

THE TITLE WAIVE: A POLICY AND LEGAL ANALYSIS OF THE 50 STATES'
ESEA WAIVERS AND THEIR IMPLICATIONS FOR FEDERALISM AND
ADMINISTRATIVE LAW MAKING IN EDUCATION POLICY

by

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ABSTRACT

SHEENA LOREN TRULL. The title waive: a policy and legal analysis of the 50 states' ESEA waivers and their implications for federalism and administrative law making in education policy
(Under the direction of DR. ROSLYN A. MICKELSON)

The aim of this dissertation is to provide a critical analysis of the Elementary and Secondary Education Act (ESEA) Flexibility Waivers administered by U.S. Secretary of Education Arne Duncan since 2012. As a function of federalism, local school policy has traditionally been under the control of state and local government. However, with the implementation of No Child Left Behind (NCLB) there was a shift in the role of the federal government in education policy. As a result of the imminent failure of almost all schools in every state to meet the goals of NCLB, which would trigger a number of adverse consequences, and the desire of the executive branch to implement new school policy, Duncan announced the issuance of Elementary and Secondary Education Act Flexibility waivers (ESEA Waivers) in 2011. This dissertation will discuss how the failure of NCLB led to the ESEA Waivers, and will examine the waivers through the lens of cooperative and coercive federalism. Given the sea of change in education policy instigated by NCLB, the waivers have the potential to initiate another major shift in education policy. Yet a comprehensive cataloging of each state's waiver approval status and policy changes implemented for the purpose of waiver approval, has not yet been done. The first goal of this study is to content analyze and catalog each of the 50 states' status in regards to their ESEA flexibility waiver and the states' major policy changes in three identified policy areas. The second goal of the dissertation will be to analyze the waivers through the lens of cooperative and coercive federalism as policymaking tools. To achieve the second goal,

the study will provide both a policy analysis of the waivers as guided by the federalism literature and a legal analysis of the waivers as outlined by prior case law. The dissertation will conclude with the overarching policy implications of the waivers and recommendations as they pertain to the current state of federal education policy in the United States.

DEDICATION

“My identity rests firmly and happily on one fact, I am my mother’s daughter” -Anonymous

This dissertation is dedicated to my mother, Gloria Trull, who instilled in me the value of hard work, but more importantly, the value of working for the betterment of others.

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CHAPTER 1: INTRODUCTION

In the decade since the passage of the No Child Left Behind Act (NCLB), the relationship of the federal government and state and local level education policy has been both criticized (Rentschler 2005; Hursh 2005; Jimerson 2005) and praised (Rose 2002; Gillis 2003; Strahan 2003; Dahir & Stone 2003) by policymakers, parents and scholars on different ends of the ideological spectrum. Despite wide bipartisan support of NCLB at the time of enactment, the years following its ratification have been riddled with highly politicized and ideological differences about the federal government's role in public education (Debray-Pelot & McGuinn 2009).

NCLB has often been referred to as the most sweeping piece of education policy ever by the federal government, and for all intents and purposes it still remains the primary federal legislative policy on the books, since it was not yet been reauthorized (Bloomfield & Cooper 2003; Zimmerling 2013). Additionally, this federal policy has been wide reaching since its inception because nearly every school district in the nation receives some type of funding as provided under Title I of NCLB (Brown 2007). The original criticisms of NCLB stemmed from the unattainable goals placed on local education agencies (LEAs) (Rentschler 2005), the perverse incentives related to the funding (Ryan 2004), and the federal government's involvement in education policy since this is a function historically left to state and local governments (Posner 2007; Vergari 2010).

In the decade following the enactment of NCLB, the predicted failures of the policy came to fruition as educators and scholars began to observe and analyze the unintended consequences of the act that were working against education equity, and were actually creating more of an opportunity gap between minority and low-income students and their wealthier counterparts (Tienken & Zhao 2013). Most notably the reasons for failure have been documented as being the uneven implementation of NCLB across states and districts (Hursh 2007), and the assumption that a lack of testing and accountability are the reasons for achievement gaps. This assumption ignores the focus on economic conditions, race relations and unequal opportunity as the cause for achievement gaps (Mintrop & Sunderman 2009; Nicholans & Berliner 2007). Additionally, the design of NCLB allowed states to manipulate testing standards to meet Adequate Yearly Progress (AYP) (Porter, Linn & Trimble 2005) and created a shift from teaching content and curriculum to a system of “drilling and killing”¹ test requirements at schools, and in classrooms with the highest needs (Mickelson et al. 2013; Haycock 2006). These unintended consequences of NCLB, while not wholly responsible, contributed to the inability of states to meet the inconceivable goal of 100% of students reaching proficiency by the year 2014 (Koyama 2012). Despite early criticisms of the 2014 goal of 100% proficiency, the goal still, as of 2015, remains intact legislatively.

In an effort to reform and rework NCLB the Obama Administration attempted to tackle the reauthorization of the act as part of the national policy agenda during Obama’s first presidential term. The administration’s reauthorization plan was presented in A Blueprint for Reform (USDOE 2010) and the same policies were presented to Congress in

¹ Drill and Kill is a term of art suggesting that the constant repetition of test prep numbs the mind and bores students to a figurative death.

an effort to restructure NCLB (Frey, Mandlawitz & Alvarez 2012). As a result of the nonfunctioning relationship between President Obama and Congress, the attempts to pass a newer version of NCLB failed (Domina 2014). The coupling of the lack of legislative action to reauthorize NCLB and the imminent failure of nearly all school districts in every state to meet the 2014 goal contributed to the Obama administration's announcing the possibility for states to apply for ESEA flexibility waivers in 2012 (Wong 2015). As of this writing in 2015, 46 states and the District of Columbia either have an approved ESEA Waiver or have one under review.² This vast utilization of the waivers has moved both the policies included in the ESEA waivers and the role of administrative lawmaking in federal education policy to the forefront of debate (Eitel & Talbert 2012; Black 2014; Riley 2012). This dissertation will focus on the latter of those two points, the role of the federal government in education policy making.

The idea of federal education reform, even the idea of federal involvement in education, is not a contemporary concept (Cibulka 1995). It is important to note that while the focus of this dissertation is on the federal involvement in education policy, education reform in the United States did not begin with the enactment of No Child Left Behind, nor did it begin with the infamous 1983 report entitled *A Nation at Risk* (Cuban 1990). In fact, education reform is an age old practice that has been occurring for a variety of reasons since the inception of public education (Cuban 1990). However, NCLB and the ESEA waivers demark substantial movement in the structure of federalism within which education policy had previously existed (Wong 2015). Therefore, for purposes of this dissertation I will review the literature concerning the federal involvement in local and

² Up to date information can be found at the US Department of Education's website for ESEA Flexibility waivers: <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>

state education agencies beginning around the 1950s, as it is most relevant to the issue of the ESEA waivers, federalism and administrative lawmaking in education policy.

Public education is historically a function of state and local agencies because of the United States' structure of federalism; federalism refers to the division of responsibility between state and federal governments (Elazar 1984; McDonnell 2008). In the United States, these separate functions have been defined by Article I, Section 8 of US Constitution, the 10th Amendment of the US Constitution, case law dictating the limits and constitutionality of the exercise of federalism, and policy scholarship analyzing various frameworks of federalism utilized in public policy making. In regards to education policymaking, many scholars have identified a system of cooperative federalism as guiding the federal government's role in public education since the 1965 passage of the Elementary and Secondary Education Act (Kincaid 1990; Manna 2006). Other scholars have noted that the federal government's role in education began as a cooperative exercise of federalism but has become more coercive over time (Schapiro 2009; Posner 2007). Cooperative federalism has been defined as a framework which "assumes a division of structures, it accepts a system of sharing that ranges from formal federal-state agreements covering specific programs to informal contacts on a regular basis for the sharing of information and experience" (Elazar 1962, pg. 305). In more recent years the idea of coercive federalism has been defined as the "strong centralized national government that exercises strict control over its states through the use of mandates for orders, often without providing the funding to carry out those requirements" (The Aspen Institute 2012). These two concepts have been argued by scholars (Black 2014; McGovern 2011; Posner 2007)

and also debated within the courts with cases such as *Dole v. South Dakota*³ and the more recent landmark case *National Federation of Independent Business v. Sebelius*⁴ in 2012. The debate between cooperative and coercive federalism and, under each interpretation of the federal government's legal permissibility of each to enact and implement education policy on state and local governments is the theoretical framework for this dissertation.

Description Of Study

In this dissertation I will conduct a content analysis of the current ESEA waivers and a legal analysis of case law to answer the motivating questions of this study. Whether a policy is coercive or not is a two-part question; the first analysis is a policy analysis and the second analysis is a question of if the waivers rise to the level of unconstitutionally coercive. The common thread among both sets of questions is the federal government's role in influencing education policy at the state and local level. Specifically, the first research question will build on the federalism policy literature and how the ESEA waivers are situated within the existing federalist structure of the United States. The question will address: If any, what type of federalism, cooperative or coercive, was exercised with the issuance of the waivers? The second research question will address the constitutionality of the ESEA waivers; specifically the level of coerciveness. This dissertation will address if the ESEA waivers are constitutional under the guidelines of the tax and spending clause? And, if the ESEA waivers rise to the legal standard of unconstitutionally coercive as decided by case law precedent? The final question I will answer is what are the policy implications of the findings?

³ *South Dakota v. Dole*, 483 U.S. 203 (1987)

⁴ *National Federation of Independent Business v. Sebelius* 132 S. Ct. 2566 (2012).

The analytic process of the dissertation will be a content analysis of each state's waivers that identifies how the waivers address the three main policy areas acknowledged as priorities by the Obama administration: 1. the use of student growth measures, 2. the teacher evaluation systems to inform personnel decisions, and 3. the adoption of a common curriculum for students. After I catalogue every state's waiver, I will conduct a qualitative content analysis of all the waivers. Content analysis is a method of both analyzing documents, as well as a systematic and objective means to documenting and quantifying a certain phenomenon (Krippendorff 2012; Downe-Wamboldt 1992; Elo & Kyngas 2008). There is an overabundance of documentation concerning the federal policies and how they are being used to shape state decisions and thus impact education. I will use public records, including but not limited to ESEA waiver applications, policy statements and pre-existing state education policies that have stemmed from these three federal level initiatives to provide a heuristic perspective of the current state of American education policy. I will also content analyze these documents and use them to discern the structure in which policy is currently being created, and how federalism has shaped current education policy. I will develop a coding and category matrix that allows the analysis to identify trends and impacts as needed to address the above research questions (Krippendorff 2012).

The second part of the analysis will be a legal analysis assessing case law precedent and relevant constitutional provisions to draw a conclusion regarding the constitutionality of the ESEA waivers. Federal influence on education policy has continually expanded in the areas of both access and accountability through legislative acts, grant funding programs, and court cases. Through the legal analysis, this dissertation will examine the waivers themselves to evaluate whether they are a continuance of constitutionally

permissible cooperative federalism or a turn in policy and exercise of coercive federalism by the executive branch.

While federalism has been well discussed and researched, this dissertation will be the first application and analysis of the waivers based on a qualitative study of all 50 states and the District of Columbia. It seeks to add to existing literature by first cataloging the waivers for each state to better understand the current state of education policy as it relates to trends in curriculum, the measurement of student growth and the use of teacher evaluation systems. Additionally, this dissertation will apply both a policy analysis and a separate constitutional analysis of the waivers as a function of federalism. The findings of this study have great implications for the future role of the ESEA waivers specifically, as well as the role and the limits of executive federalism in public education.

Importance Of Topic

This topic is important for a number of reasons. On a large scale, it is important to provide a full picture of the current education policy environment. While there have been many prior explorations of each component of this research, to my knowledge, there is no current research that seeks to identify and catalog the ESEA waivers as they currently exist and identify trends in the policies that states are implementing, and then compare those to the executive branch's current policy initiatives. The widespread use of waivers by the state represents the administrative death of No Child Left Behind. This is important because without the reauthorization of the ESEA or the passage of new legislation, the waivers are currently acting as the guiding federal law/policy on education. Documenting and analyzing the waivers and the programs that are influenced or related to the waivers is essential to policy making and to mapping out better legislation for the future. This means

that the waivers and the structure within which they are operating are imperative to understand considering that reauthorization of ESEA is imminent for the 114th Congress (Fall 2015-Spring 2016).

Secondly, from a policy perspective, the dissertation will offer insights into several policy issues at the federal, state and local level, and their intersection. Understanding the current state of federalism and administrative lawmaking in education policy is important for the reauthorization of ESEA. On a theoretical level, this study will clarify when and what type of federalism is currently being exercised by the U.S. Department of Education (USDOE). Depending on whether it is cooperative or coercive federalism this study will clarify if it is a permissible use of administrative action and whether it is beneficial in the realm of education policy. Should the study find that the waivers are an exercise of coercive federalism, the impacts of this type of policy making will be discussed. Being aware of the nested structure within which policy is being created and implemented is important to the policy process and to the implementation of future policy.

Finally, this study will provide a legal analysis for the current actions taken by Education Secretary Arne Duncan. Determining whether or not the ESEA waivers are an unconstitutional action by the Secretary and the Department of Education is important because the ESEA waivers are the current force driving federal education policy, not NCLB. If the actions are determined to be unconstitutional, it can contribute to the scholarship concerning the reauthorization of ESEA, as well as the scholarship relating to policy created through administrative actions. Conversely, should the waivers be found to be constitutional, it impacts the trajectory of administrative law in education and other policy areas. The constitutional use of the ESEA waivers has the potential to set a pattern

in which the executive branch can enact policy, despite being unsuccessful in passing laws through the legislative process. This dissertation is also an addition to the literature because it presents the opportunity to discuss implications for a variety of findings. For example, I could find that the waivers are coercive or cooperative from both a policy analysis and a legal analysis or I could find that the waivers are coercive in one analysis but not coercive by the standard of the second analysis. The combination of possible findings presents the opportunity to make recommendations about the future of education policy in more than one direction.

CHAPTER 2: LITERATURE REVIEW

Federalism And School Reform Policy Since The 1950s

From the Founders' philosophical writings, such as the Federalist papers, it has long been clear that American federalism was historically intended to specify that a division of authority and a division of responsibility must exist between the federal government and state governments (Jay, J., Hamilton, A., & Madison, J. 2003). However, the role of the state and federal governments has changed since 1789 (Hooghe & Marks 2012). The emerging new relationship has been described as a series of inter-governmental policies that work to either cooperatively or coercively influence each other (McDonnell 2008). This intertwining of government relationships has historically occurred for a number of reasons. One reason was the federal government's need for state cooperation for the implementation and enforcement of many national policies (Young 2015). The second was the necessity of federal intervention during an era plagued by states' denial of civil rights (Cross 2014). Emblematic of this necessity was the resistance to the racial integration of schools or the overturning of Jim Crow laws in the south (Cross 2014). One of the key aspects of this type of intergovernmental policy making has been the dependence on the state and local governments to carry out and sometimes even monitor federal mandates (Conley 2003).

Policymakers can use a wide array of intergovernmental arrangements, competitions, and resources to incorporate new systems and also to facilitate capacity

building within a policy structure (Manna 2006). One of the more prominent ways that the United States government works to create intergovernmental policies is by creating legislation that imposes standards and mandates as a condition of financial assistance provided to lower level governments; these programs are typically referred to as grant-in-aid programs (Levaggi & Levaggi 2011). Grant-in-aid programs were used at the very beginning of the school reform movement with the federal government providing assistance in the form of land to school districts for the construction and expansion of schools (Grodzins 1960). The key characteristics of grant programs is that the states must accept the national policy standard set by the federal legislation in order to receive the program funding (Levaggi & Levaggi 2011). One of the major complaints of these arrangements has been that the federal government puts the standards in place, but fails to fund the cost of implementation (Hooghe & Marks 2012). This type of federalism has long been described as cooperative federalism, and has been the guiding theory of federal school reform policy since the 1960s (Kincaid 1990). This section will discuss different types of federalism as described by the policy literature, and how federalism has been present within the last several decades of school reform policy. For purposes of the constitutional analysis, the section will conclude with the case law as provided by the United States Supreme Court on what constitutes an unconstitutionally coercive policy.

While federal school reform policy may not be a new concept, the level of the federal government's involvement has been ever-changing over time. During the first half of the twentieth century the federal policy regime was based on the view that public education was best controlled at the local and state level and that was evidenced by schools performing adequately (Cuban 1990). There was a shift in this policy image during the

1950s and 1960s as the civil rights movement and the war on poverty essentially called for the federal government's involvement in education in a variety of ways (McGovern 2011). In addition to this shift in ideology, the US Supreme Court *decision Brown v. Board of Education* in 1955 began the snowball series of federal level, both judicial and legislative, interventions in elementary and secondary education (Pinder 2010). Through *Brown*, and its progeny, education began being examined through the civil rights lens and then garnered national attention to providing poor students and students of color access to quality education (Pinder 2010). This wave of reform focused federal education policy on righting perceived wrongs and working to guarantee equal opportunity to the socially and economically disadvantaged (National Conference of State Legislatures 2010).

In addition to this social responsibility focus, federal policies also began to develop the science and math curriculum with the formation of the National Science Foundation, and the enactment of the National Defense Education Act (Anderson 2007). This era of education reform not only marked a clear period of federal involvement by the judiciary branch with the *Brown* ruling (Alexander & Alexander 2009), but also was a period of more "forcible" federal interventions such as the use of federal troops in Little Rock, Arkansas to enforce school integration (Kasher 1996). Simultaneously, the issue of standards and accountability was raised in an influential 1955 book by Rudolf Flesch entitled *Why Johnny Can't Read: And What You Can Do About It*. While the 1950s in American education reform is often characterized by the strides made by the federal government to try and legislate equal opportunity, it is important to note the beginning of the standards movement, which has gained great momentum over the following 60 years.

The 1950s set the stage for a series of federal school reform policies that have been defined and analyzed as cooperative in nature (Kincaid 1990).

Cooperative Federalism

Daniel Elazar (1962), building upon the work of Edward Corwin and Morton Grodzins, first introduced the term cooperative federalism into scholarly work as a term to describe the relationship between the federal and state and local level governments (Zimmerman 2001). Cooperative federalism has long been recognized as necessary for effective policy making (Young 2015). It is widely accepted that various levels of government must work in concert, in a way that promotes and facilitates policymaking (McGovern 2011). As previously mentioned, grant in-aid programs are one of the most popular intergovernmental policies used as a tool of cooperative federalism (Levaggi & Levaggi 2011). Stuntz (2011) describes the American government structure as acting in a way similar to a marble cake, stating that it represents a web of governments that share an interest in a given area but that simultaneously operate within in their own defined sphere.

Elazar (1962) described cooperative federalism as "...a division of functions between governments, as well as a division of governmental structures" (pg. 304). Although the theory of cooperative federalism assumes a division of structures, "it accepts a system of sharing that ranges from formal federal-state agreements covering specific programs to informal contacts on a regular basis for the sharing of information and experience" (Elazar 1962, pg. 305). This definition highlights the cooperative component of this theory of federalism. Furthermore, the intention of a cooperative relationship between national and state governments is supported by key components of the United States Constitution and the original ideals of the founding fathers. Explicitly, James

Madison wrote that the national government “can not be maintained without the cooperation of the states” (Madison & Hunt 1900, pg. 332), highlighting the envisioned cooperative nature between state and local governments. After a review of relevant court cases and federalism literature, Zimmerman (2001) describes the nature of cooperative federalism as a combination of:

1. Each plane of government possesses certain autonomous powers that may be exercised cooperatively, with such cooperation as initiated by either plane.
2. One plane of government does not coerce the other plane of government.
3. The roles of Congress in terms of national-state relations are facilitating and learning ones.
4. Congress uses its power to regulate interstate commerce to assist states by prohibiting use of such commerce in violation of state laws.
5. Cooperation is negotiated. (pg. 20).

The focus of cooperative policy designs is to enhance the lower government’s interest in a given area, and attempt to improve their ability to achieve the policy goals set by the multiple levels of government (Martin 2014). This is achieved by providing the lower level governments with both financial and technical assistance from the federal government (Zimmerman 2001). The logic that drives cooperative federalism is that while the federal government can act as a policy innovator, local and state governments are better equipped to implement policy in ways that are most beneficial for the unique local conditions (Zimmerman 2001).

There has been a long history of cooperative federalism through acts such as The Equal Employment Opportunity Act of 1972, Fair Labor Standards Act Amendments of 1974, the Safe Drinking Water Act of 1974 and the Federal Mine Safety and Health Act of 1977 (Zimmerman 2001). The lower level governments are tasked with providing a specified strategy to meet the overarching goals of the federal legislation (May & Burby

1996). Additionally, cooperative federalism assumes that local and state governments do not need to be forced to comply because they fundamentally agree with the federal government (May & Burby 1996). After grant-in-aid programs are put in place, federal officials often seek out relationships with local and state administrators to create a joint oversight plan and a working relationship that can be met with minimal resistance (Schapiro 2006). The earliest versions of the ESEA Act served as an example of cooperative federalism because of the flexibility and variability that states exercised in designing programs to meet the overall goals of the Act (Pinder 2010).

The Evolution Of Cooperative Federalism And School Reform Policy

With the 1950s as the backdrop to the federal government's focus on underserved populations, the 89th Congress passed President Johnson's Elementary and Secondary Education Act of 1965 (ESEA). The act reflected an age of grant funding aid used as a method to place the federal political agenda in state and local education agencies. This marked an era where equity in education had become the most salient issue for education reform and both the Executive and Legislative branch of the federal government believed that spending money was the solution (McLaughlin 1975). This is evidenced by the fact that between 1961 and 1979 the federal spending on education increased fifteen fold (Langbert 2008). The passage of ESEA was the educational reform effort that was part of President Johnson's "Great Society," and the commitment of the national government to the defense of civil rights and equal opportunity in education (McLaughlin 1975).

In accordance with the ideas of ESEA, President Johnson had declared war on poverty and recognized that cooperative federalism could be accomplished by the expansion of the federal government's role as a policy innovator (Elazar 1984). ESEA Title I's original

legislation, and most recent version, sought to impose upon the state, the federal government's goal of increasing educational opportunity for low income and disadvantaged students (McDonnell 2008). Specifically, ESEA Title I was "essentially a form of inducement through which the federal government seeks to change the institutional behavior of state and local agencies by offering them financial assistance on the condition that they undertake certain prescribed activities" (McDonnell 2008, pg. 21). The era from the passage of the ESEA Act of 1965 up to the passage of No Child Left Behind (2001) was defined by periods of limits and of expansion of the federal role in education and the federal role primarily influence policies impacting high-risk students and was cooperative in nature (Posner 2007).

The years succeeding the passage of ESEA marked a period of refining and redefining (Cuban 1990). The swift enactment of the law and the allocation formula included to ensure passage, left many questions unanswered (Alexander & Alexander 2009). With lack of clarity, the first years of the funding mandate were characterized by a deficiency in oversight and misuse of funds (Cascio, Gordon & Reber 2013). By 1973, when the application of ESEA funds was audited by the Welfare Audit Agency, they found that more than 15% of Title I funds had been misused (Murphy 1971). After these audits and a report headed by the NAACP Legal Defense Fund, the use of Title I funds, as they pertained to assisting economically disadvantaged students, began to gain the attention of the media (Cascio, Gordon & Reber 2013).

In general, the 1960s and 1970s were riddled with many structural changes to education reform efforts. There was a shift in reforms that included grant programs, project grants, and grants for inner city improvements (Alexander & Alexander 2009). Some

notable laws that passed during this time period were Title XI of the Education Amendment (1972) and the Education of all Handicapped Children of 1975 (Alexander & Alexander 2009). Simultaneously, ESEA was also being modified, and Congress amended the legislation four times by 1980 in an effort to streamline the funds and guarantee that Title I funds were being used as a supplement for educationally disadvantaged students, rather than in place of the state programs for these students (Jennings 2001). This was an important distinction because before the passage of ESEA, the needs of high-risk or educationally disadvantaged youth were not a priority for most local or state education agencies (Mack 2011). In fact, only three states had passed legislation to address the needs of these students in 1965 (Mack 2011). And despite the fact that ESEA had been enacted 15 years prior, researchers found that programs that were aimed specifically at the needs of high-risk students were still not a state priority as of 1980 (McDonnell & McLaughlin 1982). While popularity of these programs within state education agencies (SEAs) and local education agencies (LEAs) had not gained momentum, the oversight of spending had been increased (McDonnell 2008). By 1980 there were three defined elements of Title I

(a) federal regulations requiring states and localities to demonstrate that federal aid was targeted on eligible students and used to provide supplemental services, (b) federal deference to states and districts about what should constitute the educational substance of those services, and (c) limited state commitment to special needs students beyond the administration of federal categorical programs (McDonnell 2008, pg. 24).

