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NOTES

STATE DISCRETION OVER SUBJECT MATTER STANDARDS: THE RISE AND FALL OF COMMON CORE IN OKLAHOMA

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INTRODUCTION

“One, two, three, four, we don’t want your Common Core!” Across the nation, this chant and others like it stream continually from opponents of the Common Core State Standards (CCSS).¹ CCSS promises that adherence to “essential, rigorous, clear and specific, coherent, and internationally benchmarked” standards will produce students who are “ready to succeed academically in credit-bearing,

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1. See Allie Bidwell, *Common Core Support in Free Fall*, U.S. NEWS & WORLD REP. (Aug. 20, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/08/20/common-core-support-waning-most-now-oppose-standards-national-surveys-show>. See generally COMMON CORE STATE STANDARDS INITIATIVE, COMMON CORE STATE STANDARDS (2010) (providing example standards for math, language arts, literacy, social studies, and sciences).

college-entry courses and in workforce training programs.”² However, as the flaws of CCSS have become evident, many teachers, parents, and students have become frustrated with its recurring failings in the public school system.

In Oklahoma, the battle to dismantle CCSS was incendiary. Oklahoma adopted CCSS in June of 2010, and full implementation was planned for the 2014–15 school year. However, many protested the adoption, including Linda Murphy, a former candidate for Oklahoma State Superintendent of Public Instruction. Murphy admonished Oklahomans to “put a stop to Common Core before it does further damage to our children’s education.”³ Oklahoma’s cry was heard, and on Thursday, June 5, 2014, Governor Mary Fallin signed House Bill 3399, effectively repealing CCSS in the State of Oklahoma.⁴ The Oklahoma Supreme Court upheld the bill as constitutional on July 15, 2014.⁵

This Note chronicles the rise and fall of CCSS in Oklahoma against the backdrop of federal entanglement in a supposed state-run regime. Part I of this Note sets forth the history of federal involvement in public education. Part II addresses the current educational debate surrounding CCSS. Part III discusses Oklahoma’s Elementary and Secondary Education Act (ESEA) Flexibility Request submitted to the U.S. Department of Education regarding the No Child Left Behind Act (NCLB) and the resultant implementation of CCSS in Oklahoma. Finally, Part IV addresses House Bill 3399 and the repeal of CCSS.

2. COMMON CORE STATE STANDARDS INITIATIVE, STANDARDS-SETTING CRITERIA (2012), available at www.corestandards.org/assets/Criteria.pdf.

3. Linda Murphy, *Oklahoma Teachers: “Common Core Is Ruining Education”*—Part 1, THEOKIEBLAZE (Dec. 24, 2013, 1:00 AM), <http://theokieblaze.com/stories/2013/12/24/oklahoma-teachers-common-core-is-ruining-education-part-1/>.

4. Press Release, Office of Governor Mary Fallin, Gov. Fallin Signs HB 3399 to Repeal and Replace Common Core Standards (June 5, 2014), available at http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=14279.

5. M. Scott Carter, *Supreme Court: Common Core Bill Can Stand*, J. REC., July 16, 2014, at 1A.

I. THEN TILL NOW: THE FEDERAL GOVERNMENT AND PUBLIC EDUCATION

A. *The Founding Fathers and the Rise of Public Education*

Thomas Jefferson, a strong advocate for education, believed that it was the responsibility of individual states to educate the populace.⁶ To such end, Jefferson wanted the federal Constitution to acknowledge citizens' right to a public education from the state, a hope he communicated to George Washington by letter toward the end of the 1780s.⁷ Jefferson's views were not met without protest. James Madison, for example, warned that federal involvement in public education, particularly federal funding of education, "would subvert the very foundation, and transmute the very nature of the limited Government established by the people of America."⁸ Some believe that the modern-day implementation of CCSS brings Madison's Federalist fear shockingly close to reality.

Ultimately, the U.S. Constitution did not expressly guarantee the right to an education,⁹ and the public school system's "early architects" failed to reach a consensus regarding federal funding of state-run education.¹⁰ As a result, Jefferson and Madison's passionate debate about federal involvement in education was left to the people.¹¹ Throughout the development of public education from one-room schoolhouses to the modern-day school system, "the divergent goals . . . that were present at the founding of the nation have remained."¹²

6. Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 141 (2000) (citing GERALD L. GUTEK, A HISTORY OF THE WESTERN EDUCATIONAL EXPERIENCE 181 (2d ed. 1995)).

7. See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 113 (2013).

8. 3 ANNALS OF CONG. 388-89 (1792).

9. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

10. O'Brien, *supra* note 6, at 141, 145.

11. *Id.* at 145.

12. *Id.* at 142.

*B. Multiplying the Federal Footprints: Supreme Court Interpretations,
Congressional Lawmaking, and Executive Pressure*

1. Pre-World War II: The Common School Movement and the Search for
Centralization

Before 1900, federal involvement in public education was arguably “passive and reactive.”¹³ Nevertheless, the common schools movement, a 40-year period beginning in 1830, set the groundwork for modern education by imparting to “American society the statewide public school system . . . [and a resulting provision in] almost all state constitutions . . . for an affirmative right to education.”¹⁴ State agencies were guiding the administration of public schools by 1880, and by the 1920s, education had become “compulsory in every state.”¹⁵

Beginning in 1933, the New Deal’s Supreme Court justices began to limit the scope of the Tenth Amendment and “open[ed] the door” for Congress to become more involved in the affairs of public education by expanding spending power “to shape policy in areas that were not enumerated in the Constitution.”¹⁶ Rather quickly, the settler’s one-room schoolhouse morphed into “a bureaucratized and centralized ‘one best system’ of education,”¹⁷ setting aflame the battle over federal involvement—or as perceived by some, infiltration—of public schools.¹⁸

2. Post-World War II: Evolution in Education

Three significant changes in American society following World War II deepened the federal government’s influence over “the sphere of [state] education.”¹⁹ First, socioeconomic developments and the GI Bill broadened opportunities for many, dramatically swelling the middle

13. Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court’s Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1316 (2002).

