

It's Common Sense: Why the Common Core Is Not Coercive

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NOTE

IT'S COMMON SENSE: WHY THE COMMON CORE IS NOT COERCIVE

*Jeremy Bachrach Siegfried**

Education policy is one of the most hotly debated areas of American politics. The most recent debate relates to the Common Core. While many students, parents, teachers, and administrators vigorously support it, others adamantly oppose it and urge their states to opt out. Louisiana is a state that attempted to opt out. In Jindal v. United States Department of Education, former Governor Bobby Jindal argued that the federal government's efforts to tie Race to the Top funding to state adoption of the Common Core amounted to a violation of Congress's power under the Commerce Clause of the Constitution. Although the district court rejected this claim and Louisiana then chose to drop the appeal, another state in the same or different circuit may attempt to raise a similar claim to challenge the policy. This Note argues that the district court was correct to dismiss the complaint. It looks to the history of both education policy and Commerce Clause jurisprudence to establish that tying funds to a goal amounts to an incentive and does not constitute a coercive act.

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“Teachers and principals in schools from Tennessee to Washington, D.C., are making big strides in preparing students with skills for the new economy—problem solving, critical thinking, science, technology, engineering, and math. . . . It requires everything from more challenging curriculums and more demanding parents to better support for teachers and new ways to measure how well our kids think, not how well they can fill in a bubble on a test. But it’s worth it—and it’s working.”

—President Barack Obama¹

“Let’s face it: Centralized planning didn’t work in Russia, it’s not working with our health care system, and it won’t work in education.”

—former Louisiana Governor Bobby Jindal²

INTRODUCTION

The state of our public education system is one of the most debated issues in U.S. domestic policy today. We alternately blame and praise teachers, students, parents, administrators, local governments, state governments, and the federal government for the successes and failures of the system. However, perhaps no education issue over the last decade has provoked more controversy than the Common Core. The stories in the media are numerous: children learn to subtract by adding or they break down in tears because they are not prepared for Common Core-based tests. Many parents are furious, as they do not understand the new concepts being taught and feel helpless to aid their children. Advocates of Common Core also point to improved educational standards and reading scores, as well as better preparation for college and the working world.

¹ Alyson Klein et al., *Obama Sells Race to Top, Early-Childhood Education in State of the Union*, EDUC. WEEK (Jan. 28, 2014), http://www.ccsso.org/News_and_Events/Current_News/Obama_Sells_Race_to_Top_Early-Childhood_Education_in_State_of_the_Union.html.

² David Freedlander, *How the GOP Turned on Common Core*, NEWSWEEK (Sept. 28, 2015), <http://www.newsweek.com/2015/10/09/how-republicans-turned-common-core-377346.html>.

In the past few decades, education in the United States, as measured by student performance, has fallen behind other countries in reading, math, and science, leaving many students unprepared to enter the workplace.³ In addition, dropout rates throughout the country are on the rise. To address these problems and close the gap, in 2001, Congress passed the No Child Left Behind Act (NCLB), which was an updated version of the Elementary and Secondary Education Act of 1965 (ESEA).⁴ NCLB put in place testing and accountability measures, requiring states to show student growth and improvement in learning in order to remain eligible for funds.⁵

The two most recent efforts to reform education, in response to the so-called “Race to the Bottom,”⁶ are programs known as “Race to the Top”⁷ (RTTT) and the Common Core Curriculum Standards (the Common Core).⁸ Race to the Top is a program administered by the Department of Education to award federal grants to states.⁹ The program is voluntary, and a state must participate only if it seeks certain federal grants for education.¹⁰

For the Department of Education to properly evaluate state education programs to determine grant awards, there must be a uniform set of educational standards.¹¹ It is difficult to evaluate and compare the success of states and their reform plans against each other if the grade-level

³ See Lyndsey Layton, *U.S. Students Lag Around Average on International Science, Math and Reading Test*, WASH. POST (Dec. 3, 2013), http://www.washingtonpost.com/local/education/us-students-lag-around-average-on-international-science-math-and-reading-test/2013/12/02/2e510f26-5b92-11e3-a49b-90a0e156254b_story.html.

⁴ See *No Child Left Behind—Overview*, NEW AMERICA (Apr. 24, 2014), <http://febp.newamerica.net/background-analysis/no-child-left-behind-overview>.

⁵ See *id.* NCLB and its role in creating the Race to the Bottom will be explored later in this Note.

⁶ See Jay P. Greene, *Do We Need National Standards to Prevent a Race to the Bottom?*, EDUCATIONNEXT (July 17, 2012), <http://educationnext.org/do-we-need-national-standards-to-prevent-a-race-to-the-bottom>.

⁷ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005, 123 Stat. 115, 282–83 (2009).

⁸ See Greene, *supra* note 6.

⁹ See American Recovery and Reinvestment Act of 2009.

¹⁰ See *id.*

¹¹ See Willona Sloan, *Coming to Terms with Common Core Standards*, INFO BRIEF (Dec. 2010), <http://www.ascd.org/publications/newsletters/policy-priorities/vol16/issue4/full/Coming-to-Terms-with-Common-Core-Standards.aspx>.

standards¹² and tests differ across states.¹³ This is one reason the Department of Education supported developing the Common Core.¹⁴ The goal was to have each state adopt the Common Core and create a nationalized core set of standards.¹⁵ The Common Core¹⁶ would inform state and local agencies what standards students in each grade needed to meet by the end of each year.¹⁷ While some states were eager to join and accept this program, other states viewed it as an improper attempt by the federal government to take over control of public school education and to dictate to states what must be taught in their schools.¹⁸ Historically, control over public school education has resided with the states, making the adoption of the Common Core, in its critics' views, a violation of states' rights.¹⁹ To incentivize states to adopt these standards, Congress allowed the Department of Education to award states points toward Race to the Top grants for adopting the Common Core.²⁰ Many states, despite this incentive, have opted out of the program.²¹

This controversy has grown as states continue to opt out of the Common Core, thereby becoming less competitive for grants. In August of 2014, Governor Bobby Jindal challenged the implementation of the

¹² "Grade-level standards" is an educational term of art. It is used to describe the standards a student will achieve in a specific grade year. For example, a grade-level standard for first grade may be that "students will be able to add two-digit numbers" by the end of first grade. A curriculum, by contrast, would take this standard and tell the teacher when and how to teach this lesson. For example, it would dictate the lesson be taught in December and by using certain strategies. Essentially, the grade-level standards tell teachers the goals their students must achieve and the curriculum tells them how and when they must achieve them.

¹³ See Sloan, *supra* note 11 (quoting a speech by Secretary of Education Arne Duncan in 2009).

¹⁴ See *id.*; see also *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/frequently-asked-questions> (last visited Mar. 7, 2016). The standards themselves were written by the National Governors Association Center for Best Practices and the Council of Chief State School Officers. However, it was an initiative of the Department of Education, for which it recruited these organizations. *Id.* Further involved were educational experts, teachers, parents, and school administrators. *Id.*

¹⁵ See Sloan, *supra* note 11.

¹⁶ For further details, see *infra* Part II.B.

¹⁷ See Memorandum in Support of Defendants' Motion to Dismiss at 11–12, *Jindal v. U.S. Dep't of Educ.*, No. 3:14-cv-534-SDD-RLB (M.D. La. Nov. 18, 2014) ("Academic content standards 'specify what children are expected to know and be able to do.'").

¹⁸ See Lyndsey Layton, *Legislatures Taking Education into Their Own Hands*, WASH. POST (Aug. 2, 2014), http://www.washingtonpost.com/local/education/legislatures-taking-state-education-into-their-own-hands/2014/08/02/71bec126-1745-11e4-9e3b-7f2f110c6265_story.html.

¹⁹ See generally JAMES A. RAPP, EDUCATION LAW § 5.01 (2015).

