ Unlikely to accomplish anything in

(Mar. 23, 2012), <http://www.edweek.org/ew/articles/2010/06/02/33common.h29.html?qs=common+core+states+rights> (reporting on the process of the development of the Common Core as a state-led process with input from various stakeholders).

7. See Joy Resmovits, *How the Common Core Became Education's Biggest Bogeyman*, HUFFINGTON POST POLITICS (Jan. 30, 2014, 10:00 AM), http://www.huffingtonpost.com/2014/01/10/common-core_n_4537284.html (explaining the history of the Common Core and how the increasingly polarized political environment at both the state and federal levels saw initial support for Common Core erode as new governors assumed stathouses and charges grew of federal overreach).

8. See Thomas, *supra* note 2, at 52–55 (recounting the involvement in education policy of Congress and the President including President Johnson in 1964, President Reagan in 1982, President George H.W. Bush in 1989, President Clinton in 1998, and President George W. Bush in 2000).

9. See U.S. CONST. amend. X.

10. See 20 U.S.C. § 6302(a) (2006) (setting the appropriations for ESEA through fiscal year 2007).

11. 34 C.F.R. § 200.15(a) (2014); see Richard D. Kahlenberg, *Introduction*, in *IMPROVING ON NO CHILD LEFT BEHIND: GETTING EDUCATION REFORM BACK ON TRACK 2* (Richard D. Kahlenberg ed., 2008) (detailing the aspirations of the standards movement but noting many of the flaws of the implementation of standards through NCLB, including the “unrealistic” goal of achieving one hundred percent proficiency).

12. See *Fact Sheets: Student Success Act*, EDUC. & THE WORKFORCE COMM. (Feb. 3, 2015), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398301> (providing the Republican proposal); *Democratic Amendment to H.R. 5*, EDUC. & THE WORKFORCE COMM. (Feb. 2015), <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/DemocraticSubstituteto%20HR5-Summary.pdf> (providing the Democratic response).

13. See *infra* Part I.B.

Congress, the Secretary of the Department of Education (Department) partnered with the state governors and superintendents to develop the Common Core.¹⁴ Development of the Common Core presented an opportunity for the Department, the governors, and state superintendents to move education reform forward. First, the Department used the Common Core as part of its blueprint for the reauthorization of NCLB.¹⁵ Then, through the American Recovery and Reinvestment Act of 2009 (ARRA),¹⁶ the Department introduced discretionary Race to the Top grants that supported states in their adoption of common standards.¹⁷ Finally, the Department began to issue Elementary and Secondary Education Act (ESEA) Flexibility Waivers in 2012 to states that agreed to implement elements of Race to the Top.¹⁸

Despite its best intentions, the Department was not immune to the political polarization of Washington.¹⁹ The Common Core has become the banner around which politicians who advocate for smaller government

14. See Alyson Klein, *Duncan: Governors Have Been Receptive to ESEA*, EDUC. WK. POLITICS K-12 BLOG (Feb. 22, 2010, 2:25 PM), http://blogs.edweek.org/edweek/campaign-k-12/2010/02/duncan_governors_have_been_rec.html?qs=duncan+common+Core (reporting that state governors were open to the President's proposal that Title I funds be tied to adopting higher, more uniform common standards).

15. *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, DEP'T OF EDUC. (DOE) 1-2 (Mar. 2010), <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

16. American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 279 (codified as amended in scattered sections of 26 U.S.C.).

17. *Id.*; see *infra* Part II.B (describing the development and promulgation of Race to the Top grants through ARRA funds allocated to the Department).

18. 20 U.S.C. § 7861 (2012); see *ESEA Flexibility*, DOE (June 7, 2012), <http://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc> [hereinafter *ESEA Flexibility Policy Document*] (explaining how states could apply for relief of the requirements of NCLB through meeting the ESEA Flexibility Waiver requirements, including the adoption of college- and career-ready standards that were either shared by a substantial number of states or were approved by a state's institutes of higher education); see also *ESEA Flexibility: Frequently Asked Questions*, DOE 3-4 (Aug. 3, 2012), <http://www2.ed.gov/policy/eseaflex/esca-flexibility-faqs.doc> (providing the purpose for issuing and the Department's specific authority to issue ESEA Flexibility Waivers, as well as providing specific guidance for the requirements in applying for the waiver); see also *Title I Waivers*, DOE, <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters2009/index.html> (last updated June 10, 2015) (providing a list of the states that have applied or been approved for ESEA Flexibility Waivers and the documentation for such waivers).

19. See generally Jaime Fuller, *Common Core Might Be the Most Important Issue in the 2016 Republican Presidential Race. Here's What You Need to Know About it*, WASH. POST (July 23, 2014, 9:35 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/23/common-core-might-be-the-most-important-issue-in-the-2016-republican-presidential-race-heres-what-you-need-to-know-about-it/> (asserting that the Common Core is the critical issue in today's political races).

rally.²⁰ These politicians claim that the Common Core and the Department's programs that support states' adoption of those standards provide yet another example of federal government overreach.²¹ In short, opponents of the Department's efforts to support the adoption of common standards believe the Common Core represents an attempt by the Department to impose federal standards and control over education in violation of the Tenth Amendment.²² With the political waters churning,²³ Bobby Jindal, Governor of Louisiana (Governor), sued the Department of Education in the United States (U.S.) District Court for the Middle District of Louisiana on August 27, 2014.²⁴ The complaint in *Jindal v. U.S. Department of Education* (*Jindal* or Complaint) claims that the Department is incentivizing states to adopt common state standards in violation of the Department's enabling statutes, ESEA, and Tenth Amendment.²⁵ In

20. *Id.*

21. *See id.* (summarizing the positions of some potential nominees for the Republican presidential candidate in 2016, including Kentucky Senator Rand Paul, Texas Senator Ted Cruz, and Florida Senator Marco Rubio, who are all opposed to the Common Core; Wisconsin Governor Scott Walker, who is asking the state legislature to abandon the Common Core; New Jersey Governor Chris Christie, who is asking his state to reexamine the Common Core; and Louisiana Governor Bobby Jindal (Governor), who is calling on his state to abandon the Common Core in lieu of its own set of standards).

22. *See generally* ROBERT S. EITEL ET AL., PIONEER INST. FOR PUB. POL'Y RES., THE ROAD TO A NATIONAL CURRICULUM: THE LEGAL ASPECTS OF THE COMMON CORE STANDARDS, RACE TO THE TOP, AND CONDITIONAL WAIVERS (Feb. 2012) (laying out the legal arguments that the Department's Race to the Top and ESEA Flexibility Waivers are executive overreach and an imposition of national standards on the states by the federal government).

23. *See* Catherine Gewertz, *State Lawmakers Assert Influence Over Standards*, EDUC. WK. (June 23, 2014), <http://www.edweek.org/cw/articles/2014/06/23/36stateboards.h33.html> (highlighting the way state legislatures are reasserting their control over education policy in the states in reaction to the adoption of the Common Core); *see also* Andrew Ujifusa, *New Lawsuit Challenges Adoption of Common Core in Louisiana*, EDUC. WK. STATE EDWATCH BLOG (July 21, 2014, 5:41 PM), http://blogs.edweek.org/edweek/state_edwatch/2014/07/new_lawsuit_challenges_adoption_.html (reporting on the legislatures' challenge of the state board's procedure in adopting the Common Core and highlighting how Louisiana has become "ground zero" for the controversy over the Common Core at the state level); Andrew Ujifusa, *Louisiana Board Joins Common-Core-Testing Suit Against Governor Jindal*, EDUC. WK. STATE EDWATCH BLOG (July 29, 2014, 1:26 PM), http://blogs.edweek.org/edweek/state_edwatch/2014/07/louisiana_board_joins_common-core-testing_suit_against_governor_jindal.html?qs=common+core+legal+challenges (reporting on Governor Jindal's conflict with the school board and state legislature regarding the state's adoption and implementation of the Common Core).

24. Complaint, *Jindal v. U.S. Dep't of Educ.*, No. 3:14-cv-00534-SDD-RLB (M.D. La. filed Aug. 27, 2014) [hereinafter *Jindal*].

25. *Id.* at ¶ 1; Department of Education Enabling Act (DEOA), 20 U.S.C. § 3402 (2012); General Education Provisions Act (GEPA), 20 U.S.C. § 1221-1 (2012); U.S. CONST.

addition, the Complaint asserts that the use of ARRA and ESEA to support states in adopting common standards was coercive and thus exceeded the constitutional limits of the Spending Clause.²⁶

This Comment argues (1) Governor Jindal's suit is unlikely to be successful since the Department has acted within its statutory authority, and (2) in the face of Congressional inaction in reauthorizing ESEA, the Department used the administrative tools at its disposal to both relieve the states of the burdens of NCLB while advancing its statutory mandate to support states, promote innovation, and ensure the academic success of all students. Governor Jindal's suit will likely not go far and is more political theater than a true question of agency overreach.²⁷ Congress conferred regulatory powers to the Department through its enabling statutes.²⁸ Additionally, Race to the Top grants and ESEA Flexibility Waivers, the two Department programs at issue in *Jindal*, are reasonable interpretations of ESEA and ARRA. Ultimately, the courts will most likely defer to the agency's authority under a *Chevron* analysis.²⁹ Further, Louisiana voluntarily applied for both a Race to the Top grant and ESEA Flexibility Waiver, and no imminent danger exists such that the Department will take away its ESEA funding.³⁰

Part I of this Comment provides the background of the unique status that education holds in constitutional jurisprudence, as well as the long

amend. X.

26. *Jindal*, *supra* note 24, at ¶¶ 13–16. While Governor Jindal is suing the Department, two other lawsuits have been filed in state court in Louisiana. One is a petition for injunctive relief filed by parents and the Louisiana Superintendent of Education against Governor Jindal for pulling Louisiana out of the assessment consortium. Verified Pet. for Prelim. and Permanent Inj. and Decl. Relief, *Hill v. Jindal*, No. 632170, 2014 WL 4210774 (La. Jud. Dist. Ct. Jul. 22, 2014). The other is a suit against the Louisiana Superintendent of Education filed by the state legislature for implementing the Common Core. Pet. to Suspend Implementation and Enforcement of “Common Core” for Failure to Follow the Provisions of La. Law and for Inj. Relief, *La. State Reps. v. Louisiana*, No. 632150 (La. Civ. Dist. Ct. July 25, 2014).