14. Friedman & Solow, *supra* note 7, at 121–22.

15. *Id.* at 124, 127.

16. Thomas F. Risberg, *National Standards and Tests: The Worst Solution to America’s Educational Problems . . . Except for All the Others*, 79 GEO. WASH. L. REV. 890, 893 (2011).

17. O’Brien, *supra* note 6, at 140 n.13 (citing DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974)).

18. *Id.* at 138 n.4.

19. Friedman & Solow, *supra* note 7, at 137.

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class.²⁰ Second, influential civil rights cases thrust federal judges into the position of “local managers” over public school integration.²¹ Justice Warren embraced this responsibility in *Brown v. Board of Education*: “Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.”²² Third, as part of President Lyndon B. Johnson’s Great Society Program, federal legislation sought “to improve education and ensure that poor and minority students had an equal opportunity to succeed.”²³ Consequently, Americans increasingly began to view “high school graduation and college attendance as the norm [or at least as a strong possibility], and to expect supportive policies from their federal government.”²⁴

3. The Great Society: The Elementary and Secondary Education Act

While the Supreme Court “has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review,”²⁵ it has upheld certain federal regulatory and financial involvement in education as constitutional.²⁶ Though Congress historically assumed a progressive–managerial role, with the introduction of the ESEA of 1965, the federal government made its first attempt “to improve the quality of [state] education with federal funds.”²⁷ The ESEA emphasized the need to provide quality education to all people but concentrated on poorly performing minority groups.²⁸ The ESEA’s “Title I provision was the hallmark of federal efforts to improve educational equity and

20. *Id.*

21. *Id.*

22. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

23. Risberg, *supra* note 16, at 893; Friedman & Solow, *supra* note 7, at 137–38.

24. Friedman & Solow, *supra* note 7, at 137.

25. *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

26. *See, e.g., Brown*, 347 U.S. 483.

27. Stijepko Tokic, *Examining the Big Picture Regarding the Importance of the No Child Left Behind Act: Is It Worth Giving a Chance?*, 32 T. MARSHALL L. REV. 311, 313 (2007) (citing 20 U.S.C. § 6301 (1965)).

28. Risberg, *supra* note 16, at 893.

achievement,” rather than mere access.²⁹ Additionally, the ESEA led to the establishment of the Department of Education in 1979, the main federal agency assigned to implement and create policies regarding federal assistance with public education.³⁰

4. A New Agency: The Department of Education

The Department of Education is limited by a number of federal statutes that explicitly prohibit certain interferences with public education.³¹ For example, the General Education Provisions Act (GEPA) limits federal involvement in state curricula.³² The current version of the GEPA prohibits “any applicable [federal] program [from being] 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, administration, or personnel of any educational institution, school, or school system, or over . . . instructional materials.”³³ The Department of Education Organization Act (DEOA), signed into law by President Carter in 1979,³⁴ and the ESEA, as amended in 2001 by NCLB,³⁵ also “ban[ne]d federal departments and agencies [including the Department of Education] from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials.”³⁶

Some believe that these federal limitations have fallen by the wayside in the past 40 years as presidential administrations and Congress continually invade public schools in the name of reform, with cash in hand to support their cause. After all, the ESEA—an arm of the federal government—takes center stage in “authoriz[ing] funding for key

29. *Id.* See also CONG. BUDGET OFFICE, THE FEDERAL ROLE IN IMPROVING ELEMENTARY AND SECONDARY EDUCATION xi (1993) (noting that “Title I . . . initiated federal assistance to school districts for the education of disadvantaged students”).

30. ROBERT S. EITEL & KENT D. TALBERT, THE ROAD TO A NATIONAL CURRICULUM: THE LEGAL ASPECTS OF THE COMMON CORE STANDARDS, RACE TO THE TOP, AND CONDITIONAL WAIVERS 1 (Pioneer Inst. No. 81, 2012).

31. *Id.*

32. 20 U.S.C. § 1232a (2012).

33. EITEL & TALBERT, *supra* note 30, at 2 (quoting 20 U.S.C. § 1232a).

34. Department of Education Organization Act, Pub. L. No. 96-88, § 103, 93 Stat. 668, 670 (1979) (codified as amended at 20 U.S.C. § 3403(b) (2012)).

35. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9527, 115 Stat. 1425, 1983 (2002) (codified at 20 U.S.C. § 7907(a) (2012)).

36. EITEL & TALBERT, *supra* note 30, at 1.

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portions of school district budgets across the country,”³⁷ further blurring existing boundary lines between the federal government and states. Thus, despite the ESEA’s failure to achieve its initial goal of improving education for minority groups, as a 1993 report from the Congressional Budget Office concluded,³⁸ it continues to stand as a basis for federal entanglement in public education, notwithstanding other legislative prohibitions crafted by Congress itself.