²⁰ See Defendants' Post-Hearing Brief at 6–7, *Jindal v. U.S. Dep't of Educ.*, No. 3:14-cv-534-SDD-RLB (M.D. La. June 19, 2015). The Defendants refer to adopting "common standards" and assessments, which may be accomplished by adopting the Common Core. The cited portion refers to RTTT-State but serves as evidence that Race to the Top grants are based on points awarded, some of which may be acquired via Common Core adoption.

²¹ See Sloan, *supra* note 11.

Common Core as coercive.²² He argued that by encouraging its adoption in Race to the Top awards, the government was not merely incentivizing the use of the Common Core, but coercing them into using it, which is a violation of states' rights.²³

This Note focuses not on the qualities of the Common Core but rather on the litigation brought by the former Governor of Louisiana challenging its constitutionality. This Note concludes that, contrary to the arguments advanced by Governor Jindal in *Jindal v. United States Department of Education*,²⁴ encouraging states to adopt the Common Core by disbursing certain federal grants is not a coercive use of the power of the purse but, in fact, a valid use of Congress's spending power.²⁵

To place this controversy in context, this Note is divided into four parts. Part I reviews the history of financing for public school education in the United States. Part II reviews the educational reforms and criticisms of those reforms put forward by the Obama administration. Part III reviews the history of Supreme Court rulings related to federal coercion of states. Part IV examines the case in Louisiana, renders a prediction, and discusses the broad policy implications of the variety of possible outcomes.

I. EVERY STATE FOR ITSELF—THE EARLY HISTORY OF EDUCATION

The public has long professed to value education, but has struggled to properly fund and support public school education.²⁶ It was believed early in the nation's history, dating back to colonial times, that the responsibility to educate fell to families and the church.²⁷ Parents were responsible for the growth and education of their children, but many parents and adult non-parents were unwilling or hesitant to pay for education because they saw the benefits of education as related only to individual children and not to society as a whole.²⁸ Given this sense of individualism, it was difficult for local governments to raise money for public education, leaving individual families to educate their own.²⁹ At

²² See First Amended Complaint ¶¶ 56–70, *Jindal v. U.S. Dep't of Educ.*, No. 3:14-cv-534-SDD-RLB (M.D. La. Dec. 10, 2014).

²³ See *id.*

²⁴ See *id.*

²⁵ New Governor John Bel Edwards has since dropped the appeal to the Fifth Circuit of the decision against Jindal. While the analysis of the case will not be contemporaneous, it will assert that not only was the District Court's decision correct, but that any future attempt by a governor in a different circuit to challenge the Common Core on these grounds will fail.

²⁶ See generally RAPP, *supra* note 19.

²⁷ See *id.* § 5.01(2).

²⁸ See *id.* This concern of families became a recurring theme in future efforts to encourage public financing.

²⁹ See *id.*

the same time, local churches provided society's moral compass and as a result were also charged with educating the youth of the colonies.³⁰ Education was, in essence, local and without regulation.³¹

With the founding of the country, despite the development of a central government charged with funding various programs for the states, education remained local.³² As one writer noted, "The federal government has no direct responsibility to educate."³³ The job of educating the country's youth was retained by the states under the Tenth Amendment.³⁴ States continued to leave the duty to local authorities but did provide funds through state lotteries and applications for federal land grants.³⁵

This system soon became unmanageably expensive and inefficient.³⁶ Children within states were receiving vastly different educations and states could not continue to fund schools through the limited revenues they were receiving.³⁷ Change came in 1837 when Horace Mann was elected as Secretary of Education in Massachusetts.³⁸ Horace Mann created the Common School system: schools across the state would use a common system, and society would pay for them through direct and general local taxes.³⁹ In essence, the system would be standardized, and, instead of paying for the program through lotteries and donations to the church, there would be a secular system, which would be paid for by the people.⁴⁰ There were still parochial and private schools; however, parents would have to pay for those on their own.⁴¹

While the federal government did provide money through impact funds and land grants, its role in financing education was very limited until the decision in *Brown v. Board of Education*, which effectively ended segregation in schools.⁴² The controversial decision, however, required enforcement, which was best accomplished through federal intervention.⁴³ In the wake of the decision, the Department of Education was created to enforce equal opportunity.⁴⁴ In order to encourage com-

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ *Id.* § 5.01(3).

³⁴ See *id.* § 5.01(2).

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *Horace Mann (1796–1859)*, PBS, <http://www.pbs.org/onlyateacher/horace.html> (last visited Jan. 26, 2016).

³⁹ See *id.*

⁴⁰ See *id.*; see also RAPP, *supra* note 19, § 5.01(2).

⁴¹ See RAPP, *supra* note 19, § 5.01(2).

⁴² See *id.* § 5.01(3)(e).

⁴³ See *id.*

⁴⁴ See *id.*

pliance with the decision in *Brown*, Congress passed the ESEA, including Titles IV and IX, both of which demanded equality in educational opportunities.⁴⁵ Additionally, Congress passed section 504 of the Rehabilitation Act and, much later, the Individuals with Disabilities Education Act (IDEA) to enforce the rights of individuals with disabilities.⁴⁶ These programs were “carrot and stick” legislation intended to incentivize equal educational opportunities and help states meet compliance costs, which would have been impractical without federal assistance.⁴⁷

Historically, there have been three funding sources for public education.⁴⁸ There are local funds from the city or district, usually funded with taxes.⁴⁹ There are also state funds usually financed through taxes.⁵⁰ Finally, there are federal funds that states are eligible for if they comply with certain standards.⁵¹ While the federal government will usually not withhold funds from participating states that fail to comply with the standards after a grant is awarded, it does have a number of remedies, such as administrative hearings, partial withholding, and intervention, that it will employ if a state fails to comply.⁵² It must be emphasized, however, that the federal government is under no duty to provide public funds to the states. All of these programs are optional.⁵³

Through this entire process, states retained responsibility for education.⁵⁴ States are the primary source of funding for schools and retain a great deal of discretion.⁵⁵ Under the standards set forth in *Butt v. State*, a decision by the California Supreme Court followed by most states, states were required to provide educational opportunities to all students;⁵⁶ however, under *Rodriguez v. San Antonio Independent School District*, states were not required to provide equal funding to all districts.⁵⁷ States merely needed to provide equal educational opportunities and could fund schools in any way they wished as long as they could prove they were

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See generally *id.*

⁴⁸ See *id.* § 5.01(1).

⁴⁹ See *supra* note 38 and accompanying text.

⁵⁰ See RAPP, *supra* note 19, § 5.01(4)(b)(i).

⁵¹ See *supra* notes 41–46 and accompanying text.

⁵² See RAPP, *supra* note 19, § 5.01(7).

⁵³ See generally *id.*

⁵⁴ See *id.* § 5.01(4)(a).

⁵⁵ See *id.*; see also Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 614–15 (2013) (noting that states were given wide discretion to disburse federal Title I funds acquired through the Elementary Secondary Education Act (ESEA) at the local level).

⁵⁶ See *Butt v. State*, 842 P.2d 1240, 1248 (Cal. 1992).

⁵⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (holding that the Equal Protection Clause only applies when there is invidious discrimination and that it does not apply in the context of school funding). In fact, school districts had great discretion in how they disbursed funds to schools. See Pasachoff, *supra* note 55, at 614–15.

not acting in an “invidiously discriminatory” manner.⁵⁸ Thus, states disbursed federal funds and paid the rest through local and state taxes.⁵⁹

Then, in 2001, in what was perhaps the greatest overhaul of education enacted in the United States, Congress passed No Child Left Behind (NCLB).⁶⁰ NCLB proved to be controversial, angering teachers, administrators, and parents alike.⁶¹ Funding was based on two main factors: compliance with federal programs and student improvement.⁶² However, many states struggled to come into compliance to the extent required by NCLB: the cost of compliance was high and the financial reward was very low, causing many states to grow resentful and resist the standards imposed by NCLB.⁶³ While the focus on student improvement and data was well intentioned, the actual policy created an imbalance: because states were able to set their own standards, student growth in one state could not be reliably measured against that in another.⁶⁴ As such, low-performing states appeared to exploit this gap and lower their standards to artificially inflate scores each year.⁶⁵ This phenomenon was termed the “Race to the Bottom,” in which states competed to have the lowest standards in order to attain the highest rates of test score improvement. These gaps and the “Race to the Bottom” made NCLB highly controversial.⁶⁶

II. TENSIONS RISE: REFORMS UNDER THE OBAMA ADMINISTRATION

In 2008, when Barack Obama was elected President of the United States, he promised education reform and greater accountability for

⁵⁸ See RAPP, *supra* note 19, § 5.01(4)(a); see also *Rodriguez*, 411 U.S. at 60.

