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Federal Government Coerces the Adoption of Common Core: Keeping America's Youth Common Among the World's Elite, 49 J. Marshall L. Rev. 791 (2016)

Ryan Lee

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FEDERAL GOVERNMENT COERCES THE ADOPTION OF COMMON CORE: KEEPING AMERICA'S YOUTH COMMON AMONG THE WORLD'S ELITE

RYAN LEE*

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I. CAN YOU DO YOUR KID'S HOMEWORK?

A parent, who holds an engineering degree, attempts to solve his child's simple mathematical subtraction problem and is baffled.¹ A fourth grader must solve a division problem requiring 108 steps to

*I do it all for my wife, Megan, and two boys, Beckett and Henry. Thank you for your love and support.

1. See *Common Core Baffles Father*, THE PATRIOT POST, www.facebook.com/PatriotPost/photos/a.82108390913.80726.51560645913/10152143072400914/?type=3&theater (last visited Sept. 25, 2014) (showing how a father with a bachelor's degree of science degree in electronic engineering could not figure out how to subtract 427 from 316 using the common core method). The father writes, "I cannot explain the Common Core mathematics approach, nor get the answer correct." *Id.* "In the real world, simplification is valued over complication." *Id.*

get full credit on her test.² Will an elementary school child who must learn four different ways to add in order to solve a subtraction problem bring her parents to tears as they try and help her with homework?³ Imagine sitting down in the evening to help your third grade child with her math homework and your child is asked to solve this: “Bill has three goldfish. He buys two more. How many dogs live in London?”⁴ To demonstrate the bizarreness of the Common Core curriculum, ponder this actual mathematics question: “take out a *new* crayon. Circle objects with lengths shorter than the crayon blue. Circle objects with lengths longer than the crayon red.”⁵

If a college-educated parent cannot figure out how to solve these problems, how can we expect our elementary school children to do so?⁶ The answer is that parents and educators cannot, because elementary school students subjected to curriculum designed around the Common Core standards are giving up.⁷ The U.S. spends more money per student than most other countries to educate our children,

2. See Melissa Melton, *4th Grade Common Core Math Problem Takes 108 Steps to Complete*, THE DAILY SHEEPLE (Dec. 18, 2013), www.thedailysheep.com/4th-grade-common-core-math-problem-takes-108-steps-to-complete_122013 (explaining that a simple division math problem asking to divide 18 into 90 used to take two steps and now under the common core initiative takes 108 steps).

3. See Michael Rubinkam, *2+2=What? Parents Rail Against Common Core Math*, NBC WASHINGTON (May 15, 2014, 8:13 AM), www.nbcwashington.com/news/local/22What-Parents-Rail-Against-Common-Core-Math-259363861.html (discussing that parents are frustrated with the Common Core Initiative’s math problems and are stumped by the unfamiliar terms and new ways of solving simple arithmetic).

4. See *Late Show with David Letterman: Louis CK* (CBS television broadcast May 2, 2014), www.youtube.com/watch?v=HZbd7qEG3Ns (featuring guest Louis CK jokingly explaining the types of common core math problems that his daughter must solve).

5. See Alec Torres, *The Ten Dumbest Common Core Problems*, NATIONAL REVIEW (Mar. 20, 2014, 4:49 PM), www.nationalreview.com/article/373840/ten-dumbest-common-core-problems-alec-torres (listing examples of common core math problems that will leave you scratching your head).

6. See *id.* (providing a cheat sheet of the new common core math language parents must know in order to help their child with homework). For example, the cheat sheet lists as old language the common math phrase “word problem,” but for common core that language is now “math situation.” *Id.* Another common math phrase listed is “carry the one,” but now under common core that phrase has been changed to “regroup ten ones as a 10.” *Id.*

7. Jessica Chasmar, *Common Core Testing Makes Children Vomit, Wet Their Pants: N.Y. principals*, WASH. TIMES (Nov. 25, 2013), www.washingtontimes.com/news/2013/nov/25/common-core-testing-makes-child-ren-vomit/. One student wrote throughout his test booklet, “This is too hard,” and “I can’t do this.” *Id.* Additionally, some principals in New York wrote to the student’s parents voicing their concern over the new testing standards aligned with the Common Core. *Id.* The principals explained that many students being administered the Common Core standardized tests “cried during or after testing, and others vomited or lost control of their bowels or bladders.” *Id.* New York educators also stated that the kids felt like failures after taking the tests and that the tests have created a widening of the achievement gap amongst impoverished students. *Id.*

yet ranks behind twenty-nine other nations in math, twenty-two other nations in science, and nineteen other nations in reading.⁸ U.S. students are in job competition with the top performing students in math and science from the top-ranked nations, such as China, Singapore, Hong Kong, Taiwan, South Korea, Macao and Japan.⁹ The U.S. education system needs reform, but so far conditions placed on federal education funding by the federal government have not been successful in educating students to compete in the twenty-first century.

This Comment discusses how the federal government has recklessly taken control of state education, and how the Federal Department of Education's goals are failing. Section II of this Comment will discuss the traditional view that education is a function of each state, how the Spending Clause has shifted that view, and the history of federally mandated educational programs. Section III will address and analyze the Tenth Amendment issues of federally mandated education programs, and the effect of federally mandated programs on student success and state expenditures. Section IV will propose a way forward, returning education policy to the individual states absent federal involvement.

II. HOW THE SPENDING CLAUSE SHIFTED THE TRADITIONAL VIEW OF EDUCATION AS A FUNCTION OF THE STATES AND THE HISTORY OF FEDERAL INVOLVEMENT IN EDUCATION POLICY

A. *A History of Congress's Spending Powers and Its Use to Circumvent the Tenth Amendment*

The Tenth Amendment of the U.S. Constitution guarantees State sovereignty.¹⁰ It states: “[t]he powers not delegated to the U.S. by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹ The Constitution does not expressly grant to the federal government or the states the power to

8. Bill Chappel, *U.S. Students Slide In Global Ranking On Math, Reading, Science*, NPR (Dec. 3, 2013, 1:13 PM), www.npr.org/blogs/thetwohour/2013/12/03/248329823/u-s-high-school-students-slide-in-math-reading-science.

9. *Id.*

10. U.S. CONST. amend. X.

11. *Id.*

exercise control over public education.¹² Therefore, each state has historically controlled its own public education policy.¹³

The Constitution grants the U.S. Congress the power to tax and spend for the general welfare of the country.¹⁴ This Spending Clause, however, does not delegate to Congress the power to legislate all laws for the country's general welfare, and does not grant the federal government power over education.¹⁵ Absent explicit enumeration, the power over education is reserved to the states through the Tenth Amendment.¹⁶

In keeping with the intentions of the framers of the Constitution, Congress has clearly drawn the line of federal involvement in the area of education policy. Three sets of laws prohibit the federal government from prescribing the content of state curricula and assessments. The General Education Provisions Act,¹⁷ the Department of Education Organization Act,¹⁸ and the

12. See generally U.S. CONST. (illustrating that no language exists delegating the power to regulate public education policy to either the Federal Government or the states).

13. See *Cooper v. Aaron*, 358 U.S. 13, 19 (1958) (explaining, "it is, of course, quite true that the responsibility for public education is primarily the concern of the States."). Further, the responsibility of public education "must be exercised consistently with federal constitutional requirements as they apply to state action." *Id.*

14. U.S. CONST. art. 1, § 8, cl. 1 (stating that "[t]he 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.>").

15. U.S. CONST. art. 1, § 8, cl. 1.

16. See THE FEDERALIST NOS. 45, 285 (James Madison) (detailing the framers of the constitutions vision that the federal government's powers are to be limited and the powers conferred to the states "remain numerous and indefinite.>").

17. 20 U.S.C. § 1232 (a) (2015). The General Education Provision Act states in relevant part:

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

Id.

18. 20 U.S.C. § 3403 (b) (2015). The Department of Education Organization Act states in part:

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials

Elementary and Secondary Education Act — as amended by the No Child Left Behind Act in 2001¹⁹ — specifically bar direct federal involvement in the details of education. These laws protect the rights of the states and local governments to define, control, and direct academic curriculum, assessments, and instruction techniques.²⁰

However, even though states have direct control over education curriculum, assessments, and instruction techniques, Congress may still act indirectly under its spending power to encourage uniformity among the states' education policies.²¹ The U.S. Supreme Court (“Supreme Court”) has taken this position since 1936. In that year the Supreme Court, in *U.S. v. Butler*, held that the powers of Congress extend beyond the enumerated powers granted to it by the Constitution, and that through its spending power it can do indirectly what it can't do directly.²² The Supreme Court's decision in *Butler* opened the door for its decision in the seminal spending power case, *South Dakota v. Dole*. In *Dole*, South Dakota challenged a federal regulation that allowed the Secretary of Transportation to withhold federal highway funds from the states unless the states made it unlawful for any person under the age of twenty-one to consume and/or purchase alcohol.²³ South Dakota contended that the power to regulate the drinking age is not a power granted to Congress by the Constitution and as such is a power reserved to the

by any educational institution or school system, except to the extent authorized by law.

Id.

19. 20 U.S.C. § 7907(a) (2002). The Elementary and Secondary Education Act—as amended by the No Child Left Behind Act in 2001 states in part:

Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State and local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Id.

20. See Home Sch. Legal Def. Ass'n., *How is the Federal Government involved in the Common Core?* HSLDA (Oct. 3, 2014), www.hslda.org/commoncore/topic3.aspx (observing that the Department of Education has been more active in expounding the Common Core, even funding the development of the standards and assessments aligned with the standards, than any other state or organization despite congressional mandates prohibiting such involvement).

21. See *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (explaining “Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”); see also *U.S. v. Butler*, 297 U.S. 1, 66 (1936) (holding that Congress is not limited to it enumerated powers when it comes to granting federal funds for public purposes).

22. *Butler*, 297 U.S. at 66.

23. *Dole*, 483 U.S. at 205.

states under the Tenth Amendment.²⁴ The Supreme Court interpreted the Tenth Amendment issue narrowly in *Dole*, holding that the federal government can confer funds to the states and in so doing can condition the receipt of those funds on specified conditions.²⁵

For Congress to exercise its spending powers, the Supreme Court in *Dole* stated that the congressionally imposed conditions must 1) benefit the general welfare, and the conditions imposed on their receipt must be 2) unambiguous, 3) reasonably related to the purpose of the expenditure, and 4) cannot violate any independent constitutional provision (“Dole test”).²⁶ The spending power, however, is not unlimited.²⁷ Specifically, the Supreme Court has held that Congress’s authority under the Spending Clause cannot be used as a “scheme for purchasing with federal funds submission to federal regulation of a subject reserved for the states.”²⁸ Congress can overstep the boundaries of the Spending Clause when it uses the power to induce the states to engage in activities that would themselves be unconstitutional.²⁹ Further, Congress’s financial inducement to adopt a federal policy will be unconstitutional if it is so coercive as to pass the point at which “pressure turns into compulsion.”³⁰ The Supreme Court has stated that pressure from Congress on the states under the Spending Clause must condition federal funds in a way that allows the states to be free to either disregard or to fulfill the condition.³¹

24. *Id.* at 210.

25. *Id.* at 206-07.

26. *Id.* at 207-08.

27. *Id.* at 207.

28. *Butler*, 297 U.S. at 72.; *see also* *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (holding that Congress must be cognizant of and act in accordance with the nations “the general welfare” when exercising their spending powers); *Davis*, 301 U.S. at 645 (holding that Congress should be given deference in determining what is required of the Federal Government in serving the nations “general welfare”); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding that if Congress desires to condition the States’ receipt of federal funds, it “must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation”); *Massachusetts v. U.S.*, 435 U.S. 444, 461 (1978) (holding that conditions placed on the issuance of federal grants to the states might be unlawful if they are unrelated to the federal interest); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (explaining that “the federal government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof”).

29. *Dole*, 483 U.S. at 210.