C. Standardized Tests Fail to Support New Legislation

In 1983, then-President Ronald Reagan and the National Commission on Excellence in Education published a report entitled *A Nation at Risk: The Imperative for Educational Reform*.³⁹ The report gave an account of American academic underachievement relative to the international community and made recommendations to rectify the nation’s educational shortcomings.⁴⁰ *A Nation at Risk* spurred school reform movements across the country; namely the “Standards Movement,” an attempt to strengthen core curriculum in a number of states.⁴¹ Former United States Assistant Secretary of Education, Chester E. Finn, Jr., described state standards prior to the Standards Movement as “vague, uninspired, timid, . . . and generally not up to the task at hand.”⁴² Although the Standards Movement produced “stronger standards with more detail and content,” the American public school system continued to fail to meet the ESEA objectives.⁴³

Accordingly, President George W. Bush attempted “a monumental revision” of the ESEA by signing NCLB into law on January 8, 2002.⁴⁴ NCLB had the express purpose of ensuring that all students had a “fair, equal, and significant opportunity to obtain a high-quality education and

37. *Id.*

38. CONG. BUDGET OFFICE, *supra* note 29, at xiii.

39. NAT’L COMM’N ON EXCELLENCE IN EDUC., ED 226 006, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 26–27 (1983).

40. *Id.* at 13–14.

41. O’Brien, *supra* note 6, at 159.

42. Chester E. Finn, Jr., *Foreword* to THOMAS B. FORDHAM FOUND., *THE STATE OF STATE STANDARDS 2000*, at vii (Chester E. Finn, Jr. & Michael J. Petrilli, eds. 2000).

43. *Id.*

44. Erin Kucerik, *The No Child Left Behind Act of 2001: Will It Live Up to Its Promise?*, 9 GEO. J. ON POVERTY L. & POL’Y 479, 479 (2002); ROBERT SCOTT, *A REPUBLIC OF REPUBLICS: HOW COMMON CORE UNDERMINES STATE AND LOCAL AUTONOMY OVER K–12 EDUCATION* 2 (Pioneer Inst. No. 102, 2013).

reach, at a minimum, proficiency on challenging [s]tate academic achievement standards and state academic assessments.”⁴⁵ To accomplish its purpose, NCLB mandated that states “adopt ‘rigorous’ curriculum standards and test students annually to gauge progress towards reaching them.”⁴⁶ This mandate translated into four requirements for states to receive federal funds: (1) creation of specific educational standards; (2) tests that demonstrated adherence to those standards; (3) students’ proficiency; and (4) student improvement.⁴⁷ Consequently, every state either updated its own standards or drafted new ones in compliance with the mandate “and began testing every student, every year in every grade from 3–8 and again in high school.”⁴⁸

One goal of state-mandated standards is to accurately identify “what students should know and be able to do.”⁴⁹ In this regard, NCLB’s requirements fell short.⁵⁰ NCLB’s insistence that states achieve a certain proficiency rate led to what opponents describe as a “‘one-size-fits-all approach’ to educating America’s children.”⁵¹ This “bureaucratic and creativity-stifling” approach arguably identifies what children *should* know, but it fails to really gauge what children are *capable* of doing and knowing.⁵² As columnist Stephen Metcalf eloquently put it, the Republican testing reform measures, approved by George W. Bush, “emphasize[] minimal competence along a narrow range of skills, with an eye toward satisfying the low end of the labor market.”⁵³

The NCLB standards for student achievement thus leave many students unchallenged and push others aside in an effort to reach the majority in the middle.⁵⁴ Opponents to NCLB argue these standards have real consequences in the classroom; as states accept more and more obligation-tied federal funds, teachers are forced to adjust their

45. 20 U.S.C. § 6301 (2012) (footnote omitted).

46. Wayne Au et al., *The Trouble with the Common Core*, 27 RETHINKING SCH., Summer 2013, at 4, 5.

47. Risberg, *supra* note 16, at 891.

48. Au et al., *supra* note 46, at 5 (explaining that only 19 states had a form of mandatory testing before NCLB).

49. Judith A. Monsaas et al., *Georgia P-16 Initiative: Creating Change Through Higher Standards for Students and Teachers*, 6 VA. J. SOC. POL’Y & L. 179, 183 (1998) (quoting JOHN S. KENDALL & ROBERT J. MARZANO, *CONTENT KNOWLEDGE: A COMPENDIUM OF STANDARDS AND BENCHMARKS FOR K–12 EDUCATION* 19 (1996)).

50. Risberg, *supra* note 16, at 891.

51. O’Brien, *supra* note 6, at 140 (footnote omitted).

52. *Id.*

53. Stephen Metcalf, *Reading Between the Lines*, NATION, Jan. 28, 2002, at 18, 18.

54. Risberg, *supra* note 16, at 899.

classroom curricula from student-centered engagement to standard-based.⁵⁵ Educators end up “teach[ing] to the test” and, consequently, lose that spontaneity and flexibility that is essential to ensuring that students develop a lifelong love of learning.⁵⁶ This shift is solidified all the more by NCLB’s obligation of “adequate yearly progress” with the goal of complete student proficiency in selected subjects by 2014.⁵⁷

As pressure built within public-school classrooms and state education departments, three other major flaws became evident in NCLB. First, the federal mandate degraded states’ educational and curriculum standards.⁵⁸ Although individual “states [were] allowed to create their own standards and tests and determine what score [made] a student proficient,”⁵⁹—a nod to the federal protections of the GEPA, ESEA, and DEOA—the requirement to make standards and prove proficiency was, by its very nature, an intrusion into the public-school curriculum.⁶⁰

Additionally, strong suggestive input from the Bush administration significantly curtailed state independence. For example, states tailored their curricula to meet NCLB’s expectations, yet what NCLB said was “proficient” at a third-grade-reading level was a 100% reading proficiency in every third-grade classroom by 2014.⁶¹ Being no stranger to the financial opportunities associated with standard-based reform, the textbook industry also played a key role in aligning state curricula with NCLB’s proficiency standards.⁶² As Metcalf has described, the textbook publishers had previously enjoyed enormous benefits from similar reform efforts in Texas:

In the mid-1990s, then-Governor Bush became intensely focused on childhood literacy in Texas. For a period of roughly two years, most often at the invitation of the Governor, a small group

55. *Id.*

56. *Id.*

57. 20 U.S.C. § 6311(b)(3) (2012); *see also* Risberg, *supra* note 16, at 892.