This resulted in SEAs being the enforcers of federal regulations, while only using the money primarily for services that were delivered to students outside of the classroom (McDonnell 2008). While federal policy was influencing decisions of SEAs, it was still

only on the periphery, acting as a funding agent, rather than being involved in influencing programming and curriculum decisions (Brown, et al 2011).

The President's national education agenda took a sharp turn during the 1980s Reagan administration and his support of a 1983 report entitled *A Nation at Risk* (National Commission on Excellence in Education(NCEE) 1983). The report became well known for imploring the need of widespread reforms in the public education system if the United States was going to continue to economically and intellectually compete with other countries (Cross 2014). *A Nation at Risk* was fully embraced by the President to fuel his attempts to make states raise their academic standards (Cross 2014). The report made numerous recommendations, including but not limited to, increasing course requirements for high school graduation, longer school days, and higher standards in general (NCEE 1983). While President Reagan did not create or propose new federal legislation in the midst of *A Nation at Risk* he did use his position and the report to persuade SEAs to make policy changes in accordance with the findings (Vinovskis 2014). Concurrently, the public became more concerned with educational quality, and businesses became more concerned with the United States' ability to compete with global economic standards (Vinovskis 2014). This repositioned the national education policy agenda to an "excellence agenda" and away from an 'equity' agenda as guided by President Reagan's goals (Vinovskis 2014).

The 1980s marked an era of the simple assumption that transforming American education could be done through adding more demands on students and teachers, and implementing mandates and accountability systems on states (Cibulka 1995). Directly following a national call for increased standards and accountability, President George H.W. Bush took office with a strategy to use his presidency to push for higher standards in

education (Posner 2007). From 1989 to 1993, the Bush administration did not have the opportunity to reauthorize ESEA, however President G.H.W. Bush did create the National Goals Panel that involved the nation's Governors (Vinovskis 1999). In addition to the panel, G. H.W. Bush also had a legislative initiative, America 2000, that focused on standards and testing in six different subjects. The America 2000 legislation was never passed, but it was significant nonetheless; it was salient because it provided a blueprint of a national education reform agenda based on academic standards for all students (Conley 2003). At the same time of America 2000, state policymakers began to realize the power to influence behavior in the classroom by implementing standardized tests (Heubert & Hauser 1999). This realization, combined with interest groups advocating for high academic standards in order to close achievement gaps, moved the states towards the same agenda as the federal government (O'Day & Smith 1993). Throughout the 1980s, the SEAs and the federal education agenda were working together through cooperative federalism. They had similar goals in mind, to raise standards through testing, and they were using each other's bargaining power to create policy (Pinder 2010).

By the 1994 reauthorization of ESEA, the states would be required to define the levels of achievement for students in districts receiving Title I funding and to identify content and performance standards and design assessments aligned with those performance standards (Jorgensen & Hoffman 2003). In addition to the 1994 reauthorization, President Clinton's policy, the Goals 2000: Educate America Act passed in the same year (Hardman & Dawson 2008). The approach was a set of national goals, as well as federal funding grants to assist states with adopting voluntary content and performance standards (Hardman & Dawson 2008). While Goals 2000 sent a well-defined message about the

expectations of the federal administration and the federal legislature, it was the reauthorization of ESEA, called the Improving America's School Act (IASA) that sent the resounding communication that "states should ensure that students receiving Title I services were taught the knowledge and skills embodied in the state's content standards, and that they should be expected to meet those standards and given the means to do so" (McDonnell 2008, pg. 30).

Notwithstanding the more stringent requirements of Title I there was still great variability among the states (McDonnell 2008). It is also important to note that this was not a full overhaul of what the state policies in place had called for: in contrast, IASA was still acting as a complement to the state policy initiatives that were in place prior to the enactment of IASA (Wong 2007). In fact, in states where IASA's policies were not already being implemented it was not because of ideological difference but because of the inability and lack of capacity to successfully implement such policies (Wong 2007). This speaks to the continuity of cooperative federalism in education reform throughout the late 1990s and into the 2000s (McDonnell 2008). The passage of IASA and the Goals 2000 Act assisted in aligning federal & state policies concerning instructional core content and classroom practice, in a way that had never been seen before (McDonnell 2008).

The passage of IASA, combined with the state implementation variability and the inability of some states to meet the standards of the act, set the stage for the No Child Left Behind Act (NCLB) (Vinovskis 2014). President G.W. Bush began his presidency with high expectations for policy change in the intergovernmental system that was currently in place and his presidency continued the move towards more federal involvement in education policy (Posner 2007). When it came to education policy specifically, President

Bush enthusiastically pushed for the passage of NCLB as it aligned with his desire for stronger accountability measures through high-stakes testing, the raising of measurable academic standards, and with his ideology concerning school choice and the potential privatization movement of public education through opt-out possibilities and the use of charter schools (Posner 2007). NCLB was approved in 2001 and evaded the Unfunded Mandates Act by stating that NCLB requirements were conditions of federal assistance and that states had the option to decline federal funding (Posner 2007). The NCLB Act of 2001 was the first of its kind in that it required states to set specific and absolute targets for student performance and to hold schools, teachers and students accountable for meeting the goals. The original goals set by NCLB were easily passed through Congress because of the Republican need to embrace education as a key issue and the Democratic need to secure more funding for education, but scholars and educators widely recognized the goals as unattainable at the time of enactment (Wanker & Christie 2005). The most inconceivable of the goals was that all students from all subgroups and all schools would be 100% proficient by the 2013-14 school year (Wanker & Christie 2005).

NCLB is seen by some as a departure from the previous cooperative federalism (Posner 2007), while others saw NCLB as the next natural progression from previous administrations (Vinovskis 2014). NCLB changed education policy by requiring more testing, by precisely defining what was considered proficient, and providing timelines for when goals should be met (McDonnell 2008). Additionally, NCLB created sanctions, or what Ryan (2004) termed perverse incentives related to funding, when specific goals were not achieved. This type of dictation by federal legislation on local and school policies was the first of its kind in the realm of education policy (Ryan 2004). While some elements of

cooperative federalism still existed through NCLB, such as the ability of states to create their own assessments, many scholars believe that NCLB ushered in was a new era of federalism in education (Posner 2007); an era marked by coercive federalism as a result of the steadily increasing levels of involvement of the federal government since the enactment of ESEA in 1965. Table 1 summarizes the periods of federal involvement in education policy from 1965 to the present.

Table 1. Summary of reviewed school reform policy

Years	President	Legislation/Initiative	Political Motivation
1965	Lyndon B. Johnson	Elementary and Secondary Education Act (ESEA)	Part of the “Great Society” programs which were intended to serve low-income and minority communities
1983	Ronald Reagan	A Nation at Risk Report-While not a piece of legislation this was the most impactful educational report of Reagan's term in office	Reshaping of education as a means to compete in the global economy
1990	George H.W. Bush	America 2000-Proposed but never passed	Use of the National Goals Panel’s ideas to focus on setting standards and introduce national testing
1994	Bill Clinton	Improving America's School Act (IASA)	Increasing Title I Funding Requirements; Standards Based Movement
2001	George W. Bush	No Child Left Behind (NCLB)	Solidified Standard Based Movement, mandatory testing and created sanctions for failing schools
2011	Barack Obama	ESEA Flexibility Waivers	Provided flexibility for states failing to meet NCLB standards

Coercive Federalism & Policy Analysis

Coercive federalism is different than a cooperative policy design because coercive policies require state or local agencies to perform as regulatory agents of the legislation and to follow the rules prescribed by the national government or face negative consequences (Zimmerman 2001). Coercive federalism can be exercised in a variety of ways including grant conditions, total and/or partial statutory preemption, statutory direct order mandates and regulatory actions taken by both federal courts and agencies (Zimmerman 2001). One way to characterize coercive federalism is that it removes the state level agencies from the development process (May & Burby 1996). However, because there are multiple policy tools and potential actions that can operate under the umbrella of coercive federalism, this is not always the case (Posner 2007). There are times that coercive federal acts include “classic elements of cooperative federalism as well, such as the present of federal grant funding to cover some of the costs” (Posner 2007, pg. 391). In addition to defining the standards and procedures, coercive designs also define the sanctions that are applied to local and state agencies if they fail to meet the standards, or to not follow procedure (May and Burby 1996). Coercive policy designs often focus more on defining and implementing monitoring systems rather than building the capacity of lower level governments to comply with the new regulations (Zimmerman 2001). Zimmerman (2001) also offers five postulates that define coercive federalism:

1. Congress removes certain regulatory powers from states and also coerces them to implement national policies.
2. Subnational governments employ the political process in efforts to defeat preemption bills, except ones requested, or to obtain relief from preemption laws and preemption rulings of United States courts.

3. Extensive use of preemption powers by Congress produces national-state and federal interagency coordination problems.
4. The intertwining of the two planes of government in implementing policies in specific functional areas creates accountability and responsibility problems.
5. Minimum standards preemption statutes generally have engendered expanded use of reserved power by States. (pg. 27)

The reference to preemption by Zimmerman refers to both partial and total preemption which have been an integral part of US law for centuries. In its most basic form, preemption is defined by the idea that valid federal law overrides otherwise valid state law in cases of conflict between the two (Gardbaum 1994; Conway 2013). It is important to note that Zimmerman does not offer preemption alone as evidence of a coercive policy but rather the “extensive use of preemption powers” in coordination with the other postulates listed. Preemption occurs when Congress makes an explicit choice to preempt state law (*Jones*, 430 U.S. at 525 (1977)) or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (*Hines*, 312 U.S. at 67 (1941)). Preemption can also refer to the Dormant Commerce Clause that grants power to Congress but also “limits the power of the states to regulate interstate commercial activities” (Williams 2005, pg. 160).

While Zimmerman (2001) offers the five postulates to define coercive federalism, there have been other definitions to help better understand the limits of federalism. May & Burby (1996) state that coercive mandates “spell out detailed standards and procedures for achieving policy goals, thereby reducing state or local discretion in the policy development (pg. 173).” Coercive mandates also reduce the states’ ability to negotiate, they focus on sanction based monitoring and they often only impact short-term, rather than

long-term solutions (May & Burby 1996). Kincaid (2011) provides a more contemporary definition of coercive federalism by stating that coercion

Describes an era in which (1) the federal government is the dominant policymaker; (2) the federal government is able to assert its policy will unilaterally over the state and local governments; (3) elected state and local officials are more often lobbyists than partners in intergovernmental policymaking; (4) interactions between federal officials and elected state and local officials are more often consultations than negotiations; [and] (5) there are few constitutional limits on the exercise of federal power. (pg. 13)

There is a sharp change in logic when governments create or transform into a coercive policy model (Kincaid 1990). The logic of coercive federalism is paternalistic in nature and assumes that the national government knows the appropriate actions that should be taken by lower level governments (Kincaid 1990). This view recognizes that there are fundamental differences between federal and lower level governments, and seeks to compel the desired actions onto state and local policymaking (May & Burby 1996).

While there is rich literature on coercive federalism, using this research to definitively identify coercion can prove to be difficult. Currently, the US Supreme Court has not provided a bright line test to determine the limits of coercion. Due to this lack of clarity, applying the definitions as provided by Zimmerman (2001), May and Burby (1996) and Kincaid (1990; 2011) can create an obstacle for a coercion analysis. It appears that coercion does or doesn't happen on a sliding scale, rather than a distinct line between coercion and cooperation. Even Kincaid (1990) readily admits that coercive policies often have many characteristics of cooperative policies, thus making it challenging to determine a distinction. In addition to the challenge of distinction (Adler 2011), there is a documented history of scholars disagreeing on the coercive nature of specific policies, in particular NCLB. Scholars have described NCLB as cooperative in nature (Krane 2007; Vile 2009;

Havard 2009) while others have been specific about characterizing NCLB as overly coercive (Bump 2005; Posner 2007; Welner 2005). The discrepancies in both the definition of coercion and the application of the indistinct definition render it difficult to pinpoint the exercise of unconstitutional coercion by the federal government.

To further complicate a coercion analysis, there have also been valid and permissible uses of coercive federalism in recent US history, to include the federal involvement in the integration of schools, and the upheaval of Jim Crow laws in the south. The term coercive federalism on its face does not denote a negative relationship between federal and state or local governments. Rather it denotes a relationship where the federal government both sets the standards for what should be achieved by the lower level governments and attempts to force the hand of the state or local government through either funding mechanisms or the threat of force (Kincaid 1990). It is equally important to note that the constitutionally permissible level of coercion can differ depending on the intent of the policy (Ryan 2013). For example, federal coercion may be more allowable in the realm of civil rights policy due to the authority of the Equal Protection Clause (Ryan 2013). In other areas of education reform, such as testing and accountability, the level of coercion permissible does not rise that which is allowed for the integration of schools. In addition to the policy literature on coercion, the standard of constitutionally permissible coercion, as it relates to NCLB, is discussed in the following section by a review of relevant case law.

Case Law & Constitutional Limits On Coercion

Under this system of federalism, as established by the U.S. Constitution, the federal government has a limited role in setting education policy. Specifically, James Madison

wrote in the Federalist Papers, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite” (Federalist No. 45, at 289). And because education is not enumerated as a federal governmental responsibility, it is one of the powers that remain within the purview of the state governments.

In order to pass a statute, Congress must have constitutional authority; therefore, Congress must be able to specify which clause of the U.S. Constitution grants the federal government power to act (*National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012)). Public education is not one of the enumerated powers delegated to the federal government by the U.S. Constitution, meaning that the control of public education is a function of state government. This is a fact that even the federal Department of Education concedes by stating “in the U.S., the federal role of education is limited. Because of the Tenth Amendment, most education policy is decided at the state and local levels.”⁵ The issue of federalism has been addressed by the U.S. Supreme Court in a number of decisions; in their most recent case, *Sebelius* the Court stated “The Framers thus ensured that the powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy” (*Sebelius*, 132 S. Ct. at 2579) In this decision, the Court is highlighting that the purpose of federalism is to protect liberty by dividing, delegating and diffusing power. In addition to the intentions of federalism as stated by James Madison, the Tenth Amendment of the U.S. Constitution also serves as a check on the centralization of federal government power. Specifically, the Tenth Amendment seeks to

⁵ <http://www2.ed.gov/policy/landing.html>

protect the power of the states from usurpation by the federal government (U.S. Constitution Amendment X). This brief review is not meant to imply that the federal government does not have the ability to influence public education policy at the state and local levels. However, it does highlight that because of the federalist structure, the federal government does not have a clear and enumerated power to regulate public education. Therefore, their power to influence state level education policy must be derived from somewhere other than the enumerated powers.

As a result of the need for constitutional authority for education legislation, Congress often uses their taxing and spending power found at Article 1 Section 8, Clause 1 of the Constitution. This clause, the spending clause, is a source of constitutional authority by stating that in the absence of the authority to legislate directly, Congress may “offer funds to the states, and may condition those offers on compliance with specified conditions.” However, this power also has limits, as discussed below, because the federal government cannot use this authority to compel or coerce states into specific actions.

The Spending Clause states, “The Congress shall have Power to lay and collect taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States.” In addition to this language, the clause also lays out enumerated powers such as the power to coin money, regulate commerce, and establish post offices. In regards to the use of the Spending Clause as the constitutional authority for Congress to act in areas that are normally left to the state government, the Supreme Court has stated that “Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a state’s acceptance of federal funds, the conditions must be set out unambiguously,” (*Arlington Cent. Sch. Dist.*

Bd. of Educ. V. Murphy, 548 U.S. 291 (2006) ((citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) and *Bd. of Educ. V. Rowley*, 458 U.S. 176, 204 n. 26 (1982)) and that legislation enacted under “the spending power is much in the nature of a contract” and bound by “federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly” in order to satisfy constitutional requirements (*Pennhurst State School & Hospital v. Halderman*, 451 at 17). Specifically, the Supreme Court has ruled, “States cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” The Court makes clear that states must be able “to exercise their choice knowingly, cognizant of the consequences of their participation” (*Pennhurst*, 451 U.S. at 17).

While the Court has been clear that states must be able to knowingly accept terms of the federal funds, the issue about what upholds a test of constitutionality under the spending clause has gone to the Supreme Court on a number of occasions. One of the earliest cases to address the taxing and spending clause was *United States v. Butler* (297 U.S. 1 (1936)), when the Supreme Court approved Congressional spending on programs beyond the scope of the enumerated powers of Article I, section 8. This case sought to address a special tax being imposed, by the federal government, on farmers participating in a specific program. The Court was explicit in stating that the expenditure of funds beyond the enumerated powers would be permitted so long as it was to advance the general welfare. However, the Court stated that Congress was not permitted to use the taxing and spending clause to accomplish an unconstitutional end. The argument by the government was that the tax was constitutional because the farmers had a choice about participating. The Court addressed this argument by first noting that “the asserted power of choice is

illusory,” and continued by stating that even “if this plan were one for purely voluntary cooperation it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states” (*Butler*, 297 U.S. at 19). This was one of the earliest instances of the Court recognizing Congress’ potential of utilizing the tax and spending clause to go beyond the constitutional bounds of federalism.

The Supreme Court in *Pennhurst State School & Hospital v. Halderman* again addressed the use of the spending clause to conclude that states participating in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDA) (42 U.S.C. § 6000, et seq) were not required to assume the costs of providing certain treatment and services to mentally disabled citizens. The DDA sought to provide financial assistance to States to assist them in creating programs to care for the mentally disabled. The DDA provided various conditions for the receipt of federal funds, in particular it included a “bill of rights” provision, that provided mentally disabled citizens to “have a right to appropriate treatment, services and rehabilitation for such disabilities” (*Pennhurst*, 451 U.S. at 13, quoting 42. U.S.C. § 6010). Using this provision, a group of mentally disabled citizens in Pennsylvania sued their state owned institution in an effort to compel the state of Pennsylvania to pay for the costs of these services. The Court made several key statements in regards to the “bill of rights” as a provision that created enforceable obligations to the state. The Court explained that the included bill of rights, “represents general states of federal policy, not newly created legal duties” (*Pennhurst*, 451 U.S. at 22-23). The Court continued by stating “when Congress intended to impose conditions on the grant of federal funds...it proved capable of doing so in clear terms” (*Pennhurst*, 451 U.S. at 22-23). By

clear terms, the Court referred to the language of the DDA such as “conditioned.” In regards to the bill of rights the Court stated that clear terms were not used and “in marked contrast, in no way suggest that the grant of federal funds was ‘conditioned’ on a state’s funding the rights described therein” (*Pennhurst*, 451 U.S. at 22-23). The Court held that the federal government had no authority under the DDA to withhold funds to states because of a failure to comply with the “bill of rights” section. The Court was explicit in stating “Congress must express clearly its intent to impose conditions on the grant of federal funds so that States can knowingly decide whether or not to accept those funds” (*Pennhurst*, 451 U.S. at 22-23). The Court continued, “that canon applies with greatest force where, as here, a state’s potential obligations under the Act are largely indeterminate” (*Pennhurst*, 451 U.S. at 22-23). As it pertained to an overstepping of constitutionality, or coercing, the Court stated, “the crucial inquiry, however is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the state could make an informed choice” (*Pennhurst*, 451 U.S. at 25). The Court ultimately concluded, “Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with “bill of rights” provision of the DDA” (*Pennhurst*, 451 U.S. at 25).

This principle was again reaffirmed in *South Dakota v. Dole* (483 U.S. 203 (1987)). In this case, Congress used the taxing and spending clause to enact legislation ordering the Secretary of Transportation to withhold five percent of federal highway funds from states that did not enact a 21-year-old minimum drinking age. At the time, in 1984, the minimum drinking age in South Dakota was 19 years old. The Court first noted that only five percent

was a “relatively mild encouragement,” but then continued to set four limitations on Congress’ spending power (*Dole*, 483 U.S. at 211). These limitations are

The expenditure of federal funds must be in pursuit of the general welfare; (2) The conditions placed on federal funds must be unambiguous such that states can exercise their choice knowingly, cognizant of the consequences of participation; (3) The federal grant of funds must be related to the federal interest in particular national projects or programs; (4) The grant of federal funds must not otherwise be unconstitutional or prohibited by an “independent constitutional bar” (*Dole*, 483 at 206-208)

The fifth condition of *Dole* is that “Congress cannot use financial inducement and the conditions accompanying the funds to exert so much coercive pressure that it turns into ‘compulsion’” (*Dole*, 483 at 208). It is important to note, that while the Court was setting parameters for Congress’ unconstitutional use of the spending power, the Court has a long history of giving great deference to Congress on what constitutes spending for the “general welfare,” so the first prong of the five-part test is less important in practice than the other prongs.

Building on the *Dole* decision the Court once again addressed this issue in 2012 in *National Federation of Independent Business v. Sebelius*, where the Court displayed a desire to restrict Congress’ spending power. *Sebelius* was a landmark case concerning the Affordable Care Act (ACA), and a claim by 26 states that a provision of the ACA required states to expand Medicaid coverage or possibly risk losing all existing Medicaid funding. The Court ruled that this provision was an unconstitutionally coercive use of spending legislation by Congress. Chief Justice Roberts used strong language in describing the unconstitutionality of the ACA provision by stating, “permitting the Federal Government to force the states to implement a federal program would threaten the political accountability key to our federal system,” (*Sebelius*, 132 U.S. at 2602) and that “the

threatened loss of over 10 percent of the state's overall budget...is economic dragooning that leaves the States with no real option but to acquiesce" (*Sebelius*, 132 U.S. at 2605). Chief Justice Roberts likened the provision of the ACA as "a gun to head," (*Sebelius*, 132 U.S. at 2605) further noting that "the spending power is broad, it does not include surprising participating States with post acceptance or retroactive conditions" (*Sebelius*, 132 U.S. at 2606). The salience of this holding was timely as the government has been under criticism of being more coercive than ever before. Defining the legal limits of constitutionally permissible coercion is essential for the analysis of the ESEA Waivers and how they fit within the theoretical framework of federalism.

The Bush Era, NCLB And Coercive Federalism

A move towards coercive federalism during the G.W. Bush administration was not unique to education policy reform movement. Some scholars argue that in the forty years leading up to the Bush administration, both mandates and preemptions had been relied on by Congress and the President as tools to reach national policy objectives (Kincaid 1990). This trend came to a head at the same time that President G.W. Bush was coming into office with a unified Republican Congress. Despite a few previous efforts to decentralize government, such as the Unfunded Mandates Act of 1995, the Bush presidency continued a trend of centralization of policy priorities (Posner 2007; Nicholas & Berliner 2007). It's important to note that the Bush administration did propose a number policies focused on decentralization such as providing state flexibility under Medicaid, and providing state control of the Head Start program. However, the proposals were not vigorously championed by the administration when they met contention in Congress. Instead, the Bush administration and Congress created a series of significant nationalization in five

different policy arenas: homeland security, election administration, taxation, welfare and most relevant to this dissertation, education (Posner 2007).

The passage of No Child Left Behind with the leadership of President Bush marked the major turn towards centralization in the school reform movement. The new mandates of NCLB were broad, and were based on conditions of federal assistance, allowing the law to not be impacted by the Unfunded Mandates Act (Posner 2007). While there were various conditions that were seen as cooperative, such as the ability of states to define standards used for testing, NCLB is still considered an act of centralization in education policy (Posner 2007).

The original purpose of NCLB has been debated amongst scholars. The executive branch presented NCLB as a mechanism to implement, test and hold accountable high standards in K-12 education (Vinovskis 2014). In contrast, others believe that NCLB was a push by the ideological right to create a narrative for, and opportunity to, increase the privatization of schools in the United States (Posner 2007). Despite the actual intent, national report cards came out of NCLB where school districts would be given rewards, i.e. larger awards of federal money, for success, and failing schools would be punished in a number of ways. The legislation dictated that all students in grades 3 through 8 would be tested in reading and math up until 2005 when science would be added to the testing regimen. The explicit goal of NCLB was that all students would be proficient by the 2013-2014 school year, 12 years after passage. These report cards not only required testing but also required that testing results be broken down into subgroups by ethnicity, special education, English-language learners and economically disadvantaged students. Specifically, the law wanted the student performance broken down by subgroups so that

testing could be used as a tool in assessing the needs to close the widening achievement gap among minority subgroups. Adequate yearly progress (AYP) was also a distinct part of the legislation. AYP refers to the level of improvement required of the schools districts each year in respect to the growth rate of students who achieve proficiency.

