# Federalism Negative

## 1NC

### 1NC — Federalism DA

#### The [first/next] off-case is the Federalism DA.

#### First, there is strong support for education federalism now.

JACOB ’17 (Brian A.; Nonresident Senior Fellow - Economic Studies, Center on Children and Families – Brookings Institution, “How the U.S. Department of Education can foster education reform in the era of Trump and ESSA,” 2/2, https://www.brookings.edu/research/how-the-u-s-department-of-education-can-foster-education-reform-in-the-era-of-trump-and-essa/)ww

The current administration has vowed to leave education matters up to the states, continuing a movement started with the Every Student Succeeds Act (ESSA), which dramatically limited the federal government’s role in school accountability. While greater local control certainly has some benefits, it risks exacerbating the massive disparities in educational performance across states that already exists.

In 2015, there was almost a 30 percentile point difference in 4th grade math proficiency rates between the top and bottom states, only some of which can be explained by state-level social and economic factors. The massive disparity in progress is perhaps even more disturbing. Between 2003 and 2015, student proficiency rates grew by over 40 percent in some states, while remaining flat or even declining in other states.

The Department of Education (DoED) should take steps to highlight these disparities by identifying the lowest performing states and providing information on the status and progress of all states on a variety of educational metrics. The DoED might also provide modest funding and technical assistance to help demographically similar states work together to improve their public education systems.

On the campaign trail, President Trump often called for giving more discretion over education policy to states and localities, critiquing Common Core and what he viewed as other instances of federal overreach. In her recent confirmation hearing, President Trump’s nominee for Education Secretary—Betsy DeVos—repeatedly argued for leaving education matters up to the states.

And this desire for local control is not limited to the current administration. In 2015, Congress passed the Every Student Succeeds Act (ESSA) with strong bipartisan support. This legislation replaced the No Child Left Behind (NCLB) system of school accountability with a more narrowly tailored and flexible approach to school reform. Instead of requiring all schools to meet annual performance targets, ESSA requires states to focus on a small set of low-performing schools and gives them considerable latitude to design the interventions they deem appropriate.

In discussing ESSA, chair of the Senate Education Committee Lamar Alexander claimed, “The department was in effect acting as a national school board for the 42 states with waivers—100,000 schools. The states were doing fine until the federal government stuck its nose into it…So it was important to get the balls back in the hands of the people who really should have it.”[i]

#### Second, federal regulations and funding undermine education federalism.

MARSHALL et al. ’13 (Jennifer; Vice President Institute for Family, Community & Opportunity – Heritage Foundation, “Common Core National Standards and Tests: Empty Promises and Increased Federal Overreach Into Education,” 10/7, http://www.heritage.org/education/report/common-core-national-standards-and-tests-empty-promises-and-increased-federal)ww

Americans who cherish limited government must be constantly vigilant of pushes to centralize various aspects of our lives. Government intervention is a zero-sum game; every act of centralization comes at the expense of liberty and the civil society institutions upon which this country was founded.

Education is no exception. Growing federal intervention in education over the past half century has come at the expense of state and local school autonomy, and has done little to improve academic outcomes. Every new fad and program has brought not academic excellence but bureaucratic red tape for teachers and school leaders, while wresting away decision-making authority from parents.

Despite significant growth in federal intervention, American students are hardly better off now than they were in the 1970s. Graduation rates for disadvantaged students, reading performance, and international competitiveness have remained relatively flat, despite a near tripling of real per-pupil federal expenditures and more than 100 federal education programs. Achievement gaps between children from low-income families and their more affluent peers, and between white and minority children, remain stubbornly persistent. While many of these problems stem from a lack of educational choice and a monopolistic public education system, the growth in federal intervention, programs, and spending has only exacerbated them.

Federal intervention in education has been enormous under the Obama Administration, and has been coupled with a gross disregard for the normal legislative process. And today, Americans face the next massive effort to further centralize education: the Common Core State Standards Initiative.

The battle over national standards and tests is ultimately a battle over who controls the content taught in every local public school in America. Something as important as the education of America’s children should not be subjected to centralization or the whims of Washington bureaucrats. What is taught in America’s classrooms should be informed by parents, by principals, by teachers, and by the business community, which can provide input about the skills students need to be competitive when they leave high school.

Choice in education through vouchers, education savings accounts, online learning, tuition tax credit options, homeschooling—all of these options are changing how education is delivered to students, matching options to student learning needs. It’s the type of customization that has been absent from our education system. Choice and customization are critical components necessary to improve education in America. Imposing uniformity on the system through national standards and tests and further centralizing decision-making will only perpetuate the status quo.