27. See Peter Grier, *Bobby Jindal Sues Obama Over the Common Core. What's that Mean for 2016?*, CHRISTIAN SCI. MONITOR (Aug. 27, 2014), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Buzz/2014/0827/Bobby-Jindal-sues-Obama-over-Common-Core.-What-s-that-mean-for-2016> (stating that taking on the “soft target” of the Common Core is boosting Jindal's ratings in a potential run for President).

28. GEPA, 20 U.S.C. § 1221c-3; DEOA, 20 U.S.C. § 3474.

29. See *infra* Part III.C.

30. See Letter from Ann Whalen, Dir., Policy and Program Implementation, DOE, to Bobby Jindal, Governor, La. (Dec. 22, 2011), *available at* <http://www2.ed.gov/programs/racetothetop/phase3-awards/louisiana.pdf> [hereinafter Whalen Letter]; see also *Louisiana's ESEA Flexibility Request*, DOE (Apr. 5, 2013), <http://www2.ed.gov/policy/escalflex/approved-requests/larequestamended042313.pdf>.

involvement of the federal government in education and education policy. Part II discusses the development of the Common Core and the Department's two programs to incentivize its adoption by the states, Race to the Top grants and ESEA Flexibility Waivers. Part III presents the arguments of agency overreach in the *Jindal* suit against the Department of Education. Finally, Part IV argues that the Department's use of the waiver provision of ESEA provides a powerful example of how an executive agency can move policy forward during times of legislative gridlock.

I. BACKGROUND ON FEDERAL INVOLVEMENT IN EDUCATION

A. Education Jurisprudence: A Unique Status

As a backdrop to the federal government's involvement in education, it is important to understand the unique status of education in constitutional jurisprudence. Education is never mentioned in the Constitution, yet much of American legal discourse wrestles with the idea of a right to education.³¹

Because the Constitution does not explicitly address education, the Supreme Court has long held that education is not a fundamental right³² and that control over education resides with the states. Regardless, the Court has repeatedly discussed the importance of education in the United States and explained that it plays a "fundamental role" in our democracy.³³ In one of its most defining civil rights cases, *Brown v. Board of Education of Topeka*,³⁴ the Supreme Court stated that education was "the very foundation of good citizenship" and when states choose to provide a public education, they must provide it to everyone equitably.³⁵ Today, all states have compulsory education laws.³⁶ Additionally, unlike the United States

31. See, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (asserting that education is "perhaps the most important function of state and local governments").

32. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that disparities in school financing were not a violation of the Fourteenth Amendment because education was not a fundamental right and the poor are not a suspect class). But see *id.* at 62–63 (Brennan, J., dissenting) (asserting that strict scrutiny should be applied to any classification related to education since it is "inextricably linked" to the rights of citizens).

33. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (holding that states cannot deny a public education to undocumented children since education has a "fundamental role" in our society).

34. 347 U.S. 483 (1954).

35. *Id.* at 493.

36. State compulsory education laws require parents to send their children to school, usually from the ages of six to sixteen. See *National Survey of State Laws*, GALE 1–16 (2007), <https://a.next.westlaw.com/Link/Document/Blob/I9c5aa4a35b5411dc9b8c850332338889.pdf?> (providing a summary of each state's compulsory attendance law with reference to state codes, age requirements for attendance, exceptions to the statute, home school

Constitution, the majority of state constitutions articulate a right to education.³⁷ Given the country's universal understanding of the importance of education, the Supreme Court may eventually revisit its holding in *San Antonio Independent School District v. Rodriguez*³⁸ and establish education as a fundamental right.³⁹

B. Federal Involvement in Education

The Constitution does not enumerate power over education to the federal government; thus, education is reserved for the states under the Tenth Amendment.⁴⁰ Nonetheless, both Congress and the President have asserted tremendous influence over the nation's schools and districts. For example, initially enacted in 1965 as part of President Johnson's War on

provisions, and penalties on parents for noncompliance).

37. CONN. CONST. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state."); GA. CONST. art. VIII, § 1, ¶ I ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia."); N.M. CONST. art. XII, § 1 ("A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained."); S.D. CONST. art. VIII, § 1 ("The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education."); WASH. CONST. art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."); see, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 948 n.14 (4th ed. 2011) (citing examples of cases that have established a fundamental right to education, including *Serrano v. Priest*, 557 P.2d 929 (Cal. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Abbot v. Burke*, 575 A.2d 359 (N.J. 1990); *Tenn. Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993)).

38. 411 U.S. 1, 30, 37 (1973) (holding that education plays a "vital role" in our society, but it is not a fundamental right); accord *Plyler* at 221 (stating that education plays a "fundamental role" in our society). *Contra San Antonio*, 411 U.S. at 102–03 (Marshall, J., dissenting) (asserting that rights not mentioned in the Constitution, such as education, become fundamental when closely connected to constitutional rights: "As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.").

39. See CHEMERINSKY, *supra* note 37, at 946–48 (suggesting that the Supreme Court may eventually declare that education is a fundamental right by tracing the Court's decisions regarding the right to education and also citing various cases that have established education as a fundamental right at the state level).

40. U.S. CONST. amend. X.

Poverty program, ESEA established a federal grant program for states with the objective of closing the achievement gap between middle class students and students living in poverty.⁴¹ For states to receive federal education funding, they must meet federal requirements for how the funds are to be used in public schools.⁴² A fundamental concept that underlies ESEA funding is that the funds can only be used to provide support through supplemental programs.⁴³ In other words, states can accept the education funds from the federal government, but they cannot use these funds to replace the state funds necessary to run the education program already required under state law.⁴⁴

Since its enactment, ESEA has become the Department's largest public education expenditure.⁴⁵ During the first years of ESEA, ambiguity in the language of the statute led to abuses.⁴⁶ One longstanding requirement of ESEA funding has been that ESEA funds were specifically meant to supplement rather than supplant education services to help close the achievement gap.⁴⁷ Nevertheless, these supplemental programs were left to

41. See Thomas, *supra* note 2, at 52–53 (providing the history behind the enactment of ESEA during the Johnson administration).

42. See, e.g., ESEA, 20 U.S.C. § 6315(a) (2012) (mandating that funds be used to provide services to children needing “special assistance”).

43. *Id.* § 6315(b)(3) (“Funds received under this part may not be used to provide services that are otherwise required by law to be made available to children . . . but may be used to coordinate or supplement such services.”).

44. *Id.*; see also DOE, NON-REGULATORY GUIDANCE: TITLE I FISCAL ISSUES: MAINT. OF EFFORT COMPARABILITY SUPPLEMENT, NOT SUPPLANT CARRYOVER CONSOLIDATING FUNDS IN SCHOOLWIDE PROGRAMS GRANTBACK REQUIREMENTS 2, 37–40 (Feb. 2006), <https://www2.ed.gov/programs/titleiparta/fiscalguid.pdf> (defining and illustrating the difference between using Title I funds to supplement an existing program rather than to supplant state funds for a required educational program—for example, paying for a reading program from state and local funds one year and using federal Title I funds the following year would not be permitted because the school district would be using federal funds to supplant state and local funds that were already used to provide for a program).

45. The Department of Education was allocated \$68.1 billion in discretionary funds in 2013, \$36.7 billion of which was allocated for elementary and secondary education. Of that \$36.7 billion, \$24.1 billion was allocated for ESEA spending, and \$12.6 billion was allocated for Individuals with Disabilities Education Act (IDEA) spending. Of the remaining discretionary funds, \$26.7 billion was allocated for postsecondary education, \$22.8 billion of which was allocated for Pell Grants, and \$3.3 billion was allocated for other programs. See DOE, SUMMARY OF DISCRETIONARY FUNDS (Apr. 2, 2013), <http://www2.ed.gov/about/overview/budget/budget14/summary/appendix2.pdf>.

46. See Thomas, *supra* note 2, at 53 (summarizing the report *Title I of ESEA: Is It Helping Poor Children?*, which noted the use of ESEA Title I funds to pay for books and supplies for entire schools or to pay for general expenses such as overhead or operating costs).

47. 20 U.S.C. § 6315(b)(3).

the states without sufficient accountability.⁴⁸ To address some of the early abuses of ESEA, Congress has increasingly imposed greater accountability on schools.⁴⁹ In 1988, Congress amended ESEA to require documentation from states and districts that students living in poverty were demonstrating academic achievement, thus introducing an assessment requirement into ESEA.⁵⁰

In 1981, President Reagan convened the National Commission on Excellence in Education (the Commission) to examine student performance in public schools.⁵¹ The Commission issued its report, *A Nation at Risk*, in 1983, noting the “patchwork quilt” of education programs in the United States that resulted from each state developing its own education programs independently and stressing the need for uniform academic standards.⁵²

In 1989, President George H.W. Bush convened an historic educational summit in Charlottesville, Virginia with the state governors.⁵³ The summit issued recommendations for greater accountability with ESEA, including the development of higher academic standards shared by the states, similar to the findings in *A Nation at Risk*.⁵⁴ In 1991, President Bush incorporated the recommendations from the 1989 educational summit in *America 2000*,

48. See Thomas, *supra* note 2, at 51, 54 (describing steps taken to increase Title I accountability).

49. *Id.* at 54–55 (describing the process of requiring states to document and define achievement levels of students who were being served through ESEA Title I and eventually requiring administration of standardized tests to measure achievement).

50. *Id.* at 54 (describing the introduction of standardized tests to document academic achievement of disadvantaged children, the target of Title I funding for children living in poverty).

51. See DAVID P. GARDNER ET AL., NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 39–41 (1983), available at <http://files.eric.ed.gov/fulltext/ED226006.pdf> [hereinafter *A NATION AT RISK*] (describing the formation of the Commission with the purpose of providing the Secretary of Education with recommendations regarding the state of education in the United States).

52. *Id.* at 5–18 (highlighting the lack of achievement of American students); see generally *id.* at 23–36 (suggesting not only higher academic standards that were common among the states but also increased course requirements, longer school days, and changes in the training and retention of teachers).