58. *See generally* SCOTT, *supra* note 44 (discussing financial implications for states that refused to implement CCSS but still needed to uphold the requirements of NCLB).

59. Risberg, *supra* note 16, at 892.

60. *Id.* at 918–19.

61. BELLA ROSENBERG, AM. FED’N OF TEACHERS, AFL-CIO, WHAT’S PROFICIENT? THE NO CHILD LEFT BEHIND ACT AND THE MANY MEANINGS OF PROFICIENCY 3 (2004).

62. E. Wayne Ross, *General Editor’s Introduction: Defending Public Schools, Defending Democracy* to 4 DEFENDING PUBLIC SCHOOLS, at xv (Sandra Mathison & E. Wayne Ross eds., 2004).

of reading experts testified repeatedly about what would constitute a “scientifically valid” reading curriculum for Texas schoolchildren. As critics pointed out, a preponderance of the consultants were McGraw-Hill authors. “Like ants at a picnic,” recalls Richard Allington, an education professor at the University of Florida. “They wrote statements of principles for the Texas Education Agency, advised on the development of the reading curriculum framework, helped shape the state board of education call for new reading textbooks. Not surprisingly, the ‘research’ was presented as supporting McGraw-Hill products.” And not surprisingly, the company gained a dominant share in Texas’s lucrative textbook marketplace. *Educational Marketer* dubbed McGraw-Hill’s campaign in the state “masterful,” identifying standards-based reform and the success of McGraw-Hill’s “scientifically valid” phonics-based reading program as the source of the company’s eventual triumph in Texas.⁶³

A parallel development in curriculum took place across the nation when NCLB went into effect.⁶⁴ This introduces the second major flaw in NCLB: the hefty financial burden placed on states implementing standardized tests and requisite curricula.⁶⁵ The limited federal funding connected to NCLB was not enough to cover the costs of the implementation, yet states needed all the funding they could get, as limited as it was.⁶⁶ Thus, the “progressively harsher penalties” threatened by NCLB had a strong impact on states and their educational plans.⁶⁷

Third, with drastic differences in difficulty level, student test scores from state to state were not readily comparable.⁶⁸ Accordingly, there was no objective way to determine whether students among the different states were, in fact, receiving “a fair, equal, and significant opportunity to obtain a high-quality education” and achieving the same

63. Metcalf, *supra* note 53, at 20.

64. GERALD W. BRACEY, NO CHILD LEFT BEHIND: WHERE DOES THE MONEY GO? (2005), available at <http://files.eric.ed.gov/fulltext/ED508523.pdf> (criticizing NCLB and the profits made by mainstream textbook publishers).

65. Risberg, *supra* note 16, at 892.

66. See generally MATTHEW M. CHINGOS, STRENGTH IN NUMBERS: STATE SPENDING ON K-12 ASSESSMENT SYSTEMS (2012) (reviewing state funding models for NCLB programs and methods of assessment).

67. Risberg, *supra* note 16, at 896.

68. *Id.* at 892.

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“minimum . . . proficiency.”⁶⁹ These difficulties and other flaws prevalent in NCLB made it clear that even with federal input, American schools continued failing to educate their children.⁷⁰

In 2008, then-presidential candidate Barack Obama addressed the failures of NCLB as part of his campaign platform, stating during a visit to Colorado’s Mapleton Expeditionary School of the Arts:

“We must fix the failures of [NCLB]. We must provide the funding we were promised, give our states the resources they need and finally meet our commitment We also need to realize that we can meet high standards without forcing teachers and students to spend most of the year preparing for a single, high-stakes test.”⁷¹

Consistent with Obama’s concerns, just a year later, Colorado became an unfortunate example of the lengths to which school districts would go to appear compliant with NCLB and avoid its penalties:

[M]any students came home disappointed after their scores on the state test categorized them as only “partially proficient.” At least for purposes of reporting scores to the federal government as part of [NCLB], however, these students would have been relieved to know that they were “proficient” according to the State of Colorado. Colorado deemed these students partially proficient for in-state purposes, but deemed the same students proficient for the purpose of reporting their scores to the federal government. Colorado reported its scores in this fashion because, like all states, it needs to have a certain percentage of its students classified as proficient in order to avoid penalties under NCLB.⁷²

Such manipulation and dishonesty has caused some state officials in education departments to resign. For example, former Florida Education

69. 20 U.S.C. § 6301 (2012).

70. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156 (1995).

71. FairTest, *President-Elect Barack Obama on No Child Left Behind*, FAIRTEST (Dec. 15, 2008, 3:38 PM), <http://www.fairtest.org/presidentelect-barack-obama-no-child-left-behind>.