The good news is, citizens and leaders in a number of states are fighting to regain control over standards and curriculum, defending against a nationalization of education. Ultimately, we should work to ensure that decisions are made by those closest to the student: teachers, principals, and parents.

#### Third, education regulations spill over to environmental law.

WOOD et al. ’16 (Jonathan; Counsel of Record – Pacific Legal Foundation, Amicus Brief for Christie v. NCAA, November, https://cei.org/sites/default/files/FINAL%2015-356%20Amicus%20Brief.pdf)ww

The Third Circuit’s narrow interpretation of the anti-commandeering doctrine could impact far more than sports gambling. It creates a significant loophole in the doctrine that would allow the federal government to overextend its constitutional authority.

This could fundamentally alter the relationship between the federal government and the states. For instance, the federal government could compel states to continue implementing education policies well after they have proven unpopular. Previously, the need to convince states to cooperate has given them significant leverage to influence federal policy. See Young, supra at 1074-75 (explaining that state resistence to federal education policy forced a federal agency to change its requirements).

If, once adopted, the federal government could compel states to continue to implement particular policies, the political consequences could be far reaching. The federal government could dictate curricula or testing requirements in those states that previously embraced the federal policy. But see Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (recognizing education as an area of traditional state and local control). It could also require states to continue enforcing their current bathroom policies, whatever those may be. Cf. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), cert. granted, No. 16-273 (Oct. 28, 2016).

Limiting the anti-commandeering doctrine could also have severe repercussions in environmental policy. Federal-state cooperation on environmental regulation is particularly useful because states have greater local knowledge and more available enforcement officers. See Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1243-50 (1977). But if the federal government could indefinitely impose its will on states after they initially agree, that would threaten these cooperative federalism arrangements, with far reaching affects. Cf. Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. Rev. 1141, 1174 (1995).

The decision below invites these problems. For instance, if the federal government used its spending power to entice a state to adopt federal policy as its own, it could then forbid the state from ever changing its policy. When the state cried foul, the federal government could respond that, despite all appearances, the state isn’t being commandeered because it was not compelled to adopt the policy originally. See N.C.A.A., 832 F.3d at 401-02. Obviously, a state would be extremely wary to cooperate in implementing federal environmental policy if it knows that, once it does, it may be permanently giving up its sovereignty. Cf. Stewart, supra at 1243-50. That would make cooperative federalism arrangements far more treacherous, not only undermining federalism but also the policy goals that these arrangements advance.

#### Finally, state-based climate action key to avoid extinction.

MEYER ’16 (Robinson; The Atlantic, “What President Trump Will Mean for Earth’s Climate,” 11/9, https://www.theatlantic.com/science/archive/2016/11/what-president-trump-could-mean-for-climate-change/507098/)ww

If he fulfills his campaign promises, President-Elect Donald J. Trump and his future administration could prove cataclysmic for the planet’s climate.

Trump’s policies will likely ensure that the global mean temperature rises higher than 1.5 degrees Celsius. While that may seem like a small amount of warming, it would have devastating effects on a planetary scale, pushing weather patterns far outside what human civilization has previously experienced and ensuring mass extinctions.

How could one president have so massive an effect?

First, because Trump said he would withdraw the United States from the Paris Agreement, the first international treaty to mitigate global warming. This could shatter the international consensus on reducing greenhouse-gas emissions, similar to how the second Bush administration’s withdrawal from the Kyoto Protocol effectively ended that treaty’s functional life within the United States. It could enable other countries to abandon their commitments and emit greenhouse gases at much higher rates.

“China, Europe, Brazil, India and other countries will continue to move ahead with the climate commitments they made under Paris no matter what the next president does, because these commitments are in their own national interest,” said Alden Meyer, the director of policy and strategy at the Union of Concerned Scientists, in an email.

While the Paris Agreement became international law this week—making it technically impossible for a president to withdraw before 2019 or 2020—Trump could simply refuse to recognize the agreement’s obligations, the vast majority of which are non-binding. Trump also said, late in the campaign, that he would cut off American support for UN climate science.

Second, Trump will almost certainly terminate President Obama’s Clean Power Plan, a set of EPA regulations meant to reduce emissions from the power sector. Lux Research, a global energy consulting group, estimated before the election that Trump’s policies would lead to the emission of an additional 3.4 billion tons of carbon dioxide into the atmosphere, as compared to Clinton’s.