30. *See* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) (explaining that coercion occurs when “pressure turns into compulsion” and the way to analyze coercion is by the degree one is compelled in conjunction with the facts surrounding the compulsion); *see also* *West Virginia v. U.S. Dept. of Health & Human Servs.*, 289 F.3d 281, 296 (4th Cir. 2002) (explaining “Congress may use its spending powers to encourage (but not coerce) the states to enact certain laws.”).

31. *Steward Mach. Co.*, 301 U.S. at 594.

B. Historical Lineage of Federal Involvement in Public Education

Education policy became a focus of the federal government in 1965 when President Lyndon B. Johnson set forth an agenda to create equal opportunities for all students, regardless of race or affluence.³² Born out of President Johnson's proposal was The Elementary and Secondary Education Act ("ESEA").³³ Title I of ESEA provided the seminal structure for federal involvement in public education until 1994.³⁴ The goal of ESEA was to assist schools in providing remedial education to disadvantaged students through federal aid.³⁵ Remedial education involves small group or individualized basic skills instruction in the areas of reading, writing, and math outside of the regular classroom instruction.³⁶

32. David Nash, Note, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 244 (2002).

33. *Id.* at 244-45.

34. *Id.*

35. Council for Basic Educ., *Improving the Odds: A Report on Title I from the Independent Review Panel 2* (2001), <http://files.eric.ed.gov/fulltext/ED450164.pdf> [hereinafter IRP Report]. IRP is a non-partisan panel that was established by Congress "to advise the U.S. Department of Education on the evaluation of programs authorized under the statute [Title I]." *Id.* at 7.

36. See Nash, *supra* note 32, at 245 (stating that the remedial assistance education is called a "pull out" program); see also Title I Schoolwide Program Plan and Application, 1-2, 12 N.D. Dept. Of Instruction, www.nd.gov/dpi/uploads/documents/155/instruct53107.pdf (last visited Jan. 12, 2015) (giving examples of Title I pull out programs in N.D.). A "pull-out" program could entail individualized or small group instruction for low-performing students where the teacher will pre-teach or re-teach the same skills being taught to the larger class. *Id.* Additionally, a "pull-out" program can teach low-performing students study skills and organization skills to help them compete and succeed in the regular classroom. *Id.*

Title I directly tied school funding³⁷ to the number of disadvantaged students³⁸ in a school and to the number of students identified as needing remedial assistance.³⁹ School districts can identify students needing remedial assistance in a number of ways: if the student has failed a math or language arts class; if the student has been identified by the teacher as underperforming in math, reading, or writing; and/or if the student scores in the twenty-fifth percentile on standardized assessment tests in their state.⁴⁰

Political support for Title I began to grow stale in the 1980s.⁴¹ In 1983, Secretary of Education T.H. Bell established the National Commission on Excellence in Education.⁴² This Commission published a report entitled “A Nation at Risk,” which concluded that the U.S. was underachieving on both national and international scales.⁴³ Further, evaluations of Title I programs indicated that

37. See *No Child Left Behind Act - Title I Distribution Formulas*, NEW AMERICA FOUNDATION (May 21, 2016), <http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-distribution-formulas> (outlining the four distribution formulas used to determine the distribution of Title I funds: 1) “the Basic Grant”; 2) “the Concentration Grant”; 3) “Targeted Assistance Grant”; and 4) “the Education Finance Incentive Grant”). The Basic grant allocates funds to “any school district with at least 10 poor children and 2 percent of its students in poverty.” *Id.* The Concentration Grant allocates funds to school districts with “at least 15 percent of children in poverty or 6,500 poor children, whichever is less.” *Id.* The Concentration Grant funds are giving to school districts in addition to the Basic Grant funds. *Id.* Targeted assistance Grant funds are not distributed evenly per poor child like the previous grants, but instead a higher poverty school district receives more funds per poor child than lower ones do. *Id.* Lastly, The Education Incentive Grant Funds are distributed to those states that spend more state resources on education. *Id.*; see also Zoe Nueberger & Wayne Riddle, *Summary of Implications of Community Eligibility for Title I*, CTR. ON BUDGET AND POLICY PRIORITIES (July 1, 2015), www.cbpp.org/cms/?fa=view&id=4152 (stating that for Title I purposes a majority of school districts use the number of students eligible for free or reduced price school meals to identify low income students).

38. *What Is Title I?*, Formula Fairness Campaign, www.formulafairness.com/title1 (last visited Jan. 12, 2015) (defining “disadvantaged” students as “those who come from low-income families, are in foster homes, or are neglected or delinquent, or who live in families receiving temporary assistance from state governments.”).

39. IRP Report, *supra* note 35, at 2-3.

40. See Ga. Dept. of Educ., *2014-2015 REP Guidance Grade 6-12*, 1, 4-5 (May 12, 2014), www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/Documents/REP/REP%202014-15%20Guidance%20changes%205-29-14.pdf (describing states determine which students are eligible for remedial education programs).

41. CARL F. KAESTLE, CENTER ON EDUC. POLICY, *FEDERAL AID TO EDUCATION SINCE WORLD WAR II: PURPOSES AND POLITICS IN THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION* 13, 30 (2001) (describing “an aura of instability and contestation” surrounding Title I beginning in the 1980’s that was not present until that time).

42. *A Nation at Risk*, EDUCATION WEEK (Aug. 3, 2004), www.edweek.org/ew/issues/a-nation-at-risk/.

43. See The Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983) (concluding that public education faced

remedial assistance programs had an insignificant effect on closing achievement gaps because the federal funds were not disbursed as originally envisioned.⁴⁴ These gaps “occur when one group of students. . . out performs another group and the gap is statistically significant.”⁴⁵ The ineffectiveness of Title I eventually led to the standards-based reform movement of the late 1980s and 1990s.⁴⁶

C. *The Shift Towards Education “Standards”*

In 1989, President George H.W. Bush and then-Governor Bill Clinton led a National Education Summit where the nation’s governors endorsed the creation of six national education goals.⁴⁷ These education goals specified what knowledge and skills students were expected to learn and retain at each grade level.⁴⁸ In that same

a “rising tide of mediocrity”), www2.ed.gov/pubs/NatAtRisk/risk.html; see also Edward Graham, *‘A Nation at Risk’ Turns 30: Where Did It Take Us?*, NEA TODAY (Apr. 25, 2013, 9:39 PM), <http://neatoday.org/2013/04/25/a-nation-at-risk-turns-30-where-did-it-take-us/> (detailing the findings of the of the National Commission on Excellence in Education). In expressing his displeasure with federal involvement in education, Graham says, “If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war.” *Id.*

44. See Kaestle, *supra* note 41, at 31 (discussing the short falls of Title I, specifically how the program failed in one of its main objectives, which was to send Title I funds to high poverty school districts in an effort to close the achievement gaps between the disenfranchised and the privileged).

45. *Achievement Gaps*, National Center For Educational Statistics (Sept. 22, 2015), <http://nces.ed.gov/nationsreportcard/studies/gaps/>.

46. Irfan Murtuza, *National Standards and NCLB: The Promise of State Compacts*, 15 GEO. J. ON POVERTY L. & POL’Y 129, 130-31 (2008) (detailing the history of federally mandated education standards during the Bush and Clinton years).

47. *Id.* at 131. See Maris A. Vinovskis, Nat’l Educ. Goals Panel, *The Road to Charlottesville: The 1989 Education Summit* 1, 37 (1999), <http://govinfo.library.unt.edu/negp/reports/negp30.pdf> (stating the six educational goals). The six goals are: “1. Annually increasing the number of children served by preschool programs with the goal of serving all ‘at-risk’ 4-year-olds by 1995. 2. Raising the basic-skills achievement of all students to at least their grade level, and reducing the gap between the test scores of minority and white children by 1993. 3. Improving the high school graduation rate every year and reducing the number of illiterate Americans. 4. Improving the performance of American students in mathematics, science, and foreign languages until it exceeds that of students from ‘other industrialized nations.’ 5. Increasing college participation, particularly by minorities, and specifically by reducing the current ‘imbalance’ between grants and loans. 6. Recruiting more new teachers, particularly minority teachers, to ease ‘the impending teacher shortage,’ and taking other steps to upgrade the status of the profession.” *Id.*

48. *Id.* at 37.

year, the Kentucky Supreme Court, the first in a long line of state high courts, signaled its support for this “standards-based” reform.⁴⁹

Seeking to ride the wave of support for standards-based reform, Congress passed the Goals 2000: Educate America Act.⁵⁰ This legislation set goals for standards-based education⁵¹ reform.⁵² In addition to the Goals 2000 Act, the federal government still needed a way to hold states accountable for developing these standards. To accomplish this, Congress passed the Improving America's Schools Act of 1994 (“IASA”),⁵³ which marked the first major overhaul of Title I in thirty years.⁵⁴ The IASA required states to hold all Title I students accountable for achieving the same standards applicable to non-Title I students, using the standards and assessments developed under Goals 2000.⁵⁵

Under the IASA, the federal government became more involved in public education.⁵⁶ States were given specific timelines to develop standards and a means of assessment.⁵⁷ Also looming was the threat

49. See *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (holding the state's educational system unconstitutional because of its failure to ensure that all students achieve certain educational outcomes, rather than focusing on inequities in educational inputs).

50. 20 U.S.C. § 5812 (2012).

51. See William S. Koski, Comment, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 302 (2001) (laying out the principles of standards based reform in education, which include the school districts setting high minimum standards that describe what students are expected to know and the states develop assessments that will allow students to demonstrate they have met those high minimum standards).

52. See Goals 2000: Educate America Act, Pub. L. No. 103-227, 128, 108 Stat. 125 (1994) (highlighting that Goals 2000 provided federal funding to support the efforts of states to develop rigorous academic standards and aligned state assessments).

53. See generally Improving America's Schools Act of 1994, Pub. L. No. 103-382, 20 U.S.C.A. § 6301, 108 Stat. 3518 (1994) (current version at 20 U.S.C.A. § 6301-7941 (West Supp. 2002)).

54. See *State-Federal Educational Policy, Historical Essay, Clinton Years*, NYSED.GOV, http://nysa32.nysed.gov/edpolicy/research/res_essay_clinton_iasa_school2work.shtml (last visited Sept. 30, 2014) (describing the effect IASA had on Title I, explaining that “the Title I program of ESEA permitted states to use achievement ‘standards’ for economically disadvantaged students that were different from, and less challenging than, those for other students. IASA, in contrast, required that the standards for Title I and non-Title I students be the same”).

55. See H.R. REP. NO. 103-425, at 4-10 (1994) (summarizing the 1994 amendments to Title I Part A).

56. *Id.*

57. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111, 108 Stat. 3518, (a)-(d) (1994). States receiving funds under IASA were given one year from the receipt of those funds to develop challenging State content standards and challenging State student performance standards in math and language arts. *Id.* Additionally, States were given four years from the receipt of IASA funds to develop a set of high-quality, yearly student assessments in math and language arts. *Id.* These assessments were used to determine the yearly performance of

of losing a portion of federal funds for failure to meet the timeliness.⁵⁸ The IASA further required that minority students⁵⁹ make “adequate yearly progress” (“AYP”) towards achieving state standards, and that the states establish reasonable timelines for having all students achieve state standards.⁶⁰

AYP standards are developed by each state and measure the state’s year-over-year progress, which must be reported annually to the federal government in order for the states to receive federal funding for education.⁶¹ States were even required to start reporting disaggregated test score results broken down by race, ethnicity, gender, national origin, and disability.⁶² The U.S. Department of Education was charged with reviewing the process for developing state standards and assessments to ensure that the process was likely to lead to rigorous standards and aligned assessments.⁶³

Goals 2000 and the IASA led the states to adopt standards and assessment tests throughout the 1990s.⁶⁴ During that time every state had developed a method of testing its students learning growth.⁶⁵ Yet student achievement in public schools continued to

each school and based on student proficiency to meet the State’s performance standards. *Id.* The education standards under IASA required States to develop challenging content standards in academic subjects that, “I) specify what children are expected to know and be able to do, II) contain coherent and rigorous content, and III) encourage the teaching of advanced skills.” *Id.*

58. H.R. REP. NO. 103-425, *supra* note 55.

59. *See State-Federal Educational Policy, Historical Essay, supra* note 54 (explaining that IASA was a corrective measure targeted at minority student AYP goals).