⁵⁹ See RAPP, *supra* note 19, § 5.01(4)(a).

⁶⁰ See *id.*; see also Pasachoff, *supra* note 55, at 613–14.

⁶¹ See Pasachoff, *supra* note 55, at 615.

⁶² See *id.* at 615–19.

⁶³ See *id.* at 615; see also RAPP, *supra* note 19, § 5.01(3)(g)(ii) (“Among other concerns has been that the costs of compliance outstrips the level of funding.”).

⁶⁴ See *Ending the Race to the Bottom*, N.Y. TIMES (Mar. 11, 2009), <http://www.nytimes.com/2009/03/12/opinion/12thu1.html>. The writer notes that scores in Mississippi and Wyoming on a national test were vastly different but students were achieving at similar levels on state level tests.

⁶⁵ See Greene, *supra* note 6. In this way they could show student growth and acquire funds without actually improving the instruction students received or standards students attempted to reach.

⁶⁶ In December of 2015, Congress passed the Every Student Succeeds Act (ESSA). It is not yet clear what the impact of the new act is. Likely, there will be greater local control over educational decisions. The biggest impact of ESSA seems to be that it releases states from meeting NCLB’s 100% proficiency rate by the end of 2016. However, most states had already opted out of that goal. The true nuts and bolts of ESSA remain to be seen, but it appears to gut the core of NCLB, while having relatively little impact on the Common Core and Race to the Top. See *infra* Part II.

states, districts, schools, teachers, and students.⁶⁷ He appointed Arne Duncan as his Secretary of Education and charged him with reforming the public education system of the country. Working with Congress, states, and education experts, Secretary Duncan developed and implemented a two-pronged plan: first, the Race to the Top program to determine grants and contracts for states, and second, the Common Core to standardize grade level standards for students in similar grades across districts and states.⁶⁸ To enhance their compatibility, Congress linked the Race to the Top and the Common Core programs by offering increased opportunity to qualify for Race to the Top grants to states that included Common Core standards in state reform plans.⁶⁹

A. *Race to the Top*

In 2009, Race to the Top, a voluntary federal grant program, passed through both the House of Representatives and the Senate to become law.⁷⁰ The program had two methods to determine funding: requirements for eligibility to receive grants under the program, known as absolute priorities, and factors to be considered by the department to determine level of funding.⁷¹ This structure remains intact today.

The absolute priorities, which are similar to requirements for eligibility, for certain Race to the Top grants are the State Reform Agenda, standardized assessments, curriculum improvement, turn-around rates for low-performing schools, and responsible “charterization.”⁷² Other factors, which are optional, not absolute, are used to determine the amount of grants and are specific to each grant.⁷³ The more factors a state meets, the more points it receives toward various grants.⁷⁴

There are a variety of grants available under Race to the Top and a state need not adopt the Common Core to be eligible to receive some of them.⁷⁵ States that adopt standards that are more ambitious and oriented toward college preparation receive more “high points” toward various

⁶⁷ See *Full Text of Obama’s Education Speech*, DENVER POST (May 28, 2008), http://www.denverpost.com/ci_9405199.

⁶⁸ See Greene, *supra* note 6.

⁶⁹ See *supra* note 20 and accompanying text.

⁷⁰ See 34 C.F.R. subtit. B, ch. II (2009).

⁷¹ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005, 123 Stat. 115, 282–83 (2009).

⁷² See *id.*; see also *Full Text of Obama’s Education Speech*, *supra* note 67. “Charterization” refers to the process by which a state or school district adds charter schools. This can occur through the development of new schools or the takeover of failing district schools and their ensuing conversion to charter schools.

⁷³ See 34 C.F.R. subtit. B, ch. II; see also American Recovery and Reinvestment Act of 2009.

⁷⁴ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17.

⁷⁵ See *id.*

grants.⁷⁶ Race to the Top does not explicitly mention Common Core or its adoption as a factor, but adoption of “common [national] standards” helps qualify a state for the curriculum development and standardized assessments priorities, which is one of the absolute priorities.⁷⁷ Thus, while some grants require adoption of the Common Core, most do not. Furthermore, full or partial grants are still available without adoption, although accumulating higher points without Common Core will be difficult.⁷⁸ In essence, a state may receive at least partial grants for improving its curriculum or assessments without adopting Common Core if it can prove such improvements in another way.⁷⁹

B. *Common Core Curriculum Standards*

In 2009, when Congress passed legislation enacting the Race to the Top program, it also approved the Common Core Curriculum Standards.⁸⁰ The Department of Education then used it as one way to meet priorities in calculating RTTT awards.⁸¹ The Common Core sets forth a set of uniform standards but the flexibility of states to change the standards is limited. The Common Core seeks to prepare students for college and professional life, as well as bring states into alignment with each other.⁸² As such, it focuses on nonfiction works in English, interdisciplinary work between courses, and STEM courses.⁸³ It also emphasizes developing in students a deep understanding of a select few topics within a given subject as opposed to cursory, superficial knowledge of a wide breadth of topics within the subject.⁸⁴ States that adopt these standards

⁷⁶ See *id.* at 5–7.

⁷⁷ See *id.* at 7 n.4. (“Scores also took into account the date by which a State committed to adopting common standards . . . with ‘high’ points awarded.”).

⁷⁸ See Defendants’ Post-Hearing Brief, *supra* note 20, at 6–7.

⁷⁹ See *id.*

⁸⁰ See Greene, *supra* note 6.

⁸¹ See Defendants’ Post-Hearing Brief, *supra* note 20, at 7–8, 10. Participation in the programs was not required to meet priorities or require funding, but these pages imply that states adopting the Common Core received “high points” toward their eligibility.

⁸² See *id.* at 11–13.

⁸³ See *Key Design Consideration*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/ELA-Literacy/introduction/key-design-consideration> (last visited Apr. 12, 2016); *Key Shifts in English Language Arts*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/other-resources/key-shifts-in-english-language-arts> (last visited Apr. 12, 2016); Larry Edmonds & Cindy Moss, *Are We Shifting Too Much Focus to STEM?*, INT’L SOC’Y FOR TECH. IN EDUC. (May 30, 2014), <http://www.iste.org/explore/article/Detail?articleid=18&category=point-counterpoint&article=are-we-shifting-too-much-focus-to-STEM-Yes>.

⁸⁴ See The Hechinger Report, *The Common Core Math Standards: Content and Controversy*, U.S. NEWS & WORLD REPORT (Feb. 25, 2014), <http://www.usnews.com/news/special-reports/articles/2014/02/25/the-common-core-math-standards-content-and-controversy> (focusing on how math standards focus on depth of understanding); see also *For Families*, NORTH PENN SCH. DIST., <http://www.npenn.org/Domain/1182> (last visited Jan. 29, 2016).

may add standards of their own, and they and the districts may teach the material in any order using any books they wish, so long as they meet the Common Core standards.⁸⁵

The benefits of this system are numerous. Students moving between states will continue to be held to the same standards and learn the same material.⁸⁶ Evaluations of state improvement are more consistent because, rather than reducing their students' standards to artificially inflate scores, all states use the same standards. Also, students engage in deeper study of each topic rather than a cursory and superficial review of many topics, which leads to a more thorough understanding of each topic.⁸⁷ The emphasis on tracking and analyzing student data should also, in theory, better inform instruction and help struggling students improve while teaching high-performing students at their level.⁸⁸ Finally, because of its emphasis on science and math, as well as its interdisciplinary focus, the Common Core has the potential to better prepare students for higher education and an increasingly technological workplace.