53. See generally Alyson Klein, *Historic Summit Fueled Push for K–12 Standards*, EDUC. WK. (Sept. 23, 2014), <http://www.edweek.org/cw/articles/2014/09/24/05summit.h34.html> (providing an overview of the education summit with state governors convened by President H.W. Bush to establish goals for education).

54. *Id.* (recommending the establishment of national education goals that states and schools should be accountable for meeting, thus addressing the “patchwork” of standards initially raised in *A Nation at Risk*); see *A NATION AT RISK*, *supra* note 51, at 14 (“And where there should be a coherent continuum of learning, we have none, but instead an often incoherent, outdated patchwork quilt.”).

an education initiative that Congress failed to pass.⁵⁵

With President Clinton's election in 1992, the quest for educational reform continued. Congress enacted the Goals 2000: Educate America Act⁵⁶ in 1994 and reauthorized ESEA—renamed the Improving America's Schools Act of 1994.⁵⁷ These initiatives increased accountability for states accepting ESEA Title I funds and focused on student achievement tied to academic standards.⁵⁸ The Improving America's Schools Act of 1994 also introduced the concept of “adequate yearly progress”—an annual goal of measurable growth as demonstrated by standardized assessments.⁵⁹

In 2001, President George W. Bush facilitated the reauthorization of ESEA as NCLB.⁶⁰ NCLB represented a significant increase in the federal government's role in public education both in substance and accountability.⁶¹ First, NCLB formally incorporated the standards movement in education reform and linked accountability to student achievement on assessments aligned to the standards.⁶² NCLB also imposed penalties on schools and districts that failed to show adequate yearly progress on these new assessments.⁶³ Additionally, NCLB introduced a requirement that interventions for reading and mathematics, special programs or curricula to support struggling students, must be “scientifically research based.”⁶⁴ Finally, NCLB required that by 2014, all

55. See Klein, *supra* note 53 (providing grants for model schools, local development of national standards, and the establishment of school and district report cards to demonstrate progress).

56. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

57. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.).

58. See Lauren B. Resnick et al., *Standards-Based Reform: A Powerful Idea Unmoored*, in IMPROVING ON NO CHILD LEFT BEHIND: GETTING EDUCATION REFORM BACK ON TRACK 115–17 (Richard D. Kahlenberg ed., 2008) (discussing how President Clinton moved the standards movement forward through reauthorizing ESEA and requiring states to develop content and performance standards and assessments that were aligned to those standards, thereby creating an effective measure for Title I accountability).

59. *Id.* at 118.

60. 20 U.S.C. § 6301 *et seq.* (2012).

61. See Resnick et al., *supra* note 58, at 117–20; *id.* at 115–17 (adding to the standards and testing put in place under Clinton by creating an accountability system that focuses on student achievement goals and required schools and districts to meet those goals or be subject to sanctions); Thomas, *supra* note 2, at 55–57.

62. Thomas, *supra* note 2, at 55–57.

63. 34 C.F.R. §§ 200.32–200.45 (2014); see Thomas, *supra* note 2, at 57–58 (outlining penalties for failing to show adequate yearly progress, including the loss of administrative funds, reorganization of the school, replacement of staff, or a takeover of the school by the state).

64. ESEA, 20 U.S.C. § 6301(9); see *id.* at § 7801(37)(A) (defining “scientifically based

students demonstrate mastery of standards as measured by standardized assessments in English and mathematics.⁶⁵

Though laudable in its aspirations, NCLB has proven to be challenging and flawed in its implementation.⁶⁶ First, particular student groups, including English Learners and Special Education students, are especially vulnerable to being labeled as not proficient.⁶⁷ Additionally, schools and districts have found the goal of one hundred percent proficiency on the standards by 2014 unattainable.⁶⁸ NCLB also mandated a series of progressively more punitive corrective measures for those schools and districts that fail to meet these ever-increasing performance targets.⁶⁹ Since

research” as “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs”).

65. See generally *NCLB Executive Summary*, DOE <http://www2.ed.gov/nclb/overview/intro/exccsumm.html> (last updated Feb. 10, 2004).

66. E.g., Arne Duncan, *Escaping the Constraints of ‘No Child Left Behind,’* WASH. POST (Jan. 6, 2012), http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012/01/06/gIQAYmqplP_story.html (highlighting how NCLB exposed achievement gaps based on race, income level, disability, and language ability as well as started a conversation about how to close those gaps, but also how NCLB created an artificial goal of proficiency that unintentionally incentivized states to lower their academic standards in order to reach those goals).

67. See Thomas, *supra* note 2, at 58–59 (finding that English learners require at least two to seven years to become proficient in English and noting that research shows even with the highest quality instruction, many students with disabilities never attain proficiency).

68. *Id.* at 56, 58.

69. Under NCLB’s corrective actions, for example, schools that fail to meet adequate yearly progress for two consecutive years enter into School Improvement, which requires the school to use part of its Title I funds to: (1) notify parents of the school’s failure to meet performance targets; (2) offer students to transfer to another school in the district that is not in School Improvement; (3) pay for the transportation of students who elect to attend a different school; (4) develop a school plan to “incorporate strategies based on scientifically based research” and “adopt policies and practices” that will improve student achievement; and (5) provide professional development for its teachers. See 20 U.S.C. § 6316 (2012). Failure of the school to meet performance targets three years in a row adds an additional requirement—supplementary educational services (e.g., afterschool tutoring). *Id.* The previous requirements continue when the school fails to meet targets four years in a row, but at least one of a number of corrective actions also goes into effect: (1) replacing school staff who are relevant to the failure to make adequate growth; (2) putting into a place a new curriculum; (3) decreasing the school level management authority; (4) hiring an outside expert to advise the school; (5) lengthening the school day or year, or (6) restructuring the organization of the school. *Id.* Finally, if the school fails to meet performance targets five years in a row, one year is spent planning for one of the following options to occur in the year six: (1) reopening the school as a public charter school; (2) replacing all or most of the school’s staff; (3) entering into a contract with a private management company to operate the school; (4) turning the school over to the state to run; and (5) any other major restructuring of the school governance to ensure its success. *Id.*

NCLB is still in effect and requires all students to be one hundred percent proficient on grade-level academic standards at this point, most schools and districts that receive ESEA Title I funds are somewhere along the continuum of corrective action.⁷⁰

II. THE COMMON CORE AND THE DEPARTMENT OF EDUCATION

A. *The Development of the Common Core*

Congress was due to reauthorize NCLB in 2007.⁷¹ The act originally passed with significant bipartisan support, but the reality of annual assessments, yearly goals, and consequences for not meeting those goals led to a fraying of the bipartisan support that still persists today.⁷² While

70. *Id.*; see also Thomas *supra* note 2, at 56.

71. ESEA, 20 U.S.C. § 6754(c) (2012) (providing that funds would be allocated from 2002 to 2007).

72. Most of the disagreement on Capitol Hill on the reauthorization of NCLB in 2007 through today centers on issues of federal involvement in education, testing, and accountability. Interestingly, the political parties have seemingly switched sides. Compare *Miller's Speech Lacks Details, Some Say*, EDUC. WK. BLOG (July 31, 2007, 9:14 AM), http://blogs.edweek.org/edweek/NCLB-ActII/2007/07/miller_speech_draws_mixed_reac.html (reporting that the Secretary of Education under President George W. Bush, Margaret Spellings, was willing to wait for a reauthorization bill that would not “roll back” accountability measures” while Rep. George Miller (D-CA), the House Education and Labor Committee Chairperson, saw “serious changes” in the law around testing and accountability), and Amit R. Palcy, *‘No Child’ Needs to Expand Beyond Tests, Chair Says*, WASH. POST (July 31, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/30/AR2007073001711.html> (reporting that Rep. George Miller (D-CA) claimed there was “too much emphasis on standardized testing” in NCLB while the Republican Ranking Member on the House Education and Workforce Committee, Rep. Howard P. “Buck” McKeon (R-CA), said, “Any attempts to weaken the law will be met with stiff resistance from House Republicans”), with Lyndsey Layton, *White House Pushes Back Against GOP on Funds for Poor School Children*, WASH. POST (Feb. 13, 2015), http://www.washingtonpost.com/local/education/white-house-pushes-back-against-gop-on-school-funds-for-poor-kids/2015/02/13/06713fac-b399-11e4-827f-93f454140c2b_story.html (reporting on President Obama’s negative reaction to the recent Republican plan for reauthorization bill, the “Student Success Act,” which would roll back most state accountability measures), and Alyson Klein, *White House Issues Veto Threat Against House GOP NCLB Rewrite*, EDUC. WK. POLITICS K-12 BLOG (Feb. 25, 2015, 10:31 AM), http://blogs.edweek.org/edweek/campaign-k-12/2015/02/white_house_issues_veto_threat_1.html?qs=nclb+veto (reporting on President Obama’s “biggest unsurprise of the day” when he threatened to veto the House Republican’s Student Success Act because it backed off on accountability for schools to meet the needs of poor and minority students). See also Lauren Camera, *Slim Hope for ESEA Reauthorization, Say Education ‘Insiders,’* EDUC. WK. POLITICS K-12 BLOG (Aug. 14, 2014, 7:28 AM), http://blogs.edweek.org/edweek/campaign-k-12/2014/08/little_hope_for_esca_reauthori.html (taking a rather dim view of the prospects of

Congress has been unable to reach an agreement about the future of NCLB, the states have continued to pursue the educational reforms that began with *A Nation at Risk*, particularly the idea of national standards. The Department, beginning in 2009, has also used its authority to relieve states of NCLB burdens while supporting their efforts to develop and implement common standards.⁷³

In 2007, the National Governors Association and the Council of Chiefs of State Schools Organization discussed the possibility of developing national standards.⁷⁴ With lessons learned from NCLB, the standards movement that began with *A Nation at Risk* and *America 2000* was set to take its next step.⁷⁵ While standards-based education took a big step with NCLB, the “patchwork quilt” issue highlighted in *A Nation at Risk* remained.⁷⁶ Differing standards from state to state not only resulted in the continued “patchwork quilt” of educational program quality highlighted in *A Nation at Risk*, but states with lower standards were not subject to the same level of accountability under NCLB as those with higher standards.⁷⁷ A workgroup of state leaders and educators began meeting in 2009 to develop both College and Career Readiness Standards and then K-12 Academic Standards.⁷⁸ After validation and input from educators, the final version of the Common Core State Standards was released in the spring of 2010.⁷⁹ State superintendents then brought the Common Core back to their states for discussion and debate.⁸⁰ Between the states’ desire to adopt common

reauthorization—“‘We are only six years behind,’ mocked one respondent. ‘What’s the rush now?’”). Nonetheless, the Senate Committee on Health, Education, Labor & Pensions of the 114th Congress recently succeeded in introducing an ESEA reauthorization bill, the Every Child Achieves Act of 2015, on April 30, 2015, which passed the Senate on July 16, 2015. S. 1177, 114th Cong. (2015); *Text of the Every Child Achieves Act of 2015*, GOVTRACK.US, www.govtrack.us/congress/bills/114/s1177/text (last visited Aug. 4, 2015).