72. Risberg, *supra* note 16, at 891 (footnotes omitted).

Commissioner Tony Bennett resigned in 2013 after discovering “behind-the-scenes manipulation of a school grading formula.”⁷³

Problems with NCLB are not foreign to Oklahoma. In 2013, Oklahoma public schools faced technical troubles with testing that caused “[a]ll less-than-satisfactory student core curriculum scores from two days [of testing] in April [to] be thrown out.”⁷⁴ Oklahoma State Department of Education officials originally estimated that the technical issues affected 9,000 students, but that number later grew to at least 10,400 due to server crashes and scoring mix-ups.⁷⁵ Additionally, State Superintendent Janet Barresi “changed [the] cut scores—the scores students need to pass certain state tests”—*after* students had taken the tests.⁷⁶ This led some to suspect manipulation of the numbers, which arguably demonstrated that “the state is so worried about testing, that it’s losing focus on teaching.”⁷⁷

Opponents of NCLB vehemently argue that it “failed [in] its purpose of raising educational achievement in the United States.”⁷⁸ They point to “the continued decline in U.S. test scores relative to students around the world”⁷⁹ in spite of the “high-quality yearly student academic assessments” that NCLB had promised.⁸⁰ The decreasing test scores mirrored the “perverse incentives” states were given “to generate easy standards and tests, set low proficiency thresholds, and backload student achievement gains.”⁸¹ Thus, another primary criticism of NCLB is that it “placed an impossible goal in front of schools but was set to punish them

73. Kevin Burr, *Changing Cut Scores After Tests Taken Unfair*, TULSA WORLD, Sept. 10, 2013, at A13.

74. Andrea Eger, *Some Test Scores Thrown Out*, TULSA WORLD, Aug. 21, 2013, at A1.

75. *Id.*

76. Burr, *supra* note 73, at A13.

77. Tess Maune, *Green Country Parents, Educators Express Concerns over Standardized Testing*, NEWSON6.COM (Sept. 19, 2013, 9:32 PM), <http://www.newson6.com/story/23481251/parents-teachers-administrators-express-concerns-over-standardized-testing>.

78. Risberg, *supra* note 16, at 897.

79. *Id.* at 897–98.

80. 20 U.S.C. § 6311(b)(3)(A) (2012).

81. Risberg, *supra* note 16, at 898 & n.81 (citing James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 940, 945–48 (2004)). Risberg also notes that “[t]he terms ‘backload’ and ‘backloading’ refer to the practice of postponing most of the required student improvements until very near the statutory deadline.” *Id.*

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when they didn't achieve the impossible."⁸² Both sides of the public school debate generally can agree that NCLB was not the solution America's children needed.

II. THE CURRENT DEBATE: COMMON CORE STATE STANDARDS

The current debate over education centers on the newest reform measures proposed by President Obama and accepted almost unanimously by the states.⁸³ First announced in 2009, the Common Core State Standards Initiative (CCSSI) and its accompanying "federal incentive programs designed to encourage states to sign on to [it]" have "fundamentally altered the relationships between Washington and the states."⁸⁴ CCSSI poses a major threat to state-empowered education, despite its characterization as a *state-led effort* to "develop" and "voluntarily adopt[] . . . standards . . . designed to ensure that students graduating from high school are prepared to take credit bearing introductory courses in two- or four-year college programs or enter the workforce."⁸⁵ Many find the name "Common Core State Standards" disingenuous, believing that policymakers in Washington, D.C. chose it only to soften resistance from opponents of nationalized education.⁸⁶ Not swayed by the rhetoric, clear opponents argue that CCSSI is evidence that United States citizens can no longer claim a right to a "free, public, *locally controlled*, democratic education."⁸⁷ Despite repeated reference to the states in both the initiative and standards, neither can convert federally mandated standards into "state" standards when these standards were not derived from the states.⁸⁸

82. E-mail from David N. Hall, Asst. Superintendent, Owasso Pub. Sch., to Chris A. Caram, Deputy State Superintendent of Academic Affairs, Okla. State Dep't of Educ. (Nov. 10, 2011, 12:19 PM), in JANET BARRESI, OKLA. STATE DEP'T OF EDUC., OKLAHOMA WILL BE C³ BY 2020: ALL CHILDREN WILL GRADUATE FROM HIGH SCHOOL COLLEGE, CAREER, AND CITIZEN READY BY 2020, at 125 (2012).

83. SCOTT, *supra* note 44, at 1.

84. *Id.*

85. *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/wp-content/uploads/FAQs.pdf> (last visited Sept. 27, 2014).

86. Marion Brady, *Eight Problems with Common Core Standards, The Answer Sheet*, WASH. POST (Aug. 21, 2012, 11:37 AM), <http://washingtonpost.com/blogs/answer-sheet/post/eight-problems-with-common-core-standards/2012/08/21/821b300a-e4e7-11e1-8f62-58260e3940a0blog.html>.

87. *Id.* (emphasis added).

88. Au et al., *supra* note 46, at 1; Brady, *supra* note 86.

Further, opponents and numerous legal scholars view the United States Department of Education's sponsorship of CCSSI as a direct violation of the GEPA's explicit prohibition against federal government agencies "directing, supervising, or controlling curriculum or programs of instruction."⁸⁹ Some opponents of CCSSI have gone so far as to argue that it will not be long before "[f]uture historians . . . shake their heads in disbelief" and "wonder how, in a single generation, the world's oldest democracy dismantled its engine" of education.⁹⁰ Unfortunately, public education's demise remains shrouded in the secrecy surrounding CCSSI.⁹¹

Calling NCLB "one of the emptiest slogans in the history of American politics," President Obama trumpeted CCSSI as a workable solution to the nation's educational crisis.⁹² But, despite the failed "decade-long experiment in standards-based, test-driven school reform" of the NCLB, President Obama and CCSSI rushed CCSS—itsself a standards-based reform movement—into classrooms throughout the nation, including Oklahoma.⁹³ Why would states accept such a similar "test and punish approach to education reform"?⁹⁴ Opponents say the answers are simple: fear and money.⁹⁵ States need money to support their schools, and no state wants to be the state whose students do not meet certain federally recognized educational standards.⁹⁶