NCLB required each state to prepare reports about student progress and mandates. Schools that persistently didn't meet AYP and were consider low-performing schools or districts were required to submit improvement plans that would be reviewed by the U.S. Department of Education. Schools that failed on a regular basis were required to give students opt-out options, or to be restructured as a charter or magnet school. In the face of failing schools, NCLB also required districts to provide supplemental services such as tutoring and other programs to failing students.

An important goal, and one aspect of NCLB that gained a lot of media attention, was the narrowing of the achievement gap between low income minority students and their more affluent, mostly white, student counterparts (Ravitch 2010). While many states had reporting systems that measured a school's success, they looked at the overall average of success rather than breaking results down by subgroup. The difference under NCLB was that success or failure was decided by all subgroups, race and income included, so if any group didn't meet the standard then the entire school was labeled as failing (Ravitch 2010). This provision made it difficult for schools and districts to hide the low performance of the most disadvantaged subgroups within a school system (USDOE 2003). One State Board of Education official realized the importance of this provision by stating,

We will never reach our goals as a state if we don't improve the performance of our poor and black students...If you don't measure it, then you don't count it. If you don't count it, then you don't pay attention...And if you don't pay attention to it, then you don't fix it (Mizell 2003, p. 5).

This was recognized as school officials opportunity to “organize and facilitate conversations where small groups of teachers, parents, and community leaders learn to understand the implications of the data, and forge a compact of mutual accountability for attacking the problems it reveals” (Mizell 2003, p. 6). There was renewed attention being given to the achievement gap and the promises of focusing more resources to students that were ill served by the current education system. NCLB held the promise of creating greater equity within the system; developing better systems with more reliable data and providing benefits that would all around enhance equity in schools (Vinovskis 2014).

There were positive predictions on how this type of accountability could impact the achievement gap. At the time of passage, research on state accountability systems provided evidence that “the gaps between the performances of different racial/ethnic/socioeconomic groups of students have diminished over time” in subjects such as reading, writing and math (Scheurich & Skrla 2004, pg. 261). NCLB’s emphasis on student performance by subgroup encouraged states to report data in a meaningful way and “to provide district administrators with knowledge concerning the achievement gap between and among racial/ethnic groups” and then apply what is learned to pedagogy and curriculum (Scheurich & Skrla 2004, p. 291). While the tests may have been intended for the use of developing pedagogy and curriculum they were not implemented in a way that fostered the achievement of this goal (Hursh 2005). The tests were instead administered at the end of the year, making it impossible for teachers to utilize the results to improve teaching, and in great contrast to this goal, the results were used to punish both teachers and students who did not perform well (Hursh 2005). This is just one of the many failures and/or unintended

consequences that school districts experienced under NCLB in the decade following its enactment and that set the state for the waivers.

The Failures Of No Child Left Behind

While the promises of NCLB were many, in practice it did not pan out to be what was promised. There have been many reasons cited for the failure of NCLB, the first being that 100% proficiency in a 12-year time period was unrealistic (Gamoran 2007). It is important to note that the average result did not count towards the requirements of NCLB but rather that all had to meet the goal. In fact, at the current rate of progress in the American education system, the average white student would reach proficiency by 2021 and the average black student by 2043, eight and 30 years after the goal, respectively (Gamoran 2007). Calling attention to subgroup performance was one of the most positive aspects of NCLB and was widely embraced by both the left and the right (Vinovskis 2014). The aggregation of achievement by subgroup brought the attention of policymakers to the long standing achievement gap that was continuing to widen. However, NCLB has failed at making gains in the achievement gap between high-risk students and the best performing students (Reardon et al 2012).

Importantly, as previously mentioned there are many dynamics that have emerged to create the unintended consequences of NCLB. These consequences have not been restricted to one policy area of NCLB but have impacted curriculum, standards, and achievement of the very subgroups that the law was intended to protect (Vinovskis 2014). There are well researched, evidence-based explanations for the failure of NCLB that include the uneven implementation of NCLB across states and districts (Hursh 2007), and the incorrect assumption that the lack of testing is the reason for the achievement gap rather

than a recognition of the role of economic conditions, race relations and unequal opportunity in their creation (Hursh 2005). Not only does this assumption hinder the goal of closing the gap but so did NCLB's use of status measures, rather than student growth measures to assess the effectiveness of schools (Nichols & Berliner 2007). Additionally, the design of NCLB allowed the manipulation of test scores to meet AYP (Porter & Trimble 2005) and also created a shift from actually teaching content and curriculum to a system of drilling for test preparation, particularly with students with the highest needs (Mickelson et al. 2011; Haycock 2006). The unintended consequences of drill preparation include "killing" student motivation and effort in school, boredom and exposure to an alternative curriculum.

The uneven implementation of NCLB led to a number of issues that exacerbated inequality rather than closing the gap (Hursh 2007). NCLB was not only implemented differently across states but even between school districts within the same states. This resulted in students learning different curricula, being held to different standards and even the lowering of standards in the most vulnerable schools by manipulating the "cut scores," standards, or cheating by educators. In many cases education reforms increased education inequality and widened the achievement gap (Orfield et al 2004). In addition to increasing inequality in practice, the reforms included in NCLB created contradictory results because of the belief that better standards would increase achievement (Hursh 2005). Research found that the emphasis on tests and test scores undermines the efforts of exemplary schools and teachers in educating low-income students of color. As testing was introduced, many "previously successful schools began to expect less of their students as they prepared them to pass the more basic skills required on the tests" (Hursh 2007, pg. 301). A further

complication of the standards and testing deficiencies of NCLB was the use of status measures and/or achievement measures to assess the effectiveness of schools and teachers (Nichols & Berliner 2007). The use of the measures implemented by NCLB do not account for the possibility of low-achieving students making progress that may fall short of the accountability standard, but should be considered notable progress and evidence of educational effectiveness (Braun 2005). The criticism of achievement measures is that they are both unfair and misguided, and that growth measures are a more appropriate and valid means of achieving accountability (Braun 2005). Growth measures reflect what a student learned relative to her knowledge and skills at the beginning of the year rather than in terms of official curricular standards.

Part of the design of NCLB was that the states had the authority to make design decisions about how to define and test annual goals. Specifically, states were free to create their own assessments of student achievement as long as they provided evidence that state assessments were based on “challenging academic standards” (USDOE 2005). There were several ways that states used this authority to manipulate the purpose of the AYP. In some instances, they just lowered state standards in order for students to meet the goal (Fuller et al, 2006). Other “manipulations” of the decision were the use of confidence intervals (Coladraci 2003) or the decisions about the minimum number of students necessary for a school to be held responsible for a student population at the disaggregated subgroup level (Simpson, Gong, Marion 2006). Other strategies were the decisions to either back load or front load statistics in order to prove a trajectory that was consistent with meeting 100% proficiency by 2014 (Porter & Trimble 2005). The result of all of the design decisions/manipulations was that true academic growth and achievement was not being

reported accurately, and was not being measured in a way that benefited students, specifically the subgroups that NCLB was intended to impact (Porter & Trimble 2005).

Another unintended consequence of NCLB was the development of different curricula for different students; this manifested in two primary ways. The first was between schools; schools that were easily able to meet AYP, often schools in the wealthiest and whitest areas, continued to teach math, reading, science, language arts and electives (Haycock 2006). Students at historically high performing schools continued to receive a well-rounded education that focused on subjects beyond the tested subjects and continued to offer advanced placement or international baccalaureate courses (Haycock 2006). In contrast, low-performing schools, normally populated by underperforming racial and socioeconomic groups, narrowed their curriculum in an effort to focus on meeting AYP. These schools, often already short on financial resources, spend more instructional time on tested subjects in an effort to meet AYP (Haycock 2006). These students systematically receive a lower quality education because schools and teachers are concerned about possible sanctions and reduction in federal financial aid, and focused much of the time near the end of the school year on preparing students to pass a test, rather than providing a full education (Hursh 2008).

The second source of differentiated curriculum can happen both between schools and within schools. Schools have a long history of tracking or ability grouping students in the classroom. The lowest track classes are often filled by low-income and minority students (Oakes 2005). With the introduction of AYP and testing, teachers and schools embraced the “drill and kill” strategies in their lowest tracks. These students are taught in a way that is focused on test material rather than overall education. However, their high

achieving counterparts in the same school, but different ability group, receive a higher quality education (Giersch 2012; Mickelson, et al 2013). Watanabe (2008) found that the same teacher differentiated the use of their class time between different tracks. In lower track classes almost 50% of class time was spent on test preparation while only 15% of class time in upper track classes was spent on test preparation. That additional time is used to build the problem-solving, critical thinking and extracurricular skills of students in honors classes (Giersch 2012; Mickelson, et al 2013). Both types of differentiated instruction have become a tool of inequity in education. The standards and tests that were put in place to close the achievement gap have actually created a dual curriculum system that harms the very subgroups that are historically low performing (Hursh 2008).

By 2011 it was very clear to policymakers, specifically federal policy makers, that the goals of NCLB were not going to be met and that the achievement gap was not narrowing in the way that the legislation had intended. Forty-one states and the District of Columbia reported that 25% or more of their schools did not make AYP in 2011 (Usher 2012). Furthermore, in 21 states and D.C. 50% or more of state public schools did not reach AYP in 2011 (Usher 2012). The four largest states in the US, Florida, California, NY and Texas, had 91%, 66%, 47% and 28%, respectively, of schools failing to meet AYP; this is significant because these states enroll roughly one-third of the nation's students (Usher 2012). In regards to the achievement gap the findings are similarly depressing. The Civil Rights Project at Harvard University found that based on the trend, only 24 to 34 percent of students would meet NAEP proficiency in reading and only 29 to 64 percent would meet the math proficiency by 2014 (Lee, et al 2004). When these results were aggregated by race, the study found that the gap between advantaged White students and

disadvantaged minority students would not close by 2014. In fact, less than 25% of poor and black students would achieve proficiency in reading and less than 50% in math by 2014 (Lee, et al 2004).

As of August 2015 NCLB had not been reauthorized and there was no legislation being signed into law to reshape the federal education agenda (McGovern 2011). In the face of NCLB's failures, specifically the inability of schools to meet 100% proficiency by 2014 and lose federal funding, President Obama authorized the US Department of Education to allow states to apply and possibly receive waivers from the stringent requirements of NCLB without losing their federal funding. This not only marked the executive branch's recognition of the administrative death of NCLB but also opened the door for several different policy initiatives to be introduced to the national policy agenda. The conditions surrounding the issuance of the waivers, and the waivers as a response to the failures of NCLB, are addressed in the next section

ESEA Waivers As A Solution To NCLB

As part of his education policy initiative, The Obama Administration developed "The Blueprint for Reform" in which it laid out the goals and policy changes of the Administration's educational vision. This document appear in 2010 as part of the Administration's policy plan for the reauthorization of ESEA. However, as of this writing (mid-2015) the reauthorization of NCLB has not occurred, and the 2014 deadline of 100% proficiency of all students has passed. The imminent failure of 100% proficiency among all students, in all schools, was evident prior to the year 2014. Not only did researchers and education advocates recognize the failures of NCLB, the US Department of Education conceded that many parts of the law are ineffective and have acted as obstacles to local and

state level reforms that could be more effective than the NCLB provisions (USDOE 2011). In addition to the impossibility of meeting goals, there has been a particularly contentious relationship between President Obama and the Congress since his first election (Strauss, et al 2012). The combative relationship between the executive and legislative branch, in part created the necessity for the ESEA Waivers (Strauss et al, 2012). The President's "The Blueprint for Reform" was not originally intended as a guideline for the waivers, but rather as an outline for the reauthorization of NCLB. In fact, a reauthorization was proposed to Congress and failed to gain the approval necessary to move forward (Wong 2015). The combination of failing policies and the inability to reauthorize NCLB led the Obama administration to utilize other tools to guide, implement and monitor education policy.

In September of 2011, Secretary of Education Arne Duncan announced that states could apply for flexibility waivers from some NCLB mandates. As a consequence of receiving an ESEA Waiver, states would be able to retain the federal funding originally appropriated to them under NCLB. The Secretary of Education, Arne Duncan, had the power to waive the conditions of NCLB (20 U.S.C § 7861(a) (2006)). Duncan utilized this section to grant the waivers the states needed to avoid the funding and accountability requirements of NCLB. However, in order to receive a waiver, states had to meet a set of requirements in three major areas: curriculum, student achievement data, and teacher evaluations (USDOE 2011). As of May 2015, 46 states and the District of Columbia have an approved waiver or a waiver under review for approval. As a result, the waivers have become the leading national policy on education in the absence of a NCLB renewal.

Traditionally, federalism refers to the division of powers between the federal and state government (Manna 2006). Recognizing that states' interests are represented by

elected officials at the federal level, federalism refers to the different policy arenas within which elected officials at the federal level and the state level have “jurisdiction” (Kincaid 1990). With that said, it is important to note that the ESEA waivers have become the guiding federal policy in response to the lack of viable legislative policy (McMurrer & Yoshioka 2013). This imposition of federal policy on the states without the approval of elected officials could be viewed as an additional element of coerciveness (McGarity 2012). Nevertheless, coercive policies have traditionally been passed through Congress, so the lack of approval does not, on its face, signify that a policy is more cooperative or more coercive (McGarity 2012). In this instance, the waivers have been criticized for being overly coercive in implementing the desired policies of the executive branch without the proper legislation or negotiated cooperation of states (Wong 2015). Scholars state that this is evidenced by the fact that the terms of the waivers are nearly identical to the President’s 2010, proposed legislation ignored by the Congress (Black 2014). Another criticism has been the conditional acceptance of waivers on the adoption of specific policies that directly impact curriculum and pedagogy both lack authority and are unconstitutionally coercive because of the departure in policy from the original legislation from which the waivers are derived (Wong 2015; Black 2014).

The waivers represent a new policy agenda in a variety of ways. While states have always been able to apply for waivers for some requirements of NCLB, the ESEA flexibility waivers targeted the most controversial accountability provisions of NCLB and placed no limits on the number of states that can qualify for a waiver (McMurrer & Yoshioka 2013). Also, emblematic of this shift in policy is that while the waivers relieve the states from previous NCLB provisions, they make the approval of a waiver conditional

on the acceptance of the administration's education reform policies that directly impact the classroom (Wong 2015). The administration's policies not only undercut key provisions of NCLB (e.g. 100% proficiency by 2014), the waiver process of unlimited waivers conditional on specific policy departs from previous exercises of waivers as a policy making tool (Black 2014).

The Waivers And Federalism

As stated, the waivers have been criticized for their coercive nature and for the upheaval of the policy process through administrative actions. While administrative action, and even waivers, are not a new concept to the policy process, the ESEA waivers are unique in their use as a conditional waiver. The constitutional debate occurs around the use of a waiver to impose policies that are a departure from the original piece of legislation, on the states (Black 2014). The policy debate occurs around the ESEA waivers' application to the postulates of coercive federalism (Zimmerman 2001). The ESEA waivers present an opportunity to either expand the federal role in education policy by allowing the federal administration to dictate local level policy, or to limit the federal role to more cooperative policies by finding their current policy to be beyond the limits of permissible federalism.

ESEA waivers are also situated in the level of permissible coercion within the exercise of executive federalism. Executive federalism emphasizes the role of the executive branch in the relationship between the state and federal government (Shelly 2012). One of the key powers of the executive branch is the ability and willingness for the government to grant flexibility within the states on the implementation of federal policy (Gormley 2006). Despite the fact that historically education policy has fallen outside the realm of the executive branch (Henig 2009), the politics of the last three decades have

displayed an acceptance by the executive branch of education as part of all-purpose government (Henig 2009). This has been evidenced by the fact that the accountability system included in NCLB was proposed by President G.W. Bush after it being a major component of his presidential campaign (Manna 2006). President Obama also made education reforms and the reauthorization of NCLB part of his presidential campaign. The ESEA waivers are further evidence that the executive branch has created a space for executive federalism within education policy reform.

In one sense, the waivers can be seen as cooperative in nature because they are a negotiation between the federal and state executive branches (Posner 2007). However, in the absence of legislative policy the federal government both asserted authority and inserted policy by way of the executive branch (Shelly 2012). After states applied for waivers, the USDOE did work with states and state level officials to help with the approval of the ESEA waivers. Yet the waiver requests still had to adopt certain policy criteria to be granted a flexibility waiver (Henig 2013). This adoption of specific policies as defined and delegated by the executive branch is at the core of the ESEA waivers and whether they are or are not permissibly coercive.

This summary literature review serves as both a historical overview of federal education policy from 1965 to the present day, as well as the structure of federalism, within which these policy processes operate. Though the existing structure of federalism NCLB was passed to address the needs of high-risk subgroups in an effort to strive for equity in education while closing the achievement gap, for many scholars, the passage of NCLB marked an era of coercive federalism in education policy making. Whether cooperative or coercive, the law called for unattainable goals that resulted in the inability of a large

majority of states to meet the 2014 goal of 100% proficiency of all students. This widespread failure coupled with lack of legislative policy created an opportunity for the Obama administration's announcement of the ESEA waivers in 2012. The issuance of the waivers was a shift in the relationship between the federal government and its influence on state and local level education policy. This dissertation seeks to map and evaluate how the ESEA Waivers fit within the structure of federalism and if the waivers are an exercise of coercive or cooperative federalism. The dissertation will also examine the constitutionality of the issuance of the ESEA waivers by the Department of Education in the face of NCLB's failures. This two-part analysis seeks to examine what the ESEA waivers mean for understanding cooperative and coercive federalism within school reform policy.

Research Questions

As previously stated, there are two major research questions involved in this dissertation. Both questions examine the federal government's role in creating education policy at the state and local level. In particular, this study builds on the federalism literature and how the ESEA waivers are situated within the existing federalist structure of the United States. Prior to discussing how the ever-changing federal policies impact decisions by state and local policymakers, it is important to understand the federal policies themselves and how they are related to state decisions, the structure created by federalism, and the political climate that led to the ESEA waivers. Therefore, the first research question for the policy analysis is: If any, what type of federalism, coercive or cooperative, was exercised as a result of the ESEA conditional waivers?

The second question focuses on the constitutionality of the ESEA waivers and the actions of Secretary Arne Duncan. This section will focus on the Secretary's authority to

issue conditional waivers and if the waivers are unconstitutionally coercive. While there are multiple angles for a constitutional analysis of the waivers, this dissertation will focus on the application of the coercion analysis post *Sebelius* and if the waivers are unconstitutionally coercive, because this analysis is most closely related to the issues of federalism and administrative law making as discussed here. Therefore, the second question will be, do the ESEA waivers rise to the legal standard of coercive as decided by case law precedent?

CHAPTER 3: DATA & METHODOLOGY

For this dissertation I conducted an inductive content analysis of public records relating to the policy statements, waiver applications and communications between the US Department of Education and states that are available through the federal Department of Education, states' departments of education, and various local education agencies. Content analysis, while originally used for analyzing articles, advertisements, and political speeches, (Harwood & Garry 2003) has now been expanded and used for a variety of studies. Content analysis has been used as a method of analyzing documents in fields such as psychology, sociology, journalism, political science, and communications (Neuendorf 2002). Content analysis has an established position in research as it has been used to map and document the meaning of communication, (Neuendorf 2002), interpret actions of these communications, and to identify critical processes, in this case, policy processes. This content analysis serves as more than a simple description of the current federal structure within which education policy is created. This content analysis will document and interpret specific findings concerning the meanings and intentions of the current structure, along with the consequences and context of the ESEA waivers as situated within federal education policy (Krippendorff 2012; Downe-Wamboldt 1992).

This study uses qualitative data such as the public records listed above for the inductive content analysis and case law for the separate legal analysis. Inductive content

analysis is recommended when the previous knowledge that exists is fragmented (Elo & Kyngas 2008). Due to the existing knowledge in the field, the fragmentation of the research and the goal of providing more descriptive research about the context, meanings, and structure of the current education policy climate, inductive content analysis is the most appropriate method for this study.

Sampling Frame

The sampling frame from which selected documents were content analyzed consisted of the 50 states and the District of Columbia's departments of education, and the US Department of Education's waiver database since 2012, when the waivers were announced. For the second and separate legal analysis, I utilized the U.S. Constitution and relevant case law to conduct a legal analysis of the issuance of the ESEA waivers.

Data

There are multiple sources of data/documents for this analysis. They were selected because preliminary analyses of them suggested they were suitable for answering the guiding research questions. Data sources are listed below:

- No Child Left Behind legislation
- ESEA waiver applications as made available by the US Department of Education's website
- State reports indicating policy reforms post waiver approval as made available by state departments of education
- Race to the Top Grant applications
- United States Constitution
- Case Law re: Federalism
- Case Law re: The constitutionality of waivers
- Communications between USDOE & states
- State policy statements
- Other pertinent public records that emerged throughout the collection process

Table 2 presents the research questions that guide this study and the documents used to address each question. For example, for the first research question, the content analysis of the ESEA Waivers, the communications between the state and federal governments, Race to the Top Applications, state policy statements, and state laws regarding compliance and adoption of policy were used to answer this question.

Table 2: Research questions and data sources for answering them

Research Question	Data Source
If any, what type of federalism, coercive or cooperative was exercised as a result of the ESEA flexibility waivers?	<ul style="list-style-type: none"> • NCLB • ESEA Waivers • State Reports & Laws Re: Waiver Reforms • Communications between state governments & USDOE • RTTT Applications • Public Records
Do the waivers rise to the legal standard of unconstitutionally coercive as decided by case law precedent?	<ul style="list-style-type: none"> • NCLB • ESEA Waivers • US Constitution • Case Law re: Federalism • Case Law re: Coerciveness

Analytic Procedures

Content analysis is flexible in nature, and allows much of the analytic structure of the research design to be created as the researcher collects and analyzes data (Elo & Kyngas 2008). For this study, I used cataloging, open coding, and categorization. Open coding refers to the process of reading through documents and making notes and headings in the text in an effort to describe and/or categorize the context of the content (Hsieh & Shannon 2005). During this first stage I created categories that were combined and collapsed into major headings to provide context and meaning to the documents (Hsieh & Shannon 2005). From this process, I created a coding book by creating a general description through the

categories that have been identified by the first pass review (Polit & Beck 2006). The specific categories and headings that emerged throughout the research process are explained in more detail below.

Step 1: Cataloging

The ESEA waivers are the primary data source for this analysis and I coded and cataloged all waiver applications and waiver decisions. The first step was to code the waivers in regard to the three major policy reforms that the waivers impact: 1) the adoption of college and career ready standards; 2) the use of student growth measures; and, 3) the use of teacher evaluations for personnel decisions. For each state I cataloged their waiver application and status, their participation in the Race to the Top Program, and their adoption of the three policies stated above. All of this information can be gathered through the ESEA waiver applications, the RTTT applications and award information as provided by the US Department of Education and state websites concerning the adoption of policies via the applications and legislative initiatives.