73. See *infra* Part II.B.

74. See *Development Process*, *supra* note 1 (indicating that state chiefs of education discussed the possibility of common standards at a meeting of the Council of Chief State School Officials in 2007).

75. See Thomas, *supra* note 2, at 53–54.

76. See A NATION AT RISK, *supra* note 51, at 14.

77. See generally SHEILA BYRD CARMICHAEL ET AL., THOMAS B. FORDHAM INST., THE STATE OF STATE STANDARDS—AND THE COMMON CORE—IN 2010 (2010), http://cdex.s3-us-west-2.amazonaws.com/publication/pdfs/SOSSandCC2010_FullReportFINAL_8.pdf (comparing the state standards against one another and the Common Core and discussing the uneven application of NCLB).

78. See *Development Process*, *supra* note 1 (describing the formation of a standards workgroup by state education leaders in 2009).

79. *Id.*

80. *Id.*

standards and the incentives provided through federal grants, forty-five states and the District of Columbia had adopted the Common Core within three years of the Common Core's release.⁸¹

B. The Department of Education's Initiatives

As part of ARRA,⁸² Congress allocated \$45 billion in education funds to help states during the fiscal crisis in 2009. Of that \$45 billion, \$4 billion was set aside for a competitive grant program that the Department named Race to the Top for which states could apply.⁸³ Through Race to the Top, the Department set forth a blueprint for the reauthorization of NCLB, one intended to reward innovation and growth.⁸⁴ The four goals of Race to the Top were:

Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy; [b]uilding data systems to measure student growth and success, and inform teachers and principals about how they can improve instruction; [r]ecruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and [t]urning around our lowest-achieving schools.⁸⁵

In the application process, those four goals were an absolute priority.⁸⁶ While the Race to the Top application does not mention the Common

81. *Id.*

82. Pub. L. No. 111-5, 123 Stat. 279 (2009) (codified as amended in scattered sections of 26 U.S.C.).

83. *Race to the Top Fund*, DOE, <http://www2.ed.gov/programs/racetothetop/index.html> (last updated Mar. 25, 2014) (providing information regarding the regulations for the Race to the Top Program, based on the incentive grant section of ARRA); *Race to the Top Fund*, 74 Fed. Reg. 59,836, 59,836 (Nov. 18, 2009). *See* Notice of Proposed Information Collection Requests, 74 Fed. Reg. 11,533, 11,533 (Mar. 18, 2009) (soliciting public comment on ARRA's \$53.6 billion State Fiscal Stabilization Fund to support public education during the financial crisis). *See generally* DOE, THE AMERICAN RECOVERY AND REINVESTMENT ACT: SAVING AND CREATING JOBS AND REFORMING EDUCATION (Apr. 3, 2009), <http://www2.ed.gov/policy/gen/lcg/recovery/presentation/arra.pdf> (providing a breakdown of the allocation of ARRA's \$53.6 billion State Fiscal Stabilization Fund, including \$39.8 billion specifically for public education and \$4.35 billion for the Race to the Top grant program).

84. *See Race to the Top Fund*, *supra* note 83.

85. *Id.* (internal citations omitted).

86. *Id.*; *see also* Michele McNeil & Lesli A. Maxwell, *Race to Top Enters Home Stretch with 16 Finalists*, EDUC. WK. (Mar. 5, 2010), http://www.edweek.org/ew/articles/2010/03/05/24finalists_cp.h29.html?qs=common+core+states+rights (reporting on the elements of the state finalists' applications for Race to the Top, including the expansion of charter schools, Illinois requiring all districts to use student achievement as at least fifty percent of teacher evaluations, and the adoption of common standards).

Core by name, it provides that states are required to adopt “common standards” that are shared by “a significant number of states,” defined as a majority of states in the country.⁸⁷ In its responses to frequently asked questions and its scoring rubric for Race to the Top applications, however, the Department states that it does not endorse a particular set of standards.⁸⁸ While the adoption of common standards is an absolute priority, it represents only fourteen percent of the total points on the scoring rubric.⁸⁹ Under ARRA, the Department also awarded grants to state consortia to develop common assessments aligned to the common standards.⁹⁰ Two consortia were awarded grants, SMARTER Balanced Assessment Consortium (SBAC) and Partnership for Assessment for Readiness for College and Career (PARCC).⁹¹ Importantly, the language

87. See Race to the Top Fund, 74 Fed. Reg. 59,688, 59,689 (Nov. 18, 2009) (clarifying the rubric for Race to the Top that the common standards adopted needed to be adopted by the “majority of the States”).

88. DOE, RACE TO THE TOP PROGRAM GUIDANCE AND FREQUENTLY ASKED QUESTIONS 20 (May 27, 2010), <http://www2.ed.gov/programs/racetothetop/faq.pdf>.

89. DOE, APPENDIX B. SCORING RUBRIC 1-2 <https://www2.ed.gov/programs/racetothetop/scoringrubric.pdf> (last updated Jan. 2010).

90. See *Applicant Information: Race to the Top Assessment Program*, DOE (Aug. 10, 2012), <http://www2.ed.gov/programs/racetothetop-assessment/applicant.html> (providing information about the winners of the Race to the Top Assessment Program grants).

91. See *Race to the Top Assessment Program*, DOE, <http://www2.ed.gov/programs/racetothetop-assessment/index.html> (last updated Aug. 12, 2014) (explaining that ARRA funds would be provided to groups of states “to develop assessments that are valid, support and inform instruction, provide accurate information about what students know and can do, and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace.”); see also Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 75 Fed. Reg. 18,171, 18,174–75 (Apr. 9, 2010) (providing detailed evaluation criteria, including the number of states that needed to be a part of the assessment development consortium, for selection of grant recipients, which were SMARTER Balanced Assessment Consortium (SBAC) and Partnership for Assessment for Readiness for College and Career (PARCC)); *Executive Summary*, SBAC, http://www.smarterbalanced.org/wordpress/wp-content/uploads/2011/12/Smarter_Balanced_Executive_Summary.pdf (last visited Aug. 4, 2015) (providing information about SBAC); *Member States*, SBAC, <http://www.smarterbalanced.org/about/member-states/> (last visited June 6, 2015) (listing SBAC Member States to include California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Maine, Michigan, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, South Dakota, The Bureau of Indian Affairs, U.S. Virgin Islands, Vermont, Washington, West Virginia, Wisconsin, and Wyoming); *About*, PARCC, <http://www.parcconline.org/about-parcc> (last visited June 6, 2015) (providing information about PARCC, the assessment consortium comprised of Arkansas, Colorado, District of Columbia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New Mexico, New York, Ohio, and Rhode Island).

of ARRA does not explicitly call for common standards and assessments, but rather uses ambiguous language that asks states to “enhance the quality of the academic assessments” and “improve State academic content standards.”⁹²

The Department also introduced a new program in 2011 to relieve schools and districts from the demands of NCLB if they were to adopt the Common Core. Under NCLB, Congress authorizes the Secretary to grant states waivers of certain NCLB requirements.⁹³ A state can seek a waiver of some of NCLB as long as it describes how the waiver will “increase the quality of instruction” and “improve the academic achievement of students.”⁹⁴ In 2011, the Secretary implemented this provision through a program called ESEA Flexibility Waiver.⁹⁵ In order to qualify for ESEA Flexibility Waivers, states are required to implement many of the requirements of Race to the Top, including the adoption of “college- and career-ready standards.”⁹⁶ The ESEA Flexibility Waiver program similarly defines college- and career-ready standards as standards that are “common to a significant number of States” or approved by “a State network of institutions of higher education.”⁹⁷ While the ESEA Flexibility Waiver program does not mention the Common Core by name, the Common Core is the only set of common standards adopted by a significant number of states.⁹⁸ Therefore, a state either needs to adopt the Common Core or have its own standards approved by its institutes of higher education in order to qualify for an ESEA Flexibility Waiver.⁹⁹ To date, the

92. Pub. L. No. 111-5, § 14,005(d)(4), 123 Stat. 279, 282–83 (codified as amended in scattered sections of 26 U.S.C.).

93. 20 U.S.C. § 7861(a) (2012) (waiving statutory and regulatory requirements); *see also id.* § 6316 (outlining the School Improvement process and the onerous corrective actions imposed on schools that fail to meet achievement targets).

94. *Id.* § 7861(b)(1)(B); *see id.* § 7861(c) (listing the waiver restrictions); *see also supra* notes 60–70 and accompanying text (describing the requirements under NCLB).

95. *See* Letter from Arne Duncan, Sec’y, DOE, to Chief State School Officers (Sept. 23, 2011), *available at* <http://www2.ed.gov/policy/gen/guid/secletter/110923.html> (inviting state superintendents to apply for ESEA Flexibility Waivers).

96. *See ESEA Flexibility Policy Document*, *supra* note 18 (providing criteria for state’s qualifying for ESEA Flexibility).

97. *Id.*

98. *See generally Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE 1–2, <http://www.corestandards.org/wp-content/uploads/FAQs.pdf> (last visited Aug. 4, 2015) (explaining how each state had its own standards and the Common Core was built on the best of these standards).