60. *Id.*

61. *See* COMMITTEE ON TITLE I TESTING AND ASSESSMENT ET AL., TESTING, TEACHING, AND LEARNING: A GUIDE FOR STATES AND SCHOOL DISTRICTS 2, 85 (Richard F. Elmore & Robert Rothman eds., 1999), <http://files.eric.ed.gov/fulltext/ED447172.pdf> (discussing the adequate yearly reporting requirement of IASA). IASA requires that adequate yearly reporting be defined “in a manner that (1) results in continuous and substantial yearly improvement of each school and local education agency sufficient to achieve the goal of all children ... meeting the state’s proficient and advanced levels of achievement; [and] (2) is sufficiently rigorous to achieve that goal within an appropriate timeframe.” *Id.*

62. Improving America's Schools Act of 1994, *supra* note 57, at (b)(3).

63. *See* IRP Report, *supra* note 35, at 4 (describing that “[t]he U.S. Department of Education approves the process for developing and adopting assessments, but not the content or assessment instruments themselves”).

64. *See* Nash, *supra* note 32, at 246 (explaining that “by the end of the 1990’s, through a combination of gubernatorial, legislative and judicial pressures, every state in the nation had enacted educational standards”).

65. *Quality Counts 2001: A Better Balance*, Education Week 1, 8-9 (Jan. 11, 2001), www.edweek.org/media/ew/qc/archives/QC01full.pdf. This annual report published by Education Week, focused on states’ education standards and testing programs. *Id.* The report includes a summary of findings of a comprehensive 50-state survey of standards and assessment practices, and the results of a survey of 1019 teachers nationwide. *Id.*

decline under the IASA, because there was no meaningful level of accountability for student performance.⁶⁶ There was strong evidence that the goals of the 1994 revisions to Title I had not been met due to the lack of strong federal oversight.⁶⁷

The continued decline in student achievement, even after Goals 2000 and IASA, led to yet another education reform movement between 1999 and 2000.⁶⁸ The movement met with challenges because liberals and conservatives held different ideologies regarding the best way to move forward.⁶⁹ Specifically, conservatives pushed for accountability, and liberals pushed for equality amongst poor and affluent school children.⁷⁰ The two sides ultimately came together under the leadership of newly elected President George W. Bush.⁷¹ This led to the passage of the broadest education reform since the 1960's.⁷²

D. NCLB: Big Brother Takes Control

In 2001, Congress passed the No Child Left Behind Act ("NCLB").⁷³ This legislation includes a multitude of measures to increase student achievement, and imposed significant new accountability requirements⁷⁴ for student progress on school districts,

66. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 640 (2006).

67. See, e.g., Margaret E. Goertz & Mark C. Duffy, Consortium for Policy Research in Educ., *Assessment and Accountability Across the 50 States* 1, 5 (May 2001), www.cpre.org/images/stories/cpre_pdfs/rb33.pdf (finding that only twenty-two states had met the requirement under the 1994 ESEA to eliminate a dual accountability system - one standard for Title I and another standard for other schools); see also Executive Summary -- Evaluation of Title I Accountability Systems and School Improvement Efforts (TASSIE): First-Year Findings (2004), U.S. Department of Education (Apr. 7, 2004), www2.ed.gov/rschstat/eval/disadv/tassie1/index.html?exp=0 (summarizing the lack of communication and direction under IASA causing states to adopt varying ways of measuring student AYP skewing the data so that the Federal Government could not identify accurately which schools were underperforming). Also, identifying that those schools that were identified for improvement were in many instances not made aware of their designations. *Id.* Further, the school administrators that were made aware of their status as needing improvement were not knowledgeable about the criteria they must meet to exit that status. *Id.*

68. Murtuza, *supra* note 46, at 132-33.

69. *Id.* According to Murtuza, "[c]onservatives demanded accountability for failing public schools... liberals sought to close the achievement gap for minority and low-income students" *Id.*

70. *Id.*

71. Andrew Rudalevige, *The Politics of No Child Left Behind*, EDUCATION NEXT, <http://educationnext.org/the-politics-of-no-child-left-behind/> (last visited Jan. 29, 2015) (commenting on how President Bush was able to put together a coalition of Republicans, Democrats, and newly elected Democrats to pass legislation based on a framework the President provided).

72. Murtuza, *supra* note 46, at 132-33.

73. 20 U.S.C. § 6316 (2012) (repealed 2015).

74. See *The New Rules, An Overview of the Testing and Accountability*

individual schools, and states.⁷⁵ NCLB sought to mend the failures of Title I by committing additional resources to English as a second language (“ESL”) students, students in poverty, and those with disabilities.⁷⁶ Another goal of NCLB was to ensure that “highly qualified” teachers taught all students.⁷⁷

NCLB introduced significant penalties applicable to the states if their schools failed to comply with NCLB’s mandate for assessments and student AYP goals.⁷⁸ Congress required states to develop performance standards and tests in math and language arts, and as of 2006, science.⁷⁹ Under Title I, assessment tests had been administered every three or four years, making it impossible to track year-over-year progress in student achievement.⁸⁰ NCLB sought to correct this deficiency by requiring the development of quality assessment tests in math and language arts.⁸¹ Schools had to administer these tests each year to all students in grades three through eight, and, by the 2005-2006 school year, to all high school level students.⁸² Additionally, each state has to develop science-based assessment tests to be administered to all students once during elementary school, once during middle school, and once at the high school level.⁸³

NCLB further required each state to develop “annual measurable objectives” (“AMOs”), detailing plans for holding the school districts and individual schools accountable for meeting AYP

Provisions of the No Child Left Behind Act, PBS.ORG, www.pbs.org/wgbh/pages/frontline/shows/schools/nochild/nclb.html (last visited Jan. 29, 2015) (summarizing the new measures of NCLB which require states under NCLB to develop challenging assessment tests and annual progress objectives). Each state must also report the results of their annual achievement tests broken out by poverty, race, ethnicity, disability, and limited English proficiency so that states could not lump the results together in an effort to hide the achievement gaps between groups of students. *Id.*

75. *No Child Left Behind*, EDUCATION WEEK (Sept. 19, 2011), www.edweek.org/ew/issues/no-child-left-behind/.

76. 20 U.S.C. § 6301(2) (2006). *See* 20 U.S.C. § 6311(b)(2)(I)(ii) (2006) (requiring at least 95% of minority, English as a second language, learning disabled students to participate in the state assessment program).

77. 20 U.S.C. § 6301(1),(4),(6)-(10). *See* *No Child Left Behind*, *supra* note 75 (explaining that “highly qualified” means “that a teacher was certified and demonstrably proficient in his or her subject matter.”).

78. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004).

79. 20 U.S.C. § 6311(b)(1)(A), (C).

80. David K. Cohen & Susan L. Moffitt, *Center on Educ. Policy, Title I: Politics, Poverty, and Knowledge*, in *THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION*, 77, 83 (2001), (discussing that “existing tests are ... designed to assess the distribution of knowledge or skill within a population at one point in time, rather than to measure growth”).

81. 20 U.S.C. § 6311(b)(1)(C)(2012).

82. 20 U.S.C. § 6311(b)(3)(C)(v)(I) (2012).

83. *Id.* at § 6311(b)(3)(A).

and raising the proficiency⁸⁴ levels of all students.⁸⁵ Each state's AMO must incorporate a plan to increase the percentage of students deemed "proficient" in year-over-year testing.⁸⁶ NCLB mandated that by 2014 every student must be 100% proficient in math and reading based on each state's assessments.⁸⁷

NCLB provides for significant new penalties that become progressively harsher when states or schools fail to meet AYP targets in student proficiency.⁸⁸ If a state or individual school continuously failed to meet its targets, it faced significant consequences. "At the state level, failure to comply with the Act's accountability provisions could result in the loss of all administrative funding provided under the Act."⁸⁹ For individual schools, failure to satisfy AYP requirements could result in the school losing access to significant federal resources.⁹⁰ For example, parents of children enrolled in a school not meeting its AYP targets would be given the option to transfer their children to another school in that district which is performing at its AYP target.⁹¹ Ultimately, the school may be forced to fire underperforming staff and potentially relinquish control to the state.⁹² However, even with stricter accountability standards NCLB failed.⁹³

NCLB failed to increase student proficiency because states had the incentive to lower proficiency thresholds and create tests that a high percentage of students could pass.⁹⁴ The incentive to the states was to ensure they remained eligible to receive much needed federal funding for public education.⁹⁵ The pressure for high passage rates

84. See Thomas F. Risberg, Comment, *National Standards and Tests: The Worst Solution to America's Educational Problems...Except for All Others*, 79 GEO. WASH. L. REV. 890, 896 (2011) (defining student proficiency as the percentile a student tests into on standardized assessments).

85. 20 U.S.C. § 6311(b)(2)(G).

86. *Id.* at § 6311(b)(2)(E)-(F), (3)(C). States have twelve years from the end of the 2001-2002 school year to ensure that all students meet or exceed the states proficient level of academic achievement. *Id.*

87. *Duncan Says 82 Percent of America's Schools Could "Fail" Under NCLB This Year*, U.S. DEPT OF EDUC. (Mar. 9, 2011), www.ed.gov/news/press-releases/duncan-says-82-percent-americas-schools-could-fail-under-nclb-year.

88. Murtuza, *supra* note 46, at 133-34.

89. Nash, *supra* note 32, at 253.

90. See *generally*, 20 U.S.C.A. § 6316(b).

91. 20 U.S.C. § 6316(b)(1)(E)(i).

92. No Child Left Behind, *supra* note 75.

93. See Maria Glod, *U.S. Teens Trail Peers Around World on Math-Science Test*, WASH. POST (Dec. 5, 2007), www.washingtonpost.com/wp-dyn/content/article/2007/12/04/AR2007120400730.html (illustrating that U.S. Students proficiency in math and science has remained stagnant since 2003, and that U.S. students "lagged behind those in 16 of 30 countries in the Organization for Economic Cooperation and Development, a Paris-based group that represents the world's richest countries. The U.S. students were further behind in math, trailing counterparts in 23 countries.").

94. James E. Ryan, *supra* note 78, at 946-48.

95. *Id.*

led states to create tests that concentrate on memorization skills rather than analytical skills.⁹⁶ This caused many states to measure student performance using multiple choice questions standing in complete contrast to the challenging academic standards teaching advanced skills in math and science envisioned by NCLB.⁹⁷ Thus, resulting in skewed data labeling students as proficient without truly measuring a student's academic achievement.⁹⁸ With NCLB failing to meet expectations a new era of standards-based reform was called for yet again.

E. One Step Closer to a National Curriculum

In the fall of 2009 the National Governors Association (“NGA”) and the Council of Chief State School Officers (“CCSSO”) co-sponsored the development of The Common Core State Standards Initiative (“CCSSI”).⁹⁹ The goal of CCSSI is to provide a consistent high quality education that is common amongst all the states.¹⁰⁰ The initiative specifically sought to develop common core standards in English, language arts, and mathematics for all public schools.¹⁰¹

The initiative received its largest support and push from the Bill and Melinda Gates Foundation (“Gates”), which provided more than \$200 million in grants.¹⁰² The Gates foundation spread money around the country to rigorously advocate their agenda, making it difficult for state governments to refuse to adopt CCSSI.¹⁰³ “[B]eginning in 2007 . . . the [Gates] foundation gave \$27 million to NGA, CCSSO, and Achieve to help develop and advance common state standards and student data systems.”¹⁰⁴ The result was a publication entitled

96. Jennifer Cohen, *Race to The Top Funds and State Spending on Student Assessments*, NEW AMERICA (Sept. 29, 2009), www.newamerica.org/education-policy/race-to-the-top-funds-and-state-spending-on-student-assessments/.

97. See 20 U.S.C. § 6311(b)(1)(D) (listing the “Challenging Academic Standards” the states are to conform their public education policy to).