The Common Core does have some significant weaknesses, however. Most notably, the Common Core focuses heavily on nonfiction reading, often at the expense of important works of fiction.⁸⁹ The Obama Administration has emphasized preparing students for college and the workplace.⁹⁰ The Common Core reflects this shifted emphasis as it focuses on developing real-life skills by focusing on historical events and scientific innovations. This focus, supporters argue, allows students to practically apply the skills and lessons they learn.⁹¹ Critics claim that works of fiction can teach children just as much about real life as nonfic-

⁸⁵ See Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 7–8, 11.

⁸⁶ See *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/frequently-asked-questions/> (last visited Apr. 20, 2016).

⁸⁷ See The Hechinger Report, *supra* note 84.

⁸⁸ See Joshua Bleiberg & Darrell West, *In Defense of the Common Core Standards*, BROOKINGS CTR. FOR TECH. INNOVATION 8, 10–11 (2014), http://www.brookings.edu/~media/research/files/papers/2014/03/common-core-state-standards/bleiberg_west_common-core-state-standards.pdf. A teacher can look for areas of weakness for each student using statistics to help them improve their instruction of each student. In turn, this should help raise test scores, as students receive more tailored and individual attention.

⁸⁹ See *Common Core Nonfiction Reading Standards Mark the End of Literature*, *English Teachers Say*, HUFFINGTON POST (Dec. 10, 2012), http://www.huffingtonpost.com/2012/12/10/common-core-nonfiction-reading-standards_n_2271229.html.

⁹⁰ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005, 123 Stat. 115, 282–83 (2009).

⁹¹ See *id.*

tion works.⁹² Thus, there is a concern that the Common Core's emphasis on nonfiction work may prevent children from exploring fiction.⁹³

Another major concern of Common Core critics is that it overly relies on data, such as end-of-year test scores.⁹⁴ This concern manifests itself in two ways. First, teachers are concerned that their evaluations will be based more on data from their students' year-end scores, thereby leading them to teach for the purpose of increasing test scores, which is also known as "teaching to the test." This causes "a problem for teachers now dependent on good scores to achieve a rating that didn't also put their job in jeopardy."⁹⁵ This system also requires them to perform more work with no additional pay,⁹⁶ which could drive away potential strong, new teachers while burning out existing ones.

A second concern of critics is that teachers will unfairly lose their jobs because of factors beyond their control.⁹⁷ Test scores are often affected by a variety of outlying factors, such as test phrasing and students' anxiety, medication, family situation, and sleep, among others.⁹⁸ Furthermore, because state tests have not yet been aligned with Common Core Standards, teachers and experts worry that the year-end tests will not accurately reflect their efforts or what the students learned, as teach-

⁹² See Bleiberg & West, *supra* note 88. This concern may be unfounded, however; the nonfiction requirement may be met through use of nonfiction in classes other than English Language Arts (ELA) classes, meaning ELA classes can likely continue to use fiction works at the same rate they did prior to the adoption of CCSS. Therefore, it is possible there may not be the reduction in teaching fiction that was initially expected.

⁹³ See *id.*

⁹⁴ See Stan Karp, *The Problems with the Common Core*, RETHINKING SCHOOLS, http://www.rethinkingschools.org/archive/28_02/28_02_karp.shtml (last visited Apr. 12, 2016).

⁹⁵ See Amanda M. Fairbanks, *Will Test-Based Teacher Evaluations Derail the Common Core?*, THE HECHINGER REPORT (Jan. 8, 2015), http://hechingerreport.org/content/will-test-based-teacher-evaluations-derail-common-core_18694.

⁹⁶ Grading tests, tracking student data, and then formulating new lesson plans around this data can add countless additional hours to weekends or evenings. Normally, a teacher writes lesson plans and grades tests on weekends. Thus, without overtime pay, there is additional work at no additional pay over what a teacher might have to do in a non-data based system.

⁹⁷ See Karp, *supra* note 94. Teachers may be concerned that if their statistics for student performance drop, they will lose their jobs. However, student test scores on year-end tests may be based on more than just their raw knowledge. Factors such as problems at home, sleep the night before a test, test anxiety, lack of medication on test day, or other factors far outside of the teacher's control could lead to students performing below their abilities but reflecting negatively on teachers.

⁹⁸ See Max Ehrenfreund, *How Random Events During Standardized Tests Affect Your Scores and Future Income*, WASH. POST (Nov. 4, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/04/how-chance-events-during-standardized-tests-affect-your-scores-and-future-income> (explaining that factors such as crime near a school can affect test scores); see also Richard Rothstein et al., *Problems with the Use of Student Test Scores to Evaluate Teachers*, ECON. POL'Y INST. (Aug. 29, 2010), <http://www.epi.org/files/page/-/pdf/bp278.pdf> (explaining that factors such as socioeconomic background can affect access to resources such as tutors, which can create gaps in how students perform and affect teacher scores).

ers cannot control the year-end test scores for which they are held accountable.⁹⁹

Finally, the implementation of the Common Core has been difficult for many teachers, schools, and districts. Teachers often struggle to communicate concepts using Common Core methods. It demands giving students partial credit and using teaching concepts in several different ways,¹⁰⁰ while providing very little training in the new standards.¹⁰¹ As a result, some teachers struggle to find the right communicative language and feel as though they have simply wasted their time and confused the students.¹⁰² Thus, while the Common Core provides guidelines on how to teach a subject, it fails to provide teachers the tools to effectively communicate the subjects.¹⁰³

As a policy, the Common Core is highly controversial. It presents opportunities for student growth, uniformity in the education system across the country, and equitable determinations for funding. However, at the same time, it leaves potential curricular and pedagogical holes. It also may lead to teachers being unfairly held accountable for test scores that are out of their control, leading to potentially unfair teacher evaluations. Finally, given that it emphasizes strategy and arguably endorses a curriculum tailored to that strategy, it leads many to believe that the federal government has overreached by legislating a state-controlled matter.

III. FORCING THE ISSUE—A HISTORY OF COERCIVE SPENDING

Congress may not use its spending power to coerce states into accepting federal programs.¹⁰⁴ However, the Supreme Court has historically been reluctant to find congressional spending to be a violation of

⁹⁹ See Diana Pullin, *Getting to the Core: Rewriting the No Child Left Behind Act for the 21st Century*, 39 RUTGERS L. REC. 1, 10–11 (2011) (explaining that states vary in the tests and standards that they use making it difficult to evenly assess schools and teachers, particularly with regard to how they teach the Common Core).

¹⁰⁰ See The Hechinger Report, *supra* note 84. This Article shows how math standards can be confusing to communicate, as teachers are expected to go beyond teaching concepts in traditional methods (such as how slices of pizza are fractions) and instead show how fractions fall on a number line. While such concepts are important, communicating them is difficult and some fear the Common Core overemphasizes them. Another example of using different methods, that is not highlighted in the Article, is by teaching subtraction using addition skills. These abstract skills, while potentially useful, are difficult to communicate and younger students may struggle to grasp them.

¹⁰¹ See Alexandria Neason, *Are Teachers Really Ready for the Common Core?*, BOSTON GLOBE (Oct. 1, 2014), <http://www.bostonglobe.com/magazine/2014/10/01/are-teachers-really-ready-for-common-core/bAhagn3zzkQ0bM9w8GgYzN/story.html>.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ See generally *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that the adoption of drinking age of twenty-one is a valid inducement for the receipt of federal highway funds and is not coercion).

the Commerce Clause.¹⁰⁵ Early jurisprudence deferred to congressional discretion in use of the Commerce Clause, such as congressional legislation incentivizing states to regulate wheat consumption¹⁰⁶ or to adopt a drinking age of twenty-one.¹⁰⁷ However, in 2012, the Supreme Court ruled that Congress's use of the Commerce Clause in the Affordable Care Act to mandate that citizens purchase health insurance was coercive.¹⁰⁸ This section will track the history of coercion and the Commerce Clause.