99. *See Laws & Guidance: ESEA Flexibility*, DOE, <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (explaining that a waiver will be granted if states develop “rigorous” standards to improve quality of education that are also approved by the state’s institutes of higher education); *see also* Letter from Arne

Department has granted waivers to forty-three of the forty-five states that have applied.¹⁰⁰ Two other states' applications are currently under review.¹⁰¹ The Department has denied the extension of a waiver for only one state, Oklahoma, which rescinded its adoption of the Common Core without having college- and career-ready standards in place that were approved by its institutions of higher education.¹⁰²

III. THE CHARGE OF AGENCY OVERREACH

A. *Jindal v. U.S. Department of Education*

Soon after a significant majority of states adopted the Common Core in 2010, the Common Core began to experience a backlash as concern arose that the federal government had effectively imposed a national curriculum on the states.¹⁰³ Despite claims that the Department had overreached and violated the Tenth Amendment, the states voluntarily adopted the Common Core, and most of the action regarding the Common Core has occurred at the state level where legislatures are having second thoughts about its adoption.¹⁰⁴ On August 27, 2014, Governor Bobby Jindal filed the first complaint against the Department for its programs supporting the

Duncan, Sec'y, DOE, to Michael Hanley, Comm'r, Alaska Dep't of Educ. and Early Dev. (May 20, 2013), *available at* <http://www2.ed.gov/policy/eseaflex/secretary-letters/ak.html> (awarding Alaska's ESEA Flexibility Waiver); DOE, ESEA FLEXIBILITY REQUEST FOR WINDOW 3: ALASKA 26 (May 15, 2013), <http://www2.ed.gov/policy/eseaflex/approved-requests/ak1.pdf> (providing that Alaska did not adopt common standards but had its standards approved by its institute of higher education); Letter from Patrick K. Gamble, Pres., Univ. of Alaska, to Arne Duncan, Sec'y, DOE 128-29 (June 7, 2012), *available at* <http://www2.ed.gov/policy/eseaflex/approved-requests/ak1attachment.pdf> (confirming that Alaska's standards prepared students to succeed in college).

100. See *Laws & Guidance: ESEA Flexibility*, *supra* note 99 (providing a pictorial of the states that have been granted waivers).

101. *Id.* (noting that Wyoming and Iowa have waiver applications currently under review).

102. See Catherine Gewertz, *Oklahoma: The First State to Lose Its NCLB Waiver Over Standards*, EDUC. WK. CURRICULUM MATTERS BLOG (Aug. 29, 2014, 10:09 AM), http://blogs.edweek.org/edweek/curriculum/2014/08/oklahoma_first_to_lose_waiver.html?qs=oklahoma+waiver (noting that the waiver was denied not for the usual reason of the teacher evaluation requirement but because the state's standards were not good enough).

103. See generally Andrew Ujifusa, *Common Core Backlash: Track State Efforts*, EDUC. WK. (March 31, 2014), <http://www.edweek.org/ew/section/multimedia/2014-anti-cc-tracker.html> (tracking the activities in various states reacting against adoption of the Common Core).

104. See Gewertz, *supra* note 23 (providing an overview of various state legal actions in reaction to the Common Core).

adoption of common standards.¹⁰⁵ According to the Complaint, the Department has used its authority under its enabling statutes in ways Congress never intended and that violate the Tenth Amendment.¹⁰⁶

Under the Tenth Amendment, any power not explicitly delegated to the federal government is reserved for the states.¹⁰⁷ Since the Constitution does not confer to the federal government any power to control education, all of the Department's enabling statutes draw a bright line between its authority and states' rights.¹⁰⁸ For example, the General Education Provisions Act of 1965 (GEPA), which established the Department of Education, specifically provides that "no provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction . . . of any educational institution, school, or school system."¹⁰⁹ This limitation on the Department is echoed throughout its other enabling statutes.¹¹⁰ ESEA also prohibits the use of federal funds by the Department "to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school."¹¹¹ Additionally, ESEA prohibits requiring any state to have "academic content or student academic achievement standards approved or certified by the Federal Government."¹¹²

According to the Complaint, the Department's Race to the Top grant through ARRA is at odds with Congressional intent by directing standards, assessments, and programs of instruction.¹¹³ In order to meet the "absolute priority" of the Race to the Top application, the Governor claims, states were required to adopt a single set of "nationalized" standards.¹¹⁴ The requirement to implement assessments that are aligned with the standards,

105. *Jindal*, *supra* note 24.

106. *Jindal*, *supra* note 24, at ¶ 1.

107. U.S. CONST. amend. X.

108. All of the federal education statutes have a provision regarding the relationship between the Department of Education and the states. *Accord* ESEA, 20 U.S.C. § 7907 (2012) (prohibiting the federal government from controlling, directing, or mandating a instructional program or curriculum in a State); GEPA, 20 U.S.C. § 1232a (2012) (prohibiting federal control of education); DEOA, 20 U.S.C. § 3403(a) (2012) ("The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.").

109. 20 U.S.C. § 1232a.

110. *See, e.g.*, DEOA, 20 U.S.C. § 3403(b) (stating the intention of Congress not to encroach on states' and local governments' rights).

111. ESEA, 20 U.S.C. § 7907(b).

112. *Id.* § 7907(c).

113. *Jindal*, *supra* note 24, at ¶ 21.

114. *Id.* at ¶ 23.

the Governor continues, is also meant to lead states to nationalized standards under the direction of the Department.¹¹⁵ The Governor specifically points to an award letter to one of the assessment consortia under the Race to the Top Assessment grant, PARCC, which states that the Department would maintain “substantial involvement” in the program.¹¹⁶ Thus, the Governor characterizes the two assessment consortia, PARCC and SBAC, as “agents of the Department,” working to put into place nationalized standards and assessments.¹¹⁷

The Governor also argues that the Department had no authority to implement the ESEA Flexibility Waiver program.¹¹⁸ As noted above, to be awarded an ESEA Flexibility Waiver, states needed to agree to four conditions, including the adoption of college-ready and career-ready standards and aligned assessments.¹¹⁹ The Governor asserts that the waivers are coercive because states allegedly have no choice but to agree to the “objectionable” Race to the Top conditions of the waivers rather than be subject to the “more onerous conditions” of NCLB.¹²⁰

Under the Administrative Procedure Act (APA),¹²¹ a court has jurisdiction to review an agency’s action to determine if the agency violated the Constitution, exceeded the authority of its enabling statute, or otherwise acted unreasonably.¹²² A court first analyzes whether Congress conferred the agency the authority to make rules and regulations that have the force of law.¹²³ If the agency does have the authority, the court will look at the language of the statute and whether the intent of Congress is clear.¹²⁴ If the language of the statute is unclear or ambiguous, the court will then determine if the agency’s interpretation is reasonable.¹²⁵

In *Findal*, the court will need to determine whether the Department’s enabling statutes conferred the authority to provide incentives to the states to adopt common standards through its ARRA Race to the Top program and ESEA Flexibility Waivers.¹²⁶ If the Department does have such

115. *Id.* at ¶¶ 36–37.

116. *Id.* at ¶ 38.

117. *Id.* at ¶ 40.

118. *Id.* at ¶ 43.

119. *Id.* at ¶ 42; *see supra* notes 93–102 and accompanying text (explaining the details of the ESEA Flexibility Waiver program).

120. *Findal*, *supra* note 24, at ¶ 46.

121. Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (2012).

122. *Id.* § 706(2)(A)–(C).

123. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

124. *Id.* at 842–43.

125. *Id.*

126. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (establishing that before undergoing *Chevron* analysis, a court must first determine whether Congress conferred

authority, the court will then determine whether the intent of Congress is clear in the statute. If it is not, the court will determine whether the Department's interpretations of the statutes are reasonable.¹²⁷ In examining whether the Department committed a constitutional violation through its programs, the court will analyze whether the programs to encourage states to adopt common standards either (1) violated the Spending Clause by using federal funds in a manner that was coercive to the point of compulsion¹²⁸ or (2) imposed a national curriculum in violation of the Tenth Amendment.¹²⁹

Governor Jindal successfully jumped the first hurdle in his suit against the Department when the district court denied the Department's Motion to Dismiss, which claimed that the Governor lacked standing to bring his suit forward.¹³⁰ To satisfy the standing requirement, a plaintiff must establish that (1) he has suffered an injury in fact that is concrete, particularized, and imminent; (2) the injury was caused by the defendant's conduct; and (3) the injury is redressable.¹³¹ Since Louisiana voluntarily entered into the partnership to develop the Common Core,¹³² voluntarily adopted the Common Core,¹³³ voluntarily applied for and received a Race to the Top

to the agency the authority to promulgate rules with the force of law).

127. *Chevron*, 467 U.S. at 842-43.

128. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (holding that Congress may use the Spending Clause to implement programs that are for the general welfare as long as they are not coercive); *see also Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012) (reasoning that Congress's powers under the Spending Clause are limited to inducements that states take on voluntarily).

129. U.S. CONST. amend. X; *accord United States v. Lopez*, 514 U.S. 549, 563-66 (1995) (rejecting the argument that possession of a firearm near a school can be regulated by the federal government because it affects interstate commerce because the federal government could then, under the Commerce Clause, regulate local education and curriculum, an area over which the states have sovereignty).

130. *Jindal v. U.S. Dep't of Educ.*, No. 14-CV-534, 2015 WL 854132 (M.D. La. Feb. 26, 2015); *see also* Mem. in Supp. of Defs.' Mot. to Dismiss for Lack of Subject Matter Jurisdiction and in Opp'n to Pl.'s Mot. for Prelim. Inj., *Jindal v. U.S. Dep't of Educ.*, No. 3:14-cv-00534-SDD-RLB, 2014 WL 6737265 (M.D. La. Nov. 3, 2014) [hereinafter Motion to Dismiss].

131. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

132. *See Development Process*, *supra* note 1 (indicating that forty-eight states, including Louisiana, joined the Common Core State Standards Initiative to develop common standards); *see also Fifty-One States And Territories Join Common Core State Standards Initiative*, NAT'L GOVERNORS ASS'N (Sept. 1, 2009), http://www.nga.org/cms/home/news-room/news-releases/page_2009/col2-content/main-content-list/title_fifty-one-states-and-territories-join-common-core-state-standards-initiative.html (announcing that Louisiana was one of several states that had signed on to the Common Core).