98. Kevin Carey, *Hot Air: How States Inflate Their Educational Progress Under NCLB, Evidence Suggests Otherwise*, EDUCATION SECTOR (May 15, 2006), http://educationpolicy.air.org/sites/default/files/publications/Hot_Air_NCLB.pdf.

99. See *About the Standards: Development Process*, COMMON CORE STATE DEVELOPMENT INITIATIVE, www.corestandards.org/about-the-standards/development-process/ (last visited Oct. 2, 2014) (describing the timeline for the development and implementation of the CCSSI).

100. *Id.*

101. *Id.*

102. Lyndsey Layton, *How Bill Gates Pulled Off The Swift Common Core Revolution: Outside In A New Era Of Influence*, WASH. POST (June 7, 2014), www.washingtonpost.com/politics/how-bill-gates-pulled-off-the-swift-common-core-revolution/2014/06/07/a830e32e-ec34-11e3-9f5c-9075d5508f0a_story.html.

103. *Id.*

104. *Common Core Issues: What is Common Core*, HSLDA (July 21, 2014), www.hslda.org/commoncore/Topic1.aspx; see also *About Us*, ACHIEVE.ORG,

*Benchmarking for Success: Ensuring U.S. Students Receive a World-class Education.*¹⁰⁵ *Benchmarking for Success* outlined five main steps the states and federal government must adopt to ensure American students can compete for jobs with other top performing nations.¹⁰⁶ In 2008, then-president-elect Barack Obama received a copy of the publication, and shortly after being sworn in as President his administration expressed its commitment to Common Core.¹⁰⁷ Specifically, President Obama's Secretary of Education, Arne Duncan, stated his commitment to helping "states develop and implement rigorous, college-ready academic achievement standards along with improved assessments."¹⁰⁸

The United States Department of Education ("USDE") embraced the development of the Common Core State Standards, and adopted the standards as a way of benchmarking state's applications for education grants in connection with its Race to the Top program ("RTTP").¹⁰⁹ In this competitive grant program, states compete for a share of \$4.35 billion reserved for state education, included as part of the American Recovery and Restoration Act ("ARRA").¹¹⁰ To be eligible for funding, states had to promise that they would fully adopt a set of common college- and career-ready standards.¹¹¹ RTTP did

www.achieve.org/about-us (last visited Jan. 29, 2015) (stating that Achieve is a non-profit organization that works with state legislatures and state boards of education to help the states develop education policy, assessments, and curriculum).

105. Craig D. Jerald, *Benchmarking for Success: Ensuring U.S. Students Receive a World-Class Education*, Achieve.org, www.achieve.org/files/BenchmarkingforSuccess.pdf (last visited Apr. 03, 2016).

106. See *Education Policy Experts Sound Alarm Over America's Ability To Compete*, ACHIEVE (Dec. 19, 2008), www.achieve.org/education-policy-experts-sound-alarm-over-americas-ability-compete (outlining the five steps: "1. Upgrade state standards by adopting a common core of internationally benchmarked standards in math and language arts for grades K-12; 2. Leverage states' collective influence to ensure textbooks, digital media, curricula and assessments are aligned to internationally benchmarked standards and draw on lessons from high-performing nations; 3. Revise state policies for recruiting, preparing, developing and supporting teachers and school leaders to reflect the 'human capital' practices of top-performing nations and states around the world; 4. Hold schools and systems accountable through monitoring, interventions and support to ensure consistently high performance, drawing upon international best practices; and 5. Measure state-level education performance globally by examining student achievement and attainment in an international context to ensure that students are receiving the education they need to compete in the 21st century economy.").

107. *Common Core Issues: What is Common Core*, HSLDA (July 21, 2014), www.hslda.org/commoncore/Topic1.aspx.

108. *Secretary Arne Duncan Testifies before the House Budget Committee on the Fiscal Year 2010 Budget Request*, U.S. DEPT OF EDUC. (March 12, 2009), www.ed.gov/news/speeches/secretary-arne-duncan-testifies-house-budget-committee-fiscal-year-2010-budget-request.

109. Race to the Top Fund, 74 Fed. Reg. 37, 804 (July 29, 2009).

110. *Id.*

111. U.S. Dep't of Educ., Race to the Top Program Executive Summary, 1, 4

allow for states to develop their own standards, but the states were only eligible to compete for RTTP funds if their own state universities verified that those internally developed standards were comparable to the Common Core career-ready standards.¹¹²

However, most states were under economic strain at the time.¹¹³ Therefore, these states could not commit the appropriate resources for developing their own set of academic standards that would allow them to compete for RTTP funds and adopted the Common Core.¹¹⁴ A state applying for an RTTP grant was eligible for more RTTP funds by earning “high” points.¹¹⁵ A state earned “high” points by joining a consortium consisting of more than one-half of the states in the country that jointly develop and adopt common standards.¹¹⁶ A state received fewer points, and less RTTP funds, if it was part of a consortium that included only one-half of the states in the country or less.¹¹⁷ Two major consortia, The Partnership for Assessment of Readiness For College and Careers (“PARCC”) and the SMARTER Balanced Assessment Consortium (“SBAC”), were awarded grants by the Department of Education to develop assessments aligned to the Common Core.¹¹⁸ States were also required to demonstrate that they would expand their state’s longitudinal data system¹¹⁹ so that it was in the same format as other states and contained new data, such as student health, demographics, and success in postsecondary education.¹²⁰

(2009), www2.ed.gov/programs/racetothetop/executive-summary.pdf. Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 221, 59836 (Nov. 18, 2009), www.gpo.gov/fdsys/pkg/FR-2009-11-18/pdf/E9-27427.pdf.

112. Layton, *supra* note 102.

113. See *infra* note 205 and accompanying text for a breakdown of the revenues and expenses of the states as a collective.

114. Layton, *supra* note 102.

115. See 75 Fed. Reg. 18171, 18173 (Apr. 9, 2010) www.gpo.gov/fdsys/pkg/FR-2010-04-09/html/2010-8176.htm (noting the total points available for states participating in a consortium including a majority of the states).

116. See 75 Fed. Reg. 18171, 18173 (Apr. 9, 2010) (outlining the RTTP’s scoring priorities).

117. *Id.*

118. Valerie Strauss, *The Coming common Core Meltdown*, WASH. POST (Jan. 23, 2014), www.washingtonpost.com/blogs/answer-sheet/wp/2014/01/23/the-coming-common-core-meltdown/. See *Information Related To The Assessment Consortia*, NCLS.ORG, www.ncsl.org/research/education/common-core-state-standards-assessment-consortia.aspx (last visited Mar. 29, 2016) (stating that two consortia, PARCC and SBAC received \$186 million and \$176 million in RTTP grants).

119. See *Longitudinal Data Systems Task Force*, NCES.ED.ORG, <http://nces.ed.gov/Forum/longitudinal.asp> (last visited Jan. 29, 2015) (defining a longitudinal data system as an electronic database that tracks student and teacher information over many years and can be accessed by multiple schools in case that individual student or teacher should move or transfer schools).

120. 74 Fed. Reg. 221, 59836 (Nov. 18, 2009); see generally A BLUEPRINT FOR

RTTP applications were due on January 19, 2010, even though the final draft of Common Core was not released until six months later.¹²¹ As a result, states applying for RTTP funds had only a short period of time to review the final draft and adopt the standards. Specifically, the final draft was released on June 2, 2010, and states had until August 2, 2010 to review this draft and adopt the standards.¹²² During this shotgun adoption period, many states signed onto the Common Core to compete for RTTP funds while their legislators were out of session.¹²³ Nevertheless, all but eight states adopted the Common Core in order to receive RTTP funds.¹²⁴

Sentiment for Common Core has grown rapidly since its implementation in public education curriculum. In fact, it has grown “to the extent that it has become a litmus test in the Republican Party ahead of the GOP’s 2016 presidential nomination process.”¹²⁵ Common core is seen as a Democratic program and Republicans are pouncing on its negative reception as a campaign talking point.¹²⁶ Red states, including, Indiana, Oklahoma, and South Carolina, have begun to pull out of Common Core after initially adopting the standards.¹²⁷

Further, questions of self-interest remain. Who stands to benefit the most from states adopting Common Core? Does Common Core represent the nationalization of public education with the federal government wielding the whip? Undeniably though, is that Gates stands to gain financially through his affiliation with Microsoft.¹²⁸ In February 2014, Microsoft announced it would be pre-loading Common Core classroom material onto Microsoft Surface tablets, allowing it to compete for use in the classroom with the Apple iPad.¹²⁹ While conservatives argue the federal government stands to gain the most from the states adoption of the Common Core by taking control of education policy in direct contradiction of the Tenth Amendment.¹³⁰

REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 1, 8 (Mar. 2010), www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf (describing what student information the states must track in the new data systems required under RTTP).

121. Race to the Top Program Executive Summary, *supra* note 111, at 7; How is the Federal Government involved in the Common Core?, *supra* note 20.

122. *Home Sch. Legal Def. Ass’n.*, *supra* note 20.

123. *Race To The Top*, TRUTH IN AMERICAN EDUCATION, <http://truthinamericaneducation.com/race-to-the-top/> (last visited Oct. 2, 2014).

124. *Id.*

125. Layton, *supra* note 102.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See *Home Sch. Legal Def. Ass’n.*, *supra* note 20 (explaining how the federal government through the Department of Education has forced over 80% of the country into using identical academic standards and assessment tests).

III. A DETAILED LOOK AT HOW THE STATES WERE COERCED INTO ADOPTING THE COMMON CORE

A. *Common Core Fiasco*

In the aftermath of the muddled and troubled rollout of the Common Core, many parents, educators, and politicians vocalized their opinions on the development and implementation of the Common Core standards.¹³¹ Opponents of the Common Core have questioned many aspects of the program: the constitutionality of federal involvement in education policy, the development of the standards, the content of the standards, and how standardized assessments align with the Common Core.¹³² Supporters of Common Core argue that its development and implementation was a state-led effort, and that the states voluntarily adopted the standards absent pressure from the federal government.¹³³ Further, supporters also argue that experts and teachers from across the country drafted the standards, and that the standards are internationally benchmarked against those of top performing countries.¹³⁴

Despite these purported strengths of Common Core, the federal government is not doing its part to win over the opposition. The Secretary of Education, Arne Duncan, has said that he finds it “fascinating” that some of the opposition to the Common Core has come from “[w]hite suburban moms who - all of a sudden - their child isn’t as brilliant as they thought they were and their school isn’t quite as good as they thought they were, and that’s pretty scary.”¹³⁵ Secretary Duncan should also take note that opposition within his own party to the Common Core is also increasing, up seven percent in 2014 compared to 2013.¹³⁶

131. See generally Valerie Strauss, *Arne Duncan: ‘White Suburban Moms’ Upset that Common Core Shows Their Kids Aren’t Brilliant*, WASH. POST (Nov. 16, 2013), www.washingtonpost.com/blogs/answer-sheet/wp/2013/11/16/arne-duncan-white-surburban-moms-upset-that-common-core-shows-their-kids-arent-brilliant/.

132. *Id.*

133. *About the Standards: Development Process*, COMMON CORE STATE STANDARDS INITIATIVE, www.corestandards.org/about-the-standards/development-process/ (last visited Oct. 21, 2014).

134. See *About the Standards: Development Process*, COMMON CORE STATE STANDARDS INITIATIVE, www.corestandards.org/assets/Criteria.pdf (last visited Mar. 26, 2016), (detailing the criteria that guided the development of the Common Core curriculum).

135. Michele Richinick, *Arne Duncan Reflects on ‘White Suburban Moms’ Comment*, MS NBC (updated Nov. 22, 2013, 5:58 PM), www.msnbc.com/morning-joe/sec-education-arne-duncan.

136. Rebecca Klein, *Support For The Common Core Plummets, Especially Among Teachers*, HUFFINGTON POST (Aug. 19, 2014, 12:03 AM), www.huffingtonpost.com/2014/08/18/ednext-2014-survey_n_5688376.html.