The major case to articulate the legal standard regarding coercion is *South Dakota v. Dole*. The Twenty-First Amendment reserves to states the power to legislate the drinking age.¹⁰⁹ In the 1980s, however, Congress and the Reagan Administration sought to encourage states to adopt a drinking age of twenty-one by using a financial incentive: failure to adopt the drinking age would result in forfeiture of highway construction funds.¹¹⁰ Congress justified this legislation by stating that highways were a tool of interstate commerce since they ran between states and facilitated commerce and that it maintained an interest in keeping the roads safe from drunk drivers.¹¹¹ South Dakota challenged the legislation as a coercive use of the spending power.¹¹² The federal government argued that it was not coercive, but was instead a valid inducement to adopt the federal policy.¹¹³ The Supreme Court held that Congress's interest in preventing drunk driving rendered the use of highway funds and a drinking age rationally related.¹¹⁴ It also held that because the government withheld only a "relatively small percentage" of the federal highway funds, the actions constituted "pressure" more than they did "compulsion" and thus were valid.¹¹⁵ *Dole* showed that the Supreme Court was reluctant to overrule Congress and would uphold most uses of Congress's spending power.

However, twelve years later, the Supreme Court held against the federal government's use of its spending power in *New York v. United States*.¹¹⁶ To deal with the rising problem of radioactive waste, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of

¹⁰⁵ See *id.* at 209.

¹⁰⁶ See *Wickard v. Filburn*, 317 U.S. 111, 129–130 (1942).

¹⁰⁷ See *Dole*, 483 U.S. at 206.

¹⁰⁸ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012).

¹⁰⁹ See *Dole*, 483 U.S. at 205 (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

¹¹⁰ See *id.* at 208–09.

¹¹¹ See *id.*

¹¹² See *id.* at 205–06.

¹¹³ See *id.* at 206.

¹¹⁴ See *id.* at 208–209.

¹¹⁵ See *id.* at 211.

¹¹⁶ See *New York v. United States*, 505 U.S. 144, 154 (1992).

1985, which provided monetary incentives to states to dispose of their waste by 1992 or to “take title” to the waste at their own cost on January 1, 1993.¹¹⁷ New York claimed that both options were equally objectionable since the state did not have a choice to participate, and, the state claimed, the policy violated the Tenth Amendment. The Supreme Court held that while creating monetary incentives for states to clean up their waste was a valid use of the spending power, the “take title” clause was not.¹¹⁸ The Court deemed it coercive, holding that the states had no choice but to participate in the program; states did not have the ability to abstain from cleaning and therefore were punished for their non-participation by cleaning at their own cost and accepting all liabilities.¹¹⁹

In 2006, in *Arlington Central School District Board of Education v. Murphy*, the Arlington Central School District Board of Education challenged the Individuals with Disabilities Education Act (IDEA) after it was required to pay legal fees for a student following a successful court action by the parents.¹²⁰ The Supreme Court debated whether the IDEA, which was passed pursuant to the Spending Clause, required districts receiving IDEA funds to pay for students’ legal fees, when the Act said parents were entitled to recover them.¹²¹ The Court held that Congress had discretion to disburse educational funds and could attach conditions to these funds, so long as the conditions were “clear and unambiguous” and led to “knowing and voluntary acceptance” by the states.¹²² In other words, a statute creating conditional funding for states needed to be unambiguous in order to be not coercive.

In 2012, in the case of *National Federation of Independent Business v. Sebelius*, the Supreme Court again addressed the issue of what qualified as federal coercion.¹²³ Under the Affordable Care Act, the federal government was permitted to withdraw Medicaid funds from states if the state failed to comply with expanded Medicaid requirements.¹²⁴ The Court held that because the expanded Medicaid program was so large, it qualified as its own new program, and therefore, federal funds for the pre-existing Medicaid program could not be withdrawn for noncompliance.¹²⁵ In essence, the Supreme Court held that despite being called an

¹¹⁷ See *id.* at 152–54.

¹¹⁸ See *id.* at 176.

¹¹⁹ See *id.*

¹²⁰ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006).

¹²¹ See *id.*

¹²² See *id.* at 295–96.

¹²³ See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that conditioning the receipt of federal Medicaid funds on acceptance of expanded Medicaid program was an unconstitutional coercive use of spending power).

¹²⁴ See *id.* at 2581–82.

¹²⁵ See *id.* at 2606 (“Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it

expansion, the Medicaid provision acted as an entirely new program. As such, according to the Supreme Court, states needed to have the ability to collect Medicaid funds that had previously been available from the federal government prior to the “expansion” as long as those states had previously been in compliance with the pre-expansion Medicaid program.¹²⁶ Thus, in *Sebelius*, the Supreme Court made clear that not only must the use of federal funds be reasonably related to the condition applied, but also that the federal government could not withhold funds for an existing federal program based on a state’s noncompliance with a new federal program.¹²⁷

IV. INCENTIVES OR STRONG-ARM POLITICS: THE ANALYSIS

One of the most recent cases to address coercion of states through federal funding operations is *Jindal v. United States Department of Education*, which asks whether, as described in the Race to the Top legislation, awarding points based on a state’s adoption of the Common Core is a coercive use of the spending power.¹²⁸ The case was recently appealed to the Fifth Circuit after the Department of Education won in the Middle District Court of Louisiana.¹²⁹ This section analyzes the arguments made by both sides and the District Court regarding federal coercion.¹³⁰

A. *The Case in Louisiana*

In August of 2014, Governor Bobby Jindal of Louisiana, a former supporter of the Common Core, sued the Department of Education and its secretary, Arne Duncan, alleging that the federal government coerced the State of Louisiana into adopting the Common Core by threatening to withhold Race to the Top funds if the state opted out of the Common Core.¹³¹

recognized it was enlisting the States in a new health care program.”); see also Pasachoff, *supra* note 55, at 593. The Supreme Court did not address whether Congress could withhold funds associated with the new project for failure to comply. However, it is likely that such standards would follow a *Dole* analysis and would be acceptable.

¹²⁶ See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2607.

¹²⁷ See *id.* at 2608.

¹²⁸ See First Amended Complaint, *supra* note 22, ¶ 65.

¹²⁹ *Id.*

¹³⁰ This analysis will proceed under the hypothetical in which the new governor continued with the appeal, which was filed prior to his election, even though he has since dropped the appeal. The same analysis would also apply if another governor chooses to bring the same lawsuit against the Department of Education and explains why the District Court was correct in its decision.

¹³¹ See First Amended Complaint, *supra* note 22, ¶ 65.

1. Does the Governor Have Standing?

The first hurdle for the Governor to clear in his lawsuit was to prove he had standing. The Department of Education moved to dismiss, claiming that Governor Jindal lacked standing to bring this claim.¹³² The Department made two arguments: first, Jindal was not injured in his capacity as governor; second, if Jindal was seeking standing as a representative of the state, the state of Louisiana was not harmed and had not shown potential for irreparable harm.¹³³

As to the first point, the Department argued, Jindal was not harmed as governor because he did not make decisions regarding education and curriculum.¹³⁴ In the state of Louisiana, these decisions are made by the Board of Elementary and Secondary Education (BESE) and the Superintendent of Education—in this case, John White.¹³⁵ As such, the Department argued, Governor Jindal could not be harmed in his capacity as governor because his decision-making power had not been infringed upon.¹³⁶

The Department also contended that Governor Jindal could not bring this claim on behalf of the state of Louisiana because he could not allege redressability.¹³⁷ In this case, the Department argued that Governor Jindal could not show actual harm because both the BESE and Superintendent of Education, which possess the ultimate decision-making power, support the Common Core.¹³⁸ According to the Department, even if the Court were to rule that adoption of the Common Core was coercive, it would lead to no change in policy since the state would likely continue to use the Common Core.¹³⁹

Finally, citing *Lujan v. Defenders of Wildlife*, the Department argued that the Governor had not alleged any actual harm as to lost funds.¹⁴⁰ Harm must be “actual or imminent, not conjectural or hypothetical” under *Lujan*.¹⁴¹ The Department argued that because Louisiana

¹³² See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 19; Defendants’ Motion to Dismiss First Amended Complaint at 1, *Jindal v. U.S. Dep’t of Educ.*, No. 3:14-cv-534-SDD-RLB (M.D. La. Dec. 12, 2014).