The cataloging served as the first step in the content analysis process. Documents were coded for type, relevancy and source. Each document was coded as follows:

TABLE 3: Document type codebook

ESEASTATEAPPLICATION	Official state applications submitted to USDOE for approval of an ESEA Waiver
RTTSTATEAPPLICATION	Official state applications submitted to USDOE for Race to the Top Grant competition
FEDESEARESPONSE	USDOE response to states re: ESEA waiver application
FEDRTTRESPONSE	USDOE response to states re: RTTT grant application
STATELAW	Relevant codified state laws pertaining to education policies

FEDLAW	Relevant codified federal laws pertaining to education policies
STATEPOLICYSTATEMENT	Statements made by state officials re: ESEA education policies
FEDPOLICYSTATEMENT	Statements made by federal officials re: ESEA education policies
STATECOMMUNICATION	Communications from state officials to USDOE re: ESEA waivers & proposed policies
FEDCOMMUNICATION	Communications from USDOE to states re: ESEA waivers & proposed policies
STATEPUBLICRECORD	Official records of state proceedings. Examples could be official meeting minutes, legislative testimony, etc.
MEDIAREPORT	Reports from the media re: ESEA waivers
MISCELLANEOUS	Other relevant documents that do not fit in one of the other categories

This was the first step in cataloging the documents in order to identify all necessary information as it relates to the status of states' ESEA waiver, their RTTT status, and the three policies relevant to this study. The next step was gathering and documenting of all of this information state by state. Throughout this process the following information was collected for all 50 states and the District of Columbia. Below is a state example of the findings for a state:

TABLE 4: State participation in federal program

	ESEA Waiver Application	ESEA Granted	RTTT Application	RTTT Granted	RTTT Award
Georgia	11/14/11	2/9/12	Phase 1 & 2	Phase 2	\$400M

TABLE 5: Summary of state ESEA policy adoption

Georgia	Common Core	Student Growth	Student Growth Model	Personnel Decisions	Types of Personnel Decisions
	7/8/10	2012: Mandates	Percentile Model	2013	Promotion, Tenure, Dismissal

TABLE 6: State ESEA application options

State	Teacher Evaluations	Data Usage	Curriculum
GA	Option B	Option A	Option A

The “option” notations for each state refer to the options given to the states through the waiver process. A state is required to exercise one of the options available. These options are dictated by the waiver application process and relate to how or what will be implemented in each area. For example, in relation to the College and Career Readiness Standards (Curriculum) the options are as follows:

Option A:

“The State has adopted college and career ready standards in at least reading/language arts and mathematics that are common to a significant number of States, consistent with part (1) of the definition of college and career-ready standards.”

OR

Option B:

“The State has adopted college and career ready standards in at least reading/language arts and mathematics that have been approved and certified by a State network of institutions of higher education (IHEs), consistent with part (2) of the definition of college and career ready standards.”

The purpose of this first step was to be able to present descriptive findings about the current usage of the ESEA waivers and the policies being utilized across the nation. The findings from the cataloging process are presented in Chapter 4 of this dissertation.

Step 2: Coding & the Federalism Analysis

The next step was the coding of the documents and the emergence of headings and themes that would assist in making a determination about whether the ESEA waivers are an act within the federalist structure and if so, is it cooperative or coercive federalism. The focus of cooperative policy designs is to enhance the lower governments' interest in a given area and attempt to improve their ability to achieve the policy goals set by the various levels of government (Elazar 1962). This is achieved by providing the lower level governments with both financial and technical assistance from the federal government.

In contrast, as discussed in the literature review, coercive policy designs often focus more on defining and implementing monitoring systems rather than building the capacity of lower level governments to comply with the new regulations. There is a sharp change in logic when governments create or transform into a coercive policy model (Kincaid 1990). This view recognizes that there are fundamental differences between federal and lower level governments and seeks to compel the desired actions onto state and local policymaking (May & Burby 1996).

These frameworks were used as a starting place to critically analyze the documents and communication re: ESEA waivers and the type of federalism being exercised by the government. The first step of coding was reviewing the documents and letting large themes occur. The most relevant of those major themes are summarized in the following table:

TABLE 7: Coding themes

NEGOTIATION	The ability or lack thereof of the states to negotiate the terms of ESEA waivers
COMMUNICATION	Communication/Reactions to feedback from states
GUIDELINES	The federal government providing initial guidelines or clarification of guidelines re: ESEA waivers
STATECONTROL	Examples of states having control of education policy, etc.
FEDERALCONTROL	The federal government controlling education policy terms
POLICYADOPTION	Items relating to the adoption of specific policies as relevant to ESEA waivers
POLICYFLEXIBILITY	Items relating to the ability of states to dictate terms of policies
CONSEQUENCES	Items relating to possible consequences to the state

After identifying the major headings/categories I coded the documents a second time to look for more detailed themes related to cooperation and coercion which fell within headings presented above. Below are the more specific codes that emerged from the data and were used for the basis of the findings of the federalism analysis presented in Chapter 5.

TABLE 8: Coding Categories

MAJOR HEADING	CODE	EXPLANATION
NEGOTIATION	Negotiation Occurs (1)	Items demonstrating that states were able to negotiate the terms of their ESEA waivers
	Inability to Negotiate (2)	Items demonstrating that states were unable to negotiate and were made to adopt the terms provided by USDOE
COMMUNICATION	Federal government adjusts (1)	USDOE responds favorably to feedback from states
	Federal government doesn't adjust (2)	USDOE does not respond to feedback with adjustments
GUIDELINES	Federal ESEA guidelines (1)	Items relating to the ESEA application process and applications

	Federal RTTT guidelines (2)	Items relating to the RTTT process and applications
	Federal policy guidelines(3)	Items relating to specific policy prescription by USDOE
	State policy guidelines(4)	Items relating to state policy prescription
STATECONTROL	States exerting control(1)	Items relating to states exerting control over policy prescription
	States relinquishing control(2)	Items relating to states relinquishing control over policy prescription
FEDCONTROL	USDOE exerting control(1)	Items relating to USDOE exerting control over policy prescription
	USDOE relinquishing control(2)	Items relating to USDOE relinquishing control over policy prescription
POLICYADOPTION	Prior adoption of policy(1)	Items documenting the adoption of “ESEA waiver policies” prior to the waiver process
	Adoption of policy due to federal program(2)	Items documenting the adoption of ESEA Waiver policies as a result of Waiver or RTTT process
	Independent policy adoption(3)	Adoption of ESEA waiver polices post Waiver process but unrelated to federal program
	Lack of policy adoption(4)	Refusal of adoption of ESEA waiver policies
POLICYFLEXIBILITY	Contention regarding flexibility(1)	Items related to/showing contention between states and USDOE due to policy specifics
	Acceptance of flexible policy terms(2)	Items related to/showing flexibility of policy specifics
	Complete inflexibility of USDOE(3)	Items related to/showing complete inflexibility of policy specifics

CONSEQUENCES	Sanction based review(1)	Items related to a review process which involves sanctions
	Acceptance of sanctions(2)	Item related to states' willingness to accept sanctions
	Threat of sanctions(3)	Items related USDOE threatening the use of sanctions

Validity Of Content Analysis

In qualitative content analysis, the term validity, has been described as the trustworthiness of both the process and the actual data analysis (Elo et al 2014). While there are many recommended measures to take to ensure the trustworthiness of deductive content analysis, there are fewer recommendations for how to ensure validity for inductive content analysis. One suggestion is that one researcher is responsible for the analysis and others follow-up on the review of the whole analysis process and the categorization process. In general, a researcher must revisit the data and the analysis process several times to check the coding and interpretation of the data (Pyett 2003). In addition to personally going over the process multiple times, I used two other suggested measures to increase validity.

The first method was double coding by a second researcher, this method is used to address the quality of the categorization matrix (Schreir 2012). According to Schreir (2012) if the code definitions are clear and appropriate for the data, then two rounds of coding should reproduce approximately the same results. For this study I conducted the first round of coding, developing the categories and coding matrix. After developing the coding matrix, I had another researcher code 10% of the sample for each type of document (see Table 7). There were no major discrepancies in the coding of the data. Any

discrepancies that did exist, we discussed and I either clarified the definition of the coding schema or reassessed the specific coding discrepancy. In addition to having a second coder to increase the validity of the coding matrix, I independently recoded another 10% of the sample and compared the results to my original coding. Again, no major discrepancies existed. Secondly, I had a third researcher review the overall process, check for adequacy of the analysis and discuss any areas that needed to be addressed to increase the validity of the analytical process (Kyangas et al. 2011).

Limitations Of The Study

There are several limitations to this study. First, because of the specific nature of the ESEA waivers the findings are not generalizable to other federal programs. While the study provides an additional contribution to the literature regarding cooperative and coercive federalism, it does not provide generalizable results that can be applied to other waiver programs without an individual and in depth analysis. Second, the sampling for this study attempted to collect all relevant documents provided by the federal government and state governments via their respective websites. While every effort was made to use a 100% sample of the available data, it must be noted that all relevant data may not have been made available by the state and federal government. This is especially true regarding the communications between state and federal officials. Additionally, some communication could have been conducted informally, via personal conversation and/or via telephone, and there is no written record of such communication. While it would be ideal to have this data, it is just not feasible and therefore represents a hole in the data collection process. Lastly, while I took measures to increase the validity of the study, ideally I would have triangulated the study with a quantitative study. Due to the nature of

the study, I was unable to use a quantitative analysis to support the qualitative findings of this study.

Step 3: Constitutional Analysis of Waivers

The third step is a second and separate analysis concerning the constitutionality of the ESEA waivers. A case law analysis involves the reviewing of previous decisions of the U.S. Courts as they pertain to federalism and the use of waivers in administrative lawmaking. Once reviewing the case law, applying the facts and previous analysis to the current state of affairs for the ESEA waivers, I provided an analysis of how these legal provisions apply to the waivers. The findings of this analysis are found in Chapter 6 of this dissertation. This third step differs from the previous because it is a legal/critical analysis rather than an empirical content analysis. This third step is not part of the content analysis described above. Rather, it is an application of previous cases, previous scholarship and the law to make an argument regarding the constitutionality of the ESEA waivers. This case law analysis is meant to be a supplement to the qualitative content analysis presented in this dissertation. The legal analysis found in Chapter 6 will address the research question concerning if the ESEA waivers rise to the legal standard of unconstitutionally coercive as decided by case law precedent.

CHAPTER 4: ESEA WAIVERS & POLICY TRENDS

This chapter aims to document and catalog what education policies are in place in regards to the three policy areas examined by this dissertation, the first set of goals for this study. Specifically, I cataloged the policies that relate to the adoption of the common core, the use of student growth measures in teacher evaluations, and the use of teacher evaluations in personnel decisions. This chapter will first map out the application and approval of the applications for ESEA waivers by state. It will then briefly discuss what is required by states under NCLB, and by waivers in the three aforementioned policy arenas. Next, this chapter will present the findings regarding the adoption of policies and trends for the 50 states and the District of Columbia as they relate to curriculum, student growth, and the use of teacher evaluations. The chapter will conclude with a discussion on how this cataloging of policies contributes to the overall analysis presented in this study.

ESEA Waivers

The centerpiece of this study is the ESEA Waivers and whether the issuance of these waivers by the federal administration challenges the limits of permissible federalism by being coercive, rather than cooperative. The first step in this study is to catalog the status of the states' waivers, and the policies that have been adopted as a result of the waivers. As of this writing, June 2015, there are five states that do not have an ESEA waiver: California*, Montana, Nebraska, North Dakota, and Vermont. There are two states who have applied for waivers that are pending approval: Iowa and Wyoming. The

remaining 43 states and the District of Columbia have applied for and been granted an ESEA Waiver by the Department of Education. One exception to note is that California* as a state does not have a waiver but the Department of Education has allowed school districts within California to apply for and receive an ESEA Waiver independent of the state. The first waivers were applied for in November of 2011, directly after the announcement of the flexibility packages, and the most recent waiver was applied for in April of 2013. Below are the dates of application and approval for each state in the ESEA Waiver process:

TABLE 9: ESEA waiver applications and approval dates

State	Submitted	Granted	State	Submitted	Granted
AL	9/6/12	6/21/13	MO	2/28/12	6/29/12
AK	9/6/12	5/20/13	MT	None	N/A
AZ	2/28/12	7/19/12	NE	None	N/A
AR	2/28/12	6/29/12	NV	2/29/12	8/8/12
CA	None*	N/A	NH	9/6/12	6/26/13
CO	11/14/11	2/9/12	NJ	11/14/11	2/9/12
CT	2/28/12	5/29/12	NM	11/14/11	2/15/12
DE	2/28/12	5/29/12	NY	2/28/12	5/29/12
DC	2/28/12	7/19/12	NC	2/28/12	5/29/12
FL	11/14/11	2/9/12	ND	None	N/A
GA	11/14/11	2/9/12	OH	2/28/12	5/29/12
HI	9/6/12	5/20/13	OK	11/14/11	2/9/12
ID	2/28/12	10/17/12	OR	2/28/12	7/19/12
IL	2/23/12	4/18/14	PA	2/28/12	8/20/13
IN	11/14/11	2/9/12	RI	2/28/12	5/29/12
IA	2/28/12	Pending	SC	2/28/12	7/19/12
KS	2/28/12	7/19/12	SD	2/28/12	6/29/12
KY	11/14/11	2/9/12	TN	11/14/11	2/9/12
LA	2/28/12	5/29/12	TX	4/15/13	9/30/13
ME	9/6/12	8/12/13	UT	2/28/12	6/29/12

MD	2/28/12	5/29/12	VT	None	N/A
MA	11/14/11	2/9/12	VA	2/27/12	6/29/12
MI	2/28/12	7/19/12	WA	2/28/12	7/6/12
MN	11/14/11	2/9/12	WV	9/6/12	5/20/13
MS	2/28/12	7/19/12	WI	2/28/12	7/6/12
			WY	4/15/13	Pending

Overall, the ESEA waivers have been widely embraced by the states because of the need for relief from the penalties associated with failing to meet the standards set by NCLB. However, the waivers came with conditions requiring states to “agree and be prepared to take on the rigorous reforms required by all of the principles of ESEA flexibility in exchange for that waiver.”⁶ For the five states that currently do not have an ESEA waiver, it appears to be because of the unwillingness of the state to agree to these reforms, or the inability to take on the costs of implementing the necessary systems for reform. Montana’s state superintendent specifically cited the cost of implementation, and the hours required for the application to not be of benefit for Montana’s school system as a whole.⁷ Vermont, Nebraska, and North Dakota all decided to not participate, or to cease participation from the waiver process, because of their unwillingness to adopt teacher evaluation systems that linked student achievement to evaluations, and then used the results of such evaluations to inform personnel decisions as required for the ESEA Flexibility Package. Also, the

6 Letter from Arne Duncan to the Superintendent of California denying the state’s application for a waiver. Found at <http://edsources.org/wp-content/uploads/Arne-Duncan-s-Letter-Rejecting-California-s-NCLB-Waiver-Request3.pdf>

7 Letter from Montana’s Office of Public Instruction to Secretary Arne Duncan stating that Montana would not be seeking an ESEA Waiver. Found at: http://opi.mt.gov/PDF/Supt/Dept_of_Ed/ESEA_Waiver_Decline.pdf

inability to agree on adjustments to the number required for student's reaching proficiency proved problematic for North Dakota⁸

The development of new content standards and assessment standards are the major centerpiece of the ESEA Flexibility package. As demonstrated below, the remaining states and the District of Columbia have made commitments to both adopt and develop new systems in accordance with ESEA Waiver requirements⁹, or to implement policies that were in the pipeline to meet the requirements for waiver approval. The remaining sections of this chapter will discuss the findings on how states responded to the waiver requirements for content and assessment standards.

Content Standards

As stated, prior to the ESEA waivers, NCLB was the federal legislation guiding federal funding for education and thus education policy in the US. Under NCLB, states receiving Title I funding were required to:

- Develop and adopt content and performance standards and aligned assessments in the subjects of mathematics and reading in each of grades 3-8, and for at least one grade in grades 10-12 by the end of the 2005-2006 school year, assuming certain minimum levels of annual federal funding were provided for state assessment grants
- Adopt content and performance standards in science by the end of the 2005-2006 school year, and
- Adopt assessments in science by the end of the 2007-2008 school year (NCLB 2001)

8 Vermont: http://education.vermont.gov/documents/EDU-Letter_to_parents_and_caregivers_AOE_8_8_14.pdf;

Nebraska: http://blogs.edweek.org/edweek/campaign-k12/2015/03/nebraska_to_seek_no_child_left.html

North Dakota: <http://www.dpi.state.nd.us/ESEA/nov8%20letter.pdf>

9 Available: <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>; outlining the requirements of the flexibility package.

These requirements set the boundaries for both content and performance standards. The requirement for content standards requires states to specify what students are expected to learn and what they are able to do in each subject at the end of a school year. While states were not required to have their content standards approved by the federal government, they did have to provide evidence that demonstrated they had adopted and had an implementation plan for such standards (NCLB 2001). In fact, DOE provided non-regulatory guidance for what content standards are to include. The guidance states:

Academic content standards specify what all students are expected to know, and be able to do. Academic content standards must contain coherent and rigorous content, and encourage the teaching of advanced learning.

Academic content standards should be clear and specific and give teachers, students, and parents sufficient direction to guide teaching and learning. Additionally, academic content standards should be understandable for educators to teach the expected content in their classrooms, and for students to attain the expected high levels of achievement. Thus, academic content standards should be written in clear, jargon-free, and straightforward prose that is accessible to a wide range of audiences (DOE 2003).

This was the guidance provided for states on content standards under NCLB, i.e. curricula standards. However, the ESEA Waivers were a bit more specific on what was an acceptable content standard for states seeking a flexibility waiver. To receive an ESEA waiver the state must:

Demonstrate that it has college-and career-ready expectations for all students by adopting college-and career ready standards in reading/language arts and mathematics, at a minimum (DOE 2011).

The focus of this as it relates to curriculum or content standards is the language “college-and-career-ready standards” which were defined as:

Content standards for kindergarten through 12th grade that build towards college and career readiness by the time of high school graduation. A State’s college-and career-ready standards must be either (1) standards that are common to a significant number of States; or (2) standards that are approved by a State network of institutions of higher education, which must certify that students who meet the standards will not need remedial course work at the postsecondary level (DOE 2011).

“Common to a significant number of states” was not defined by the ESEA Waiver policy statements. However, the federal government had indicated their support for the Common Core State Standards (CCSS) in a number of ways. This support was made evident by President Obama’s Blueprint for Reform¹⁰, the Race to the Top (RTTT) Grant Competition scoring guidelines,¹¹ and the award of the Race to the Top Assessment Grant to the Partnership for the Assessment of Readiness for College and Careers (PARCC);¹² the consortium which led the development of CCSS.

The Common Core State Standards initiative (CCSSI) began as a grassroots movement led by the National Governors Association and the Council of Chief State School Officers to develop common standards, and mathematics in K-12 education (Porter et al 2011). The movement was spurred by the concerns about student mobility, consistent expectations for students, students’ preparation for global competition, and the skills needed by students for employment. CCSSII states its purpose as:

A state led initiative...to create a rigorous set of shared standards that states can voluntarily adopt. The standards are crafted to ‘define the knowledge and skills students should have within their K-12 education careers so they graduate from high school able to succeed in entry-level, credit-bearing academic college course and workforce training programs.’¹³

10 See page. 7 <https://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>

11 See page 7, <https://www2.ed.gov/programs/racetothetop/scoringrubric.pdf>

12 <http://www2.ed.gov/programs/racetothetop-assessment/parcc-award-letter.pdf>

13 <http://www.corestandards.org/about-the-standards/frequently-asked-questions/>

The development of these standards began at a meeting in 2007, and the final Common Core State Standards were released on June 2, 2010 (Porter et al. 2011). This was not, and still is not technically a federal led movement, but as noted, the federal administration has supported the Common Core State Standards in a number of ways.

The Common Core State Standards have been widely accepted by the states since the release of the final standards in 2010. Through an examination of state policies, with the exception of four states, Alaska, Nebraska, Texas, and Virginia, the findings demonstrate that all other states and the District of Columbia adopted the Common Core State Standards either partially, or in their entirety.¹⁴

TABLE 10: Common Core state standards adoption date by state

STATE	CCSS DATE	STATE	CCSS DATE	STATE	CCSS DATE
AL	11/18/10	KY	2/10/10	ND	6/20/11
AK	NOT ADOPTED	LA	7/1/10	OH	6/18/10
AZ	6/28/10	ME	4/4/11	OK	6/25/10
AR	7/12/10	MD	6/22/10	OR	10/29/10
CA	8/2/10	MA	7/21/10	PA	7/2/10
CO	8/2/10	MI	6/15/10	RI	7/1/10
CT	7/7/10	MN	11/3/11	SC	7/14/10
DE	8/19/10	MS	6/28/10	SD	11/29/10
DC	7/22/10	MO	6/15/10	TN	7/30/10
FL	7/27/10	MT	11/4/11	TX	NOT ADOPTED
GA	7/8/10	NE	NOT ADOPTED	UT	8/8/10
HI	6/18/10	NV	6/22/10	VT	8/17/10
ID	11/24/11	NH	7/13/10	VA	NOT

¹⁴ In more recent years, states have repealed the adoption of the common core standards. (See <http://www.ccrslegislation.info/CCR-State-Policy-Resources/common-core-status-map> for more information) While this is important to note to give an accurate account of the current use of the policy, it is not relevant to the examination of this dissertation.

					ADOPTED
IL	6/24/10	NJ	6/23/10	WA	7/20/11
IN	8/3/10	NM	11/29/10	WV	6/2/10
IA	7/29/10	NY	7/19/10	WI	6/2/10
KS	10/12/10	NC	6/3/10	WY	6/16/12

While this table demonstrates the wide acceptance of the Common Core, it also demonstrates that many of the states adopted the Common Core State Standards prior to announcement of the ESEA flexibility waivers. The dates of adoption are relevant to the question of whether CCSS represent cooperative or coercive federalism. Certainly the incorporation of CC in the waiver process is relevant to this question but the fact that the adoptions by states preceded RTTT and waivers is important to note.

The federal administration announced the possibility of waivers in September of 2011. By this time, of the states who adopted the Common Core, all but Montana (which never applied for an ESEA Waiver), Idaho, and Wisconsin had already committed to adopting the initiative. This suggests that either the states were motivated by their own initiatives to adopt the Common Core, or that there may have been an intervention other than the ESEA Waivers that encouraged the wide spread adoption of Common Core Standards.

McGuinn (2011) suggests that the Federal Race to the Top Grant Competition encouraged or even incentivized the adoption of the Common Core State Standards by states. I conducted research on the requirements and timeline of RTTT, and have included findings as to RTTT's influences as they relate to the three policy areas explored here. The Race to the Top (RTTT) Grant program was originally authorized under the

State Fiscal Stabilization Fund, which is included in the American Recovery and Reinvestment Act (2009). The purpose of the program was to provide competitive grants to states that were committed to implementing reforms in four areas:

- Enhancing standards and assessments
- Improving the collection and use of data
- Increasing teacher effectiveness and achieving equity in teacher distribution
- Turning around struggling schools

To date, the competition has had three different phases. During 2010, Phase I and II of the competition, 11 states and the District of Columbia were awarded approximately four billion dollars for assistance with the programs and policies described in the states' application.¹⁵ A third phase of the program was funded through the Department of Defense and the Full-Year Continuing Appropriations Act in FY 2011. This Phase was only open to the finalists of Phase 2 and awarded approximately \$200 million amongst the winners.

