COMMON CORE AND NORTH CAROLINA: PART II—AN ASSAULT ON FEDERALISM

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The first paper in this five-part series examined the history and structure of Common Core. Now, we turn to the question of Common Core's constitutionality and legality. Proponents of Common Core adamantly argue that it is a state-led initiative, not a federal edict. The insistence that Common Core is "state-led" comes despite the federal government's directed efforts not only *to induce states to adopt* Common Core with billions of dollars in Race to the Top (RTTT) grants, but also *to keep states locked* into the initiative after adoption through No Child Left Behind (NCLB) and Elementary and Secondary Education Act (ESEA) waivers. In light of the billions of federal dollars spent on Common Core, some have wondered why there has been so much effort put into to convincing the public that Common Core is "state-led." Some may believe that the insistence that Common Core is not a federal marching order is purely political. But, in reality, claims that Common Core is state-led are little more than a shallow attempt to pay lip service to constitutional principles of federalism which limit the power of the federal government. This paper provides a brief overview of the concept of federalism, followed by an explanation of the federal government's constitutionally limited role in education matters, and an explanation of how Common Core runs afoul of the letter and spirit of the Constitution and federal law.

Federalism and the Role of the Federal Government in Education Policy

Under the system of federalism established by the U.S. Constitution, the federal government's role in setting education policy is limited.[2] In the Federalist Papers, James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are

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[2] Broadly defined, federalism is "The legal relationship and distribution of power between the national and regional governments within a federal system of government." Black's Law Dictionary (9th ed. 2009).

numerous and indefinite."[3] Put another way, Congress must have constitutional authority to pass a statute; it must be able to point to a specific clause of the U.S. Constitution authorizing the federal government to act.[4] Because there is no constitutional authorization for Congress to regulate education, control of public education is a power that remains with the states,[5] a fact that even the U.S. Department of Education concedes.[6] Recognition of this restraint on federal authority may explain the adamancy with which the Department of Education and Common Core advocates argue that the initiative is a "state-led" effort.[7] One must remember that the purpose of federalism is to protect liberty by diffusing power.[8] As the Court noted in *Sebelius*, "The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy."[9] Buttressing the federal constitutional framework, the Tenth Amendment to the U.S. Constitution serves as an additional check on consolidation of power in the federal government by protecting the prerogatives and powers of the states from usurpation by the federal government.[10]

This is not to say that the federal government has no ability to influence state level policy in areas such as public education. Under Congress' taxing and spending power found at Article I, §8 cl. 1 of the Constitution, even where Congress has no constitutional authority to

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[3] Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).
[4] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-78 (2012) (cited herein as *Sebelius*).
[5] "The States thus can and do perform many of the vital functions of modern government--punishing street crime, *running public schools*, and zoning property for development, to name but a few….Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (cited herein as *Sebelius*).
[6] The Department's website notes that "in the U.S., the federal role in education is limited. Because of the Tenth Amendment, most education policy is decided at the state and local levels." U.S. Dept. of Education, Policy Overview, http://www2.ed.gov/policy/landing.jhtml.
[7] *See* e.g., Common Core State Standards Initiative, Frequently Asked Questions, http://www.corestandards.org/resources/frequently-asked-questions (cited herein as Common Core FAQ).
[8] The Supreme Court has explained that "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted).
[9] 132 S. Ct. at 2578 (quoting Federalist No. 45 (James Madison)).
[10] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

legislate directly, it may nevertheless "offer funds to the States, and may condition those offers on compliance with specified conditions."[11] But even this power is limited by principles of federalism as explained below. The federal government's authority to influence state action cannot morph into compulsion and still survive constitutional scrutiny.

Leading Cases on the Limits of Federal Spending Power

Congress often relies on the Spending Clause of Article I, §8, cl. 1., as the source of its constitutional authority when enacting education legislation like NCLB. [12] The Spending Clause states: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defen[s]e and general Welfare of the United States[.]" Article I, §8 then lays out specific enumerated powers like the power to coin money, regulate commerce, and establish post offices. The Supreme Court has explained, "Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'"[13] Legislation enacted under "'the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly'" in order to satisfy constitutional requirements.[14] The Supreme Court has reasoned, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'"[15] By insisting that Congress speak with a clear voice, the Supreme Court enables States "to exercise their choice knowingly, cognizant of the consequences of their participation." [16]

In one of the earliest cases to address the taxing and spending clause, the Supreme Court approved of Congressional spending on objects beyond the scope of the enumerated powers of Article I, §8 in *United States v. Butler*, so long as the expenditure of funds advanced

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[11] *Sebelius,* 132 S. Ct. at 2579.
[12] *School District of the City of Pontiac v. Sec. of the United states Dept. of Edu.,* 512 F.3d 252 (6th Cir. 2008)(vacated for rehearing and reinstated at 2008 LEXIS 12121)
[13] *Arlington Cent. Sch. Dist. Bd. of Educ. V. Murphy*, 548 U.S. 291 (2006) ((citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) and *Bd. of Educ. V. Rowley*, 458 U.S. 176, 204 n. 26 (1982)).
[14] *Id.* (quoting *Pennhurst*, 451 U.S. at 17).
[15] *Id.* (quoting *Pennhurst*, 451 U.S. at 17).
[16] *Pennhurst*, 451 U.S. at 17.