*B. Comparing the Constitutionality of Congress's Use of
Its Spending Power in Enacting NCLB and the
RTTP:*

The constitutionality of NCLB has been challenged by individual states, but no court has found that the federal government overstepped its spending powers in enacting NCLB.¹³⁷ Under the *Dole* test, NCLB is an appropriate use of Congress's spending powers.¹³⁸ NCLB is intended to serve the "general welfare" because it seeks to improve the educational system, and it is unambiguous by virtue of the states agreeing to the provisions of NCLB.¹³⁹ Further, NCLB funds are tied to a federal interest, which is stated in the title "leaving no child behind," and NCLB does not violate any independent provision of the Constitution.¹⁴⁰ The test examining the violation of independent provisions of the Constitution relates only to whether the conditions attached to the funds require the states to conduct unconstitutional activities.¹⁴¹ NCLB conditions the receipt of federal funds on states committing to improving education in high-poverty school districts.¹⁴² This is not unconstitutional; rather, the

137. See *Sch. Dist. of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 295 (6th Cir. 2009) (finding NCLB does not violate a states tenth amendment rights when federal funding does not cover the full cost of its implementation); see also *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 494 (2006) (dismissing Connecticut's Tenth Amendment challenge to NCLB for subject matter jurisdiction and because it was not judicially reviewable).

138. *Dole*, 483 U.S. at 207-08.

139. See *Dole*, 483 U.S. 203, at 207 (explaining that Congress's use of its spending powers is unambiguous if states knowingly accept federal funds aware of the consequences of their participation in the federal program); see also Coulter M. Bump, Comment, *Reviving the Coercion Test: a Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 541-42 (2005) (articulating that when a state agrees to adopt a federal regulatory program in exchange for federal funds, it is akin to a contract, and that upon a state's agreement to receive funds, ambiguity ceases to exist, because the state is assumed to have read the legislation, understood the details, and agreed to comply with the requirements laid out by congress).

140. See *Dole*, 483 U.S. 203, at 210-11 (explaining that the spending power may not be used to induce states to participate in activities that themselves would be unconstitutional). The Court offers the example that "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise" of the Congress' spending powers." *Id.*

141. *Id.*

142. See National Education Association, *Federal Education Funding under NCLB: Fairness Contributor or Inhibitor?*, 1 (last visited Apr. 26, 2016), www.nea.org/assets/docs/PB39revfedfundingnclb2011.pdf (describing that NCLB was enacted to target high-poverty school districts in an effort to close the achievement gap of students in those districts compared to wealthier school districts).

goals of NCLB are in direct alignment with the Fourteenth Amendment.¹⁴³

Like NCLB, the RTTP meets the elements of the *Dole* test.¹⁴⁴ The RTTP satisfies the first element of *Dole* because it intends to serve the “general welfare.”¹⁴⁵ The term “general welfare” has been interpreted as being discretionary in nature and the discretion belongs to Congress.¹⁴⁶ The discretion conferred to Congress should only be questioned if its “choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”¹⁴⁷ The RTTP was enacted to ensure all students graduate high school with the skills they need to succeed in college and in their careers, which is clearly intended to serve the “general welfare” of our country’s students¹⁴⁸ as interpreted by the *Helvering* Court.¹⁴⁹

The second element, ambiguity, is met for the sole reason that states that adopted the Common Core standards in order to compete for RTTP funds signed on to the RTTP.¹⁵⁰ However, opponents of the RTTP believe this to be an area of contention. In *Pennhurst State School and Hospital v. Halderman*, the Supreme Court stated that a legitimate use of Congress’s spending power rests on whether states knowingly accept the terms of a contract offered to them by Congress.¹⁵¹ “There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”¹⁵²

It can be argued that the statute was ambiguous at the time states were required to apply for RTTP funds, because the standards had to be adopted so quickly.¹⁵³ In some circumstances the states did not even know what the standards were when they signed on to adopt them.¹⁵⁴ Additionally, states that had time to review the standards adopted them without any field data that the Common Core standards would increase student proficiency.¹⁵⁵ States were

143. U.S. CONST. amend. XIV.

144. *Dole*, 483 U.S. at 207-08.

145. *Id.* at 210.

146. *Davis*, 301 U.S. at 640 (1937).

147. *Id.*

148. *About the Common Core State Standards*, COMMON CORE STATE DEVELOPMENT INITIATIVE, www.corestandards.org/about-the-standards (last visited Jan. 14, 2015) (detailing the goals of the RTTP).

149. *Davis*, 301 U.S. at 640 (1937).

150. Bump, *supra* note 139, at 541-42.

151. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1937).

152. *Id.*

153. How is the Federal Government involved in the Common Core?, *supra* note 20.

154. *Id.*

155. See Stan Karp, *The Problems with the Common Core*, RETHINKING SCHOOLS, www.rethinkingschools.org/archive/28_02/28_02_karp.shtml (last visited Jan. 14, 2015) (illustrating that the Common Core is more of a marketing

merely given rhetoric regarding the goals of the RTTP and were unaware at the time of adoption that five members of the validation committee¹⁵⁶ did not sign off on the drafted standards that were presented to the states.¹⁵⁷ However, like any contract, a state signing onto the Common Core to receive federal funds indicates understanding.¹⁵⁸ Therefore, it is unlikely a court would hold otherwise.¹⁵⁹

As to the third element of the *Dole* test – forwarding a federal interest – RTTP seeks to reform four areas of education: 1) improving the collection and use of data to better measure student growth and success; 2) developing, training, and rewarding the nation’s best teachers; 3) adopting a set of standards that better prepare students for college and careers, and, 4) increasing student achievement in the nation’s most underperforming schools.¹⁶⁰ The Supreme Court gives deference to Congress under *Dole* if there is any reasonable relation between the policy goals and the conditions.¹⁶¹ Thus, it could be expected that the conditions placed on states receiving RTTP funds would be undisputedly related to the goals of RTTP because states are required to use federal funds to implement plans that strictly

plan than an educational reform plan because the standards are more abstract descriptions of what students should know and when and was rolled out nationally without any sort of pilot program).

156. *Reaching Higher The Common Core State Standards Validation Committee, A Report From the National Governors Association Center for Best Practices & the Council of Chief State School Officers*, 1, 1-2 CORE STANDARDS (June, 2010), www.corestandards.org/assets/CommonCoreReport_6.10.pdf. The validation committee was responsible for reviewing the evidence used for creating the Common Core college-and-career ready standards. *Id.* Additionally, the committee reviewed the standards to make sure they were clear and specific and benchmarked the standards against education standards with other leading countries expectations. *Id.*

157. See Sandra Stotsky, *Common Core’s Invalid Validation Committee*, at 1, 4, UNIV. OF ARK. (Sept. 9, 2013), www.uaedreform.org/downloads/2013/11/common-cores-invalid-validation-committee.pdf (describing that five members of the validation committee who did not sign off on the Common Core standards names were excluded from the official report issued to the states and their reasons for not signing off were never made known to the state boards of education).

158. See 27 WILLISTON ON CONTRACTS § 70:113 (4th ed. 2001) (stating that, “[o]ne who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them”).

159. See *Sch. Dist. of Pontiac*, 584 F.3d 253 at 272 (holding dismissal of plaintiff’s action was appropriate, even though the court agreed that the language of NCLB was ambiguous in that states were unaware that they were required to meet all conditions of NCLB using state funds once federal funds were used even though the language of the act stated “nothing in this act shall . . . mandate a state . . . to spend any funds or incur any costs not paid for under this act.”).

160. See *Bobby Jindal v. U.S. Dep’t of Educ.*, No. 3:14-CV-534 (M.D. of La. 2014) (No. 19-1).

161. Kenneth R. Thomas, Cong. Research Serv., R42367, *The Constitutionality of Federal Grant Conditions after National Federation of Independent Business v. Sebelius* 1, 12 (2012).

adhere to these goals.¹⁶² Finally, RTTP meets the fourth *Dole* requirement because it does not condition the receipt of federal funds on the states' commitment to unconstitutional activities.¹⁶³ But the fourth element does not take into account the potential for federal coercion, which means it is not concerned with Tenth Amendment violations.¹⁶⁴

C. *The Coercion Test and the RTTP*

As discussed above, NCLB and RTTP individually satisfy the four elements of the *Dole* test. However, NCLB in conjunction with RTTP, must still be scrutinized to determine if the provisions of both programs acted to coerce the states into adopting the Common Core.¹⁶⁵ Though RTTP and NCLB are two separate and distinct government programs, the federal government skillfully tied the Common Core standards of RTTP directly to NCLB.¹⁶⁶ Thus, the two programs are so intertwined that if a state wanted to opt out of the RTTP, it would still need to use the Common Core standards to receive NCLB funds.¹⁶⁷ The federal government can only use its spending powers to induce states to comply with federal policy in areas that the federal government does not directly control; thus, the federal government cannot force states to comply.¹⁶⁸ Such coercion is equivalent to direct regulation, and is unconstitutional.¹⁶⁹ Historically, the Supreme Court gave deference to Congress's use of its spending power, but a majority of current Justices have begun to limit congressional spending power.¹⁷⁰ For instance, in 2012, in *NFIB*

162. U.S. DEPT OF EDUC., PROGRAM DESCRIPTION (Nov. 10, 2015), <http://www2.ed.gov/programs/racetothetop/index.html>.

163. *Dole*, 483 U.S. at 210-11.

164. *Unconstitutional Coercion: How the No Child Left Behind Act Violates Oregon's 10th Amendment Rights*, at 8-9, WILLAMETTE UNIV. (2006), www.yumpu.com/en/document/view/33539216/unconstitutional-coercion-willamette-university.

165. *West Virginia*, 289 F.3d at 296.

166. Alex Cameron, *Oklahoma Loses 'No Child Left Behind' Waiver Following Common Core Repeal*, NEWS 9 (Aug. 28, 2014, 6:26 PM), www.news9.com/story/26395911/oklahoma-loses-no-child-left-behind-waiver-following-common-core-repeal (reporting that Oklahoma after repealing the Common Core standard lost its NCLB waiver because the DOE found Oklahoma's own standards were not aligned with college-and-career ready standards and will now have to resume compliance with NCLB mandates).

167. *Id.*

168. *New York v. United States*, 505 U.S. 144, 166 (1992).

169. See U.S. CONST. amend X. (prescribing that those powers not conferred to the Federal Government are left to the states).

170. *West Virginia*, 289 F.3d at 289-90. See also *Butler*, 297 U.S. at 66 (holding that Congress's spending power is not limited by the other federally enumerated powers); *Dole*, 483 U.S. at 207 (holding that the Federal Government could place reasonable conditions on money dispersed to the states through

v. Sibelius, the Supreme Court found that Congress overstepped its use of its spending power by coercing the states to either accept an expansion of Medicaid or lose all of its Medicaid funding.¹⁷¹

Similarly to *NFIB v. Sibelius*, opponents of the Common Core can demonstrate that the financial inducement offered by Congress was coercive; that is, it passed the point at which pressure to adopt the Common Core became compulsion. These opponents can demonstrate that the federal government's involvement in Common Core goes beyond withholding RTTP funds for non-participation. Instead, it forces an obligation on the states to adopt a form of Common Core under the NCLB waiver program.¹⁷²

All schools receiving funds from NCLB are obligated to the conditions of the program, but the Department of Education has devised what can be characterized as a coercive scheme, which waives the harshest conditions of NCLB.¹⁷³ The scheme continues to provide education funding to states as long as they adopt a common set of college-and-career ready standards.¹⁷⁴ A state seeking a waiver "must declare whether it has adopted college- and career-ready standards in reading/language arts and mathematics that are common to a significant number of States" or "adopt such standards certified by its state network of institutions of higher education, as long as they are consistent with the Department's definition of such standards—the Common Core standards."¹⁷⁵ As a practical matter, most states seeking waivers have settled for the Common Core standards, rather than investing in the creation of their own standards that resemble the Common Core standards.¹⁷⁶

Congress's spending powers).

171. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012).