In regards to “enhancing standards and assessments,” the RTTT program stated that states must adopt “internationally-benchmarked standards and assessments that prepare students for success in college and the workplace (NGA 2008).” Specifically, states received points on their application for developing and adopting a “common set of K-12 standards.” Furthermore, states were awarded additional points for working with a consortium that included “a significant number of states.” For purposes of the grant competition, the Department of Education defined a common set of K-12 standards as:

A set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A state may supplement the common standards with additional standards, provided the

¹⁵ Information regarding requirements, timelines, applications and awards for RTTT is available at <http://www2.ed.gov/programs/racetothetop/index.html>

additional standards do not exceed 15 percent of the State's total standards for the content area.¹⁶

States were given three opportunities to meet this requirement through the competition process. Phase I and II for the competition were held in 2010, while the third and final phase of RTTT was held the following year. For the scoring of applications, the Department of Education created general ranges for reviewers to use as a guide. There were three primary ranges for high quality, medium quality, and low quality responses, and applications could receive a maximum of 500 points overall. The timelines for RTTT are presented below:

TABLE 11: Race to the Top grant competition timeline

	PHASE I	PHASE 2	PHASE 3 Part I	PHASE 3 Part II
Deadline	19-Jan-10	1-Jun-10	22-Nov-11	16-Dec-11
Award Date	29-Mar-10	24-Aug-10	23-Dec-11	23-Dec-11

These dates are significant because if RTTT was the motivating factor for states to adopt the CCSS, then adoption would occur prior to or during the application process. The dates of CCSS adoption and a state's participation in RTTT are presented below:

TABLE 12: Common Core adoption and Race to the Top competition

STATE	CCSS DATE	RTTT APPLICATION	RTTT AWARDED	AMOUNT
AL	11/18/10	PH. 1 & 2	None	None
AK	NOT ADOPTED	None	None	None
AZ	6/28/10	PH. 1,2,3	PH. 3	\$25M
AR	7/12/10	PH. 1 & 2	None	None

¹⁶ <http://www2.ed.gov/programs/racetothetop/phase1-resources.html#assistance>

CA	8/2/10	PH. 1 & 2	None	None
CO	8/2/10	PH. 1,2,3	PH. 3	\$18M
CT	7/7/10	PH. 1 & 2	None	None
DE	8/19/10	PH. 1	PH. 1	\$100M
DC	7/22/10	PH. 1 & 2	PH. 2	\$75M
FL	7/27/10	PH. 1 & 2	PH. 2	\$700M
GA	7/8/10	PH. 1 & 2	PH. 2	\$400M
HI	6/18/10	PH. 1 & 2	PH. 2	\$75M
ID	11/24/11	PH. 1	None	None
IL	6/24/10	PH. 1 & 2	PH. 3	\$43M
IN	8/3/10	PH. 1	None	None
IA	7/29/10	PH. 1 & 2	None	None
KS	10/12/10	PH. 1	None	None
KY	2/10/10	PH. 1,2,3	PH. 3	\$17M
LA	7/1/10	PH. 1,2,3	PH. 3	\$17M
ME	4/4/11	PH. 2	None	None
MD	6/22/10	PH. 2	PH. 2	\$250M
MA	7/21/10	PH. 1 & 2	PH. 2	\$250M
MI	6/15/10	PH. 1 & 2	None	None
MN	11/3/11	PH. 1	None	None
MS	6/28/10	PH. 1 & 2	None	None
MO	6/15/10	PH. 1	None	None
MT	11/4/11	PH. 2	None	None
NE	NOT ADOPTED	PH. 1 & 2	None	None
NV	6/22/10	PH. 2	None	None
NH	7/13/10	PH. 1	None	None
NJ	6/23/10	PH. 1	PH. 3	\$38M
NM	11/29/10	PH. 1	None	None
NY	7/19/10	PH. 1 & 2	PH. 2	\$700M
NC	6/3/10	PH. 1 & 2	PH. 2	\$400M
ND	6/20/11	None	None	None
OH	6/18/10	PH. 1 & 2	PH. 2	\$400M

OK	6/25/10	PH. 1 & 2	None	None
OR	10/29/10	PH. 1	None	None
PA	7/2/10	PH. 1, 2, 3	PH. 3	\$41M
RI	7/1/10	PH. 1 & 2	PH. 2	\$75M
SC	7/14/10	PH. 1 & 2	None	None
SD	11/29/10	PH. 1	None	None
TN	7/30/10	PH. 1	PH. 1	\$500M
TX	NOT ADOPTED	None	None	None
UT	8/8/10	PH. 1, 2, 3	None	None
VT	8/17/10	None	None	None
VA	NOT ADOPTED	PH. 1	None	None
WA	7/20/11	PH. 2	None	None
WV	6/2/10	PH. 1	None	None
WI	6/2/10	PH. 1 & 2	None	None
WY	6/16/12	PH. 1	None	None

Based on an analysis of these dates, 32 states and the District of Columbia agreed to adopt the Common Core State Standards prior to August of 2010, and would have included these plans in their Phase I and II applications. In fact, all but two of these 32 states and the District of Columbia did submit an application for Phase I and II of the competition. Thirteen more states adopted the Common Core Standards before December of 2011, the award date for Phase III of the competition. And again, all but one of these states submitted applications for a Race to the Top Grant. Wyoming was the last to adopt the standards in 2012, and four states still have not adopted the standards.

This section has undeniably demonstrated that the Common Core State Standards have been widely accepted. Despite South Carolina's and Oklahoma's decisions to drop

the CCSS standards in 2014, there are still 44 states and the District of Columbia that have adopted and committed to implement Common Core Standards since 2010. While cataloging state policies spurred by ESEA Waivers was the purpose of this section, I believe it is important to note the timing of states' adoption of CCSS in relation to Race to The Top, and the ESEA Waivers for a number of reasons. First, it is clear that ESEA Waivers were not the motivating factor for states to adopt CCSS, because nearly 100% of states that adopted CCSS did so before the announcement of the ESEA waivers in September 2011. Therefore, in this instance, the waivers could not be coercive for a majority of states and therefore irrelevant for the cooperative/coercive analysis in the following chapter. However, Race to the Top also included an incentive for states to adopt the standards.

For the RTTT applications, the Department of Education established ranges for the reviewers to use as guidelines for the scoring of applications. There were three main scoring categories into which applications were placed; high quality, medium quality, and low-quality responses. Each application could receive a total of 500 overall points for its quality. As it related to content standards, a state could receive a maximum of 40 points. The Department of Education instructed reviewers to award high quality points to states that were participating in a consortium that was developing standards that included a majority of the states in the nation.¹⁷ At the time of the RTTT process, the Common Core State Standards were the only standards being developed by a consortium of states that had enough states to meet the criteria to receive points within the "high quality" range. While this dissertation does not seek to analyze the coerciveness of RTTT nor does it suggest that 10% (40 of 500 points) is enough to independently coerce a state, I believe this information

¹⁷ The scoring rubric used for evaluating state RTT grant applications was included as Appendix B in the Federal Register, RTT State Grant Competition Notice. Appendix B begins on p. 59850.

is important to note because of how it adds to the trend of the federal administration pushing or incentivizing states to adopt specific policies; policies related to curriculum that are usually left to the discretion of the states.

Student Growth Measures & Teacher Evaluations

As previously noted in the literature review, one of the major criticisms of NCLB was the use of student achievement measures for school and teacher assessments, rather than the use of student growth measures. The federal administration also expressed the intention to integrate student growth measures in teacher evaluation systems in the Blueprint for Reform, the Race to the Top competition, and the ESEA flexibility waivers.

RTTT asked states to describe their plans and targets for school systems and to:

design and implement rigorous, transparent, and fair evaluation systems for teachers and principals that (a) differentiate effectiveness using multiple rating categories that take into account data on student growth as a significant factor, and to use the results of annual evaluations for:

developing teachers and principals; making decisions regarding compensation, promotion, and retention of teachers and principals; determining whether to grant tenure or full certification to teachers and principals; or removing ineffective tenured and untenured teachers and principals after providing opportunities for improvement.

In total, a state could earn 58 points, just less than 11%, for improving teacher and principal effectiveness based on performance measures. However, it is not as clear cut for this category what method of improvement would automatically earn a “high quality” score as it was for content standards.

The federal push for the use of student growth measures, and the use of evaluations for personnel decisions continued with the ESEA Flexibility Waivers. In order to receive

a waiver, both SEAs and LEAs had to commit to develop, adopt, pilot, and implement teacher evaluation systems that:

- Use multiple valid measures in determining performance levels, including data on student growth and other measures of professional practice, and
- Will be used to inform personnel decisions.¹⁸

If a state was unwilling or unable to commit to developing and implementing an assessment system that met these objectives, then the state was ineligible to receive the ESEA waiver package in its entirety. For example, the state of California is unable to development an assessment system because of both budgetary reasons and the laws that are currently in place. Because of the state's inability to comply, it still remains ineligible to receive a waiver. With respect to this condition, the ESEA waivers provided a timeline for the development and implementation of such systems as shown below:

TABLE 13: ESEA waivers window 1 and 2

ESEA Waivers Window 1 & 2	
School Yr.	Requirement
2012-13	Develop evaluation systems & support systems
2013-14	Pilot evaluation systems OR fully implement evaluation systems
2014-15	Implement piloted systems AND Develop plan for using results
2015-16	Implement plan to use evaluations in personnel decisions.

TABLE 14: ESEA waivers window 3

ESEA Waivers Window 3	
School Yr.	Requirement
2013-14	Develop evaluation systems & support systems
2014-15	Pilot evaluation systems OR fully implement evaluation systems
2015-16	Implement piloted systems AND Develop plan for using results
2016-17	Implement plan to use evaluations in personnel decisions.

¹⁸ See ESEA Flexibility Policy Document (<http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>)

It is important to note that waivers were first made available in 2012, and this timeline required states to commit to developing an evaluation system in the same year that the waiver would be granted, less than 12 months after the announcement of the possibility of the waivers. The states responded accordingly.

TABLE 15: Student growth usage by state

Student Growth Usage by State			
	Student Growth	Model	Year Adopted
AL	Recommends	Not Specified	2013*
AK	Mandates	Not Specified	2013*
AZ	Mandates	Percentile Model	2010**
AR	Mandates	Percentile Model	2014*
CA	Recommends	Not Specified	2012
CO	Mandates	Percentile Model	2010
CT	Mandates	Vertical Model	2011
DE	Mandates	Value Added Model	2012
DC	Mandates	Value Added Model	2013
FL	Mandates	Value Added Model	2011**
GA	Mandates	Percentile Model	2012*
HI	Mandates	Percentile Model	2013*
ID	Mandates	Percentile Model	2011*
IL	Mandates	Not Specified	2010
IN	Mandates	Percentile Model	2013
IA	Mandates	Value Added Model	2013*
KS	Recommends	Student Learning Objectives	2012*
KY	Mandates	Percentile Model	2012*
LA	Mandates	Value Added Model	2013*
ME	Mandates	Not Specified	2012*
MD	Mandates	Percentile Model	2010**
MA	Mandates	Not Specified	2011
MI	Mandates	Value Added Model	2011

MN	Mandates	Value Added Model	2011
MS	Recommends	Percentile Model	2013*
MO	Recommends	Not Specified	2012*
MT	May Include	Not Specified	2013*
NE	Recommends	Student Learning Objectives	2012*
NV	Mandates	Percentile Model	2011
NH	Recommends	Percentile Model	2012*
NJ	Mandates	Percentile Model	2010
NM	Mandates	Value Added Model	2013*
NY	Mandates	Percentile Model	2012
NC	Mandates	Value Added Model	2012*
ND	Recommends	Not Specified	2012
OH	Mandates	Value Added Model	2011
OK	Mandates	Value Added Model	2013
OR	Mandates	Student Learning Objectives	2011*
PA	Mandates	Value Added Model	2012
RI	Mandates	Percentile Model	2011
SC	Recommends	Value Added Model	2012*
SD	Mandates	Not Specified	2012*
TN	Mandates	Value Added Model	2010
TX	Mandates	Value Added Model	2013*
UT	Mandates	Percentile Model	2012
VT	Recommends	Not Specified	2012
VA	Mandates	Percentile Model	2011
WA	Mandates	Not Specified	2012
WV	Mandates	Value Added Model	2012
WI	Mandates	Value Added Model	2011
WY	Mandates	Percentile Model	2013

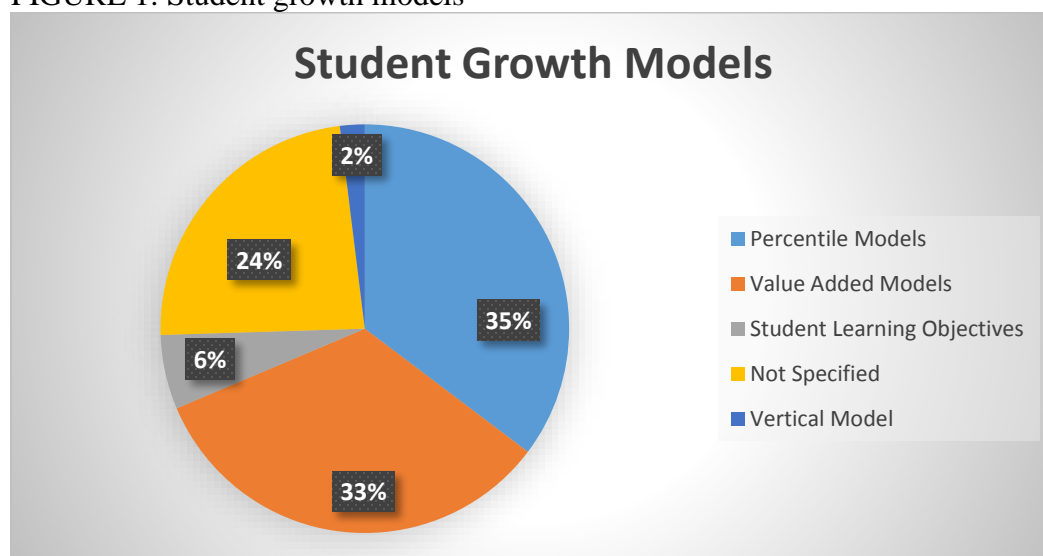
*Adoption & Implementation was outlined by ESEA Waiver Application

**Adoption & Implementation was outline by RTTT Application

As of this writing, June of 2015, every state has either adopted the use of student growth measures as part of their teacher evaluation system, or has adopted a plan to use student

growth measures in coming years. Ten states recommend the use of student growth models because they allow the LEAs to make specific decisions about how to implement the teacher evaluation systems. Montana also allows LEAs to make decisions about their teacher evaluation systems, but they do not specifically recommend the use of student growth measures. The state only specifies that the LEAs may include student growth measures in their evaluation systems. The other 39 states and the District of Columbia mandate the use of student growth measures as part of the teacher evaluation systems. The variation between states is in how states use the student growth measure, rather than if they do or do not utilize the measure. There are four large umbrella categories to describe the methods used by the states: Percentile Models, Value Added Models, Student Learning Objectives, and states that do not specify. These models are represented amongst the states as follows¹⁹:

FIGURE 1: Student growth models



¹⁹ This table created through a compilation of several sources, primarily an examination of the laws and amendments enacted by each of the states represented in the graph.

Percentile Models and Value Added Models account for nearly 70% of the models used amongst the states. If it were possible to get information on each of the districts that are allowed to create their own models, the percent specified in Figure 1 would be greater because many districts also utilize percentile and student growth models. It is also important to note that some models such as Value Added Models can incorporate both a percentile method and use student learning objectives as part of the larger model. The primary finding from this part of the analysis is that states have overwhelmingly incorporated student growth measures into their evaluation systems in the last five years.

In regards to the relationship between the ESEA Waivers and the use of student growth measures, I found evidence from a review of RTTT applications, ESEA Waivers, and state statutes²⁰, that at least 22 of the states adopted the use of student growth into the teacher evaluation system as a direct result of a state's desire to be approved for an ESEA waiver. Prior to the ESEA waiver applications, these states did not use student growth measures as a requirement or recommendation, and the implementation of such measures was a result of systems as described in their ESEA Waiver applications. There were three states that specifically implemented the use of student growth measures because of their RTTT applications. The use of student growth measures alone only accounted for five possible points of the overall 500, which may be why there wasn't as strong of a trend as there was for the adoption of CCSS during the RTTT grant competition. It is important to note, that this push by the federal government and acceptance of the policy by the state governments could've been a result of other factors than RTTT or ESEA as well. There

²⁰ Citations of a complete set of materials used are too extensive to provide here but are available upon request.

has been a growing amount of research,²¹ supporting the use of student growth measures as a more accurate way to track the growth of students and the effectiveness of teachers. This section does not suggest that ESEA or RTTT are the sole motivators of the adoption of student growth measures. Rather, these findings seek to provide a link between the timeline of the adoption and the participation in federal programs. I am not suggesting that the implementation of student growth was unrelated to RTTT or ESEA for the remaining 25 states and the District of Columbia. Rather, I provide data that indicates that there is no direct evidence of this relationship. With the exception of four states (implemented in 2010), all states adopted a student growth measure during 2011 or later. This suggests that adoption of Student Growth Measures is part of a national trend that could have been spurred by the RTTT competition, and the widespread need for ESEA flexibility waivers.

Evaluations Informing Personnel Decisions

The second part of this analysis, as it relates to assessments, was the push to use teacher evaluation systems in personnel decisions. This accounted for 28 of the 500 points of the RTTT competition, and was a specific requirement for the ESEA Waiver process. However, these 28 points were divided amongst four different subcategories and states could receive points for using evaluations to inform professional development, rather than using evaluations for firing, hiring, tenure, compensation, etc. Based on the analysis of RTTT applications, ESEA Waivers, and state statutes, there are currently 39 states and the

21 See Gill, B., Bruch, J., & Booker, K (2013). Using Alternative Student Growth Measures for Evaluation Teacher Performance: What the Literature Says. REL 2013-002. Regional Educational Laboratory Mid-Atlantic. Chicago. See also, Diaz-Bilello, E.K., & Briggs, D.C. (2014) Using Student Growth Percentiles for Educator Evaluations at the Teacher Level: Key Issues and Technical Considerations.

District of Columbia that use teacher evaluation results to inform personnel decisions.

Below is a summary of how teacher evaluations are being used across these states:

TABLE 16: Teacher evaluations and personnel decisions

	Promotion	Tenure	Dismissal	Licensure/ Certificatio n	Compensation	Doesn't Specify
AZ						X
AR			X			
CO	X					
CT						X
DE	X	X	X	X		
DC	X		X		X	
FL	X		X		X	
GA	X	X	X			
HI		X		X		
ID						X
IL				X		
IN			X		X	
IA	X		X	X		
KS		X	X			
KY						X
LA		X	X	X		
ME			X			
MD		X			X	
MI	X	X	X		X	
MN			X	X	X	
MS						X
MO						X
NV			X			
NM			X		X	
NY	X	X	X		X	
NC	X	X	X	X	X	
ND						X
OH		X		X	X	

OK	X		X		X	
OR	X				X	
PA			X			
RI	X	X	X	X	X	
SC			X	X		
TN	X	X	X	X	X	
TX			X			
UT			X		X	
VA					X	
WA		X	X			
WI			X			
WY			X			

TABLE 17: Summary of teacher evaluation use

	Promotion	Tenure	Dismissal	Licensure/Certification	Compensation	Doesn't Specify
Number of States	13	13	26	10	15	7

Of the 39 states, seven states do not specify how the evaluations will be used, but only that they will be used in the making of personnel decisions. Of the other 33 states, an overwhelming majority, 26, can use teacher evaluations for dismissal after providing the teacher with an opportunity for improvement. Thirteen states use the evaluations for promotion, 13 for tenure decisions, 11 for licensure or certification decisions, and 16 states can use teacher evaluations in some capacity as it relates to compensation. Overall, the use of teacher evaluations is a growing trend and states are beginning to incorporate them into hiring, firing, tenure, continuing licensure, and compensation decisions. Of the 39 states which use teacher evaluations for personnel decisions, the timeline for adopting these policies is represented in the table below:

TABLE 18: Teacher evaluations and personnel decisions date of adoption by state

Teacher Evaluations & Personnel Decisions Date of Adoption					
AZ	2010**	KS	2013*	ND	2012
AR	2010**	KY	2013	OH	2011
CO	2010	LA	2013	OK	2010**
CT	2010**	ME	2012	OR	2011*
DE	2010**	MD	2010**	PA	2012**
DC	2012*	MI	2011	RI	2010**
FL	2013	MN	2011	SC	2004
GA	2013	MS	2013*	TN	2010
HI	2010**	MO	2012*	TX	2010
ID	2013	NV	2011	UT	2011
IL	2012*	NM	2013*	VA	2011
IN	2013	NY	2014*	WA	2012
IA	2013	NC	2012*	WI	2013*
				WY	2012*

*Adoption & Implementation was outlined by ESEA Waiver Application

**Adoption & Implementation was outline by RTTT Application

With the exception of one state (SC), all state reforms or new legislation regarding the use of teacher evaluations for personnel decisions occurred after 2010, the time of the RTTT application process. My review of the RTTT applications and related state documents revealed direct evidence that least nine of the 40 SEAs changes to the use of teacher evaluations was directly related to their RTTT applications or part of their RTTT reassurances, and 11 states' changes were detailed as part of their ESEA Waiver applications. While there may not be evidence that the changes for the other states were motivated by the federal administration's programs, the timing of changes speaks to the trend of the states following or adopting policies that are in line with the majority of the states. This time period is also consistent with the perspective that the federal

administration is advocating and/or incentivizing states to adopt specific policies as expressed in The Blueprint for Reform, the instructions for the RTTT grant competition, and the policy statement for the ESEA Flexibility Waivers.

Conclusions

The findings presented in this chapter seek to describe the state level reform trends in current education policy as they relate to the ESEA Waivers. These findings clearly demonstrate that the ESEA waivers have been widely embraced and adopted by 43 states and the District of Columbia, and two more states are awaiting approval. As a result of this vast use of the ESEA Waiver Flexibility package, the remaining findings relate to the policies developed and implemented by states in the last five years and their relationship to their ESEA Waiver applications. The first policy examined was the adoption of the Common Core State Standards, and the findings show that CCSS has been as widely adopted as the waivers themselves. In fact, 46 states and the District of Columbia have adopted the CCSS since 2010. However, the cataloging and analysis of the dates of the states both adopting and implementing CCSS provide evidence that the ESEA waivers did not motivate or spur the adoption of Common Core. As a result of this finding, I added an additional element to the analysis, the Race to the Top Grant Competition. An analysis of the dates of CCSS implementation, the timeline for RTTT, the application dates for RTTT, and the scoring schema for RTTT content standards reveal that there may be a correlation between the RTTT competition, and the widespread adoption of CCSS by the nation.

The remaining findings relate to assessment standards, specifically the use of student growth measures and the use of teacher evaluation systems to inform personnel decisions. In regards to student growth measures, this analysis shows that there is not variation in the

adoption of the use of student growth measures for teacher evaluations. In fact, all states and the District of Columbia use student growth measures as either a mandate or a strong recommendation for LEAs to implement in their teacher evaluation systems. No real variation exists in the adoption of student growth measures; the variation exists in the implementation. The analysis of state laws and policies indicate that there are four major ways in which states measure student growth: percentile models, value added models, student learning objectives, or they do not specify. The majority of states use either the percentile, or value added model. Specifications for the implementation of the student growth measures were not explicit in either the RTTT guidance documents, nor in the ESEA Waiver policy statements. The two programs only spoke to the adoption of the policy, and the states then implemented student growth measures as part of their evaluation systems. This analysis finds that about half of the states adopted student growth measures as a direct result of their ESEA Waiver, and three states' adoption of the policy can be directly linked to their RTTT application. For the remaining states, I did not find any direct correlation between the federal program and the adoption of policy, but the reforms did take place during the timeframe of 2011 to the present. This could be evidence that the federal programs spurred or incentivized the adoption of student growth measure, or it could be evidence of policy diffusion. This analysis is unable to yield evidence answering that specific question.

The findings related to using teacher evaluation systems to inform personnel decisions are similar to those regarding the use of student growth measures. The use of teacher evaluations for personnel decisions has been adopted by 39 states and the District of Columbia. While this appears to be the least popular of the three policies included here,

it still remains that a majority of the states have implemented the use of personnel decisions in some manner. Again, the variation between states appears in the implementation of teacher evaluation results, rather than the adoption itself. Each state uses the results of teacher evaluations in a variety of ways that may include decisions about dismissal, tenure, promotion, certification, and compensation. Additionally, this analysis demonstrates that there is direct evidence that at least 20 states adopted these policies as a condition to either their RTTT, or ESEA Waiver application. For the remaining states, all but one state made policy reforms within the timeframe that aligns with the federal programs examined here. Again, this does not suggest that RTTT or the waivers were the single motivator for the adoption of state policy reforms, these findings seek to track the relationship between the two and provide any evidence of possible correlation.

Overall, these findings provide the groundwork for conducting the second part of this analysis as presented in the following chapter. In order to conduct a content analysis regarding the cooperative or coercive nature of the ESEA waivers, I had to first catalog and analyze the adoption of policies across states as they relate to the ESEA Waiver application process and timeframe. The guiding finding from this portion of the analysis is that in at least some instances, it was impossible for ESEA waivers to coerce states because the states had already adopted policies such as the Common Core, prior to the announcement of the waivers. Additionally, due to the variation in states' adoption timeframes and the implementation of these policies, it may be possible that ESEA waivers are coercive for some states, but cooperative for others. This idea will be incorporated in the following chapter concerning the cooperative or coercive nature of the ESEA waivers.