¹³³ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 18–25.

¹³⁴ See *id.* at 22.

¹³⁵ See *id.* at 23.

¹³⁶ See *id.* at 23–24; Defendants’ Post-Hearing Brief, *supra* note 20, at 12. Although not noted as an argument in the Department’s Motion to Dismiss, the Legislature voted to adopt both the Common Core and RTTT, further undermining Jindal’s standing to claim harm.

¹³⁷ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17; see also Defendants’ Post-Hearing Brief, *supra* note 20, at 12.

¹³⁸ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 24.

¹³⁹ See *id.*; see also Defendants’ Post-Hearing Brief, *supra* note 20, at 12.

¹⁴⁰ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 19.

¹⁴¹ See *id.* at 18; see also Defendants’ Post-Hearing Brief, *supra* note 20, at 3. Both sources cite *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

had not opted out of the Common Core, it had not lost federal funds, and because it may not lose funds, allegations of harm are premature and speculative.¹⁴²

Governor Jindal argued, in opposition, that he had standing as a representative of Louisiana, which he claims has been harmed by the Common Core because it is not free to make its own choices regarding education, a right guaranteed to states by the Tenth Amendment, the General Education Provisions Act of 1965 (GEPA), and the No Child Left Behind Act.¹⁴³ Governor Jindal claimed that the Common Core requires the state to implement so many objectives and methods that the state is left with little ability to develop its own curriculum, leading to irreparable harm.¹⁴⁴ Jindal further contended, using a declaration from educational expert Williamson M. Evers, that the Common Core is the only readily available set of standards that would allow the State to accumulate enough points to qualify for RTTT.¹⁴⁵

The Department's argument seemed to be the stronger of the two because Governor Jindal could not make the decision to opt out. However, Governor Jindal's argument won, and the Court agreed that he had standing, ensuring the likelihood that the issue will be decided by a judge who President Obama appointed and who may therefore look upon the Obama Administration's policies favorably.

2. Governor Jindal's Arguments

The focus of Governor Jindal's claim was that governance over education is primarily a state function.¹⁴⁶ His argument was supported by the history of education policy in the country, as discussed in Part I of this Note.¹⁴⁷ In paragraph 9 of the *Jindal v. United States Department of Education* complaint, Governor Jindal cited the GEPA in support of this premise:

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,

¹⁴² See Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 19.

¹⁴³ See Post-Hearing Memorandum in Opposition to Defendants' Motion to Dismiss at 8, *Jindal v. U.S. Dep't of Educ.*, No. 14-cv-534-SDD-RLB (M.D. La. Dec. 12, 2014).

¹⁴⁴ See *id.* Governor Jindal supports these assertions with the declaration of Williamson M. Evers, a Research Fellow at Stanford University's Hoover Institution who is an educational expert. See generally Exhibit A: Declaration of Williamson M. Evers, *Jindal v. U.S. Dep't of Educ.*, No. 14-cv-00534 (M.D. La. Dec. 12, 2014) [hereinafter Exhibit A].

¹⁴⁵ See Exhibit A, *supra* note 144, ¶ 7. The Department counters this argument by noting that Georgia and Kentucky did not adopt the Common Core and actually created their own standards in conjunction with certain Common Core standards that left them eligible for RTTT and they, in fact, received some funds.

¹⁴⁶ See First Amended Complaint, *supra* note 22, ¶¶ 9–14.

¹⁴⁷ See *supra* Part I.

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 system¹⁴⁸

He also alleged in the complaint that NCLB does not grant the Department of Education power to mandate or even to endorse a curriculum, and instead explicitly reserves these powers to the states.¹⁴⁹ Jindal also argued that the Department of Education Organization Act (DEOA), which formed the Department of Education, severely limits the power of the Department of Education and gives it little control over state curricula.¹⁵⁰ If Jindal were correct that, under the DEOA, the federal government has no power to mandate a curriculum and that the power to do so is reserved to the states, then any federal action mandating a state to adopt a particular curriculum is coercive.¹⁵¹

Governor Jindal contended, therefore, that various RTTT requirements amount to coercive government action.¹⁵² First, he argued that the Common Core is essentially a curriculum, and, accordingly, the Department cannot coerce the state into accepting it.¹⁵³ Based upon testimony from educational expert William Everson of Stanford to support his argument, Governor Jindal claimed that the materials of Common Core act as a curriculum, even if the government characterizes them as standards, or benchmarks, for students to achieve by the end of the year.¹⁵⁴ Jindal argued that given its emphasis on scripts, objectives, methods, and pedagogy, the Common Core leaves little room for states and districts to write their own curricula, as they must use and follow these tools to meet the standards set forth by the Common Core.¹⁵⁵

Next, Jindal argued that the state reform criteria in RTTT essentially require his state to adopt the Common Core.¹⁵⁶ Under RTTT, awards and eligibility are based on states' accumulation of "high" and "low" points.¹⁵⁷ "High points" are awarded for adopting standards in conjunc-

¹⁴⁸ See First Amended Complaint, *supra* note 22, ¶ 9.

¹⁴⁹ See *id.* ¶ 13.

¹⁵⁰ See *id.* ¶¶ 11–12.

¹⁵¹ The Department does not challenge this premise and instead argues that its policies are not coercive because they are not curricula.

¹⁵² See First Amended Complaint, *supra* note 22, ¶ 66.

¹⁵³ See *id.* ¶¶ 5–6, 9–14, 16; see also Exhibit A, *supra* note 144, at 1.

¹⁵⁴ See First Amended Complaint, *supra* note 22, ¶¶ 5–6.

¹⁵⁵ See Post-Hearing Memorandum in Opposition to Defendants' Motion to Dismiss, *supra* note 143, at 1.

¹⁵⁶ See First Amended Complaint, *supra* note 22, ¶¶ 22–24.

¹⁵⁷ See *id.* ¶¶ 6–7, 23; see also Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 7 n.4; Exhibit A, *supra* note 144, at 6–7.

tion with “common national standards,” while using other standards may result in only “low points.”¹⁵⁸ Jindal argued this split prevents the state from acquiring enough points to qualify or win an award, since states cannot write their own standards in a way that would receive high points.¹⁵⁹ Similar to the government’s radioactive waste program in *New York v. United States*,¹⁶⁰ he argued, the government presents Common Core as a choice, but in reality it is not: a state must either participate in the Common Core to accumulate enough points to qualify for federal funding under RTTT, or fund education on its own.¹⁶¹ Essentially, this double-edged sword of two equally objectionable possibilities makes the action coercive.¹⁶²

Finally, Jindal argued that various provisions in RTTT essentially require that the state adopt the Common Core.¹⁶³ He argued that to qualify for RTTT a state must use student assessments based on a “common set of K–12 standards.”¹⁶⁴ Because there are no equivalent standards that will meet “common . . . standards,”¹⁶⁵ he argued, the failure to use the Common Core will lead to forfeiture of certain grants, which are substantial.¹⁶⁶ As an example, Jindal alleged, the lack of an equivalent requires a state to adopt the Common Core in order to receive funding for assessments under the Comprehensive Assessment Systems portion of the bill.¹⁶⁷ The Governor also argued that one of the RTTT programs, RTTT-District, specifically mandates adoption of the Common Core.¹⁶⁸ As such, Jindal argued that the state could potentially lose a great deal of federal money by not adopting the Common Core, making the policy coercive.¹⁶⁹

3. The Department’s Arguments

The Department’s key argument was that the Common Core is not a curriculum, but a set of standards:

¹⁵⁸ See First Amended Complaint, *supra* note 22, ¶¶ 6–7, 24; see also Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 7 n.4.