172. Dr. Sandra Stotsky, *How States and School Districts Can Opt Out of Common Core*, EDUCATION NEWS (Mar. 8, 2014), www.educationviews.org/states-school-districts-opt-common-core/ (noting that if states do not adopt common core they will be subject to the NCLB mandate). If the state does not meet its mandatory AYP of 100% proficiency then the schools must relinquish control of 20% of their federal funding to supplemental education services and programs. *Id.*

173. See *ESEA Flexibility Document*, U.S. DEPT OF EDUC. (June 7, 2012), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (detailing the NCLB waiver program as an invitation to each "State educational agency (SEA) to request flexibility regarding specific requirements of the No Child Left Behind Act of 2001 (NCLB) in exchange for rigorous and comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction").

174. *Id.*

175. Robert S. Eitel & Kent D. Talbert, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, at 13, 20 (Feb. 2012), THE FEDERALIST SOCIETY www.fed-soc.org/publications/detail/the-road-to-a-national-curriculum-the-legal-aspects-of-the-common-core-standards-race-to-the-top-and-conditional-waivers.

176. See *Standards in your State*, COMMON CORE STATE STANDARDS INITIATIVE, www.corestandards.org/standards-in-your-state/ (last visited Oct. 23, 2014) (providing the forty-three states, the District of Columbia, four territories,

The issue of coercion in regard to the RTTP is distinguishable from the *Dole* case. In *Dole*, the court held that a 5% reduction in federal highway funding for states not complying with the federal goal of raising the drinking age to twenty-one constituted inducement.¹⁷⁷ By contrast, under the RTTP, if a state voluntarily decides not to adopt the Common Core, or standards resembling the Common Core vetted by the state's higher education institutions, the state is not eligible to receive any RTTP funds.¹⁷⁸ Further, the states that do not adopt the Common Core are not eligible for NCLB waivers, and must meet NCLB's unachievable mandate of 100% proficiency for each student by the year 2014 to continue receiving federal education funding.¹⁷⁹ This proficiency goal seems impossible when 48% of schools failed to meet AYP in 2011, and the Department of Education projected 82% failure in that same year.¹⁸⁰ Even Secretary Duncan has implied the standards under NCLB are unachievable.¹⁸¹ The 5% threshold set by the *Dole* court pales in comparison to what states would lose in education funding by not adopting the common Core and not receiving a waiver from NCLB. Namely, 100% of the RTTP grants – all of which is federal funding – would be lost, and 20% of NCLB funding, though not entirely lost, will be earmarked and the federal government will dictate how the state can spend the money.¹⁸² When a state may voluntarily refuse to

and the Department of Defense Education Activity have adopted the Common Core State Standards).

177. *Dole*, 483 U.S. at 211-12.

178. Race to the Top Program Executive Summary, *supra* note 112; 77 Fed. Reg. 49655-49657 (Aug. 16, 2012); 78 Fed. Reg. 48008-48009 (Aug. 8, 2013).

179. See Lisa Schiff, *School Beat: NCLB and Dr. Pangloss' World*, BEYOND CHRON (Nov. 29, 2007), www.beyondchron.org/school-beat-nclb-and-dr-pangloss-world/ (detailing that many researchers looking into the facets of NCLB have found that the mandate that all school children must be proficient in math and reading in 2014 is unfair and unachievable); see also Page Leskin, *Illinois Granted Waiver From No Child Left Behind Act*, DAILY NORTHWESTERN (Apr. 25, 2014), <http://dailynorthwestern.com/2014/04/25/city/illinois-granted-waiver-from-no-child-left-behind-act/> (reporting that Illinois received a waiver from the 100% proficiency mandate under NCLB because the Illinois board of Education found NCLB to be “counterproductive” and “unrealistic”). Illinois was granted a waiver on the condition that it join a state consortium. *Id.* Illinois chose PARCC, and thus adopted the Common Core. *Id.*

180. See Report: *Half of U.S. schools fail federal standards*, USA TODAY (Dec. 15, 2011, 4:14 PM), <http://usatoday30.usatoday.com/news/education/story/2011-12-15/schools-federal-standards/51949126/1> (describing the AYP failures throughout the U.S. in 2011).

181. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES (Aug. 8, 2011), www.nytimes.com/2011/08/08/education/08educ.html?pagewanted=all (referring to NCLB as a “slow-motion train wreck” in response to the announcement that the Department of Education would begin granting waivers for NCLB's stringent proficiency requirements). Not uncommon to the Obama administration, opponents argue that the waivers are a sweeping use of executive authority. *Id.*

182. Stotsky, *supra* note 172.

comply with a federal program, but the price of such refusal is the loss of benefits – that is coercion.¹⁸³

Furthermore, the conditions on funding under the RTTP in conjunction with the NCLB waivers are analogous to the holding in *NFIB v. Sibelius*.¹⁸⁴ In *NFIB*, the Supreme Court found that states would be coerced into adopting the federal government's expansion of Medicaid because they had to either accept the changes to Medicaid or lose all Medicaid funding.¹⁸⁵ This would include funding under the existing Medicaid program.¹⁸⁶ The federal government has enacted the same scheme under the RTTP and the NCLB waiver program. States not adopting the Common Core are not eligible for any new funding under the RTTP.¹⁸⁷ Further, if a state wanted to continue receiving funds from NCLB, it had to meet the unattainable goals of 100% proficiency or lose control of 20% of that existing programs federal funding.¹⁸⁸ Here, as in *NFIB*, the states have no real choice: they must adopt the Common Core to continue receiving federal education grants.

Effectively, the Department of Education has coerced the states into adopting the Common Core standards. With states aware that the NCLB mandates were impossible to reach, and the 100% proficiency date looming, forty-three states, the District of Columbia, and Puerto Rico submitted requests for and received waivers in conjunction with adopting the Common Core standards.¹⁸⁹ Every state that has received a RTTP grant and/or a waiver from NCLB has adopted the Common Core and is a member of one of the two state consortia writing standardized assessments.¹⁹⁰ Proponents of the RTTP point to a few exceptions, namely that Texas, Virginia, and Indiana did not adopt the Common Core, but did receive waivers.¹⁹¹ However, their receipt of waivers was conditioned on adopting policy that was aligned with federal requirements.¹⁹² If a state wants to be

183. See *Butler*, 297 U.S. at 70-71 (1936) (rejecting the argument that the voluntary nature of a federal program itself eliminates any tenth amendment concerns, instead stating that “[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy.... This is coercion by economic pressure. The asserted power of choice is illusory.”).

184. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607.

185. *Id.*

186. *Id.*

187. A Blueprint for Reform, *supra* note 121. Beginning in 2015, the funds under RTTP will only be available to those states adopting the Common Core or standards that are similar to a majority of states. *Id.*

188. Stotsky, *supra* note 172.

189. U.S. Dep't of Educ., *supra* note 111.

190. Home Sch. Legal Def. Ass'n., *supra* note 20.

191. Lyndsey Layton, *Oklahoma Loses, Indiana Wins Federal Education Waiver*, WASH. POST (Aug. 28, 2014), www.washingtonpost.com/local/education/oklahoma-loses-indiana-wins-federal-education-waiver/2014/08/28/47d2d56a-2ee6-11e4-994d-202962a9150c_story.html.

192. See *id.* (describing how Oklahoma lost its waiver after pulling out of the Common Core and was unable to satisfy DOE requirements with their state

free from NCLB mandates, it must either adopt the Common Core or adopt standards that are aligned with the Common Core.¹⁹³

Additionally, in *New York v. United States* the Supreme Court held that it was coercive to force states that refused to adopt a federal regulation program to take ownership of and responsibility for all nuclear waste within their borders.¹⁹⁴ The Supreme Court found that Congress acted to coerce New York because Congress “held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction.”¹⁹⁵ Similarly, the RTTP and the Department of Education’s waiver scheme offer state governments a “choice” of adopting the Common Core as a condition of receiving RTTP funds; should the states not comply, the federal government forces the states to submit to another federal program.¹⁹⁶ Thus, the states, no matter which path they choose, must adopt the Common Core, or be subject to severe penalty under NCLB. This could include the potential loss of funding.¹⁹⁷ Under *New York*, this is coercion.¹⁹⁸

Proponents of the RTTP continually argue that states voluntarily adopted the RTTP and NCLB programs.¹⁹⁹ However,

adopted policy). The article describes how Indiana, after pulling out of the Common Core, was able to receive a NCLB waiver only after adopted standards resembling those of the Common Core, and having these standards approved by Indiana’s state university as being rigorous enough to prepare students for college without needing remedial coursework. *Id.*; see also Michele McNeil, *Texas Wins NCLB Waiver After Concessions*, EDUC. WK. (Oct. 9, 2013), www.edweek.org/ew/articles/2013/10/09/07texas-waiver.h33.html (detailing that Texas received an NCLB waiver after scrapping its own accountability system in favor of one that aligns with federal requirements).

193. *Delaware and Tennessee Win First Race to The Top Grants*, U.S. DEPT OF ED. (Mar. 29, 2010), www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants.

194. *New York*, 505 U.S. at 188.

195. *Id.* at 176. At issue in *New York v. United States* was the Low-Level Radioactive Waste Policy Amendments Act of 1985. *Id.* Under the “take title” provision of the act the States had to choose between conforming to federal regulations or taking title to the waste. *Id.* The court reasoned that since Congress cannot directly force States to legislate according to their scheme, and since Congress likewise cannot force States to take title to radioactive waste, Congress cannot force States to choose between the two. *Id.*

196. U.S. DEPT OF EDUC., *supra* note 173; U.S. DEPT OF EDUC. *supra* note 193.

197. Stotsky, *supra* note 172.

198. See *New York*, 505 U.S. at 177 (holding the “take title” provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985 is inconsistent with the to the federalist structure of government because under the act a state no matter the choice they make must follow the mandate of Congress).

199. See *Jindal*, *supra* note 160, at 1 (arguing in a motion to dismiss for the defendant that the adoption of the RTTP was undertaken voluntarily by the state of Louisiana and that the state can amend their participation in the RTTP voluntarily at any time).

adoption of these programs was anything but voluntary, given the economic conditions when RTTP passed.²⁰⁰ In that fiscal year, ten states that competed for RTTP funds faced huge fiscal challenges, with budget gaps ranging from at least ten percent to thirty-three percent.²⁰¹ During that same time, the country was recovering from the Great Recession, which caused the largest collapse in state revenues ever recorded.²⁰²

Despite these dire economic circumstances, “states’ education . . . obligations continue to grow.”²⁰³ On average, education expenses account for 35.8% of a state’s total expenditures.²⁰⁴ For the 2011 fiscal year, state governments as a whole had overall revenues of \$1,912.3 billion, while, as a whole, overall expenses totaled \$1,976.8 billion.²⁰⁵ Additionally, federal grants comprised over one-third of the states’ total revenues during that same period.²⁰⁶ Instead, states had to adopt the Common Core as a condition for receiving RTTP funds, and had to apply for an NLCB waiver lest be unable to fund education in their respective states.²⁰⁷

D. The Federal Government Needs to Get Out of the Education Business

Not only are the RTTP and the NCLB waiver program inappropriate uses of Congress’s spending power, but more importantly NCLB was a failure,²⁰⁸ and early signs point to the

200. See Bob Williams & Joe Luppino-Esposito, *Financial Incentives Are The “Core” Of New Education Standards*, STATE BUDGET SOLUTIONS PARTNERS (June 18, 2013), www.statebudgetsolutions.org/publications/detail/financial-incentives-are-the-core-of-new-education-standards#ixzz3Ov2n8UZH (reporting that states increasingly rely on federal financial support ranging from a low of twenty-four percent to a high of forty-nine percent of a state’s budget).

201. See Amanda Paulson, *Which states are facing the worst budget deficits in 2010?*, CHRISTIAN SCI. MONITOR (Dec. 30, 2009), www.csmonitor.com/USA/2009/1230/Which-states-are-facing-the-worst-budget-deficits-in-2010 (reporting that in 2010 the following states had the largest budget gaps in the U.S.: California \$20.7 billion, Oklahoma 18.5%, Arizona 30%, Illinois 16.5%, Hawaii 21%, New Jersey 27.5%, New York 12%, Nevada 33%, Colorado 10%, Michigan 14.7%).