CHAPTER 5: RESULTS OF FEDERALISM ANALYSIS

The first set of research questions for this analysis was what role, if any, has federalism played in the issuance of ESEA Waivers? And if federalism did play a role, then what type, coercive or cooperative, was exercised as a result of the ESEA conditional waivers? For this investigation, I analyzed ESEA state applications, communications between the United States Department of Education and state governments, policy statements from the United States Department of Education, memos and statements from state education officials, and other reports as found relevant throughout the data collection process. Throughout the open coding process, categories and themes emerged that I then organized and examined the findings presented here. Using the themes developed during the coding process, three major findings emerged from the data and the analytical process. This chapter will present each of the three findings and the data related to each.

Finding 1: Cooperativeness/Coerciveness Is Not Consistent Across ESEA Imposed Policies

The ESEA waivers presented the opportunity for the states to develop a number of policies, three of which have been discussed in detail in the previous chapter. The three policies examined as part of this analysis was the adoption of CCSS, the use of student growth measures, and the use of teacher evaluation systems to inform personnel decisions. This portion of the analysis revealed that the level of cooperativeness or coerciveness imposed by the ESEA waivers varied across policies. In the case of the

implementation of Common Core, states were not coerced by the ESEA waivers to adopt this policy.

Theme: Policy Adoption Prior to ESEA Waivers

The majority of states that have adopted CCSS did so either independently, or through the RTTT application process. While some critics argue that RTTT coerced the adoption of CCSS, that argument was not the focus of this analysis. The following data points support the finding that ESEA Waivers did not coerce the adoption of CCSS:

46 states and the District of Columbia adopted CCSS prior to the availability of the waivers. Three states, Alaska, Texas, and Virginia, did not adopt CCSS but still received an ESEA Waiver.

Theme: Acceptance of Standards other than CCSS

The applications of these three states and the correspondence between the state and the USDOE, demonstrates the willingness of the federal administration to accept content standards that were considered “college-and-career-ready,” but were not specifically CCSS. For principle 1A. “Adopt College-and Career-Ready Standards” the state of Virginia (VA) opted for Option B:

The State has adopted college-and-career standards in at least reading/language arts and mathematics that have been approved and certified by a State network of institutions of higher education (IHEs), consistent with part (2) of the definition of college-and career-ready standards.

In the attachment required to provide proof of rigorous standards and adoptions, VA described their standards as a College and Career Readiness Initiative (CCRI) that:

The Board authorized the VDOE to conduct students to determine factors contributing to success in postsecondary education. As part of that effort, the Department requested ACT, The College Board, and Achieve American Diploma Project (ADP), to conduct students comparing their respective standards for postsecondary readiness to the Standards of Learning in mathematics and English.

The College Board, ACT, and Achieve found that Virginia's Mathematics and English Standards of Learning showed strong alignment with their respective postsecondary readiness standards and likely prepared students for college and career success. (Virginia ESEA Flexibility Waiver 2012; Attachment 4)

After submitting the application, the USDOE responded to the application with Peer Review Feedback. The letter dated, April 17, 2012 states:

The peers noted, and we agree, that Virginia's request describes a particularly strong development infrastructure used to enhance the quality of the State's standards and improve student achievement.

Additionally, the letter provides specific feedback, by principle, for areas of improvement.

In addressing principle 1, the peer reviewers made recommendations to provide more details i.e.: the use of the standards with English Language Learners and students with disabilities, but did not provide any recommendations for strengthening or amending the content standards themselves. The lack of comment or recommendation, suggests approval by the peer review board. Ultimately, the request was approved on June 29, 2012. Alaska (AK) also chose Option B for their content standards and submitted documentation stating that the:

State Board of Education of Early Development adopt the revised Alaska/Language Arts and Mathematics Standards. (Alaska ESEA Waiver Application 2012, Attachment 4).

AK further described the standards:

The Alaska Department of Education and Early Development (EED) worked with stakeholders to develop the state's new college-and career-ready English/language arts and mathematic standards in grades kindergarten through 12. The stakeholders used the Common Core State Standards as the lens through which to examine Alaska's previous standards and revise them. This work was conducted over 18 months and included a study by the Council of Chief State School Officers (CCSSO) of the alignment of Alaska's college-and career ready standards with CCSS (AK ESEA Waiver Application 2012, pg. 26).

While the standards were compared to CCSS, official adoption of CCSS was not required for the approval of the waiver. Again, USDOE responded in a letter dated November 8, 2012 to the application by stating that:

The peers noted, and the Department's ESEA flexibility team agrees, that Alaska's request was strong regarding the adoption of college-and career-ready standards and most aspects of the plan to transition to these standards.

Additionally, there was no feedback given regarding a necessary adjustment or amendment to the actual Alaska Language Arts and Mathematics Standards themselves, and the application for the waiver was granted May 20, 2013. As the case with VA and AK, Texas (TX) also received positive feedback from the USDOE concerning their alternative college-and career-ready standards. In a feedback letter dated May 20, 2013, USDOE stated:

The peers noted, and the Department's ESEA flexibility team agrees, that Texas's request was particularly strong in describing the development and implementation of Texas's college- and career-ready standards and the implementation of transition activities to support English Learners in successfully achieving those standards.

TX was not required or recommended to adjust their content standards and received a waiver approval on September 30, 2013.

This data provides evidence that the adoption of college-and career-ready standards was cooperative in nature, because many states had adopted standards that met the requirements prior to the application for ESEA flexibility. Additionally, the cooperative nature of the ESEA waivers is illustrated by the fact that states which chose to adopt standards other than CCSS, the standard championed by the federal administration, were still praised for their efforts in adopting adequate content standards and ultimately approved for the ESEA waiver without modification to such content standards.

However, the data reveals that the level of cooperation and/or coercion differs for other policies, specifically the policy requiring states to use teacher evaluations to inform personnel decisions. As part of principle 3, Supporting Effective Instruction and Leadership, states were required to “commit, adopt, pilot, and implement with the involvement of teachers and principals, teacher and principal evaluation and support systems that: ... (6) will be used to inform personnel decisions (ESEA Policy Statement 2012, pg. 3).”

Theme: Policy adoption Prior to ESEA Waivers

Unlike the adoption of college-and-career-ready standards, there was not widespread use of teacher evaluations for the personnel decisions prior to the ESEA Waivers. To date, 38 states and the District of Columbia have agreed to incorporate the use of teacher evaluations in personnel decisions in some manner. However, only 11 states adopted this policy prior to the ESEA Waivers, and the majority of those states, nine, did so as a direct result of their RTTT application. Of the other 28 states, 11 incorporated this change as a result of their ESEA Waiver application. The other 17 states adopted this policy after the announcement of the ESEA Waiver applications. As stated, some states adopted this policy in direct relationship to their ESEA waiver, this finding is explained through the analysis of their ESEA Waiver application and the state statutes regarding the use of teacher evaluations. It is possible that other states may have adopted this policy as result of other motivating factors. Oregon is an example of a state in which adoption of the policy is directly linked to their waiver application. As part of principle 3 of Oregon’s waiver application, they choose Option A which states:

If the SEA has not already developed and adopted all of the guidelines consistent with Principle 3, provide:

The SEA's plan to develop and adopt guidelines for local teacher and principal evaluation and support systems by the end of the 2011-2012 school year; (ESEA Policy Statement 2012)

In the explanation of OR's plan for implementation and addressing the use of teacher evaluations for personnel decisions, the application included:

Senate Bill 290 and OAR 581-022-1723: Adopt teaching and administrator standards to improve student academic growth and achievement by assisting school districts in determining the effectiveness of teachers and administrators and in making human resource decisions.

Proposed State Guidelines: school districts must describe in policy how their education evaluation and support system is used to inform personnel decisions (e.g. contract status, contract renewals, plans of assistance, placement, assignment, career advancement, etc.) (OR ESEA Waiver application 2012, pg. 116).

The stated statutes and senate bill were ultimately adopted by the OR state legislature in 2011 as part of their plan to receive their ESEA Waiver. This was the case for a majority of the states that had not already adopted the use of teacher evaluations for personnel decisions during the RTTT application process. This data alone does not suggest that the states were coerced beyond the permissible limits to adopt this policy, but rather to provide evidence that the ESEA Waivers were at a minimum the spurring cause of widespread adoption.

Theme: Contention regarding policy specifics

In several instances, there was contention between the state and the USDOE about the adoption of the use of teacher evaluation systems for personnel decisions. Alabama (AL) was one state that has had continuing issues with the federal government accepting their plan for the use of teacher evaluation systems. In AL's original submission for a waiver, they addressed this portion of principle 3 by stating "This measure [teacher

evaluation] could be used to inform a professional learning plan (AL ESEA Waiver Application 2012, pg. 71). The USDOE first responded to the initial submission in a letter dated November 8, 2012 stating that:

At the same time, based on the peer reviewers' comments and our review of the materials Alabama has provided to date, we have identified certain components of your request that need further clarification, additional development, or revision. In particular, concerns were identified with respect to the following:...Development and implementation of teacher and principal support and evaluation guidelines consistent with the requirements of ESEA flexibility.

AL amended their request without providing specifics for the use of teacher evaluations for personnel decisions and did receive conditional approval. The response only included the specific terms that they must adopt, and mandated that they implement a system that used teacher evaluations that were used to inform personnel decisions. This was made clear by the peer review feedback specifically stating that this must be included in their amended application for principle 3, and then in their conditional approval letter from Secretary Arne Duncan stating:

Our decision to approve Alabama's request for ESEA flexibility, subject to Alabama's meeting the conditions discussed below, is based on our determination that the request meets the four principles articulated in the Department's September 23, 2011, document titled ESEA Flexibility. In particular, Alabama has: ...(3) committed to developing, adopting, piloting, and implementing teacher and principal evaluation and support systems that support student achievement and inform personnel decisions.

The state was put on notice via this letter that they had until June 30, 2014 to meet these provisions, or they would have to file for an extension because the waiver would not be granted without conditions until all issues were addressed. As of December 22, 2014 the state of Alabama received a "principle 3 status letter" from USDOE stating that:

Based on the review of Alabama's guidelines and taking into account the feedback from the expert peers, I have determined that Alabama has not yet adopted guidelines for teacher and principal evaluation and support systems that meet all requirements of ESEA flexibility, nor does it have a process for ensuring that each district in Alabama develops, adopts, pilots, and implements teacher and principal evaluation and support systems consistent with those guidelines as required by ESEA flexibility.

Within the enumerated list of items required to receive approval, was a call for the state to:

Please address concerns regarding the guidelines for teacher and principal evaluation and support systems: ...Provide additional information about how evaluation results and feedback from the evaluation process will inform personnel decisions. See 3.A.ii.f.

For the states that have yet to adopt the use of teacher evaluations for personnel decisions, they have each received a conditional waiver and the USDOE has been explicit in the necessity for the state to detail a system and a plan to use the evaluations for more than just professional development or planning. This is evidence of contention between the state and the USDOE. However, this finding alone does not confirm that the USDOE is operating beyond the permissible limits of coercion, because they are in fact still approving waivers for state, suggesting that there is room for negotiation with the department. This finding is illustrative of the federal push of a specific policy prescription against the will of the state, and the level of federal policy prescription is one of the measures of cooperative or coercive federalism.

Finding 2: The ESEA Waivers Can Be An Exercise Of Cooperative Federalism

The lack of consistency across the level of cooperativeness or coerciveness in policy areas also exists across states. The waivers are a federal initiative made available to all states, and therefore often characterized as a national program. However, this analysis shows states have a separate and unique experience/relationship with USDOE throughout the ESEA Waiver Flexibility application process. The variation in process

results in the opportunity for the ESEA Waivers to exhibit elements of both cooperative and coercive federalism. This section will present the evidence for the finding that the ESEA waivers can be an exercise of cooperative federalism.

Theme: Negotiation between states and the federal government does occur

One of the elements of cooperative federalism is the state level government's ability to negotiate with the federal government in terms of policy prescription and implementation (Zimmerman 2001; May & Burby 1996). This data analysis provides evidence that negotiation did occur, and continues to occur between some states and the federal government throughout the ESEA Waiver process. There are five states, Maine (ME), Pennsylvania (PA) and Illinois (IL) (who have approved waivers) and Iowa (IA) and Wyoming (WY) (who are still in negotiations for approval) where there is evidence of negotiation.

Maine: In the case of ME the USDOE identified three areas that needed further development. Those areas were addressed in a USDOE letter dated November 8, 2012 stating:

based on the peer reviewers' comments and our review of the materials Maine has provided to date, we have identified certain components of your request that need further clarification, additional development, or revision. In particular, concerns were identified with respect to the following: lack of information regarding targeted and differentiated interventions in priority and focus schools, or any schools failing to meet targets and make progress; weak graduation rate accountability; and lack of accountability for subgroups, particularly English Learners, students with disabilities, and low-achieving students, across the request, including lack of detail regarding transition to college- and career-ready standards for teachers of English Learners and students with disabilities.

Maine and the USDOE negotiated the terms of the waiver for nearly 11 months before the approval. Some of the examples of adjustments made were the raising of the graduation rate to 90% at each Title I school in the state over the next six years, when the original

target was set at 80%, and allowing the state to pilot the program in the 2014-2015 school year with full implementation the following year (ME ESEA Waiver Application Redline version 2013). While the USDOE did state that “Maine DOE should increase graduate rate accountability” (ME Peer Panel Notes 2012) the federal administration allowed ME to make an incremental change in the policy, not specified by USDOE, and still granted approval for the state.

Pennsylvania: In the case of PA, an ongoing condition that required negotiation and adjustment to the teacher and principal evaluation system was the use of student growth data to differentiate between teachers’ level of effectiveness. The original application for PA read

Teacher Specific Data (classroom teachers in tested areas only) Reporting at the teacher specific level from the Pennsylvania Value-Added Assessment System (PVAAS) will comprise 15% of the overall Educator Effectiveness system in Pennsylvania. PVAAS teacher-specific reporting estimates the effect of a teacher’s performance on the academic progress of a group of students. The reports are based on the Education Value-Added Assessment System (EVAAS) methodology provided to Pennsylvania (PA) by SAS EVAAS (PA ESEA Waiver Application 2012, pg. 102).

This version of the application was met with peer review feedback stating that

While 30 percent of the educator’s evaluation is based on value-added data, only 15 percent is based on teacher-specific data. Please explain how the evaluation system will accurately differentiate teacher performance and prevent obscuring the performance of great teachers in lower performing schools and less effective teachers in great schools. See 3.A.ii.b. (USDOE Letter dated May 15, 2013).

PA responded to this feedback by amending their application and including an attachment stating

The Department has contracted SAS Inc. to make available PVAAS for schools to use as the rating tool in the evaluation for the teacher effectiveness tool. SAS has been working in three other states and has been in business since 1996. PVAAS is not a test, but a growth tool to separate achievement from the progress of the

individual student. Building and schools will be assessed, but not individual grades levels. Teacher effectiveness rating will not occur until a teacher has three years of a rolling average in academic growth (PVAAS). This data will be used as part of the teacher's summative evaluation. TLEA's are responsible to make sure the right teacher will need to be linked to the right students and the right course for the right proportion of time. Certified educators who are assigned full or partial responsibility for a student's learning in a particular subject/grade/course are assigned as the teacher of record for PVAAS reporting. Intervention specialists, literacy coaches, gifted teachers, and special education teachers who also meet the criteria below are also included in the PVAAS growth model. (PA ESEA Flexibility Request Attachments 2013, pg. 19).

Following this amendment, a conditional approval was granted to PA to allow time for the state to collect data in an effort to develop a system that was best for the SEA and LEAs, and similarly met the requirements of the ESEA waivers (PA Public Comment 2013). The waiver approval stated that it was contingent on PA continuing efforts to provide

Data demonstrating that Pennsylvania's teacher evaluation system differentiates teachers who make significantly different contributions to student growth...[and] provide the final regulations it adopts for the its principal evaluation system and evidence that those regulations include student growth data as a significant factor in determining performance levels for principals (Letter from the Secretary 2013).

This type of negotiation, the give and take between states and the federal administration, is an indicator of cooperative federalism. This negotiation is done in an effort to develop and implement the most beneficial educational policies with the guidance of the federal government and opinions of state level governments. In some cases, the federal government has negotiated with states in excess of 11 months in an effort to come to a cooperative agreement that both meets the requirements of ESEA flexibility waivers while allowing the state to develop plans that best fit their state education system's needs.

Theme: Federal government adjusts to state feedback

Another characteristic of cooperative federalism is the government's willingness to adjust to the needs of the state on implementation and development of prescribed policies.

One of the criticisms of the ESEA waivers was the quick timeline for implementation required for approval of a waiver. In some cases, states had to propose a large number of reforms with a plan to develop, pilot, and implement in the school year immediately following approval. There were widespread complaints from state departments of education, administrators, and teachers. Mississippi expressed concerns about the double testing occurring because of the field testing of new assessments. The state was similarly concerned about how the double testing could impact students with significant cognitive disability. The state wished to reduce “the time taking statewide assessments and/or field tests to allow more time for classroom instruction (MS public comment 2013),” for the students who it impacted the most. Fifteen states requested an extension to give students fewer tests and nine states expressed the need for an extension for the use of teacher evaluations for personnel decisions. USDOE responded to the needs of the states in a letter on June 18, 2013 stating

In recent months, we have heard from many of you and from thousands of teachers, principals, and education advocates. While there is a broad sense that these far-reaching changes carry enormous promise for schools, children, and the future of our country, there is caution that too much change all at once could undermine our collective progress... With that in mind, the Department is open to additional flexibility for states in two critical areas: the first relates to one particular element of teacher and leader evaluation and support system implementation, and the second addresses "double-testing" during the transition to new assessments aligned with college- and career-ready standards.

This letter announced states would have the opportunity to apply for an extension for the use of teacher of evaluations for personnel decisions until the 2016-2017 school year. USDOE also agreed to allow states participating in field tests to administer only one assessment in the 2013-2014 school year. The original deadline for the extension of September 30, 2013 was subsequently extended to October 31, 2013, and ultimately to

November 22, 2013. This adjustment was in direct response to the feedback given from SEAs and LEAs and the desire of the federal government to provide “assistance” in the form of additional time for the implementation of school reforms.

Theme: Policy Adoption prior to ESEA Waivers

Finding 1 demonstrated that the level of cooperativeness and/or coerciveness is not consistent across policy areas. As evidenced by the previous two themes for finding number 2, each state has had a unique process for applying and obtaining a federal waiver. This indicates that they may have experienced varying levels of cooperation or coercion depending on the individual circumstances of each state. This section identifies the states that had a cooperative relationship with the federal government during the waiver application process because of prior adoption of policies that were in alignment with ESEA waiver packages.

There is a subset of states that had previously adopted policies in line with the ESEA flexibility waiver requirements; Each of those states is identified below:

TABLE 19: States with prior adoption of ESEA waiver policies

Colorado	Connecticut
Florida	Delaware
Georgia	Louisiana
Kentucky	Maryland
Massachusetts	New York
Minnesota	North Carolina
New Jersey	Ohio
Oklahoma	Rhode Island
Tennessee	

These states had policies in place prior to the ESEA waiver process because they were applicants and recipients of the Race to the Top Grants. As discussed in the previous

chapter, RTTT and the ESEA Waiver applications both reflected the goals and objectives initially articulated in the federal government's Blueprint for Reform. These states were granted an ESEA waiver by either February 29, 2012 or May 19, 2012, the first two waves of approval, because they only required minor adjustments or amendments of their application. For example, in 2010 Tennessee passed Senate Bill 5, "Tennessee First to the Top Act of 2010." This legislation required "evaluation outcomes be used for personnel decisions that may include recruitment, promotion, compensation and dismissal (TN-SB 5, section 13)" and mandated the use of student growth measures in section 10(d)(2)(a)(i); Tennessee had also adopted the CCSS by July of 2010. In fact, all states listed in the table had adopted policies consistent with the ESEA waiver requirements or had submitted plans to develop and implement such plans prior to applying for ESEA Waivers. The adoption of policies prior to the waiver process indicates that while the states may have been incentivized by the ESEA waivers to continue with the adoption of such policies, they were not coerced by the ESEA waivers, themselves, to adopt and implement such policies.

The evidence presented throughout this section demonstrates that the ESEA waivers, in practice, can be an exercise of cooperative federalism because of the exercise of negotiation with the states, the willingness of the federal government to adjust to the needs of the state, and preemptive adoption of policy packages meeting the requirements of the ESEA waiver prior to the availability of the waivers. While each of the discussed themes suggest that the waivers are a cooperative policy, this finding only determines that the ESEA waivers have characteristics of cooperative federalism and that for some states the waivers have functioned as an exercise of cooperative federalism. As noted in the literature review, coercive policies often have characteristics of cooperative policies

(Kincaid 1990). Finding 2 alone does not define the waivers' relationship with all of the states. The third and final finding of the policy analysis discussed in the next section is that the ESEA waivers can also be an exercise of coercive federalism.

Finding 3: The ESEA Waivers Can Be an Exercise of Coercive Federalism

The two types of federalism discussed in the literature review are cooperative and coercive federalism, the latter being described as exceeding beyond the limits of the federal government and constitutional role when it pertains to education policy. Through my analysis of the waivers and the communications between state governments and the federal governments, I found evidence that the ESEA waivers can be an exercise of coercive federalism, or at a minimum, an attempt at coercion. Some of the characteristics of a coercive policy are a lack of negotiation between the state or local governments and the federal government, and a focus on sanctioned based monitoring by the federal government rather than assistance with implementation and development of policies.

Theme: Inability of states to negotiate

There are three specific instances where there was a lack of negotiation between the federal and state governments despite the states' desire to receive an ESEA waiver. There were two states, Vermont and North Dakota who originally applied for a waiver and then withdrew from the waiver process because of the lack of flexibility in policy prescription. California applied for a waiver and was ultimately denied as a result of the same inflexibility.

Vermont: Vermont (VT) initially expressed a desire to receive an ESEA waiver. The Board of Education issued a statement to the public, and to possible stakeholders, describing the ESEA waiver as "an opportunity to bring meaningful education goals and

objectives together.” The statement even discussed the waivers as an opportunity to address the deficiencies of NCLB by stating that “IDEA and NCLB highlighted some of the areas where we need to focus attention, but both are overly prescriptive and do not offer solutions (VT ESEA Flexibility Waiver Request Frequently Asked Questions December 30, 2011).” The commissioner of Education, Armando Vilaseca used vivid language in support of the waiver

Vermont and the rest of the country have been given a wonderful opportunity to shed the flawed aspect of the No Child Left Behind Act (NCLB) and refocus our efforts on the true success for all students... . Requesting this waiver is truly an opportunity for Vermont to propose our desire system of accountability (October 25, 2011).

The state of Vermont submitted application for a waiver February of 2012. Following the feedback for USDOE the VT Department of Education revisited the application and attempted to amend the application to fulfill the requirements of the waiver package. In February of 2012 the Deputy commissioner, John Fischer, reported during a board meeting that he had returned from Dallas for peer review of the waiver applications and that “annual testing/lack of is a non-negotiable; the Secretary is not allowing it as part of the waiver” (Vermont State Board of Education Meeting on February 21, 2012: Approved Minutes). This statement was reiterated in March of 2012 when Fischer gave a report on the amended application and the interactions between the state and the USDOE. Fischer stated it had become clear that the “annual assessments/testing are non-negotiable” (Vermont State Board of Education Meeting on 03-20-2012: Approved Minutes). Following these statements, Vermont received USDOE feedback on April 17, 2012. USDOE replied

Significant concerns were identified with respect to the following: 1) the level of detail provided on Vermont’s plan to transition to college-and career-ready standards; 2) the lack of detail regarding Vermont’s proposed accountability system; and 3) the implementation of interventions for priority, focus and other

Title I schools and exit criteria from priority and focus schools that ensure significant progress in improving student achievement and, for focus schools narrowing achievement gaps.

In reaction to this feedback, the Board began a discussion on withdrawing the ESEA application because of the inability to come to agreeable terms on assessments (Vermont State Board of Education Meeting on 4/17/12: Approved Minutes). The VT board of education again revisited the waiver application in May of 2012

Vermont DOE would need to do significantly more work on the ESEA waiver in order to have an approvable application. Vermont's waiver would no longer be the one that was agreed upon by stakeholder's months ago when first submitted. Commissioner Vilaseca recommended that the DOE not continue with the waiver application at this time. He would like to leave it open at the federal level, if there is actual flexibility in the future, that Vermont could apply at a future time. (Vermont State Board of Education Meeting on May 15, 2012).