With the ESEA and NCLB penalty deadlines quickly approaching, states floundered for help, and the federal government quickly came to the "rescue."⁹⁷ Section 9401 of the ESEA, as amended by NCLB, allows for waivers of the statutory and regulatory requirements connected with NCLB, as applicable to state educational agencies.⁹⁸ The Secretary of

89. SCOTT, *supra* note 44, at 4 (alteration in original) (quoting 20 U.S.C. § 1232a (2012)).

90. Brady, *supra* note 86.

91. *Id.*

92. Stan Karp, *School Reform We Can't Believe In*, RETHINKING SCH., Spring 2010, at 48, 48; FairTest, *supra* note 71.

93. Au et al., *supra* note 46, at 5.

94. *Id.*

95. *Id.* at 4–5.

96. *Id.*

97. *Id.*

98. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9401(a), 115 Stat. 1425, 1972 (2002) (codified at 20 U.S.C. § 7861(a) (2012)).

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Education may grant these waivers to individual states and has done so.⁹⁹ How? Opponents adamantly point to the Obama administration's convenient grant of a state waiver under the ESEA conditioned on the "adoption of standards meeting the description of the Common Core."¹⁰⁰

As an additional incentive to adopt CCSS, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA) in February of that year.¹⁰¹ ARRA was lauded as "historic legislation designed to stimulate the economy, support job creation, and invest in critical sectors, including education."¹⁰² The act provided support for a new grant entitled Race to the Top (RTTT), also announced in 2009 by President Obama and Education Secretary Arne Duncan.¹⁰³ The RTTT Executive Summary explained it as follows:

The ARRA provides \$4.35 billion for the Race to the Top Fund, a competitive grant program designed to encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas:

- Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;
- Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;

99. *Id.*; *Waiver Watch, Federal Education Programs*, CENTER ON EDUC. POL'Y, <http://www.cep-dc.org/index.cfm?DocumentSubTopicID=48> (last updated Sept. 10, 2014) (showing a dynamic map chronologizing states' waiver statuses since 2011).

100. Charles Grassley, *Preface* to SCOTT, *supra* note 44, at 1.

101. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

102. U.S. DEP'T OF EDUC., *RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2* (2009).

103. Valerie Strauss, *Report: Race to the Top Isn't Delivering Big Results, Answer Sheet*, WASH. POST (Sept. 12, 2013, 11:45 AM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/09/12/report-race-to-the-top-isnt-delivering-big-results/>.

- Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and
- Turning around our lowest-achieving schools.¹⁰⁴

The United States Department of Education's discussion of RTTT "provided that for a state to have a realistic chance to compete for funds, the state must commit to adopting a 'common set of K–12 standards.'"¹⁰⁵ Predictably, those standards matched the ones laid out in the Common Core.¹⁰⁶ Also problematic is the "huge mismatch" between the amount of grant funding available and the cost of implementing the systems mandated by RTTT¹⁰⁷—a problem exacerbated by the fact that schools are still struggling with debt associated with NCLB curricula and testing despite federal waivers of state penalties. Thus, even with RTTT grants, funds available for implementation of CCSS are limited.

Oponents of CCSS also argue that consequential public discussion regarding the benefits or detriments of the Common Core curricula was significantly limited because the states had less than two months to review the final version of CCSS before the RTTT deadline to demonstrate adoption of "common standards."¹⁰⁸ As a result, many

104. U.S. DEP'T. OF EDUC., *supra* note 102, at 2.

105. Grassley, *supra* note 100, at i.

106. *Id.*

107. Strauss, *supra* note 103.

108. Grassley, *supra* note 100, at i.

B. Standards and Assessments (70 points)

State Reform Conditions Criteria

(B)(1) Developing and adopting common standards (40 points)

The extent to which the State has demonstrated its commitment to adopting a common set of high-quality standards, evidenced by . . .

(i) The State's participation in a consortium of States that— (20 points)

(a) Is working toward jointly developing and adopting a common set of K–12 standards . . . that are supported by evidence that they are internationally benchmarked and build toward college and career readiness by the time of high school graduation; and

(b) Includes a significant number of States; and

(ii) (20 points)

(a) For Phase 1 applications, the State's high-quality plan demonstrating its commitment to and progress toward adopting

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citizens, including numerous Oklahomans, believe that the states were financially and politically forced to “cede[] their autonomy to design and oversee the implementation of their own standards and tests.”¹⁰⁹

Specifically, opponents argue:

[T]he misnamed “Common Core State Standards” are not state standards. They’re national standards, created by Gates-funded consultants for the National Governors Association (NGA). They were designed, in part, to circumvent federal restrictions on the adoption of a national curriculum, hence the insertion of the word “state” in the brand name. States were [financially] coerced into adopting the Common Core by requirements attached to the federal Race to the Top grants and, later, the No Child Left Behind waivers.¹¹⁰

Others suggest federal funding has distorted what may have begun as a “voluntary effort between states” to improve education.¹¹¹ Additionally, many dissenters understandably fear that the introduction of CCSS and

a common set of K–12 standards . . . by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State, and to implementing the standards thereafter in a well-planned way; or
(b) For Phase 2 applications, the State’s adoption of a common set of K–12 standards . . . by August 2, 2010, or, at a minimum, by a later date in 2010 specified by the State in a high-quality plan toward which the State has made significant progress, and its commitment to implementing the standards thereafter in a well-planned way.