202. Phil Oliff & Chris Mai & Vincent Palacios, *States Continue to Feel Recession’s Impact*, 1, 1 CTR. ON Budget & Policy Priorities (June 27, 2012), www.cbpp.org/files/2-8-08sfp.pdf.

203. *Id.*

204. Cheryl H. Lee, Robert Jesse Willhide and Edwin Pome, U.S. Department of Commerce Economics and Statistics Administration, U.S. Census Bureau, G12-CG-ASFIN, State Government Finances Summary Report: 2012, 1, 8 (2014), www.census.gov/prod/2014pubs/g12-cg-asfin.pdf.

205. *Id.* at 5.

206. *Id.* at 2.

207. See Williams, *supra* note 200 (observing that states rarely turn down “free money” in the form of grants from the federal government).

208. See *Promise of No Child Left Behind falls short after 10 years*, USA TODAY (Jan. 7, 2012, 12:59 PM), <http://usatoday30.usatoday.com/news/>

Common Core standards failing as well.²⁰⁹ The clear and concise language of the Department of Education Organization Act of 1979 indicates that education policy is a subject explicitly reserved to the states:

It is the intention of the Congress in the establishment of the Department to *protect the rights of State and local governments* and public and private educational institutions in the areas of educational policies and administration of programs and to *strengthen and improve the control of such governments and institutions over their own educational programs and policies*. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education, which is reserved, to the States and the local school systems and other instrumentalities of the States.²¹⁰

Furthermore, as the federal government repeatedly attempts to regulate federal policy, the costs of education continue to grow. These costs are a great burden on the states themselves. Similar to NCLB, the costs associated with a complete overhaul of a state's education policy are hundreds of millions, if not billions, of dollars.²¹¹ For

education/story/2012-01-07/no-child-left-behind-anniversary/52430722/1 (detailing the failures of NCLB's main goal which was to eliminate the achievement gap amongst minority and poor children, but the results ten years after NCLB was enacted show a huge difference amongst white students and those NCLB was supposed to help); *see also* Jesse Hahnel, *No Child Left Behind Fails to Close the Achievement Gap*, YOUTH LAW (2009), <http://youthlaw.org/publication/no-child-left-behind-fails-to-close-the-achievement-gap/> (chronicling the achievement gap result under NCLB and reporting that in the subjects of math and reading there were no statistical changes in the achievement gap between white-black or white-Hispanic students from 2004-2008 under NCLB).

209. *See* Dr. Susan Berry, *Fail: Common Core Test Results Show Most NYS Students Still Scoring Below Proficiency*, BREITBART (Aug. 15, 2014), www.breitbart.com/big-government/2014/08/15/fail-common-core-test-results-show-most-nys-students-still-scoring-below-proficiency/ (reporting that in the first year of assessment testing aligned with the Common core 31% of New York state school children tested proficient compared to 55% in reading and 65% in math the year prior); *see also* Andrew Ujifusa, *Tests Aligned to Common Core in New York State Trigger Score Drops*, ED. WEEK (Aug. 7, 2013), http://blogs.edweek.org/edweek/state_edwatch/2013/08/_one_interesting_aspect_of.html (reporting on the first results from New York's implementation statewide assessments aligned with the Common Core). The results show that only 31% of third-eighth graders are proficient in math and 31.1% are proficient in English language arts, signifying a 31% and 24% decrease respectively in student proficiency compared to the 2011-2012 academic year. *Id.*

210. 20 U.S.C. § 3403(a) (emphasis added)

211. Lindsey Burke, *State Costs for Adopting and Implementing the Common Core State Standards: National Education Standards and Tests: Big Expense, Little Value*, truthinamericaneducation.com (Feb. 18, 2011), <http://truthinamericaneducation.com/common-core-state-standards/state-costs-for-adopting-and-implementing-the-common-core-state-standards/>.

example, California estimates that it will cost \$1.6 billion to replace its existing standards with the Common Core standards.²¹² Unfortunately, California signed onto the Common Core to be eligible for RTTP funds, but lost its bid.²¹³ If California had been successful in its bid for RTTP funds, it would have offset some of the 1.6 billion dollar implementation cost with as much as \$700 million in RTTP funds.²¹⁴ Additionally, Texas did not adopt the Common Core because implementing the new standards and tests would require the purchase of new textbooks, assessments, and professional development tools at an estimated cost of \$3 billion.²¹⁵

RTTP funds are dispersed to the schools awarded grants over a four-year period at which time all of the RTTP funds will be depleted.²¹⁶ With \$4.35 billion available to be split amongst the states, it is clear based on California's cost of implementation alone that the states will bear the financial burden of fully adopting the Common Core.²¹⁷ The concern immediately becomes the same as it was under NCLB: once the RTTP funds are depleted, states will be faced with long-term increased costs due to the more complicated scoring needs anticipated under the Common Core assessments.²¹⁸ Things have to change.

IV. THERE IS NO ONE ANSWER: A GUIDE POST FOR HOW THE STATES CAN MOVE BEYOND FEDERAL INVOLVEMENT IN ADOPTING EDUCATION POLICY FOR THE 21ST CENTURY STUDENT

The RTTP program in conjunction with the NCLB waiver program should be dissolved. As discussed, NCLB is an appropriate use of Congress's spending powers.²¹⁹ However, the content and assessments aligned with NCLB need to be entirely overhauled.²²⁰ Further, Congress should suspend the 100% proficiency mandate of

212. *Id.*

213. Howard Blume, *California loses bid for federal Race to the Top education grant*, L.A. TIMES (Aug. 24, 2010, 8:45 AM), <http://latimesblogs.latimes.com/lanow/2010/08/california-loses-bid-for-obama-administration-race-to-the-top-school-reform-grant.html>.

214. *Id.*

215. Burke, *supra* note 211.

216. U.S. DEP'T OF EDUC., *supra* note 193.

217. *Id.*

218. See Jennifer Cohen, *Race to the Top Funds State Spending on Student Assessments*, NEWS AMERICA (Sept. 29, 2009), www.newamerica.org/education-policy/race-to-the-top-funds-and-state-spending-on-student-assessments/ (observing that more complex assessment tests bring with them increased costs in scoring and that the costs savings states expect by participating in a consortium may be washed out).

219. See *supra* notes 6-22 and accompanying text (detailing how NCLB and RTTP separately satisfy the Dole test).

220. *Spellings*, 453 F. Supp. 2d at 494.

NCLB and institute achievable goals allowing the states the opportunity to overhaul their current education policies.²²¹

States should be given the autonomy to create state compacts where they can develop curriculum and assessment standards free from federal oversight.²²² A state compact alleviates the issue of state sovereignty concerns, as the compacts do not require federal involvement in state education standards, curriculum, and assessments.²²³ Further, state compacts allow for the cost sharing of standards and assessments typically amongst a group of similarly situated states.²²⁴ States can create regional compacts that are more attuned to student needs in their respective geographic areas, which understand the challenges of meeting the proficiency goals they set under the compact.²²⁵ This creates realistic and achievable reform that meets the needs of the twenty-first century student.

A. How to Untangle the Common Core and Return to the States the Sole Power to Control Education Policy

As a first step, the citizens of the respective states need to demand that their state legislatures refuse to adopt the Common Core, and the receipt of any federal grant money that places conditions on how students are taught.²²⁶ For a state to wean itself off federal education funds and federal oversight, its legislature must

221. See Dillon, *supra* note 181 (providing statistical data that 38% of U.S. public schools fell short of the NCLB proficiency mandate in 2010 and providing a statement from Secretary Duncan that he believes that percentage to rise to 80% in 2011).

222. See *Race to the Top Technical Review*, U.S. DEPT OF EDUC. (Apr. 24, 2015), <http://www2.ed.gov/programs/racetothetop-assessment/performance.html> (detailing federal oversight under the RTTP assessment program and technical review process requiring “on-going, but at least monthly, conversations between the Department and the grantee; on-site program reviews by Department staff; stocktake meetings with the consortium and senior leaders in the Department; and the annual performance report.”).

223. *Id.*

224. Murtuza, *supra* note 46, at 141.

225. See National Assoc. Of State Boards of Education, *State Assessment Collaboratives: Lessons from the New England Common Assessment Program*, 4, 15 (June 19, 2014), (discussing the success of the New England Common Assessment Program in part due to the collaboration of similarly situated states and their shared interest in high school graduates who will likely enter the universities of the New England area).

226. See Frederick M. Hess, *How the Common Core Went Wrong*, NATIONAL AFFAIRS, www.nationalaffairs.com/publications/detail/how-the-common-core-went-wrong (last visited Jan. 17, 2014) (discussing that the states need to again take the lead in public education, repealing the Common Core, and for citizens to demand form their local leaders less federal oversight in public education).

be resilient in its refusal of federal involvement.²²⁷ Federal involvement is counterproductive because the states are more in tune with the needs of their constituent students than the federal government.

After detaching itself from the Common Core, state legislatures should adopt a fiscally responsible funding formula that sets an annual fixed percentage of state funds to be allocated to state education.²²⁸ This percentage should then be enshrined in the state's constitution via amendment, so that the state legislatures cannot use the funds as a bargaining chip during annual budget negotiations.²²⁹ This eliminates annual fluctuation in state education funding, and makes it less likely that the states will become dependent on federal education grants.²³⁰ Lastly, the states should pass legislation that explicitly prohibits the state from accepting funds from the federal government that prescribe education standards or accountability systems from the states.²³¹ Thus, returning to the traditional view that education is a function reserved to the states.²³²

B. Creation of State Compacts

Developing state compacts, where individual states share resources and develop common curriculums and assessments, can be an appropriate path forward. State compacts avoid the unnecessary intrusion of the federal government, yet prevent states from acting in isolation. However, this process of developing and implementing the

227. *Id.*

228. See Kenneth K. Wong, *The Design of the Rhode Island School Funding Formula, Toward a Coherent System of Allocating State Aid to Public Schools*, Ctr. For American Progress (Aug. 2011), www.americanprogress.org/wpcontent/uploads/issues/2011/08/pdf/rhode_island_reform.pdf (outlining Rhode Island's adoption of a funding formula in which they set an annual guarantee of 25% state funding for elementary and secondary education).

229. See *id.* (analyzing that a fixed percentage was essential to Rhode Island's funding reform, because during the fiscal crisis Rhode island suffered in the 1990s the state legislature delayed and deferred the disbursement of education funds). Also during his period Rhode Island legislatures proposed to eliminate the than legislation calling for 25% of state revenues to be allocated to education, ultimately reducing the percentage from 25% to 9%. *Id.* Requiring an increase in federal funding to operate Rhode Island schools. *Id.*

230. See New America Foundation, *Federal, State, and Local K-12 School Finance Overview*, ATLAS (June. 29, 2015), <http://febp.newamerica.net/background-analysis/school-finance> (discussing that the disparity in state funding for education is caused in part because of a state's lack of willingness to provide education funding); Wong, *supra* note 228.

231. Lamar Alexander, *Republicans Want to Free America from Federal Education Mandates*, NAT'L REV. (June, 11, 2013, 4:52 PM), www.nationalreview.com/corner/350788/republicans-want-free-america-federal-education-mandates-lamar-alexander.

232. *Cooper*, 358 U.S. at 19.

standards cannot be swift, discrete, and untested. This is the problem with the Common Core.²³³

There are two main benefits to state compacts: 1) states can reduce the developmental costs of assessment testing, and 2) compacts ensure that students within geographically similar areas are college ready.²³⁴ The developmental costs per student are drastically different from state to state, due to the variations in population and the number of students requiring public education in each state.²³⁵ When states join a compact they share the benefits of scaling their costs.²³⁶

Additionally, the objective of the RTTP was to ensure that U.S. students were college-and-career ready by developing a set of standards common amongst a majority of the states.²³⁷ State compacts better meet this goal. States close in proximity to one another tend to share similar values, which allows for the development of region-specific content.²³⁸ Content that is developed toward the values and interests of a region will increase student engagement in the classroom and increase motivation during testing, which in turn leads to a greater number of proficient students.²³⁹ Further, geographic location is a major factor students consider when choosing a college.²⁴⁰ It is more likely a student will choose an in-state or out-of-state school based on its proximity to home.²⁴¹ Therefore, state compacts that are aligned geographically can share

233. See Hess, *supra* note 226 (depicting the way the common Core was adopted, specifically describing the process as “stealth,” implemented without any statistical support that the assessments and curriculum aligned with the assessments would increase student proficiency on math, language arts, and science).