¹⁵⁹ See First Amended Complaint, *supra* note 22, ¶ 24; see also Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 7 n.4; Exhibit A, *supra* note 144, at 6–7.

¹⁶⁰ See *supra* Part III.

¹⁶¹ See First Amended Complaint, *supra* note 22, ¶ 68.

¹⁶² See *id.*

¹⁶³ See *id.* ¶¶ 1–2, 22–24.

¹⁶⁴ See *id.* ¶ 23.

¹⁶⁵ See Exhibit A, *supra* note 144, at 2.

¹⁶⁶ See First Amended Complaint, *supra* note 22, ¶¶ 67–70.

¹⁶⁷ See *id.* ¶¶ 25–31; see also Exhibit A, *supra* note 144, at 1–2. Without these funds, states may struggle to write strong year-end tests. As such, access to funds may be imperative for writing good tests and thus, showing improvement to acquire more funds.

¹⁶⁸ See First Amended Complaint, *supra* note 22, ¶¶ 32–33.

¹⁶⁹ See *id.* ¶¶ 67–70.

Content standards are not the equivalent of a curriculum; rather, content standards describe the competencies students should acquire in each grade and subject, i.e., *what skills* students should have, while curriculum consists of the resources, approaches, and materials used in instruction as well as the pace and sequencing for providing that instruction, i.e., *how to teach* those skills. Thus, adoption of common content standards does not involve adoption of curriculum, which is left to the discretion of State and local education leaders.¹⁷⁰

Though the standards may discuss pedagogy, methods, and objectives, they are merely the suggested methods and year-end goals for students to obtain.¹⁷¹ The state still has the power and authority to establish the curriculum in order to meet these standards, or, in other words, the ability to decide how to teach lessons, what materials to use, and the order in which to teach subjects.¹⁷² According to the Department, the government is not forcing a curriculum on the state since Common Core is not a curriculum.¹⁷³

The Department also argued that even if the Common Core were to be considered a curriculum, it is not forced on the states.¹⁷⁴ It attempted to illustrate this in several ways. First, it argued, awards are based on points achieved.¹⁷⁵ Therefore, the Common Core only amounts to a certain number of points that would qualify a state for a grant.¹⁷⁶ Despite the Governor's claim that adopting the Common Core is the only way to acquire the necessary points, the Department contended, these points can in fact be acquired even in the absence of Common Core adoption.¹⁷⁷ It specifically cited to grants awarded to Georgia and Kentucky, which

¹⁷⁰ Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 3.

¹⁷¹ *See id.* at 11. In fact, the motion to dismiss quotes the Louisiana BESE website:

[T]he Common Core State Standards are not a curriculum. The standards are a set of goals and expectations adopted by Louisiana to better prepare students to be college- and career-ready. Local school districts and teachers are responsible for defining the curriculum, lessons and materials used in their schools to meet the standards.

Frequently Asked Common Core Questions, BESE, <http://bese.louisiana.gov/current-initiatives/common-core-faq> (last visited Mar. 7, 2016). Thus, standards are not the substance of what students are taught or how they are taught, but instead are lists or descriptions of learning goals, or the skills students need to learn for a subject in each grade.

¹⁷² *See* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 11–12.

¹⁷³ *See id.*

¹⁷⁴ *See id.* at 19.

¹⁷⁵ *See id.* at 6–9; *see also* Defendants' Post-Hearing Brief, *supra* note 20, at 6–8.

¹⁷⁶ *See* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 6–9; *see also* Defendants' Post-Hearing Brief, *supra* note 20, at 6–8.

¹⁷⁷ *See* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 6–9; *see also* Defendants' Post-Hearing Brief, *supra* note 20, at 6–9.

both opted out of the Common Core after previously adopting it, in order to write their own standards.¹⁷⁸

Furthermore, the Department argued, Common Core is not listed as an “absolute” priority for funding.¹⁷⁹ Absolute priorities are requirements to be eligible for RTTT funds.¹⁸⁰ To argue its point in its post-hearing brief to dismiss, the Department cited the RTTT website:

B-2. If a State does not meet a selection criterion, or does not respond to one, is it still eligible to compete for a Race to the Top grant?

Yes. Each selection criterion has a point value. (For more detail, see Appendix B, Scoring Rubric, published in each of the notices.) Under absolute priority 1, States must comprehensively address the four education reform areas specified in the [American Recovery and Reinvestment Act of 2009], but they are not required to address every selection criterion. If a State does not address a criterion, it will not receive points in that area, but it will still be eligible to compete. If a State addresses the criterion, but does so only partially or poorly, it may receive partial or no points as determined by peer reviewers. If a State receives partial or no points on a criterion, it may still win if the overall application score is high enough.¹⁸¹

It went on to explain that the Common Core is a part of these selection criteria as opposed to a requirement.¹⁸² Therefore, it amounts to a part of the score toward an absolute priority.¹⁸³ It is not, in and of itself, an absolute priority, but it may help a state meet one, and a failure to adopt the Common Core will not prevent a state from meeting the absolute priority.¹⁸⁴ Therefore, because it is not an absolute requirement, a state may be eligible for some RTTT grants or partial RTTT grants even without the Common Core.¹⁸⁵ Additionally, RTTT-State—which is another RTTT grant program operating differently and separately from RTTT-

¹⁷⁸ See Defendants’ Post-Hearing Brief, *supra* note 20, at 9.

¹⁷⁹ See *id.* at 7.

¹⁸⁰ See *id.* at 6–7.

¹⁸¹ See *id.* (citing *Race to the Top Frequently Asked Questions*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/racetothetop/faq.html> (last visited Mar. 7, 2016)).

¹⁸² See *id.* at 7.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 7, 9.

District—does not require adoption of the Common Core.¹⁸⁶ It serves as evidence that adoption of the Common Core is not mandatory for all funding, and that a state can receive some RTTT grants without adopting the Common Core.¹⁸⁷ As such, unlike the facts in *New York*, a state has the ability not to participate in the Common Core and still receive federal funding.¹⁸⁸ In short, a state can participate in a national education program to the extent that it wishes and is not faced with two equally objectionable options.¹⁸⁹

The Department also claimed that the bill allows states to fully or partially withdraw from the Common Core with no threat of penalty.¹⁹⁰ If a state chooses to withdraw from the program or partially withdraw, it may still be able to receive some RTTT funds that it earned prior to the introduction of the Common Core, and thus will not be sacrificing previously available RTTT funds. Furthermore, a state certainly will not sacrifice previously available NCLB funds, which would help counter a potential *Sebelius* claim.¹⁹¹

B. Discussion

On balance, the Department of Education appeared to have stronger arguments. While the Governor was correct that the Common Core dictates for the state much of what students must accomplish as educational goals, the Department was also correct that it leaves for states a great deal of decision-making regarding curricula.¹⁹² States can choose their books, pacing charts, lessons, and order of lessons.¹⁹³ These factors are the essence of a curriculum. As such, the Common Core is not a curriculum or an equivalent of a curriculum that the federal government mandates.

Furthermore, as the Department noted, the Common Core is only one factor it considers when deciding state grants, and then it only considers adoption of the Common Core in deciding just a few grants. There are many grants for states to receive which do not require Common Core

¹⁸⁶ See Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 17, at 6–7 (noting that adoption by a state led to an award of twenty points but was not decisive to whether the state received a grant).

¹⁸⁷ See *id.* at 7.

¹⁸⁸ See *id.* at 6–8.

¹⁸⁹ See Defendants' Post-Hearing Brief, *supra* note 20, at 8–9.

¹⁹⁰ See *id.*

¹⁹¹ See *Myths vs. Facts*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/myths-vs-facts> (last visited Mar. 7, 2016).