133. *See Development Process*, *supra* note 1.

grant of \$17.4 million,¹³⁴ and voluntarily applied for and received an ESEA Flexibility Waiver,¹³⁵ the Department argued that Governor Jindal could not prove an injury in fact, much less causation, or redressability.¹³⁶ Presuming the allegations in the Governor's Complaint to be true, however, the district court denied the Department's Motion to Dismiss and focused its analysis on the issue of whether the standards and assessments encouraged through Race to the Top and the ESEA Flexibility Waivers were tantamount to an infringement of Louisiana's state sovereignty over its educational program. The district court ruled:

134. See Whalen Letter, *supra* note 30.

135. *Louisiana's ESEA Flexibility Waiver Request*, *supra* note 30; *States Approved for ESEA Flexibility (Including DC and PR)*, DOE (Sept. 27, 2013), <http://www2.ed.gov/policy/elsec/guid/csea-flexibility/approvalflexrequest820.doc>.

136. See Mot. to Dismiss at 19–20 (arguing that there was no injury in fact to the state since applying for the Race to the Top grant and ESEA Flexibility Waiver were not mandatory and failure to apply would not necessarily result in any loss of ESEA funding); *id.* at 21 (arguing that there was no causation because any injury was brought on by the voluntary actions of the Governor and the state); *id.* at 21–24 (arguing that there was no redressability since controlling state law, not the Governor, binds Louisiana in adopting the Common Core and implementing the PARCC assessments).

Two separate scenarios also demonstrate that failure to adopt the Common Core or to receive a Race to the Top grant or ESEA Flexibility Waiver would not result in injury in fact to a state—Texas and Alaska did not participate in the development of the Common Core, adopt the Common Core, or apply for the Race to the Top grant, but did receive ESEA Flexibility Waivers and continued to receive ESEA funding; California, on the other hand, did participate in the development of the Common Core, adopt the Common Core, apply for and fail to receive a Race to the Top grant, and did not receive an ESEA Flexibility Waiver, but still receives ESEA funding and operates under the original requirements of NCLB. See *Forty-Nine States and Territories Join Common Core Standards Initiative*, NAT'L GOVERNORS ASS'N (June 1, 2009), http://www.nga.org/cms/home/newsroom/news-releases/page_2009/col2-content/main-content-list/title_forty-nine-states-and-territories-join-common-core-standards-initiative.html [hereinafter *Forty-Nine States*] (providing that Alaska and Texas were not among the states that signed on to the development of the Common Core but that California was one of such states); *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state/> (last visited June 15, 2015) (showing that Alaska and Texas have not adopted the Common Core but California has); DOE, RACE TO THE TOP: PHASE I FINAL RESULTS, <http://www2.ed.gov/programs/racetothetop/phase1-applications/score-summary.pdf> (last visited Aug. 4, 2015) (showing that Alaska and Texas did not apply for Race to the Top but California did and failed); *Laws & Guidance: ESEA Flexibility*, *supra* note 99 (showing that the Department granted Alaska and Texas ESEA Flexibility despite not having adopted the Common Core but did not grant California ESEA Flexibility even though it did adopt the Common Core).

Even if the common standards and aligned assessments were thrust upon Louisiana, without any meaningful way to resist, and even if the Secretary was without the authority to grant conditional ESEA waivers, Louisiana's sovereign right to control education is injured only if the Common Core Standards and PARCC assessments jointly operate in a way that mandates educational curriculum, content or programs of instruction.¹³⁷

Whether standards and assessments are equivalent to curriculum, then, will be central to the court's decision.

B. *Conferred Authority*

As the district court found that Governor Jindal established standing to bring his suit, the merits of the case rest on whether the Department had the authority to incentivize the adoption of the Common Core and aligned assessments.¹³⁸ The court will most likely hold that the Department's programs to support the adoption of common standards are an acceptable use of agency authority. The court will begin its analysis by examining the Department's enabling statutes to determine if Congress intended the agency to create rules and regulations that have the force of law.¹³⁹ Under both the Department of Education Organization Act (DEOA) and GEPA, Congress conferred the Department the authority to promulgate regulations that have the force of law to accomplish the intent of the statutes.¹⁴⁰ Under DEOA, the purpose of the Department of Education is to "*supplement and complement*" state efforts and to "*promote improvements*" in order to improve education in the United States.¹⁴¹ The statute also gives the Secretary of Education the authority to create rules and regulations that are necessary or appropriate to fulfill the mandate of the Department.¹⁴² When Congress established the Department of Education under GEPA, Congress also recognized that the country's welfare and security depended upon a "well-educated citizenry."¹⁴³ To achieve that goal, GEPA provides that the Secretary is "authorized to make, promulgate, issue, rescind, and amend rules and regulations" of the programs overseen by the

137. *Jindal v. U.S. Dep't of Educ.* No. 14-CV-534, 2015 WL 854132 at *5 (M.D. La. Feb. 26, 2015).

138. *See id.* (stating that "there is only infringement to the State's sovereignty over the field of education if the standards and assessments are *de facto* curriculum.").

139. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (establishing that a court must first determine whether Congress conferred an agency the authority to promulgate rules with the force of law before a court may apply *Chevron* analysis).

140. *See* DEOA, 20 U.S.C. § 3474 (2012); GEPA, 20 U.S.C. § 1221c-3 (2012).

141. 20 U.S.C. § 3402 (emphasis added).

142. *Id.* § 3474.

143. *Id.* § 1221-1.

Department.¹⁴⁴ Since Congress conferred the Department and the Secretary the authority to promulgate regulations with the force of law, the court will next need to determine whether the intent of Congress is clear from the statute, and if not, whether the Department's programs reflect a reasonable interpretation of the statute.¹⁴⁵

C. Congressional Intent and Reasonable Interpretation

While Governor Jindal asserts that the actions of the Department clearly exceed the intentions of Congress,¹⁴⁶ the plain meaning of NCLB refutes this assertion. The Act is far-reaching and aims to ensure that children attain high levels of achievement on assessments aligned to rigorous academic standards developed by the states.¹⁴⁷ To achieve these aims, Congress conferred to the Department the authority to promulgate sweeping rules and regulations.¹⁴⁸ Congress authorized the Department to ensure that the materials used for instruction align with academic standards, hold schools and districts accountable, and improve teaching and learning by using assessments meant to ensure students meet the challenging and rigorous academic standards that the states developed.¹⁴⁹

To understand the issues in the Governor's suit against the Department of Education, it is beneficial to define how educators use these terms. After all, the Governor's argument rests on the idea that standards and assessment drive "curriculum," which the Department is expressly forbidden from controlling.¹⁵⁰ While "standard" refers to the achievement level that is considered acceptable or desirable, "curriculum" is defined as the courses taught at schools.¹⁵¹ Standards let us know what students will learn, while curriculum encompasses the tools, strategies, frameworks, textbooks, and materials teachers use to operationalize the standards.¹⁵² In

144. *Id.* § 1221c-3.

145. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

146. *Jindal*, *supra* note 24, at ¶ 1.

147. ESEA, 20 U.S.C. § 6301 (2012).

148. *See* DEOA, 20 U.S.C. § 3474 (2012); GEPA, 20 U.S.C. § 1221c-3 (2012).

149. ESEA, 20 U.S.C. § 6301(1).

150. *See Jindal*, *supra* note 24, at ¶ 1 (“This case involves an attempt by the executive branch to implement national education reform . . . in contradiction . . . of Congressional policy forbidding federal direction or control of curriculum. . . .”); *see also* EITEL ET AL., *supra* note 22, at 19–20 (stating that standards drive curriculum and that the Department understood that a change in standards would result in a change of curriculum).

151. *See* REBECCA R. SKINNER & JODY FEDER, CONG. RESEARCH SERV., R43711, COMMON CORE STATE STANDARDS AND ASSESSMENTS: BACKGROUND AND ISSUES 6 (2014).

152. *Id.* at 6, 22–23 (differentiating between standards and curriculum while concluding that the Department acted within its authority and did not violate its statutes or promulgate a national curriculum).

short, standards are *what* students will learn, while curriculum and instructions are *how* students will learn those standards.

For example, a professor of administrative law probably has an idea of what is essential for law students to learn about the topic during a course. The professor would probably want all the students to understand the APA and the way our regulatory state is structured. He or she may also want students to understand what agencies are, how they are formed, and how Congress confers authority to them, but that they mostly reside within the Executive Branch. Our professor's law students may also be expected to learn the processes of note-and-comment rulemaking, adjudication, and guidance documents. Moreover, an administrative law professor may expect students to be able to articulate the constitutional issues raised by unelected agencies, to conduct an arbitrary and capricious as well as a deference analysis, to discuss why an agency would choose one form of action—rulemaking, adjudicatory enforcement, or non-binding guidance—over another, as well as to argue policy issues. These skills are the standards of an administrative law course.¹⁵³

An administrative law professor would then need to choose the casebook and other materials that would best help students master these standards. The professor would consider the following: what cases were in the casebook; how the cases were sequenced; what background, issues, and topics are presented in the notes for the cases; and what practice problems, if any, were given to students to apply their knowledge. The materials and how they are presented are the curriculum of the course.

Finally, the instruction of the course would include the activities and strategies the professor would use to engage the students with the curriculum so they can master the standards. Would the professor lecture or use the Socratic method? Would there be a number of short essays throughout the course, a research paper, or one final? Would the professor have the students work in pairs or groups to discuss the material? Would students role play an agency adjudication or submit a comment to a proposed rule on regulations.gov? These activities and strategies are the instruction of the course.

Elementary and secondary education follows a path similar to that of our hypothetical law professor above. States adopt standards that articulate

153. Compare WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES xiii–xiv (5th ed. 2014) (listing substantive topics covered, including rulemaking, nonlegislative rules, adjudication, judicial review, and the structure of agencies), with ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH xiii–xxxiv (2nd ed. 2010) (listing substantive topics covered, including rulemaking, judicial review, deference to agency action, adjudication, evidence, separation of powers, the Freedom of Information Act, and the Government in the Sunshine Act).

what students will learn.¹⁵⁴ As an example, the Common Core standard for reading literature, CCSS ELA-Literacy.RL-11-12.9, expects students in the eleventh and twelfth grades to be able to “demonstrate knowledge of eighteenth-, nineteenth- and early-twentieth-century foundational works of American literature, including how two or more texts from the same period treat similar themes or topics.”¹⁵⁵ The Common Core Standards build up to this expectation in seventh grade with CCSS ELA-Literacy.RL-7.9, which expects students to be able to “compare and contrast a fictional portrayal of a time, place, or character and a historical account of the same period as a means of understanding how authors of fiction use or alter history.”¹⁵⁶ CCSS ELA-Literacy.RL-3.9 provides an example of how this complex standard begins: “Compare and contrast the themes, settings, and plots of stories written by the same author about the same or similar characters (e.g., in books from a series).”¹⁵⁷ Mastering the skills of understanding theme, setting, character, and plot and then comparing the works of the same or different authors to analyze themes and topics in American history are daunting tasks. The standards, however, do not provide what content to teach or how teachers are supposed to make this happen in the classroom.