(B)(2) Developing and implementing common, high-quality assessments
(10 points)

The extent to which the State has demonstrated its commitment to improving the quality of its assessments, evidenced by (as set forth in Appendix B) the State’s participation in a consortium of States that—

(i) Is working toward jointly developing and implementing common, high-quality assessments . . . aligned with the consortium’s common set of K–12 standards . . . ; and

(ii) Includes a significant number of States.

U.S. DEP’T OF EDUC., *supra* note 102, at 7–8 (footnote omitted).

109. SCOTT, *supra* note 44, at 1.

110. Au et al., *supra* note 46, at 4–5.

111. Grassley, *supra* note 100, at i.

RTTT “plac[ed] the nation on the road to [greater] federal direction over elementary and secondary school curriculum and instruction.”¹¹²

III. IMPLEMENTATION OF COMMON CORE STATE STANDARDS IN OKLAHOMA

In 2011, the Oklahoma State Department of Education, through Deputy Superintendent Dr. Chris A. Caram, submitted a proposed ESEA Flexibility Request (“Oklahoma’s Waiver”),¹¹³ seeking leniency regarding the ESEA and NCLB penalties.¹¹⁴ Oklahoma’s Waiver was approved on February 9, 2012.¹¹⁵ As part of Oklahoma’s Waiver, the state agreed to the “implementation of statewide initiatives, including CCSS.”¹¹⁶

Officials entered into this agreement despite a clear lack of public support.¹¹⁷ Just days before State Superintendent Barresi signed off on Oklahoma’s Waiver, Dr. Caram received an e-mail from a veteran educator concerned that the state was making a “hasty judgment” in adopting CCSS and was in danger of running off the “curriculum and assessment cliff.”¹¹⁸

In response to this and other similar local concerns, the Oklahoma State Department of Education disseminated a sample letter to school superintendents “[s]upporting families in raising the grade for Oklahoma children.”¹¹⁹ Specifically, the proposed letter was intended to respond to parents’ growing concerns. In part, it read: “We expect that as our schools begin to align assessments to the new, more rigorous academic standards, your children’s test scores may drop. This is understandable

112. EITEL & TALBERT, *supra* note 30, at 1.

113. BARRESI, *supra* note 82, at 3–4.

114. *Id.* at 4–5. *See also* EITEL & TALBERT, *supra* note 30, at 15–16.

115. Letter from Arne Duncan to Janet Barresi, Superintendent of Pub. Instruction, State Dep’t of Educ. (Feb. 9, 2012), *available at* <http://www2.ed.gov/policy/eseaflex/secretary-letters/ok.html>.

116. BARRESI, *supra* note 82, at 9.

117. E-mail from Gerald Roberts to Chris A. Caram, Deputy State Superintendent of Academic Affairs, Okla. State Dep’t of Educ. (Nov. 10, 2011, 12:19 PM), *in* BARRESI, *supra* note 82, at 156–57.

118. *Id.*

119. Andrea Eger & Kim Archer, *Tulsa-Area Passage Rates Fall*, TULSA WORLD, Sept. 10, 2013, at A1.

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and even expected.”¹²⁰ Essentially, the proposed letter hinted that more educational time could be centered on “preparing students for exams” and less toward teaching children the fundamentals through engaged learning.¹²¹ Moreover, the letter prepared parents to forestall a possible backlash, for the “expected” downturn in student testing performance.¹²² Notably, Oklahoma test scores were already below those NCLB required, hence the need for Oklahoma’s Waiver.¹²³ Conspicuously missing from the Oklahoma State Department of Education’s letter, however, was a defense to criticisms of CCSS or an explanation of why implementation of these standards would be good for the state’s children.

Interestingly, this sample letter was released in the middle of 2013, more than a year before “the next generation of standardized tests” would be implemented.¹²⁴ At the time, Oklahoma law stated:

By August 1, 2010, the State Board of Education shall adopt revisions to the subject matter curriculum . . . as is necessary to align the curriculum with the K–12 Common Core State Standards developed by the Common Core State Standards Initiative The revised curriculum shall reflect the K–12 Common Core State Standards in their entirety and may include additional standards as long as the amount of additional standards is not more than fifteen percent (15%) of the K–12 Common Core State Standards.¹²⁵

Sending this letter early illustrated the extent to which the Oklahoma State Department of Education was aware of some of the ill effects that would accompany adoption of CCSS. One ill effect was specifically addressed by Oklahoma House Resolution No. 1011.¹²⁶ Adopted on May 24, 2013, the Resolution expressed concern regarding the financial burdens related to the adoption of CCSS, noting that “it is incumbent upon legislators to assess the cost to the state of adopting the Common

120. *Id.*; see also Javier C. Hernández & Robert Gebeloff, *Test Scores Sink as State Adopts New Benchmarks*, N.Y. TIMES, Aug. 8, 2013, at A1 (noting that Kentucky was the first state to develop tests based on the new standards and “reported plummeting scores”).