¹⁹² See *id.*

¹⁹³ See *id.* The factors mentioned above go into the website's definition of "devis[ing] lesson plans and tailor[ing] instruction to the individual needs of the students in the classrooms."

adoption.¹⁹⁴ Adoption of the Common Core helps in obtaining points for those grants, but it is still not officially required to qualify for an award.¹⁹⁵ A state may choose how competitive it wishes to be for highly competitive grants such as RTTT-District, but the failure to receive those competitive grants does not prevent the state from receiving other grants or previously available federal funds.¹⁹⁶ Furthermore, a state can still be competitive even if it adopts only elements of the Common Core for its standards, as was demonstrated by Georgia and Kentucky.¹⁹⁷ Essentially, a state can receive federal money whether or not it adopts the Common Core and is not left with “two equally objectionable” choices.

Furthermore, as the Department argued, Governor Jindal failed to allege a way in which the Common Core harms students. The Department was correct in noting that Louisiana will likely continue to use the Common Core, meaning that the Governor alleged hypothetical harm, not actual harm.¹⁹⁸

In addition, the federal government appeared to have a strong interest in educating public school students, and this spending is rationally related to that interest. The United States has struggled to educate its students, who represent the next wave of the workforce. It is therefore crucial to the future of the country, both socially and economically, that the future workforce be educated and skilled. The federal government was therefore furthering this nationwide interest by helping pay for the education of its children. Thus, this spending and these programs are rationally related to that interest.

Finally, the policy appeared to meet both *Dole* and *Sebelius* standards of rational relation to government interest and expansion of a previously existing program. The federal government would appear to have a significant interest in educating children. Children represent the future workforce of the country and can be important economic participants. Additionally, because the program was separate from No Child Left Behind, it is unlikely that old NCLB funds would be withdrawn for failure to adopt the Common Core.¹⁹⁹ As such, there was no *Dole* rational relation problem or a *Sebelius* problem of conditioning preexisting funds on new conditions.

¹⁹⁴ These grants include, for example, certain Race to the Top grants, past NCLB grants, and new Every Student Succeeds Act grants.

¹⁹⁵ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 6–9; see also Defendants’ Post-Hearing Brief, *supra* note 20, at 6–9.

¹⁹⁶ See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 17, at 6–9; see also Defendants’ Post-Hearing Brief, *supra* note 20, at 6–9.

¹⁹⁷ See Defendants’ Post-Hearing Brief, *supra* note 20, at 9.

¹⁹⁸ See *supra* Part IV.A.2 and accompanying text.

¹⁹⁹ See *Myths vs. Facts*, *supra* note 191.

The government's argument highlighted a contradiction in Jindal's complaint that any future governor or plaintiff would need to address. Jindal argued that education is a state matter in which the government has no interest; however, he simultaneously argued that the federal government owed the state money so that the state could properly educate its students.²⁰⁰ In essence, he denied that there is a federal interest in education but argued there is such an interest as to require funding. This contradiction weakened the Governor's argument.

Ultimately, if a future plaintiff follows Jindal's template, she is unlikely to succeed. Jindal did not show that Louisiana would reject the Common Core or that it has even been forced on the state. Louisiana voluntarily adopted the Common Core before joining RTTT, and even if it were to leave the Common Core consortium, it could still qualify to receive numerous federal grants for education. Failure to comply may lead to sacrificing some federal funds available under some discretionary grants, but those amounts are likely insignificant. As a result, any future challenge in a different circuit on the same grounds is highly unlikely to be successful.

C. Broad-Based Policy Impact of a Decision

Although this case was dropped, it could have long-term broad-based policy impacts on the rest of the country. Some of the policy implications of a decision are explored below.

The first possibility is that this claim is never revived by another state in the same or different circuit or that it is revived by another state in the same or different circuit but is unsuccessful, so the law is upheld as non-coercive. If this happens, those who object to the Common Core will attempt to find another legal route to weaken it. States that do not wish to adopt the Common Core will be allowed to opt out, but they will be at a disadvantage in the competition for federal Race to the Top funds. Furthermore, a decision in favor of the Department of Education will more strongly embed both Race to the Top and Common Core as national education programs. Although the country will be closer to a nationalized curriculum, states will retain independence in curricular decisions and develop a more common set of standards. While the actual merits of the policy of both Common Core and Race to the Top are outside the scope of this Note, finding the law to be non-coercive would strengthen the backbone of the programs and likely increase the role of the Common Core in classrooms. Furthermore, such a finding would reinforce the role of the federal government in education and would mark

²⁰⁰ This argument is advanced by the author. The Department of Education did not advance this argument in its briefs.

a success for the Obama Administration and Democrats going into the 2016 election cycle.

The second possibility is that another governor or elected official in a different circuit brings the same challenge, and the court finds that tying Race to the Top and Common Core together is coercive. If that official succeeds, the programs will no longer be tied together and the Department of Education will no longer be able to use adoption of the Common Core as a factor in granting state education awards. This will likely lead to many states opting out of the Common Core and could return the country to a “race to the bottom” mentality, as states would seek to drop their standards to show improvement. States would regain greater independence in education, and the decision would strike a blow to the hopes of creating a national education system. Furthermore, it would severely limit the role of the federal government in education over the long term. In sum, the federal role in education would be limited and there would be limited national education standards, but education would return closer to its roots at the inception of the country. In the 2016 election cycle, the decision would likely be used by Republicans to show how the Obama Administration and Democrats attempted to exceed their authority to govern state decisions. Democrats would attempt to distance themselves from the programs and would likely suggest new education plans, which could cause further delay towards educational reform.

In sum, tying Race to the Top and Common Core together is most likely to be upheld. Regardless of the outcome, however, the decision will likely be challenged and could very well reach the Supreme Court. Any decision would add another layer to the coercion analysis and could govern the future of education in the country for decades to come.

CONCLUSION

The history of federal involvement in education in the United States is, relatively speaking, fairly short.²⁰¹ Education has long been considered a state and local issue. The Common Core and federal efforts to improve a failing education system have been met with great resistance. The case in Louisiana highlights this conflict. As noted above, Louisiana claims the federal government has coerced it into accepting the Common Core by using Race to the Top funds as incentives to adopt it. However, for the reasons noted above, any state that would challenge the Common Core has a significant challenge. Ultimately, a court faced with this challenge should find that there is no coercion under existing Supreme Court precedents, since the Common Core is merely a set of standards and not a federal curriculum imposed on the states, and because the funds that

²⁰¹ See generally RAPP, *supra* note 19, § 5.01.

states might forgo in applying for certain discretionary grants would be minimal.

A ruling in favor of a challenging state, however, could have a seismic impact on the education system in the United States. Many conservative states would likely opt out of the Common Core, again creating an uneven playing field for receiving funds. Furthermore, if enough states opt out, it may spell the end for the Common Core and potentially even RTTT, since evaluating states against each other will become difficult, if not impossible. It is unclear what impact such events would have on students, as the net impact of the Common Core on students is not yet clear. However, it would clearly force the next president or Congress to come up with an entirely new educational policy and manner of implementation.

A decision against a challenging state would likely reaffirm the place of both RTTT and the Common Core, especially given that it would be the second such time this argument failed. Fewer states would choose to opt out and there would be a more intricately linked national curriculum. The policy benefits, as noted above, are not yet clear, as we do not know whether the Common Core is good for students. Nonetheless, it would give education and education policymakers a clear plan for the next few decades.

Regardless of the outcome, the most interesting irony of this debate is the logic of any state challenging the connection between Race to the Top and Common Core. States claiming coercion are essentially arguing that education is a state function in which the federal government has no interest; however, those states are also arguing that the federal government owes them money to properly educate their students. Such an argument, in its essence, would seem difficult to support. As such, regardless of whether one believes the Common Core is good policy, it is unlikely that a court would see the federal government as forcing it on states in violation of the law.