Once states adopt standards that articulate the skills students are expected to master, they develop curriculum guidance for districts and schools. Typically, a state will develop a curriculum framework that fleshes out the standards and describes what the standards might look like in the classroom.¹⁵⁸ The California draft *English Language Arts/English Language Development (ELA/ELD) Framework*, adopted by the California State Board of Education, fleshes out the Common Core with descriptions of what the

154. See *English Language Arts Standards—Reading: Literature Grade 11–12*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/ELA-Literacy/RL/11-12/> (last visited Aug. 4, 2015).

155. *Id.*

156. *English Language Arts Standards—Reading: Literature Grade 7*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/ELA-Literacy/RL/7/> (last visited Aug. 4, 2015).

157. *English Language Arts Standards—Reading: Literature Grade 3*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/ELA-Literacy/RL/3/> (last visited Aug. 4, 2015).

158. See CAL. DEPT. OF EDUC., *ENGLISH LANGUAGE ARTS/ENGLISH LANGUAGE DEVELOPMENT FRAMEWORK FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE 1–2* (2014) [hereinafter *ELA/ELD FRAMEWORK*], <http://www.cde.ca.gov/ci/r/cf/documents/elacldfwintro.pdf> (distinguishing the standards that “define what students are expected to know and be able to do at each grade level or span” and the framework that provides the “blueprint for the implementation of . . . standards” by providing guidance on “the development of curriculum, instruction, assessment, instructional materials, and professional learning”).

curriculum would look like in the classroom and what it should emphasize and suggests materials that might be used.¹⁵⁹ Publishers use these frameworks to develop textbooks, anthologies, and other materials that are approved by the state board.¹⁶⁰ Local boards of education then go through a similar process in adopting state-approved curriculum materials that would meet the needs of their particular schools and students.¹⁶¹ Local boards can also adopt materials they feel are in line with the frameworks and address the standards. Thus, an eleventh grade teacher who is charged with making sure students master CCSS.ELA-Literacy.RL.11-12.9 may have a variety of American novels from which to select when developing his or her curriculum. The teacher could choose to focus on American identity and race through Mark Twain's *The Adventures of Huckleberry Finn* and Zora Neale Hurston's *Their Eyes Were Watching God*. Alternatively, the teacher could focus on class and social issues through comparing Upton Sinclair's *The Jungle*, a depiction of the immigrant experience in the meatpacking industry in Chicago, with F. Scott Fitzgerald's *The Great Gatsby*, a study of American social class during the Jazz Age in New York City. Standards are distinct from curriculum: standards set the goal of what students should learn, and curriculum is the decision made by local communities of how to get to the goal.

With an understanding of the difference between standards and curriculum, both the Race to the Top program and the ESEA Flexibility Waivers promulgated by the Department become reasonable interpretations of ARRA and ESEA. The Department's enabling statutes, as well as ARRA and ESEA, confer to the Department the authority to promulgate, amend, or rescind rules and procedures to further Congressional intent.¹⁶² The purpose of the Department is to facilitate the states in developing a "well-educated citizenry."¹⁶³ Although the Tenth Amendment precludes the federal government from controlling education, the Department's purpose is to ensure that all children learn at high levels through supplementing and complimenting the efforts of states and

159. *Id.* at 11-12 (providing an overview of the organization of the framework including an overview of the standards, major themes, curriculum, instruction, assessment, and instructional practices, as well as "snapshots and longer vignettes" of classroom instruction).

160. *Id.* at 2 (discussing publishers as an audience to the framework).

161. *Id.* at 2-3 (stating that educators are an audience to the framework, as they will use it as a "road map" to develop curriculum).

162. GEPA, 20 U.S.C. § 1221e-3 (2012); ARRA, Pub. L. No. 111-5, 123 Stat. 279 (2009) (codified as amended in scattered sections of 26 U.S.C.) (linking ARRA funds to ESEA); ESEA, 20 U.S.C. § 6571 (2012).

163. GEPA, 20 U.S.C. § 1221-1.

promoting innovation.¹⁶⁴

The Department did not mandate or direct the forty-eight states that developed the Common Core.¹⁶⁵ State governors and superintendents, not the Department, initiated the work on the Common Core with broad support.¹⁶⁶ By supporting the adoption of the Common Core and providing grants to develop assessments aligned to the Common Core, as required under NCLB, the Department was merely fulfilling its mandate to support states' efforts to ensure the achievement of all students.¹⁶⁷ Similarly, the ESEA Flexibility Waiver program falls within a reasonable interpretation of the Department's mandate to support states' efforts to effectuate challenging standards and assessment systems while at the same time "to improve the management and efficiency of Federal education activities" in light of the growing burden of NCLB accountability.¹⁶⁸

D. The Spending Clause and the Tenth Amendment

The context of the Race to the Top and ESEA Flexibility Waiver programs easily refutes Governor Jindal's contention that the Department

164. DOE, OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION 1–2 (2010), available at <http://www2.ed.gov/about/overview/focus/what.pdf>.

165. See *Development Process*, *supra* note 1 (documenting that it was the governors and educational leaders of the states that met and launched the Common Core State Standards Initiative).

166. See *Forty-Nine States*, *supra* note 136 (providing that forty-eight state governors, with the exception of Alaska and Texas, agreed to participate in the state-led initiative to develop common standards in English and mathematics for grades K–12).

167. See ESEA, 20 U.S.C. § 6301 (stating that the Department must ensure all students have a fair and equal opportunity to achieve).

168. *Id.* § 3402(6). Courts generally defer to agency expertise in "filling the gaps" of statutory language, but recent legal scholarship has focused on how much deference should be given to agencies when they interpret a waiver provision rather than just the statute. Compare Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 614–18 (arguing that courts should not grant agencies *Chevron* deference when analyzing a waiver provision, particularly when that provision is so broad as in the case of ESEA and the Secretary has conditioned the waiver on requirements that were not in the original statute), and Patrick Hancy, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending*, 64 CASE W. RES. L. REV. 577, 578–79 (2013) (claiming that under the standard of *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), NCLB is unconstitutionally coercive), with David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 266–72 (2013) (using the ESEA waiver provision as an example of how broad waiver provisions in statutes facilitate government functioning, particularly in times of legislative gridlock and legislative complexity), and Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 662 (2013) (arriving at the conclusion after analyzing ESEA, one of the largest federal programs, that under the holding in *NFIB v. Sebelius*, 132 S. Ct. 2566, ESEA would not be deemed unconstitutionally coercive).

used those programs to coerce states into adopting the Common Core and, therefore, violated the limits of the Spending Clause. The Supreme Court has held that it is not coercive if the federal government attaches conditions to the receipt of federal funds as long as those conditions are related to the purpose of federal spending and are not coercive to the point of compulsion.¹⁶⁹ As previously discussed, the Department's enabling statutes grant it the authority to incentivize states to adopt common standards in order to fulfill its mandate to promote a well-educated citizenry. The question the district court will need to address is whether the programs themselves are so burdensome, like a "gun to the head,"¹⁷⁰ that states have no choice but to comply.¹⁷¹

ESEA has never been a resource for states to supplant their required program. Since its inception in 1965, ESEA has mandated that the purpose of federal funds is to *supplement* state-mandated education programs to support low-achieving students.¹⁷² ESEA was always intended to be something above and beyond the required program.¹⁷³ States, districts, and schools can opt out of Title I of ESEA, continue providing education as required under state law, and reject federal funding for supplemental programs.¹⁷⁴ Of the \$45 billion ARRA funds that states and schools received from the federal government beginning in 2009, only \$4 billion of that total was set aside for the competitive Race to the Top grant program.¹⁷⁵ States still received sizeable amounts of federal support through ARRA on top of ESEA Title I funds during the financial crisis without requirements to participate in the program.¹⁷⁶

169. See *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), where the Court held constitutional the withholding of federal highway funds from states failing to adopt a minimum drinking age).

170. *NFIB v. Sebelius*, 132 S. Ct. at 2639-40 (equating the Affordable Care Act's (ACA's) requirement that states implement the expansion of Medicaid or lose Medicaid funding as a "gun to the head;" in other words, the ACA's requirement left the states with no choice but to sign on to the new program).

171. See *supra* Part IILC.

172. ESEA, 20 U.S.C. § 6315(b)(3) (2012) ("Funds received . . . may not be used to provide services that are otherwise required by law to be made available to children . . . but may be used to coordinate or supplement such services.").

173. *Id.* (emphasizing that ESEA funds are only to supplement the educational program).

174. See Anthony Consiglio, Note, *Nervous Laughter and the High Cost of Equality: Renewing "No Child Left Behind" Will Safeguard a Vibrant Federalism and a Path Toward Educational Excellence*, 2009 BYU EDUC. & L.J. 365, 380-82 (2009) (noting that federal funding of education amounts to only about seven or eight percent of total education spending).

175. See *supra* note 83 and accompanying text (providing information regarding Race to the Top Program).

176. See *State Fiscal Stabilization Fund*, DOE (Mar. 7, 2009),

The ESEA Flexibility Waiver also did not coerce states to adopt the Common Core. If states were content to continue doing business under the regulations of NCLB, they were free to do so. Additionally, the ESEA Flexibility Waiver program required states to adopt college- and career-ready standards.¹⁷⁷ States could choose either to adopt common standards with other states or have their standards approved as college- and career-ready by state institutes of higher learning. While Oklahoma passed legislation rescinding its adoption of the Common Core and lost its ESEA Flexibility Waiver, Indiana pulled out of the Common Core but retained its ESEA Flexibility Waiver when Indiana's colleges and universities approved Indiana's own standards.¹⁷⁸ States, therefore, have three options from which to choose in setting the course of their education policy.