Vermont withdrew from the application process and later elaborated on the details as to why the state withdrew and decided to not reapply. In a statement to parents, the Vermont Security of Education stated in boldface type, "the Vermont agency of Education does not agree with this federal policy." The secretary went on to discuss why the state did not agree with the policy as it specifically relates to Vermont schools.

This policy does not serve the interest of Vermont schools, nor does it advance our economic or social well-being... We chose not to agree to a waiver for a lot of reasons, including that the research we have read on evaluating teachers based on test scores suggests these methods are unreliable in classes with 15 or fewer students, and this represents about 40-50% of our classes. It would be unfair to our students to automatically fire their educators based on technically inadequate tools. This statement revealed an important piece of information in regards to the presence of coercion by the federal government. Vermont did not solely oppose the use of assessments because of an ideological difference with the federal government, but rather because it was not a policy best suited for the unique classroom characteristics of Vermont. Due to USDOE's stance of "non-negotiable" terms, the state was unable to tailor a policy that was

most advantageous for the explicit circumstances of Vermont's classrooms; this is a classic example of federal coercion.

North Dakota echoed Vermont's sentiments with their decision to withdraw their application. In March of 2013, Superintendent Baesler cited the reasons for the decision

The idea of developing a state determined plan was very inviting. [However] the further we progressed through the waiver process the more we felt we were being asked to adopt another national, one-size-fits-all model. We discovered there is very little flexibility for us in the ESEA Waiver. Schools and teachers would actually see very little relief (North Dakota Department of Public Instruction Press Release March 4, 2013).

Baesler continued to elaborate on the inflexibility of the waiver

Although the waiver offered the promise of temporary relief of the unattainable requirements of No child Left Behind, [but] it created incredible uncertainty over what final form of standards would be expected either by the U.S. Department of Education or by Congress in some future ESEA reauthorization. We have students to educate; we don't have time to wait for the federal government to determine our fate-and ultimately the fate of our children.

In both VT and ND, the state education leaders felt as though there was an inability to negotiate with the U.S. Department of Education. Coercion exists when states are removed from the policy development process and when states are not able to negotiate policies that are best for the unique characteristics of the SEA and LEAs. The application, feedback, and ultimately the withdrawal process of the Vermont and North Dakota waiver applications provide evidence of this coercive characteristic of the ESEA waivers.

California's ESEA waiver denial demonstrates a third instance of lack of negotiation. California submitted a waiver application in June of 2012. The waiver application was ultimately denied by Secretary Duncan and the state of California, to date, does not have a waiver. As a supplement to the application, a letter indicated the State of California's commitment to further implementing their adoption of the Common Core and

continuing development of their state accountability system as prescribed by the enacted law. Furthermore, California state officials expressed that “following an extensive analysis of the current law and potential costs, benefits, and consequences of seeking such a waiver, we determined that California could not meet the waiver conditions within the required timeline or in the current California fiscal and policy environment (CA Dept of Ed. Letter Dated December 21, 2012). Despite this obstacle, California still submitted an application with a timeline to implement policies that the state believed was feasible within the state policies budget. The Secretary of Education responded to the application in January of 2013

I believe that a State must [emphasis added] agree and be prepared to take on the rigorous reforms required by all [emphasis added] of the principles of ESEA flexibility in exchange for that waiver. Because California’s requirements did not indicate that California intended to meet that high bar, I am declining to exercise my authority to approve your waiver request.

Education Week characterized the exchange by USDOE as “It’s quite simple, really: you didn’t follow all of our rules.”²² Despite California’s case that the reforms required by the waiver were not feasible under state law nor in the face of the state budget, USDOE refused to negotiate the terms of the waiver and ultimately denied the state²³ application for flexibility.

For each of these three states, the inability to negotiate with the federal department resulted in the state facing the penalties of not meeting the standards of No Child Left Behind that have been uniformly denounced as unrealistic by researchers, school administrators, state governments and the federal government. As a penalty, the states

²² http://blogs.edweek.org/edweek/campaign-k-12/2013/01/california_gets_official_nclb_.html

²³ Arne Duncan, allowed eight districts in California, named the California Office to Reform Education (CORE), to apply for and receive a waiver. After receiving the waivers, the districts have been criticized for inability to meet some of the key requirements of the waiver. For more, http://blogs.edweek.org/edweek/District_Dossier/2014/05/californias_core_districts_fal.html.

have restricted use their Title I funding, further limiting their ability to best meet the needs of their local and state communities.

Theme: Sanction based Mandatory Review

One characteristic of coerciveness is the federal government's dictation of a mandatory review process that can attach sanctions to the states for failure to comply or meet deadlines (May & Burby 1996; Zimmerman 2001). On its face, the only possible sanction for a failure to comply with the terms of the waiver is to lose the waiver. By losing the waiver, the state then becomes vulnerable to the sanctions imposed by the 2001 version of NCLB, restricting the use of Title I funds. This sanction requires states to use the Title I funds for tutoring services as described by NCLB rather than allowing the states to make decisions regarding the most effective and impactful way to utilize Title I funds in the districts. There is one clear-cut instance of USDOE using their monitoring tool to impose sanctions on a state, rather than assisting with implementation and development.

Washington (WA): on March 27, 2014 WA state submitted a request for a one-year extension on their ESEA flexibility waiver. The need for the extension was prompted by implementation of the teacher evaluation system in the 2013-2014 school year, and using "student growth" measures as defined by USDOE. WA had developed an evaluation system which included student growth measures, but USDOE concluded that "Washington's interpretation of including student growth as a significant factor in educator evaluation system is inconsistent with the ESEA Flexibility definition of "student growth" (USDOE Letter date August 14, 2013). The state of Washington had previously committed to seeking a legislative change in order to meet the USDOE's definition of "student

growth” in their July 19th letter. Despite the process of the state to seek such legislative change, Secretary Duncan issued a letter revoking the state’s waiver

I recognize that to require the use of statewide assessments to measure student growth requires a legislative change, and that Governor Inslee and your office worked diligently to obtain the change.... However, because those efforts were unsuccessful, and your legislature is not scheduled to reconvene until January 2015, I cannot extend Washington’s authority to implement ESEA flexibility.

The letter continues on to state that Washington would, from that point forward, be required to continue under the authority of NCLB. Enclosed with the letter was a statement describing the revocation of all 18 terms of the waiver that Washington had originally been granted. In this instance, the state was actively working towards implementing the requirements of the ESEA waiver. State officials had incorporated student growth into their evaluation system and had committed to seeking a legislative change to define student growth in the specific terms as prescribed by USDOE. Despite efforts by the state, USDOE revoked all waivers granted in the original waiver. This revocation demonstrates evidence of a monitoring program focused on sanctions when states did not meet the exact policy descriptions as decided by the federal government, rather than providing assistance for implementation and development.

This analysis provides three major findings as they relate to the cooperative or coercive nature of the waivers. The first finding is that cooperativeness and/or coerciveness is not consistent across ESEA imposed policies. In the case of the CCSS, the majority of states had adopted the standards prior to the ESEA flexibility waivers, and therefore were not coerced by the need for waiver approval. Additionally, VA, AK, and TX were all able to receive an ESEA waiver with standards that differed from the CCSS. In contrast to this, AL was not able to receive approval for a policy that did not incorporate

teacher evaluation systems into personnel decisions; USDOE required and/or coerced the state to comply with this policy to receive waiver approval. The second major finding is that ESEA Waivers can be an exercise of cooperative federalism. This was evidenced by states being able to negotiate terms with USDOE how PA negotiated the terms of the use of student growth measures throughout the ESEA waiver process. Another example of cooperation was the adjustment of policies to the feedback of the states, such as MS's concern about double testing students because of ESEA waiver requirements. The final finding is that the ESEA Waivers can also be an exercise of coercive federalism. The inability of states to negotiate is demonstrated by VT's inability to obtain a waiver despite evidence that the policy required by the waiver was not beneficial to the students or teachers in VT. Also, the focus of sanctions based reviews, such as the case of WA loss of waiver, is further evidence of coercion by the federal government. I will discuss these findings and those found in the previous chapter in the final chapter. The final chapter will combine all the findings; interpret them, address policy implications, and the motivating questions of this dissertation. In addition to the findings of the federalism analysis, the legal discussion of coercion found in the following chapter will be included in the final conclusions.

CHAPTER 6: LEGAL ANALYSIS OF ESEA WAIVERS

Coercion is not only a concept applicable in the field of public policy analysis, but also a legal concept that has been defined and refined by the U.S. Supreme Court. This chapter will build on the case law precedent presented in the literature review concerning the constitutional limits of coercion and federal conditional spending. Specifically, this analysis will focus on the application of the holding of *NFIB v. Sebelius* (132 S. Ct. 2566 (2012)), to the ESEA waivers. The legal analysis presented here is an independent and separate analysis from the previous policy analysis. This chapter seeks to address the second set of research questions; Are the ESEA Waivers, as a tool of conditional spending, within the constitutional limits of federalism? And do the waivers rise to the legal standard of coercion as decided by case law precedent?

The Spending Clause And The Coercion Analysis

The case law precedent presented in the literature review provides the judicial background leading up to *Sebelius*. As a brief review, the Court used the previous decisions from *United States v. Butler* (1936) and *Pennhurst State School & Hospital v. Halderman* (1981) to define the limits on Congress of conditional spending. Subsequently, the US Supreme Court explicitly set guidelines for a coercion analysis for conditional spending in *South Dakota v. Dole* (1987). The *Dole* decision set five limitations to Congress' spending power, "(1) The expenditure of federal funds must be in pursuit of the general welfare; (2) The conditions placed on federal funds must be unambiguous such that states can exercise

consequences of participation; (3) the federal grant of funds must be related to the federal interest in particular national projects or programs; (4) The grant of federal funds must not otherwise be unconstitutional or prohibited by an “independent constitutional bar (Dole 1987, pg. 206-208).” The fifth condition of Dole was that “Congress cannot use financial inducement and the conditions accompanying the funds to exert so much coercive pressure that it turns into ‘compulsion’ (Dole 1987, pg. 208). This decision set the parameters for federal courts and the application of a modern coercion analysis for conditional spending. While these cases are the most relevant to this analysis, the constitutionality of conditional spending has been addressed by federal courts, in other cases, as it relates to education funding.

Conditional Spending And Education

While most of the case law precedent that guides the analysis of conditional spending is not related to education funding, the federal courts have dealt with conditional spending in the past. In 2006 the Supreme Court applied the conditional spending doctrine in *Arlington Central School District Board of Education v. Murphy* (548 U.S. 291 (2006)). In *Murphy*, the issue was the recovery of consultation fees as allowed under the Individuals with Disabilities Education Act (IDEA). The act allowed for the district court to “award reasonable attorney’s fees as part of the costs” to the parents winning a claim under the statute. The issue before the court was whether the statute allowed for the shifting of payments from attorneys to experts. In this case, the court applied the *Pennhurst* requirement that any funding conditions must be imposed by Congress unambiguously. Justice Alito further explained that when evaluating a condition and whether it was or wasn’t expressed unambiguously, the court must reference the state officer who decides

whether to accept the conditional federal funds. In other words, the courts could not use congressional legislative history as part of the analysis of spending conditions.

Following this decision, the Sixth Circuit Court addressed a NCLB conditional spending issue in *School District of Pontiac v. Secretary of the United States Department of Education* (584 F.3d 253 (6th Cir. 2009)). The school district and local education associations claimed that the unfunded mandates provision did not require them to comply with NCLB requirements when federal funds were not provided to cover the costs associated with compliance. The Sixth Circuit found that the provision failed the Pennhurst test because “the only thing clear about §7907(a) is that it is unclear (*Pontiac* 2009, pg. 277).” This decision and the *Murphy* decision both strengthened the “unambiguously expressed” requirement of federal conditional spending that was articulated in *Pennhurst* and adopted by the *Dole* Court.

More applicable to this analysis than the previous two cases, is the Fourth Circuit ruling in *Virginia Department of Education v. Riley* (106 F.3d 559 (4th Cir. 1997)). The basis for this case was the IDEA provision that requires states to provide a “free appropriate public education”²⁴ to all children with disabilities, including those suspended or expelled from school. In contrast to this provision, Virginia, an IDEA-funds recipient, had a policy of withholding free educational services from disabled students who had been expelled for behavior unrelated to their disabilities. In response to this policy, the USDOE threatened to sanction VA by withholding \$60 million in IDEA funds for two years. Virginia refused to change the policy and a case was filed.

²⁴ Sec. 5, § 612, 89 Stat. at 780 (current version at 20 U.S.C. § 1412(a)(1) (2012)).

While the court narrowly decided that the provision's language did not create a condition, the court did comment on the fact that if it were a provision, withholding a total of \$60 million would be beyond the scope of "relatively mild encouragement" as permitted in the Dole case. Additionally, in the dissent, Chief Justice Roberts noted the large amount of funding at stake. He rejected the idea of the percentage-based argument that the IDEA funding was only five percent of Virginia's spending to educate students with disabilities, and instead focused on the absolute amount of funding as compared to the small number of students who are affected by the provision being litigated.

While none of the three cases provide a precise formula in deciding the constitutional limits of conditional spending, they do add to the opinion that courts are becoming more skeptical about federal conditional spending. Additionally, these three cases affirm the strength in which the Court is willing to enforce the Pennhurst requirement, and provide an additional analysis for the amount of spending that may be sufficient to cross the line of coercion. The totality of these three cases combined with the Butler, Pennhurst, and Dole decisions, provide the basis for an analysis in the most recent case addressing conditional spending, *Sebelius*. The *Sebelius* decision is discussed in the next section in an effort to better understand how a modern coercion analysis could be applied to the ESEA Waivers.

Dissecting *Sebelius*

Sebelius gained tremendous attention because of the political tensions that surrounded the Affordable Care Act. Before ACA, the Medicaid program offered conditional funding to states that allowed the state to cover unemployed parents making

less than 37% of the poverty line, and employed parents making less than 63%.²⁵ After the passage of ACA, beginning in 2014 states who received federal funding were required to extend coverage to any person under 65 years old and with an income below 133% of the poverty line.²⁶ The US Supreme Court decided in a 7-2 decision that the expansion of coverage under the ACA was unconstitutionally coercive (*Sebelius* 2012). This section will explain the *Sebelius* opinion in an effort to apply the two most salient issues utilized by the Court to hold this condition of ACA as unconstitutionally coercive.

Chief Justice Robert's opinion focused on two elements of the ACA that crossed the line of unconstitutionally coercive, the amount of funding and the retroactive effect of the condition's placed on states. Specifically, Chief Justice Roberts referred to the portion of the state's overall budget that the new condition impacted. In the case of *Dole*, the amount of funding that was impacted was less than one percent of the state's budget. In contrast, the ACA condition affected over ten percent of the average state's budget. Due to the large amount of the budget, Chief Justice Roberts used strong language in concluding that the condition was "economic dragooning that leaves the States with no real option but to acquiesce (*Sebelius* 2012, pg. 2605).

Chief Justice Roberts equated the second element, the retroactive effect of the condition to a policy change that was a "shift in kind, not merely degree" (*Sebelius* 2012, pg. 2605). This reasoning of the Court was that the ACA changed Medicaid in a manner that transformed it into a different and distinct program from the original Medicaid legislation. Prior to the ACA, there were four discrete categories that Medicaid was

25 42 U.S.C. § 1396a(a)(10) (2006).

26 42 U.S.C. § 1396a(a)(10) (2006).

intended to cover, the disabled, the blind, the elderly, and needy families with dependent children. After the ACA, Medicaid became a program that is meant to provide healthcare for the entire population who are at or below 133% of the poverty level. Chief Justice Roberts reasoned that this drastic change imposed a retroactive condition on the states that they could not have anticipated when they originally accepted the federal funding. This finding was derived from the *Pennhurst* decision that places the requirement on Congress to “unambiguously express (*Sebelius* 2012, pg. 2606)” funding conditions to the state.

There are two important points to note about the Chief Justice’s opinion. First, he did not connect the two elements of unconstitutionality to each other in anyway. They were separate and independent grounds that stand on their own. Also, the *Dole* test requires that all five prongs be satisfied for conditional spending to be constitutional. The *Pennhurst* decision is the basis of for one of those prongs, so finding that the ACA violated the rule articulated in *Pennhurst* is sufficient to render the ACA provision unconstitutional. Secondly, Chief Justice Roberts explicitly chose to not elaborate or define a line for an amount that could serve as a basis for a test of coerciveness. He stated “we have no need to fix a line either. It is enough today that wherever that line may be, this state is surely beyond that (*Sebelius* 2012, pg. 2606).”

In a separate opinion representing the plurality opinion of Justices Scalia, Kennedy, Thomas and Alito, the Justices argued that the “sheer size of this federal spending program in relation to state expenditures (*Sebelius* 2012, pg. 2663)” makes it practically impossible to replace lost federal funds through tax increases or budget cuts. This opinion focused primarily on the amount of Medicaid funding that was in the balance and the concerns this created for coercion. The plurality opinion stated that when a federal program is funded

by a heavy tax such as Medicaid, that the states then lose their ability to tax constituents in an effort to replace the loss of federal funds for the same program. Citizens in nonparticipating states would have to take on a new tax in addition to the existing federal tax being used to fund the program in other states. This would create additional costs for the residents and political costs for the legislators, thus creating the pressure for legislators to participate in the program despite their opinions about the policy's effectiveness or efficiency. Overall, this opinion focused on the states' dependence on the federal funding and the impracticality of an "opt out" option for replacing the funds. The plurality also discussed at great length the concept of using old funding conditioned on compliance with a new program. While the plurality was not explicit in the definition, it provided indicators that I use in the analysis of the ESEA waivers below.

The dissenting opinion was written by Justice Ginsburg, who was joined by Justice Sotomayor. The ruling for *Sebelius* was a 7-2 ruling, therefore the dissent does not hold much strength. However, it is important to understand the competing sides of the argument. Justice Ginsburg focused her dissent on the shift-in-kind premise of the majority. The dissent stated that Congress had already amended the Medicaid program more than 50 times, without issue, and that Congress expressly reserved the "right to alter, amend, or repeal any provision" of the Medicaid programs.²⁷ As a supplement to this argument, Justice Ginsburg highlighted that because the federal government bears the majority of the financial burden for the expansion of Medicaid, in practice, it does not require the states to change their financial contribution significantly. Justice Ginsburg reasoned that Congress had exercised its spending power within the parameters of

²⁷ 42 U.S.C. § 1304 (2006).

Pennhurst by simply amending an existing program. Additionally, Justice Ginsburg rejected the idea that the Court should be engaging in a quantitative federalism analysis as included in the other two opinions. In fact, Justice Ginsburg wrote that such an analysis “appears to involve political judgments that defy judicial calculation (*Sebelius* 2012, pg. 2640),” thus stating that the Court lacked judicial competence to conduct such an analysis.

Application of the Conditional Spending Clause After *Sebelius*

In *Sebelius*, the opinion of Chief Justice Roberts was based on two separate analyses to hold the expansion of Medicaid through the ACA as unconstitutional. The first part of the analysis was a budgetary analysis finding that the expansion involved a sum of money large enough that states could not truly refuse the offer, and therefore were compelled to accept the terms of ACA. The second was a “shift-in-kind analysis” stating that the expansion imposed an unexpected condition on the states which was contrary to the original terms of accepting the funding. This section will apply these two analyses to the current education funding scheme through NCLB & the ESEA Waivers.

Budgetary Analysis

While the courts in both *Sebelius* and in *Riley*, made comments about the willingness to find conditional spending in violation of the coercion principle because of the amount of money at stake, they have yet to draw an exact line for subsequent cases. However, the plurality opinion in *Sebelius* noted that federal funding for elementary and secondary education is the next largest federal funding item after Medicaid. The opinion of Chief Justice Roberts and the opinion of the other justices, who joined him in opining that ACA’s Medicaid expansion was unconstitutionally coercive, does provide some vague

parameters in deciding if the amount of funding at stake is an amount that leaves states with no real choice to decline the retroactive conditions placed on the funding.

In *Sebelius*, Chief Justice Roberts discussed the percentage of funding at risk compared to a state's total spending for all purposes. The plurality opinion emphasized the absolute amount of funding that the states receive and how much of the nation's Medicaid expenditures are a result of federal funding. Chief Justice Roberts was explicit in stating that "the threatened loss of over 10 percent of State's overall budget is economic dragooning (*Sebelius* 2012, pg. 2605)." In 2013, Medicaid comprised 23.7% of total state spending and K-12 represented 19.9% of all state spending (NASBO 2012).

It is well documented that funding schemes vary by state, but according to the US Census data, overall, 12.3% of elementary and secondary education revenue came from the federal government (US Census Report 2012). When calculated as the percentage of state expenditures, since the enactment of NCLB, conditional funding has been as low as 1.55% and as high as 2.11% depending on the year in question (NEA 2010; NASBO 2012). This is much lower than the 10% mark identified in *Sebelius*. In contrast, the conditional spending upheld by the Dole court only equated to .19% of total state expenditures. Based on these two opinions, Dole and *Sebelius*, the current levels of spending required for coerciveness could fall anywhere between .19% or 10% of overall state expenditures. The amount of conditional funding impacted by the ESEA waivers falls within this range. Therefore, based solely on this part of the analysis, there is an argument that conditional spending for education, as it exists today, could be a sufficient amount of funding that states have no real choice but to accept the terms of the ESEA waivers.

Shift-in-kind Analysis

Chief Justice Roberts discussed a second and more determinative condition for coerciveness by stating that the ACA's expansion of Medicaid was a "shift in kind, not merely degree" (*Sebelius* 2012, pg. 2605) in the purpose of Medicaid. His opinion noted that the ACA distinctly changed the program from its originally intended form and forced the states to accept a retroactive condition of funding. The plurality opinion distinctly states that conditions that threaten to take away existing federal funds via the creation of a "new program" could be beyond the limits of constitutionality. "We have upheld Congress' authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because it is the means by which Congress ensures that the funds are spent according to its view of the "general welfare." However, "conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes (*Sebelius* 2012, pgs.2603-2604)."

This distinction is necessary to apply the shift-in kind analysis to the ESEA waivers. According to the plurality, unconstitutionally coercive becomes a possibility when there is an existing grant program in place, and the new condition threatens to alter or remove those funds because of a change in policy that the states must accept. The original education funding provided to states was done so under the goals and intentions of the No Child Left Behind Act of 2001. The lack of an ESEA waiver subjected a state to penalties on the existing funding, if the states did not agree to the conditions of the waivers through their waiver applications. Therefore, the shift-in-kind analysis is appropriate to the ESEA

Waivers because it falls into the category of conditions that threaten to take away federal funds from the original program.

The plurality's opinion provides guidance for the indicators of what constitutes a program so different from the original program that it creates a shift-in-kind, or replacement, rather than just a simple modification of the pre-existing program. While the opinion did not provide a specific test for what defines a new program, it did state that the more a change can be said to transform a program by making it so broad that it is comprehensive or universal, the more likely it is that the condition is a shift in kind rather than degree (Pasachoff 2012). Additionally, the court provided three more indicators for deciding if a condition created a shift rather than a modification. The second indicator is whether the pre-existing program remains intact in addition to the modification (Pasachoff 2012). The third and fourth indicator to be considered in this analysis is whether “[3]Congress created a separate funding provision to cover the costs of” the new condition and whether “[4] the conditions on use of the different funds” are separate and distinct from those present on the original program (*Sebelius* at 2606). These four indicators (Pasachoff 2012) provide guidance for examining the ESEA waivers under the application of the conditional spending clause in *Sebelius*.

The level of comprehensive or universal reform can easily be argued for the ESEA waivers; forty-six states and the District of Columbia have agreed to the conditions of the waivers. Furthermore, for the policies analyzed by this dissertation, there has been universal reform in the areas of content standards and teacher evaluation standards. In fact, all but 4 states have adopted the Common Core standards, 100% of states have adopted either the use of student growth measures, or a plan to adopt the use of such measures, and

84% of states who received a waiver have committed to using teacher evaluations to inform personnel decisions. These three policies were not mandated by the original NCLB program, they impose significant policy changes on the states, they impose a significant cost on the states, and they have been widely adopted in a manner that is both comprehensive and universal in nature.