"the general welfare."[17] In that case, the Court invalidated a New Deal measure that sought to stabilize agricultural prices by controlling agricultural production, a feat which the federal government planned to accomplish by imposing a special tax on farmers participating in a particular program. The Court explained that although the federal government could use the taxing and spending clause for the general welfare and not just in exercising its other enumerated powers, the federal government could not use that power to accomplish an unconstitutional end. The government had argued that the scheme at issue was constitutional because farmers had a choice about participating. After first noting, "The asserted power of choice is illusory," the Court continued, even "if this plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states."[18] Thus, from even the earliest cases addressing the taxing and spending power of the federal government, the Court was aware of the potential for governmental abuse of that power and transgression of the constitutional bounds of federalism.

In *Pennhurst State Sch. & Hosp. v. Halderman,* the Supreme Court applied these principles to conclude that States participating in the Developmentally Disabled Assistance and Bill of Rights Act of 1975 ("DDA"),[19] were not required to assume the costs of providing certain treatment and services to mentally disabled citizens.[20] The DDA provided financial assistance to participating States to aid them in creating programs to care for and treat the mentally disabled.[21] The DDA also provided a variety of conditions for the receipt of federal funds.[22] At the heart of the case was the DDA's "bill of rights" provision, which provided that mentally disabled citizens "have a right to appropriate treatment, services, and habilitation for such disabilities" to be provided "in the setting that is least restrictive of the person's personal liberty."[23] The plaintiffs, certain disabled citizens of Pennsylvania, sued their state-owned institution to enforce these "rights"— that is, to compel Pennsylvania to pay for the costs of

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[17] 297 U.S. 1 (1936).
[18] 451 U.S. at 19.
[19] 42 U.S.C. §§ 6000, et seq.
[20] 451 U.S at 5.
[21] *Id.* at 11.
[22] *Id.* at 12.
[23] *Id.* at 13 (quoting 42 U.S.C. § 6010)

these services.[24]

The Supreme Court held, however, that the foregoing language in the DDA's "bill of rights" provision did not create enforceable obligations on the State. The Court explained that the provision's terms, "represent general statements of federal policy, not newly created legal duties."[25] It stated that "[w]hen Congress intended to impose conditions on the grant of federal funds," as in other sections of the DDA, "it proved capable of doing so in clear terms," by, for example, using the term "conditioned." This "bill of rights" section, "in marked contrast, in no way suggest[ed] that the grant of federal funds [was] 'conditioned' on a State's funding the rights described therein."[26] The Court further noted that the federal government had no authority under the DDA to withhold funds from States for failing to comply with this "bill of rights" section. [27]Accordingly, that section could "hardly be considered a 'condition' of the grant of federal funds."[28] The Court reiterated, "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."[29] The Court continued, "That canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate."[30] In considering whether the federal government is coercing the states and overstepping its Article I, §8 power, "The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but *whether Congress spoke so clearly that we can fairly say that the State could make an informed choice."*[31] Thus, the Court concluded that "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with the "bill of rights' provision of the DDA."[32]

The Court reaffirmed this principle in *South Dakota v. Dole*, when it rejected a state challenge to a provision of federal law that withheld 5 percent of any state's federal highway

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[24] *Id.*
[25] *Id.* at 22-23.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 25 (emphasis added).
[32] *Id.*

funds unless the state adopted a minimum drinking age of 21 years.[33] Although the *Dole* Court found the 5 percent withholding to be a "relatively mild encouragement," [34] it nevertheless noted four limitations on Congress' spending power: (1) The expenditure of federal funds must be in pursuit of the general welfare; (2) The conditions placed on federal funds must be unambiguous such that states can exercise their choice knowingly, cognizant of the consequences of their participation; (3) The federal grant of funds must be related to the federal interest in particular national projects or programs; (4) The grant of federal funds must not otherwise be unconstitutional or prohibited by an "independent constitutional bar."[35]

Most recently, in the landmark Affordable Care Act/Obamacare case, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the Court signaled a desire to reign in Congress' spending power. Largely overshadowed by the Court's decision on the individual mandate in that same case, were the parts of the Court's opinions striking down the Act's Medicaid expansion scheme that penalized states for choosing not to expand Medicaid. This decision reflects the Court's concerns about the balance of power and the largess of the federal government in America's federal system. In *Sebelius*, twenty-six states claimed that a provision of the Affordable Care Act that required states to expand Medicaid coverage or risk losing all existing Medicaid funding was unconstitutional.[36] The Court ruled that this provision was unconstitutionally coercive of state governments.[37] Chief Justice John Roberts warned, "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."[38] Finding that the withholding of existing Medicaid funds was more than the "mild encouragement" present in *South Dakota v. Dole*, Chief Justice Roberts wrote that the Medicaid expansion provision was "a gun to the head."[39] "The