IV. AGENCY AUTHORITY, DEFERENCE AND THE USE OF THE WAIVER

The U.S. District Court for the Middle District of Louisiana will most likely find in favor of the Department in *Findal v. U.S. Department of Education*. The Department used the authority granted to it by Congress to fulfill its mandate to ensure the achievement of all children through encouraging innovation while supporting states. When confronted with an act of Congress that was becoming unworkable, the Secretary effectively used the administrative tools available to him to relieve states of the burdens of NCLB while supporting states in their efforts to develop and adopt common standards.

<http://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html> (providing an overview of the \$48.6 billion program available to state education programs through ARRA to weather the fiscal crisis).

177. See *ESEA Flexibility Policy Document*, *supra* note 18 (indicating that ESEA Flexibility will be granted to State Education Authorities that adopt rigorous college- and career-ready standards).

178. Lauren Camera, *Oklahoma Loses Waiver Over Academic Standards; Indiana, Kansas Waivers Extended*, EDUC. WK. POLITICS K-12 BLOG (Aug. 28, 2014, 3:00 PM), http://blogs.edweek.org/edweek/campaign-k-12/2014/08/hold_hold_hold_oklahoma_loses_.html. But see Andrew Ujifusa, *Indiana Finally OKs Standards to Replace Common-Core Adoption*, EDUC. WK. STATE EDWATCH BLOG (Apr. 8, 2014, 11:31 AM), http://blogs.edweek.org/edweek/state_edwatch/2014/04/indiana_finally_adopts_standards_to_replace_common-core_adoption.html (highlighting that the new standards are a hybrid between the Common Core and Indiana's prior standards and noting that some analysts say the new standards are "very similar, if not identical, to the common core"); Allie Bidwell, *Indiana Drops Common Core, But Will New Standards Be Different?*, U.S. NEWS & WORLD REP. (Mar. 24, 2014, 6:20 PM), <http://www.usnews.com/news/articles/2014/03/24/indiana-drops-common-core-but-some-say-new-standards-arent-much-different> (questioning whether the new standards are not just the Common Core repackaged).

A. *The Need for the Common Core*

Since the passage of ESEA in 1965, the federal government has been involved in education policy in the United States.¹⁷⁹ Despite being one of the wealthiest industrialized countries in the world, the achievement of our students is lacking.¹⁸⁰ For over thirty years, education reformers have stressed the importance of challenging standards to improve education.¹⁸¹

B. *The Use of the Waiver to Create Policy*

Through the waiver provision in ESEA,¹⁸² the Department has offered states a suite of choices in response to NCLB. Those states that choose to continue implementing the Common Core can do so under the ESEA Flexibility Waiver.¹⁸³ Likewise, those states that have standards that their institutes of higher education certified as being college- and career-ready can also utilize the waiver.¹⁸⁴ The Common Core had great support when it was unveiled in 2010 with forty-five states as well as the District of Columbia adopting the standards by 2013.¹⁸⁵ However, because the Common Core has become a lightning rod for executive overreach, a few states are experiencing buyer's remorse and have passed legislation either rescinding the adoption of the Common Core or reviewing the standards.¹⁸⁶ Oklahoma and Indiana have already pulled out of the Common Core.¹⁸⁷ South Carolina has passed legislation that will replace

179. ESEA, 20 U.S.C. § 6301 *et seq.* (2012).

180. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PISA 2012 RESULTS IN FOCUS 5 (2012), <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-overview.pdf> (showing the ranking of the United States compared to other industrialized nations.).

181. See Resnick et al., *supra* note 58, at 103-04; *supra* Part I.B.

182. 20 U.S.C. § 7861.

183. See *Laws & Guidance: ESEA Flexibility*, *supra* note 99.

184. *Id.* (stating that the waiver will only be granted to states with “rigorous” standards); see also *ESEA Flexibility Policy Document*, *supra* note 18.

185. See *Development Process*, *supra* note 1; see also Catherine Gewertz, *State Adoptions of Common Standards Stearn Ahead*, EDUC. WK. (July 9, 2010), <http://www.edweek.org/cw/articles/2010/07/09/36standards.h29.html?qs=Common+Core+legal+challenges> (outlining the early history of the Common Core when the standards were first released).

186. See Gewertz, *supra* note 23 (showing how legislatures that once approved the Common Core based on the recommendation of their departments of education are now reasserting their authority and demanding more control over educational policy, which was once the wheelhouse of the states’ departments of education).

187. See Andrew Ujifusa, *Indiana Releases Draft of New Academic Standards to Replace Common Core*, EDUC. WK. STATE EDWATCH BLOG (Feb. 20, 2014, 6:51 AM), http://blogs.edweek.org/edweek/state_edwatch/2014/02/indiana_releases_draft_of_new_

the Common Core with its own standards next year.¹⁸⁸ Nevertheless, forty-three states are operating under ESEA Flexibility Waivers and no states have lost ESEA funds. Additionally, forty-three states are still pursuing the implementation of the Common Core.¹⁸⁹

C. Clarification of Congressional Intent through Reauthorization of ESEA

Eventually, however, Congress needs to take on the reauthorization of ESEA. Eight years past the date for its reauthorization, states are struggling under NCLB's burdens.¹⁹⁰ Presented with a blueprint for reauthorization in the form of Race to the Top, Congress should debate and refine Race to the Top. The Common Core, an initiative led by the states and initially welcomed by most, should be retained and incorporated in the reauthorization of ESEA.

CONCLUSION

When the final version of the Common Core was released in 2010, it was heralded as a great advance in education reform.¹⁹¹ Initiated by state leaders and educators, the Common Core was the culmination of decades of work on content and performance standards to improve the achievement of all students.¹⁹² The Constitution restrained the federal government from developing national standards.¹⁹³ As a result, there was a hodgepodge of standards and programs from state to state, first characterized as a

academic_standards_to_replace_common_core.html?qs=indiana; Andrew Ujifusa, *Okla. Gov. Fallin Signs Bill to Replace Common Core With New Standards*, EDUC. WK. STATE EDWATCH BLOG (June 5, 2014, 5:47 PM), http://blogs.edweek.org/edweek/state_edwatch/2014/06/okla_gov_fallin_signs_bill_to_replace_common_core_with_new_standards.html (noting that in signing the bill to replace the Common Core, Governor Fallin had once defended the standards, saying, "It is driven and implemented by those states that choose to participate. It is also not a federal curriculum; in fact, it's not a curriculum at all. Local educators and school districts will still design the best lesson plans, will chose appropriate textbooks, and will drive classroom learning.").

188. See Catherine Gewertz, *South Carolina Becomes the Second State to 'Un-Adopt' Common Core*, EDUC. WK. CURRICULUM MATTERS BLOG (June 4, 2014, 4:52 PM), http://blogs.edweek.org/edweek/curriculum/2014/06/south_carolina_becomes_the_sec.html?qs=south+carolina (reporting on the second state to repeal adoption of the Common Core after Indiana). But see Ujifusa, *supra* note 178 (reporting on how Indiana's new standards are similar to the Common Core); Bidwell, *supra* note 178.

189. See *Development Process*, *supra* note 1.

190. See *supra* notes 60–70 and accompanying text.

191. *Id.*

192. See Resnick et al., *supra* note 58, at 103–04.

193. U.S. CONST. amend. X.

“patchwork quilt” in the 1983 report, *A Nation at Risk*.¹⁹⁴ Through the leadership of President George H.W. Bush, President Clinton, and President George W. Bush, the state governors and superintendents eventually reached a consensus and developed the Common Core State Standards in 2009.¹⁹⁵ Within a year, forty-six states had adopted the standards and began work toward implementation.

The Secretary of Education, seeing an opportunity to move the education agenda forward in an era of political polarization, used his authority to incentivize and support not only the development of the standards but the assessment system as well.¹⁹⁶ Unfortunately, the Common Core became seen as executive overreach, an attempt to force national standards on the states.¹⁹⁷ While the states’ enthusiasm for the Common Core has cooled as a result of heated political rhetoric, forty-five of the original forty-six states are still moving forward with implementing the Common Core. Though Governor Jindal has sued the Department, the case will likely be decided in favor of the Department, which acted well within its enabling statutes to further its Congressional mandate.

Ultimately, the Department used the administrative tools it had to fulfill its Congressional mandate.¹⁹⁸ In light of Congress’s long-running inability to reauthorize ESEA since 2007, the Department needed to step in and fill the gaps of legislation following reauthorization.¹⁹⁹ The actions of the Department, however, should give Congress pause. Forty-three states and the District of Columbia are operating with ESEA Flexibility Waivers. In essence, in failing to reauthorize ESEA, Congress has handed education policy almost entirely over to the Department.²⁰⁰

194. See *A NATION AT RISK*, *supra* note 51, at 14.

195. See *supra* Part I.B; *supra* Part II.A.

196. See *supra* Part II.A.

197. See *supra* Part III.

198. See *supra* Part III.B.

199. See *supra* Part II.A–B.

200. At the time of the publication of this Comment, the 114th Congress has made progress in moving the reauthorization of ESEA forward. On April 30, 2015, Senator Lamar Alexander (R-TN), Chairperson of the Senate Committee on Health, Education, Labor & Pensions, introduced the Every Child Achieves Act of 2015 to reauthorize the ESEA, which passed the Senate on July 16, 2015. S. 1177, 114th Cong. (2015); *Text of the Every Child Achieves Act of 2015*, GOVTRACK.US, www.govtrack.us/congress/bills/114/s1177/text (last visited Aug. 4, 2015). Much of the language of the bill restrains the authority of the Department and its Secretary. For example, the Secretary does not have the authority under the bill to require states to adopt particular standards or assessments. S. 1177 § 1111(a)(6). In terms of standards, specifically, the Secretary “shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.” *Id.* § 1111(b)(1)(G)(ii). While the bill allows states to enter into

partnerships, it also goes further to prohibit the Secretary from “requiring or coercing” states to enter into such partnerships. *Id.* § 1111(c)(2). Whether the House will pass the bill with these limitations and prohibitions and whether President Obama will sign it into law are still very open questions. However, the Department’s involvement in the adoption and implementation of the Common Core has certainly motivated Congress to limit the agency’s authority.



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