These two factors alone could push the world over the edge. The Intergovernmental Panel on Climate Change estimated that the planet could only stand another five years of emissions at current rates before it would become impossible to keep the global mean temperature from rising 1.5 degrees Celsius. If emissions increased under a Trump administration, as Lux projects, then the world could overshoot that carbon budget well before 2021.

Trump appears to doubt the existence of climate change itself. Though he later denied saying it, Trump tweeted before the campaign began that climate change was a hoax invented by the Chinese government to depress American industry.

“The Paris Agreement was signed and ratified not by a President, but by the United States itself. As a matter of international law, and as a matter of human survival, the nations of the world can, must, and will hold the United States to its climate commitments,” said Carroll Muffett, the president and CEO of the Center for International Climate Law.

“Donald Trump now has the unflattering distinction of being the only head of state in the entire world to reject the scientific consensus that mankind is driving climate change,” said Michael Brune, the executive director of the Sierra Club, in a statement. “No matter what happens, Donald Trump can’t change the fact that wind and solar energy are rapidly becoming more affordable and accessible than dirty fossil fuels. With both the market and grassroots environmental advocacy moving us toward clean energy, there is still a strong path forward for reducing climate pollution even under a Trump presidency.”

Indeed, Brune’s statement hints at the next steps for climate activists. The Sierra Club has successfully retired more than 190 coal plants since 2003, leading a campaign that has relied more on local activism than federal support. Even if Trump seeks to expand the construction of coal-burning plants, those campaigns will likely continue.

Activists are also likely to seek the creation of emissions-restriction plans in individual states. While Washington defeated a carbon-tax referendum last night, that measure was opposed by the state’s left. Other state efforts at mitigating climate change have found more success. Earlier this year, California passed a series of state laws that will dramatically alter that state’s energy profile, granting its state agency the freedom to cut emissions by 40 percent by 2030. It seems likely that environmental leaders will seek similar measures in other states.

## 2NC/1NR — Uniqueness

### They Say: “Non-Unique — Education”

#### ESSA and recent regulatory rollbacks have increased state control of education

GOELZHAUSER and ROSE ’17 (Greg; Associate Professor of Political Science – Utah State University, and Shanna; Associate Professor of Government – Clarement McKenna College, “The State of American Federalism 2016–2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations,” 6/8, Publius, 47.3)ww

In December 2015, President Obama signed the Every Student Succeeds Act (ESSA), which replaces No Child Left Behind (NCLB), an initiative that was advanced by the George W. Bush administration and passed by the Republican-controlled Congress in 2001 but quickly lost favor with conservatives and liberals alike. The law was criticized for increasing the federal government’s role in K-12 education and for relying too heavily on standardized tests, among other things. However, when NCLB expired in 2007, national lawmakers could not agree on how to update the much-maligned law, leaving it in limbo for nearly a decade. This impasse was finally broken in 2015 when Congress passed ESSA by overwhelming bipartisan margins of 359-64 in the House and 85-12 in the Senate, in what President Obama referred to as a “Christmas miracle” (Kerr 2015). The law went into effect in August 2016 and allows for an eighteen-month transition period.

The Wall Street Journal (2015) hailed ESSA as “the largest devolution of federal control to the states in a quarter-century.” The new law retains some features of NCLB while eliminating others that were widely viewed as too restrictive or punitive. It requires children to continue to take standardized tests in the third through eighth grades, and schools to continue to report on the progress of disadvantaged groups including disabled students, minorities, and English learners. However, ESSA significantly reduces the federal role in turning around (or closing) struggling schools by allowing states to establish their own accountability systems. Such systems must be partly based on test scores and graduation rates, but otherwise the new law gives states substantial flexibility to incorporate other factors, such as school safety and teacher engagement, and to determine how much these factors count toward defining a school’s success or failure.

The law represents a balancing act between Republicans’ (and many Democrats’) desire to return more control over public education to states and localities and Democrats’ desire to protect vulnerable students. The compromise reflects the extent to which the two parties have traded places since 2001 when it comes to their positions on the federal role in K-12 education. During the debate over NCLB, Republicans—concerned that the American education system was no longer internationally competitive—hoped a greater federal role would improve school accountability, while many Democrats were skeptical of the top-down approach, fearing teachers would be micromanaged. But then during the Obama years, Republicans grew concerned about what they saw as federal government overreach in the administration’s NCLB waivers and its Race to the Top competitive grant program, which pushed states to adopt the Common Core standards (Edwards 2015). And while Democrats found many things to criticize in NCLB, they liked that it forced schools to pay attention to minorities and other disadvantaged groups of students. In an article in this issue, Andrew Saultz, Lance D. Fusarelli, and Andrew McEachin examine the role played by liberal and conservative constituencies in pressuring Congress for NCLB reform.