The question here becomes if the changes implemented through the ESEA waivers were likened to the creation of a new and independent program from the conditioned funds of the original program (NCLB), or are the waivers simply a modification of the permissible conditions tied to federal funding? In this instance, the waivers do act as a new program attached to a still-existing old program. First, the waivers are explicitly tied to the old program because of the funding at risk. The sanction imposed as a result of not receiving a waiver, restricts the use of Title I funds; Title I funds were allocated under the original NCLB Act. Secondly, NCLB is still intact because it is only “old” in practice; NCLB remains the legislative authority on education policy and federal funding for education. Third, the waivers do not act as a modification of NCLB, but rather an upheaval of the original program because of the legislature’s inability to pass a renewed version of NCLB. And lastly, the ESEA waivers specifically require states to adopt new policies as solutions to the problems with NCLB. These policies, the adoption of the Common Core standards and the specific use of a student growth measures in teacher evaluation systems, were not requirements of the original legislation. As evidence of the independent nature of the waivers, they are generally characterized as a “break in course from NCLB because too many circumstances had changed since its passage (Black 2014, pg. 653).” As demonstrated, the waivers are a separate and independent program, seeking to impact the

funding tied to the original NCLB program; based on this conclusion, the coercion analysis can continue and the remaining two factors must be examined.

The third and fourth indicators concern whether the modifications create a separate funding stream for the ESEA waivers. The answer to this part of the analysis is a simple no. The federal funding for the states still comes from the original funding stream of NCLB. In fact, the sanctions imposed if a state does not obtain a waiver relate to manner in which Title I funds can be used by a state. The Title I funds that are in the balance are the same funds provided to states by the original NCLB legislation. However, the plurality did not make clear if a separate funding stream is necessary for a new set of conditions to equate to an independent program, or if this was just an indicator for consideration.

The waivers are unique in comparison to the Medicaid expansion because rather than a modification to pre-existing legislation, the waivers are a tool to advert the conditions of pre-existing legislation. I believe this characteristic of the waivers strengthens the argument that the program (ESEA waivers) is independent from the still intact NCLB program, thus equating the waivers to a “shift-in-kind” rather than a mere adjustment. The importance of a program being a shift from the original policy rather than a modification relates to the Pennhurst holding that the conditions must be unambiguously expressed by Congress, and that the failure to do so fails one prong of the Dole test. The Dole test requires conditional spending to meet all five prongs; the ESEA waiver’s failure to meet just one is enough to support an argument that the waiver program is unconstitutionally coercive.

Conclusions

This legal analysis is limited in that fact that it specifically applies the reasoning in *Sebelius* to the ESEA waivers. The analysis discusses the Chief Justice's opinion and the plurality's opinion as they relate to the budgetary analysis and the shift-in-kind analysis as applied to the Medicaid expansion; the expansion that was spurred by the ACA and ultimately held to be unconstitutionally coercive. An application of the budgetary analysis yields the conclusion that while the spending impacted by the ESEA waivers does not equate to the ten percent reference in *Sebelius*, it does fall within a range that could be large enough to be considered a candidate for "economic dragooning." While the percentage of total state expenditure is much smaller than that of the Medicaid expansion, federal funding for education is still the second highest category for federal funding. If the *Sebelius* Court believed that in order for the amount in question to be of concern it had to be the top spending item of the federal government, they could've easily indicated that line. However, the court found it unnecessary to define a specific cutoff, thus allowing the argument to emerge that the amount of conditional spending at stake in education could be enough to coerce states into accepting the conditions of the ESEA waivers.

Secondly, and more importantly, is the application of the shift-in-kind argument derived from the necessity of Congress to unambiguously express the conditions of federal funding. The four indicators derived from the plurality's opinion, allow for guidance on whether the waivers are a full shift in policy from the original legislation or just merely an adjustment. In this chapter, I have made the argument that the ESEA waivers are an independent program because of their universal and comprehensive nature, and the fact that the conditions of the waiver are not only a modification, but an attempt at an upheaval

of NCLB while NCLB is still the legislative authority on federal education policy. Additionally, the conditions of the ESEA waivers seek to impact funding that is still tied to NCLB. While the waivers do not create a separate stream of funding from NCLB, the court did not make it clear that this was a necessary component to determine if a program was a shift, but rather it is just a factor to consider. From this application of the holding in *Sebelius*, I find the waivers to be unconstitutionally coercive. This conclusion is based on the amount of funding at stake and the potential for a large impact on the student population, combined with the fact that ESEA waivers are a departure from NCLB, and operate as a separate and distinct program rather than a mere modification. This finding, along with the findings of the previous policy analysis will be discussed in the following chapter in the context of conclusions about ESEA waivers and policy recommendations moving forward.

CHAPTER 7: CONCLUSIONS, POLICY IMPLICATIONS & FUTURE RESEARCH

In 2012 USDOE, under the Obama Administration, announced that states would be able to apply for ESEA flexibility waivers to avoid the sanctions associated with not meeting the original goals of No Child Left Behind. In order to be eligible for a waiver, each state had to submit an application package that detailed how the state would adopt and implement policies that were required for the approval of a waiver. As of this writing in July of 2015, 43 states and the District of Columbia have been approved for a waiver. The first analysis of this dissertation is a content analysis of applications, the communication regarding the approval process, policy statements and other public records relating to the approval or denial of ESEA waivers. The second analysis is a policy and legal analysis examining the waiver process through the lens of cooperative and coercive federalism as it relates to education policy. With respect to the ESEA waiver process, and the documents available for examination, I am able to identify the several conclusions, to make recommendations concerning the policy implications of these findings and propose possibilities for future research.

Conclusions & Discussions

The first conclusion from this research is that the ESEA waiver program did have a meaningful impact on the adoption and implementation of education policy across the United States since 2012. This study provides no irrefutable evidence that the ESEA

waivers were the sole reason for the change or implementation of policies across the nation, but at a minimum it provides evidence of a relationship between the federal program and the adoption of various education policies for many but not all states. Specifically, there is evidence that at least 22 states, or 51% of waiver states, adopted the use of student growth measures through the ESEA waiver application process. Usually a single factor does not determine the adoption of a policy. This conclusion is not to suggest that the ESEA waivers were the single motivating factor for states to adopt the use of student growth measures. There are a number of variables such as the continued scholarly evidence that student growth measures are a more accurate measure of effectiveness, or the complaints of educators and administrators about the inability of student achievement measures to truly capture the progress of students in the classroom, that could likely contributed to adoption and implementation of these policies. However, this conclusion serves as evidence that within the current policy environment the ESEA waivers did have a relationship to and at least some impact on the adoption of education policies across states. That impact likely ranged from the incentivizing of policy adoption, the encouraging of rapid implementation to the coercing of policy details in education concerning curriculum and evaluation.

The second important conclusion that this research develops is that the cooperativeness and/or coerciveness of the ESEA waivers is not always consistent across policies. For this study, the analysis demonstrated that there was no evidence of coercion by the ESEA waivers in the case of the adoption of the Common Core Standards. While there may be a question concerning the coerciveness of RTTT and the adoption of Common

Core, for this analysis it can clearly be concluded that the ESEA waivers did not coerce the states to adopt CCSS. One hundred percent of states who have adopted the standards did so before the availability of the waivers was announced. In addition, to the adoption of the policy prior to the ESEA waiver application, there is evidence of states such as Virginia and Alaska receiving waivers without the specific adoption of CCSS. In contrast to the adoption to CCSS, there is evidence of contention between some states and the federal government over the policy specifics for the use of teacher evaluations for personnel decisions. For example, Alabama amended its application at least three times and still only received a conditional waiver. The waiver was conditioned on the state being more specific concerning the use of teacher evaluations and requiring AL to submit evidence beyond simply stating that the evaluations could be used to develop a professional learning plan. This conclusion is important because it demonstrates what the literature already suggests, that coercion is not a bright line test that can be easily identify when studying a federal program. Rather, coercion or cooperation exists and is practiced on a sliding scale that often blurs the line, and allows researchers, policy makers and the court to disagree on which programs are unconstitutionally coercive.

The third conclusion is for a majority of the states, the ESEA waivers are an exercise of cooperative federalism. For approximately 40% of the states that have received a waiver, the states had adopted the ESEA-encouraged policies prior to the availability of the waivers. Again, this is not to suggest, that the ESEA waiver program did not play a role in the continued development and implementation of the policies discussed here, but rather to provide clear evidence that the ESEA waivers did not operate in a coercive manner for at least 17 of the 43 states that have been approved for flexibility. In addition to these

17 states there are other examples of cooperation between USDOE and state governments. One of the characteristics of cooperation is the ability of the states to negotiate. There are several instances where the data demonstrate negotiation; for example, Maine and Pennsylvania. For both states the data reveal evidence of negotiation for months at a time between the state and USDOE about specific policy prescriptions. The states were granted waiver approval, and were allowed to develop and implement policies that were not specifically dictated by USDOE. The waiver approvals allowed for incremental policy change that satisfied the original desires of the states but also met the conditions of the ESEA waiver.

A third characteristic of cooperation supported by the data is the USDOE's willingness to adjust the ESEA waiver policy to the feedback provided by the states. The states expressed concerns about the unintended consequences of the new policies being adopted, and USDOE made extension waivers available. In the case of piloting new assessments, the states were concerned about the double testing of students, particularly of students of the most vulnerable population. In response to this concern, USDOE gave states the opportunity to apply for waiver extensions that pushed back implementation of assessments to address the needs of the states. Immediately after the extensions were made available, approximately 35% of waiver states applied for extensions that allowed fewer testing of students. This conclusion is not to suggest that the federal government was willing to adjust in every instance of state feedback, but rather to provide evidence that in at least some cases the USDOE's waiver policy was not so rigid that it did not allow for continued cooperation with the states. This conclusion is important because it demonstrates the cooperative nature of the ESEA waivers. It suggests that rather than a

coercive force, the ESEA waivers appeared during a time of policy adoption that had already begun and served as a complement to the current policy environment. This conclusion on its own does not answer the question of whether or not the ESEA waivers go beyond the limits of constitutionally permissible coercion. These data demonstrate, that at a minimum, ESEA Waivers have characteristics of cooperative federalism by continuing ongoing policy adoption, allowing for negotiation with the states, and adjusting to the concerns and needs of the states during the waiver process.

The fourth conclusion from this study is that the ESEA waivers also can be coercive in nature. This is evidenced by data demonstrating that some states were unable to negotiate and by the sanction based review system used by USDOE during the waiver process. The case of Vermont and California most clearly demonstrate the coercive characteristics of the waivers. In the case of Vermont, the state was met with resistance from USDOE because they did not want to adopt and implement a teacher evaluation system as required by the waiver application. Not only did Vermont express the desire to implement an evaluation system that differed from the waiver requirements, the state provided empirical evidence as to why the evaluation system was not suitable for the state, and was not beneficial to the students or the teachers. Despite this evidence from the state showing there were better suited policies for the specifics of Vermont classrooms, the USDOE refused to adjust to the needs of the state. Vermont withdrew their application for a waiver because of the lack of the ability to negotiate policies that were most appropriate for Vermont's classrooms and students. As a result of withdrawing from the waiver process, Vermont had to face the sanctions imposed by the original No Child Left Behind legislation. The sanctions include the control of how Title I funds can be utilized, further

creating negative impacts for students in the Vermont public school systems. Similarly, California withdrew from the waiver process because of the inability to negotiate. The state of California informed USDOE that adopting and implementing the ESEA-prescribed policies on the timeline required was not feasible because of the state budget and the state legislative process. USDOE did allow school districts in CA to apply for and receive waivers, but the state itself was unable to receive a waiver due to the unwillingness of USDOE to work with the specific circumstances of the state.

In addition to the inability of some states to negotiate for policies that best fit the local and state characteristics of their schools, the review system of the ESEA waiver process is coercive in nature because it focuses on sanction based review rather than a review system that seeks to supplement and assist states with implementation. In the case of Washington State, the ESEA waiver was revoked because of the state's inability to pass legislation in accordance with the requirements of the waiver. While this may seem like a reasonable sanction for not complying with terms of the federal program, the decision to revoke the waiver was made despite Washington's continued commitment to pass legislation address USDOE's concerns. The state legislative process did not fit the desired timeline of USDOE for one policy (student growth measures) and USDOE revoked the waiver for 18 different waiver terms. Consequently, Washington was faced with the original sanctions of the NCLB legislation until their waiver was reinstated.

This fourth conclusion requires me to address two questions regarding coercion. First, if a state has the opportunity to opt out, such as the case for Vermont, North Dakota and California, does coercion actually exist? Or is it simply attempted coercion? The second question is, if there is evidence for a majority of the states that the waivers were

cooperative in nature and only evidence of coercion for as few as three states, does that rise to the level of unconstitutionally coercive? The first question is the more complicated of the two. On its face, the choice to “opt out” appears to be in direct contrast to the idea of coercion. However, in this case the “opt out” option carried with it a consequence/sanction. The available *choice* to the states was to participate in the waiver program or to face the sanctions attached to the failures to meet the goals of NCLB. Taken in context, that nearly 80% of all schools were facing the NCLB sanctions, it provided the states with no real option to not participate without facing some sort of financial consequence or federal oversight. The choice was illusory at best. Due to the link between the NCLB sanctions and the use of the waivers, the *option* of states to not apply for a waiver resembles coercion more than it resembles the true ability of the states to make a choice.

The second question regarding the “amount” of coercion required to determine a policy to be unconstitutionally coercive is a much simpler discussion. For even one state to be unconstitutionally coerced, the policy exceeds the limits of permissible federalism. This idea can be best explained in two ways. First, is the willingness of the Court to make a determination of coerciveness based on the legal complaint of a single state? In cases such as *Dole*, the opinion of the court does not suggest that the policy is not coercive because it only impacts a single state and not the majority of the states. The coercion analysis of the Court does not stop at the inability of the complainant to provide evidence of coercion across all 50 states in the nation. This implies the willingness of the Court to render a policy as unconstitutionally coercive because of the effect of the federal program on one state alone. Secondly, the answer to this question can be explained by a comparison of the declaration of a policy as discriminatory or beyond the limits of the equal protection

clause. In order for a policy or law to be determined to be unconstitutionally discriminatory it does not have to impact each protected class individually. Evidence that a policy disproportionately impacts or discriminates against even one protected class is sufficient to determine the discriminatory nature of the overall policy. While this analysis of ESEA waivers is unrelated to discrimination, this idea that evidence proving a policy is beyond the permissible limits of the Constitution for one group or one state, is adequate to make a determination about the policy as a whole; it is unnecessary to demonstrate that policy equally coerced each state or even that the waivers coerced the majority of the states. Evidence of coercion in one instance, such as the case for Vermont, is enough to suggest that the ESEA waivers exceed the limits of federalism and permissible coercion from a policy perspective.

The fifth and final conclusion of this study relates to the legal analysis of the waivers, rather than the content analysis. This separate analysis assessed the waivers under previous case law precedent as provided by the US Supreme Court and other federal courts. A legal analysis required to assess all the possible angles of a coercion by the waivers would be so extensive that it could be a separate and independent work from this dissertation. For this analysis I focused on the application of the *Sebelius* opinion to the circumstances of the ESEA waivers. I decided this was most appropriate because *Sebelius* is our most modern application of the coercion principle to a federal program and therefore, most relevant. From this analysis, I concluded that there is evidence that the ESEA waivers could be unconstitutionally coercive when the tests of the *Dole* Court and the *Sebelius* opinion are applied to the ESEA waivers. The waivers impact an amount of funding that fall within a range the court has considered large enough to coerce state participation.

Additionally, applying the shift-in kind analysis used in the *Sebelius* case is appropriate because the ESEA waivers are a new program that threaten to impact the use of federal funds from a pre-existing federal program, NCLB. Through this analysis, I conclude that the ESEA waivers could be found unconstitutionally coercive because the ESEA program impacts a large amount of funding, it requires states to accept conditions that were not unambiguously stated at the inception of NCLB and the waivers are a departure from the original nature and intended purpose of NCLB.

As with many scholarly legal analyses, this conclusion does not suggest nor guarantee that the US Supreme Court would echo or agree with this finding. However, it does suggest that there is a possibility for a holding by the Court that the waivers extend beyond the bounds of federalism. More importantly, this finding has to be taken into account with the previous policy conclusions regarding the coercive nature of the waivers. This study has presented evidence and findings from both a policy analysis and a legal analysis that suggest the ESEA waivers *could* be impermissibly and unconstitutionally coercive as determined by research concerning coercive federalism and previous case law determining the limits of coercion. The congruence of these conclusions is important for the policy implications of this study.

Policy Implications

The findings from this research suggest several policy implications for education policymaking and provide for suggestions for areas of improvement for relationships between the federal government and SEAs/LEAs. The assumption of these implications and recommendations is that the current structure is both beyond the limits of permissible coercion, and that there is a role for the federal government in education policymaking. It

is within that framework that I discuss and recommend the following points concerning the ESEA waivers.

The first implication from this research is that federal programs can have an impact on the adoption of policies nationwide. While this study does not provide evidence of a direct causal relationship between the ESEA waivers and the adoption of various policies, it does demonstrate that the federal administration has effective tools in impacting policy. In the case of the waivers, it is possible that the federal program came at a time when the states were already set to adopt policy reforms because of the widespread failure of NCLB. However, this study provides at least some evidence to suggest that the initiative may be responsible for the rapid implementation and consistent adoption of policy reform across the nation. This is important to note because of the future implications for the role of the executive branch in local education policymaking.

The idea that grant-in aid programs can be used to affect policy is not novel. There has been a long history in the US of the federal government using grant in aid programs as a policymaking tool. However, the implication from this type of policymaking is that the federal administration can effectively use this tool in education and can use waivers to complement the current policy environment, if utilized properly. While the issuance of the waivers has been criticized by policymakers, and by the findings of this study, it does not remove the fact that it was an effective strategy for implementing change. Through the use of the ESEA waivers and RTTT “President Obama managed to jump-start policy processes that may have languished for years in state governments around the country (Howell 2015).

In regards to the findings that ESEA waivers could be unconstitutionally coercive there are several implications and recommendations. First, the view that the waivers

coerced states to accept the policies associated with ESEA waivers opens the door for litigation regarding the coercive nature of the federal program. In fact, one state, Louisiana has already filed a suit of this nature. In the complaint, Governor Jindal asserts that “Congress has repeatedly drawn a bright line between the federal government’s limited authority to influence education policy and the exclusive authority of the States to define, direct, and control the content of curriculum, instructional programs, and materials of instruction (pg. 4)” and that “the department tethered NCLB waivers and other ESEA conditions to the RTTT program objectives of Common Core standards and assessments, thus coercing states to participate in objectionable RTTT conditions under the threat of more onerous conditions and/or loss of funding under ESEA and NCLB (pg. 19).”²⁸ If this litigation is successful for the complainant, it would set the stage for the possible reversal of the policies put in place by the ESEA waivers. However, there is no guarantee that the litigation would result in the upheaval of all policies, because as stated previously, states may have been on the path of adopting the policies prior to the ESEA waiver program.

In light of the findings of this research and in the face of possible litigation, there are two main recommendations that stem from my dissertation. First, efforts should be made to adjust the terms of the ESEA waivers in the areas that raise concerns about coercive federalism. In cases such as Vermont, USDOE should create provisions that allow states to adopt policies that are best suited for the unique circumstances of a state. The quality of the policies adopted through this provision could be monitored in the same manner that USDOE approved content standards. States were given the opportunity to provide evidence that standards and policies had been widely accepted and/or approved by

²⁸ Full complaint found here: <http://www.gov.state.la.us/assets/docs/Jindal%20Final%20Complaint.pdf>

a consortium of researchers and scholars in the field. This same standard should be allowed for states with unusual circumstances, or with evidence that the imposed policy would be detrimental for the education of the children in the state. In the case of California, where there are budgetary or legal constraints to the adoption of ESEA-imposed policies, provisions must be included to both allow and optimize negotiation between the state and USDOE in an effort to gain conditional approval or full approval of a waiver. The inability to negotiate, and the lack of flexibility in regards to the most beneficial policy prescriptions, are the two areas where the ESEA waivers appear to be more coercive than cooperative. Adjusting and/or amending the requirements for waiver approval in accordance with these recommendations could alleviate the coercive relationship between USDOE and the states.

The second recommendation is for USDOE to give states the opportunity to provide official, on the record, input to USDOE about the waiver process, the needs of the states and the impacts that the ESEA policies have had at the local and state level. One of the characteristics of cooperative federalism is that the states not only have the ability to negotiate but they are also involved in the planning process of the program. Using the waiver renewal system to allow states to participate in the policy process could assist in transforming the policy from coercive to cooperative. Additionally, it would shift the role of prescribing education policy back to the states, rather than the federal government. In order to operate within the limits of federalism, it is unnecessary to completely remove the waivers as an option for the states. In fact, the remedy of complete upheaval would ignore the fact that the states do still need a solution to address the NCLB failures. Adjustments to the process, and the policy itself, as recommended here could allow the federal government to still guide education policy and provide relief from the sanctions of failed

legislation, while allowing states to be stakeholders in the development, adoption and implementation of education reform.

The final recommendation is for the Obama administration and Congress to refocus their efforts on the reauthorization of ESEA. One of the major criticisms of the ESEA waivers is that the federal administration, through USDOE, used the waivers to circumvent the legislative process. The converse of that argument is that the administration acted to provide states with a viable solution in the face of the legislature failing to act. Despite the motivation for the ESEA waivers, the reauthorization of ESEA would allow for the federal legislative branch to enact legislation that addresses the failures of NCLB. By passing new legislation, it would remedy the issues identified in this dissertation through the legal analysis. A new version of ESEA would allow the federal government to unambiguously articulate the conditions for federal education funding, and would address the “shift-in kind” complication of the waivers.

Future Research

The results of this study provide the opportunity for potential future research in a number of different areas related to education policy, federalism and coercion. First, as it relates specifically to the ESEA waivers there is an opportunity to attempt to measure the impact on policy adoption in a more quantitative way. Using the theoretical frameworks of federalism and policy diffusion, an examination of the likelihood of policy adoption with concern for the participation in federal programs such as RTTT and the ESEA waivers could provide a fruitful analysis of the ability of the federal administration to impact education policy across states. It is possible that quantitative analyses of the 50 states could be utilized to help explain or demonstrate a link between the ESEA waivers and the

adoption of various policies. This type of analysis could provide stronger evidence of the casual relationship, or lack thereof, between waivers and the use of student growth measure, teacher evaluation systems and/or the adoption of the common core.

Secondly, as an original part of the design of this study, I hoped to do a case study examining the waiver process, the impacts of the process, and the possible consequences for a state to participate in such an extensive application process. As Vermont stated, the hours required to continue in the application process outweighed any benefit of the participating in the ESEA waiver program. Recognizing that the availability of resources varies across states, the impact of participating in such a program could also vary. For example, in high poverty, low-income, low-achieving states such as Mississippi, both the stakes for participating in the program and the consequences of not participating could be much greater than in states with a contrasting profile. Not only would this provide insight to the totality of the impact of the ESEA waiver program, it also provides the opportunity to examine the varying levels of coercion across states. The type of “economic dragooning” described by the Court could be present in one state but not in the other.

This study shows that there are states that the ESEA waiver did not coerce at all, while there are other states that USDOE attempted to coerce through the application process. Better understanding the characteristics of states with a cooperative relationship versus those with a coercive relationship could contribute the literature regarding effective administrative lawmaking. Recognizing that the federal government must operate within the constitutional bounds of federalism, it is important to have data and analyses on circumstances that foster a cooperative relationship rather than a coercive one. This type

of research would not only help define the limits of coercion but also provide results that can inform policymaking via the federal government.

Finally, I believe this study highlights the need for scholars to explore better ways of quantifying coercion and better defining coercion for the purpose of public policy scholarship. While the discussion of cooperative and coercive federalism has not been ignored by scholarship, the proper defining and operationalizing of variables that can be used to examine policies is a hole in the literature. This type of research could be achieved through a large scale examination of grant-in-aid programs and the characteristics that exist in both cooperative and coercive policies. Likewise, this could be achieved through an analysis of case law, characteristics of cases and the manner that federal courts and the US Supreme Court have examined coercion across policy areas. An attempt to fill this hole in the literature would be beneficial for the continued analysis of the appropriate role of the federal government in policy areas, such as education, that are historically a function of the state.

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