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[33] 483 U.S. 203 (1987).
[34] *Id.* at 211.
[35] *Id.* at 206-08 (internal quotation marks omitted).
[36] 132 S. Ct. 2566.
[37] Although no single opinion commanded a majority of the Court, seven justices—Chief Justice John Roberts, Justice Breyer, Justice Kagan, Justice Kennedy, Justice Scalia, Justice Alito, and Justice Thomas—found the forced Medicaid expansion provision unconstitutionally coercive in some respect, but differed on the appropriate remedy.
[38] *Sebelius*, 132 S. Ct. at 2602.
[39] *Id.* at 2605.

threatened loss of over 10 percent of a State's overall budget… is economic dragooning that leaves the States with no real option but to acquiesce[.]"[40] Moreover, Chief Justice Roberts wrote that while "the spending power is broad, it does not include surprising participating States with post acceptance or retroactive conditions."[41]

Common Core In Light of the Spending Clause

With the guidance of *Pennhurst, Dole* and *Sebelius*, serious constitutional questions about Common Core become apparent. First, a strong case can be made that the conditions placed on Race to the Top grants, were not clear and unambiguous, as required under *Pennhurst* and *Dole*, such that participating states could exercise their choice knowingly and cognizant of the consequences of their participation.[42] Many states were rushed to meet federal deadlines for RTTT grant applications and, like North Carolina, had to endorse Common Core and submit grant applications before the standards were finalized and published.[43] The RTTT applications required states to explain how they planned to implement "college and career-ready" standards, Common Core being the only standards meeting the Department of Education's requirements.[44] In addition, there was no time for an analysis of the full financial implications of adopting Common Core and developing aligned assessments.[45] But with $4.35 billion in federal RTTT grants at stake, the federal government's push for states to adopt Common Core was an offer states could not refuse: 45

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[40] *Id.*
[41] *Id.* at 2606.
[42] 483 U.S. at 207.
[43] North Carolina endorsed Common Core in January and again in May of 2010, submitting its RTTT application on May 27, 2010. http://www2.ed.gov/programs/racetothetop/phase2-applications/north-carolina.pdf. The final draft of Common Core was not released until June of 2010. Common Core Process, http://www.corestandards.org/resources/process. Phase One RTTT applications were due Jan. 19, 2010, while Phase Two applications (which included North Carolina's) were due June 1, 2010. U.S. Dept. of Edu., Webinar 5, Nov. 24, 2009. http://www2.ed.gov/programs/racetothetop/webinar-understanding-the-application.pdf.
[44] *See* "Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010," *Federal Register*, Vol. 74, No. 221 (November 18, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-27427.pdf.
[45] The full cost of adoption and implementation of Common Core is the subject of a subsequent paper in this series.

states took the deal.[46] Moreover, in addition to the enticing "carrot" of RTTT funds, the Department of Education has added the coercive "stick" of full application of NCLB/ESEA. States refusing to implement Common Core cannot get much needed "flexibility" waivers exempting the states that acquiesce to Common Core from the most onerous provisions of the NCLB/ESEA.[47] Thus, the waiver policy can be seen as a type of post acceptance condition that was disparaged by the Court in *Sebelius*.[48]

Second, there is a good argument that Common Core violates *Dole's* third requirement, that a grant of federal funds must be related to the federal interest in particular national projects or programs.[49] No less than three separate federal laws prohibit the Department of Education from being involved in public school curriculum. For instance, the General Education Provisions Act (GEPA) provides in part that: "No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system[.]"[50] In addition, both the Department of Education Organization Act (DEOA),[51] and the (ESEA),[52] as amended by the No Child Left Behind Act of 2001 (NCLB), contain similar language. As a result, Common Core cannot logically be related to a legitimate federal interest, as required under *Dole*,[53] because federal law explicitly prohibits federal involvement in curriculum.

Conclusion

Common Core, and the efforts of the federal government to foist it upon the states, runs counter to the principles of federalism that are the foundation of the U.S. Constitution. The federal government's involvement with Common Core likely represents unconstitutional

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[46] Common Core State Standards Initiative, In the States, http://www.corestandards.org/in-the-states.
[47] U.S. Dep't of Educ., ESEA Flexibility 7 (2011), http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html.
[48] 132 S. Ct. at 2606.
[49] 483 U.S. at 207-08.
[50] 20 U.S.C. § 1232a.
[51] 20 U.S.C. § 3403(b).
[52] 20 U.S.C. § 7907(a).
[53] 483 U.S. at 207-08.

coercion of the states and violates three separate federal laws. In sum, Common Core represents an assault on federalism.