234. See Matthew M. Chingos, *Strength in Numbers, State Spending on K-12 Assessment Systems*, 1, 2 The Brookings Institute (Nov. 2012), www.brookings.edu/~media/research/files/reports/2012/11/29%20cost%20of%20assessment%20chingos/11_assessment_chingos_final (providing a model comparing the cost per student of a state with 100,000 students with a state that has 1,000,000 students, calculating the cost savings to the smaller state of as much as 35% by joining a compact with the larger state); New America Foundation, *supra* note 230.

235. New America Foundation, *supra* note 230.

236. Chingos, *supra* note 234.

237. Jindal, *supra* note 160.

238. National Assoc. Of State Boards of Education, *supra* note 225.

239. *Id.*

240. NOEL-LEVITZ, WHY DID THEY ENROLL? THE FACTORS INFLUENCING COLLEGE CHOICE 1, 3-8 (2012), www.noellelitz.com/documents/shared/Papers_and_Research/2012/2012_Factors_to_Enroll.pdf (charting the results from a national survey in which 55,000 college bound students were asked to rank the reasons they chose the college they did). 62% of those students responding stated that the college’s proximity to their home was important or very important to their decision. *Id.*

241. *Id.*

post-secondary experiences and requirements in developing standards that will ensure students entering college are considered proficient.²⁴²

In the context of state compacts, “proficient” means that a student does not require remedial course work²⁴³ upon entering college due to poor standardized test scores in math and reading.²⁴⁴ Because those not requiring remedial course work have a significantly better chance of completing college, states that can eliminate or reduce the need for remedial coursework when a student enters college can meet the federal goal of developing college and career ready skills.²⁴⁵

Shared development of assessments also means shared data. States participating in a compact should require that each member state identify those who might need remedial coursework while still in high school, so that they can receive help before they graduate. This increases those students’ potential for success in college.²⁴⁶

For state compacts to achieve the goal of developing college-and-career ready students, they must adopt curriculum, standards, and assessments that are identical to one another. Failure to do so would have an economic effect. For example, if a state that is part of the compact supplements, expands, or retracts any part of the standards and assessments, then any cost savings that would have been realized from sharing production, printing, and scoring costs will be lost.²⁴⁷ It would also have an educational effect, because colleges in the different states would revert to having different standards of proficiency that entering students must meet to avoid remedial

242. Stuart Kahl, *The Gold Standard for State Collaboration: Congratulations to the New England Common Assessment Program*, MEASURED PROGRESS, <http://psychometrictools.measuredprogress.org/documents/10157/32bb6dfd-4710-4aa8-b391-cfeba2ffe05f> (last visited Jan. 17, 2015) (discussing that geographically aligned state compacts are strengthened by the ability of the member states to share experiences and talents of other educators in developing and sustaining a successful common assessment and curriculum).

243. See National Conference of State Legislatures, *Reforming Remedial Education*, www.ncsl.org/research/education/improving-college-completion-reforming-remedial.aspx (last visited Jan. 17, 2015) (defining remedial coursework as classes taken when enrolled in college that are below college-level course, mostly taken without receiving credit for the coursework while still paying the tuition for the course).

244. *Id.*

245. See *id.* (participating in a remedial course work significantly reduces a student’s chance of successfully completing college).

246. Adrienne Lu Pew, *1 in 5 freshmen need remedial courses, but do they work?*, USA Today (July 25, 2013, 10:40 AM), www.usatoday.com/story/news/nation/2013/07/25/stateline-remedial-education/2586013/ (reporting that a number of states are passing legislation to identify and help those students that may require remedial course in college while some states are eliminating remedial course entirely).

247. National Assoc. Of State Boards of Education, *supra* note 225.

coursework. As a result, eradicating the benefits that students would receive upon entering college.²⁴⁸

C. Developing Standards for the Long Term

States joining a compact must be transparent in the process and take the time to develop standards that meet the needs of the students of the collective states. States should begin by outlining content and curriculum standards.²⁴⁹ Content standards address the knowledge, concepts, and skills that every student should know at the end of each grade level from kindergarten through high school.²⁵⁰ Then, to be transparent, the compacts should send these content standards to the school districts within the states and have open meetings where teachers and parents can participate in open discussion.²⁵¹ Such transparency in the development process prevents the tension that have surrounded the Common Core roll out. Teachers and parents alike will not feel the enormous weight of reform all at once, and will have a voice in the process.²⁵²

Upon receiving feedback, the compacts should amend the content standards to reflect the majority view of the school districts. The next step would be to develop curriculum around the content standards.²⁵³ This is something the federal government is not

248. *Id.*

249. See California State Board of Education, Content Standards (Apr. 15, 2014), www.cde.ca.gov/be/st/ss/ (describing an example of state outlined content standards).

250. *Id.*

251. See Stotsky, *supra* note 157 (explaining that the Common Core standards were developed in secret without the standards being presented to individual school boards for open meetings where the standards would be subject to public comment). Additionally, Stotsky writes that it was not until seven months after the standards were published, and an uprising from parents demanding the names of the persons responsible for writing the Common Core standards were the identity of those individuals released. *Id.*; see also Karp, *supra* note 155 (noting that the Common Core Standards were drafted behind closed doors and not a single teacher was part of the work groups that developed and wrote the standards).

252. See Karp, *supra* note 155 (stating that “[a] reasonable approach to implementing new standards would include a few multi-year pilot programs that provided time, resources, opportunities for collaboration, and transparent evaluation plans.”).

253. See Stuart Kahl, *Common Standards and Common Sense*, MEASURED PROGRESS, <http://psychometrictools.measuredprogress.org/documents/10157/2cae5527-25b2-492c-8f42-92ce0055af87> (last visited Mar. 28, 2016) (arguing that common content standards alone will not raise proficiency of students but will only make the percentage of students testing proficient comparable across states). Dr. Kahl argues that common assessments and content standards aligned with the assessments is best carried out by like-minded state compacts to better achieve a rise in student performance. *Id.*

empowered to do directly under its enumerated powers, but the states can.²⁵⁴ Developing curriculum around the standards will ensure that all students from states participating in the compact are taught the same way. This increases the odds that these students will not require remedial coursework upon entering college.²⁵⁵

Last, to alleviate the problems the RTTP faced, the content standards, curriculum, and assessment standards should be phased in over time.²⁵⁶ Pilot programs should be instituted in select school districts within the compact, and that the pilot programs be set up to account for all demographics, including minority, poor, and disabled students.²⁵⁷ Further, each school participating in the pilot program shall designate which classes will be taught and administered the new standards. After a “final” draft of the standards and curriculum has been approved, a select group of current teachers and students enrolled in programs to become teachers, receive training in the new program and curriculum over the course of an entire semester.²⁵⁸ Once these teachers have mastered the new standards, they should be placed into the schools participating in the pilot programs to teach the new standards. This would ensure the students are being taught the standards correctly from day one and would eliminate any gap in the school year where teachers have to learn the program themselves.²⁵⁹ The compact can then analyze the data collected from

254. 20 U.S.C. § 1232; 20 U.S.C. § 3403(b); 20 U.S.C. 7907(A); 20 U.S.C. § 3403(a).

255. National Conference of State Legislatures, *supra* note 243.

256. See Stuart Kahl, *NCLB Needs Quality Time*, Measured Progress (Apr. 11, 2007) (articulating that phasing in the AYP requirements will help to ensure program improvement and ensure that all students being tested under NCLB are accounted for and minimizing the chances of error).

257. See Wong, *supra* note 228 (detailing how a gradual phase in Rhode Island’s new education funding formula helped to avoid political conflict because reform occurred in small increments to be sure no single group was overly affected by the change; thus, successfully keeping legislative commitment for the funding formulas implementation over a number of years).

258. See Catherine Gewertz, *Teachers Say They Are Not Well-Prepared for Common Core*, EDUC. WK. (Apr. 19, 2014), www.edweek.org/ew/articles/2014/08/20/01teachers.h34.html (discussing a main issue with the Common Core rollout was a lack of training). Gewertz reports that teachers feel unprepared to teach the new curriculum aligned with Common Core, and the training that the teachers are receiving is of low quality. *Id.* Only 45% of teachers surveyed in 2013 said that they felt familiar with the language arts standards of the Common Core. *Id.*; see also Alexandria Neason, *Will weak teacher training ruin the Common Core?*, HECHINGERREPORT.ORG (Oct. 1, 2014), http://hechingerreport.org/content/teachers-ready-common-core_17538/ (stating that teachers are receiving training for the Common Core in the form of weekend workshops and short term on the job training even though research shows that these types of training sessions are ineffective).

259. See Gina Jordan, *Florida Teachers Will Attend Summer Camp For Common Core Standards*, NPR (May 9, 2013, 1:43 PM), <http://stateimpact.npr.org/florida/2013/05/09/florida-teachers-will-attend-summer-camp-for-common-core-standards/> (stating that three years after states began adopting the common Core only a quarter of teachers feel they have been given the tools necessary to

these pilot programs and changes can be made prior to a full roll out of the program.

V. MOVING FORWARD

The Race to the Top Program, instituted by The Department of Education²⁶⁰ and financially backed by the Gates foundation, is a gross misuse of Congress's spending powers.²⁶¹ This, in conjunction with the No Child Left Behind waiver program violates the rights of the states as enumerated in the Tenth Amendment.²⁶² The federal government's scheme leaves no meaningful choice for the states: they must adopt a form of the Common Core whether they participate in the RTTP, or elect to remain subjected to the unachievable conditions of No Child Left Behind.²⁶³ The states must rise up and demand that the federal government return education policy back to them before

understand the Common core and how to teach it in a classroom). Even though proven ineffective, the Department of Education began summer school programs in which teachers from across the country can participate in two-day training sessions to "master" the Common Core. *Id.*

260. About the Standards, *supra* note 99.

261. Valerie Strauss, *How Microsoft will make money from Common Core (despite what Bill Gates said)*, Wash. Post (July 12, 2014), www.washingtonpost.com/blogs/answer-sheet/wp/2014/07/12/how-microsoft-will-make-money-from-common-core-despite-what-bill-gates-said/ (detailing that for the children of America Common Core is as much, if not more, of a business decision than one whose purpose it is to advance the critical thinking skills of America's youth). Further, describing how under the guise of the Gates Foundation's veiled motives, Bill Gates himself stands to make huge financial gains through the states' adoption of the Common Core standards. *Id.*; see also Dr. Susan Berry, *The Federally Funded Partnership for Assessment of Readiness for College and Careers (PARCC), a Common Core assessment consortium, issued a press release Friday that confirmed the Common Core standards and their associated tests are intended to drive curriculum*, BREITBART.COM (Aug. 25, 2014), www.breitbart.com/Big-Government/2014/08/25/Common-Core-PARCC-CEO-Acknowledges-Goal-of-Assessments-To-Drive-Curriculum (interviewing Hoover Institution scholar Ze'ev Wurman discussing Microsoft's potential for monetary gain due to the requirements of common core). In this article, Wurman stated "that the computer technology and infrastructure needed to support just the annual testing by Common Core's newfangled assessments is estimated at \$50 per tested student every year." *Id.* Wurman added, "[s]ince over half of students are tested annually, we are talking about public education spending an additional one and a half billion dollars annually on technology for testing – 30 million students times 50!" *Id.* Wurman speculated that "[c]onservatively assuming Microsoft will capture at least half of that market, and assuming just 40% gross margin, Bill Gates is expected to reel in every year in extra profit (not revenue) as much as all he spent on supporting Common Core throughout the years." *Id.*

262. See U.S. CONST. amend. X (stating that those powers not expressly given to the federal government are left to the states).

263. See generally U.S. CONST. The Constitution is silent as to public education. The federal government should have no involvement in setting curriculum standards and goals. *Id.*

the federal policy rules the chalkboard.