121. Maune, *supra* note 77.

122. Eger & Archer, *supra* note 119.

123. *Id.*

124. *Id.*

125. OKLA. STAT. tit. 70, § 11-103.6a (repealed 2014).

126. H.R. Res. 1011, 54th Leg., 1st Sess. (Okla. 2013).

Core State Standards, in their entirety, along with the concomitant changes to Oklahoma education, including but not limited to vast changes in testing, textbooks, teacher evaluation, and school performance.”¹²⁷

Other ill effects of CCSS in Oklahoma forced changes in classroom curricula that mirrored observations and predictions made before implementation: “As sets of standards are put in place, schools must organize teaching and learning around meeting the standards.”¹²⁸ Limited resources and time, combined with the emphasis on core curriculum, “raised heated opposition from parents” who stressed the importance of maintaining educational time in the arts and physical exercise.¹²⁹ The conflict in Oklahoma between parents, the state, and the federal government made “the process of building the public school curriculum like trying to erect a building under the direction of multiple owners who have divergent conceptions of the purpose of the building.”¹³⁰

IV. THE FALL OF COMMON CORE STATE STANDARDS IN OKLAHOMA

A. Oklahoma Passes House Bill 3399

Oklahoma’s Waiver was “set to expire at the end of the 2013–2014 school year.”¹³¹ Prior to expiration, the state needed to begin the requisite process of requesting a renewal of its reform plan, which would extend Oklahoma’s Waiver through 2016.¹³² In order to receive renewal, Oklahoma had to demonstrate that it:

- [Was] [o]n track to meet current commitments and requirements under ESEA flexibility[;]
- Ha[d] a plan for implementing ESEA flexibility through the 2015–2016 school year[;]

127. *Id.*; *Oklahoma House Resolution 1011*, LEGISCAN, <http://legiscan.com/OK/bill/HR1011/2013> (last visited Sept. 28, 2014).

128. Monsaas, *supra* note 49, at 192.

129. O’Brien, *supra* note 6, at 138 n.3.

130. *Id.* at 145.

131. *States Granted Waivers from No Child Left Behind Allowed to Reapply for Renewal for 2014 and 2015 School Years*, U.S. DEP’T EDUC. (Aug. 29, 2013), <http://www.ed.gov/news/press-releases/states-granted-waivers-no-child-left-behind-allowed-reapply-renewal-2014-and-2015>.

132. *Id.*

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- [Was] [m]eeting the high bar set to protect all students and support all teachers and principals under ESEA flexibility[;]
- [Was] [i]dentifying schools and subgroups in need and ensuring they receive interventions and supports[; and]
- Ha[d] resolved any outstanding monitoring findings or compliance issues in ESEA flexibility or related programs.¹³³

Although Oklahoma's Waiver could be modified at the same time it was renewed, Oklahomans soon found that no revision could correct the imbalance between state and federal control over state education.¹³⁴

Thus, on Friday, May 23, 2014, with a vote of 71–18, the House repealed CCSS, and the Senate followed with a vote of 31–10.¹³⁵ Soon after, Oklahoma Governor Mary Fallin signed the bill into legislation with the following comments:

“[Common Core] was intended to develop a set of high standards in classrooms across the nation that would ensure children graduated from high school prepared for college and a career in an increasingly competitive workforce. It was originally designed as a state-lead [sic]—not federal—initiative that each state could choose to voluntarily adopt.

“Unfortunately, federal overreach has tainted Common Core. President Obama and Washington bureaucrats have usurped Common Core in an attempt to influence state education standards. The results are predictable. What should have been a bipartisan policy is now widely regarded as the president's plan to establish federal control of curricula, testing and teaching strategies.

“We cannot ignore the widespread concern of citizens, parents, educators and legislators who have expressed fear that adopting Common Core gives up local control of Oklahoma's public schools. The words ‘Common Core’ in Oklahoma are now so divisive that they have become a distraction that

133. *Id.*

134. *Id.*

135. Press Release, *supra* note 4; see H.R. 3399, 54th Leg., 2d Sess. (Okla. 2014).

interferes with our mission of providing the best education possible for our children.”¹³⁶

House Bill 3399 prohibits Oklahoma’s State Board of Education from entering into any “agreement, memorandum of understanding or contract with any federal agency or private entity which in any way cedes or limits state discretion or control over . . . subject matter standards.”¹³⁷ House Bill 3399 also instructs Oklahoma’s State Board of Education to revert back to subject matter standards “which were in place prior to the revisions adopted by the Board in June 2010” until new ones can be created and implemented.¹³⁸ According to Governor Fallin, the state can establish “academic standards that will be better than [those prescribed by] Common Core.”¹³⁹

B. The Oklahoma Supreme Court Upholds House Bill 3399

Before standards revision could begin, however, a lawsuit challenging the bill was filed by members of the State Board of Education (Members).¹⁴⁰ One such Member expressed “that if the law [stands], educators would be hampered in their efforts to develop standards for public schools.”¹⁴¹ Represented by Fellers Snider, an Oklahoma City-based law firm, the Members “criticized the Legislature’s reach into an area that . . . [is within] the purview of the state education board, the board created by the Oklahoma Constitution and charged with supervising education instruction in the state.”¹⁴² The Members further claimed that “the bill creates a corrosive effect (by) having the Legislature inside the room when education standards are being developed.”¹⁴³ However, the Oklahoma Supreme Court disagreed, upholding House Bill 3399 as constitutional.¹⁴⁴

136. Press Release, *supra* note 4.

137. Okla. H.R. 3399.

138. *Id.*

139. Press Release, *supra* note 4.

140. Carter, *supra* note 5, at 1A.

141. *Id.*

142. *Id.*

143. *Id.*

144. Pack v. State, 2014 OK 66, 330 P.3d 1216 (per curiam).

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CONCLUSION

In upholding House Bill 3399, the Oklahoma Supreme Court demonstrated that what has traditionally been seen as a fight between states and the federal government also implicates intrastate division of power. Although opponents supported the repeal of CCSS, they were concerned that House Bill 3399 required the State Board of Education to cede its authority over subject matter standards to the state government. Consequently, though CCSS is no longer applicable in Oklahoma, the argument leading to its demise is still alive and well among state citizens. Even if the debate about federal overreaching has been to put rest for now, tension over perceived state overreaching may make the creation of new subject matter standards a bigger challenge than Oklahomans anticipated.