Although the new law rolls back much of the NCLB Act, the magnitude of its effects on the American education system will be muted by waivers. Forty-two states and the District of Columbia had waivers from certain NCLB requirements at the time ESSA became law, allowing them to establish their own standards for student success. “This means that most of the country’s students have already been learning under a system that eschewed much of No Child Left Behind’s most obvious and onerous aspects—and looks a lot like the system envisioned in Every Student Succeeds” (Wong 2015). Nonetheless, the law does attempt to change the federal-state power balance. Senator Lamar Alexander (R-TN), who co-authored the legislation, claimed ESSA “will end the waivers through which the U.S. Department of Education has become in effect a national school board. Governors have been forced to come to Washington, D.C., and play Mother May I” (Camera 2015).

In 2017, the bipartisan compromise underlying ESSA fell apart as the GOP-controlled Congress—in a narrow vote along partisan lines—relied on a process set out in the rarely used Congressional Review Act to rescind accountability regulations that had been adopted by the Obama administration in late 2016, one year after ESSA’s passage. The regulations were intended to clarify how states should measure schools’ performance and hold low-performing schools accountable under ESSA. Congressional Democrats defended the reporting requirements as necessary to protect vulnerable students, but Republicans argued that the regulations were another example of federal overreach by the Obama administration. The rollback effectively leaves it up to states to find ways to enforce protections for at-risk students. Some state education leaders welcomed the additional flexibility, while others said they feared the move opened a loophole that would make it easier to ignore or hide failing schools, to the detriment of vulnerable students (Brown 2017).

#### Trump has revitalized federalism — state control of education policy is key.

Roberts 17 — Kevin D. Roberts, Ph.D., a longtime educator who is Executive Vice President of the Texas Public Policy Foundation in Austin, 2017 (“States, Not the Feds, Should Lead Education Reform,” *Real Clear Education*, February 7th, Available Online at [http://www.realcleareducation.com/articles/2017/02/07/states\_not\_the\_feds\_should\_lead\_ education\_reform\_\_110115.html](http://www.realcleareducation.com/articles/2017/02/07/states_not_the_feds_should_lead_%20education_reform__110115.html), Accessed 06-22-2017)

The era of Donald Trump offers conservative reformers opportunities they have not seen since the 1980s. The most significant are in education, where the federal government has aggrandized its power, rendering states impotent. This overreach comes at the expense of two things very dear to the nation—our schoolchildren and our understanding of shared power.

Though the Trump administration will no doubt address the former problem, its means of doing so may very well exacerbate the latter. Too often, well-intentioned, conservative executives end up using federal power to heal the wounds caused by the very same bludgeon—federal power.

If President Trump is correct in his inaugural exhortation that “now is the hour of action,” then states—not federal bureaucrats—need to lead the charge on education policy.

Among the many problems facing American education, the most significant may be our schools’ and colleges’ utter failure to teach civic education. Two generations of American students have been taught precious little about the American Founding or the Constitution, let alone the philosophical foundation of the American system of government—federalism. That notion of shared power between the federal government and states has, as a result, withered.

How fitting, then, that Texas—where the American spirit of independence, work ethic, freedom and a vibrant notion of state power is palpable—take the lead in renewing federalism. And how fitting that it do so in the policy area where revitalized state power is most needed: education.

During the otherwise-bleak years of the previous administration, the Lone Star State has shined as a beacon of liberty, deregulation and restrained government authority. Harkening to Justice Louis Brandeis's early-20th-century comment that “states are the laboratories of democracy,” Texas-based initiatives have sprouted across the nation. It's no Texan braggadocio to observe that nationwide, efforts in tort reform, deregulation, tax reduction and criminal justice reform originated in Texas. The resulting “Texas Model” has become the blueprint for leaders in dozens of states.

And that is precisely how our system should work. Though we are all familiar with the legitimate claims based on state sovereignty and the Tenth Amendment, our Founders viewed those as mere baseline expectations. In the realm of public policy, they saw the states as taking the initiative, being so bold and innovative that the federal government would have to serve as a check on them—not the other way around, as the case has been in recent years.

As the Obama administration would be the first to say, Texas has led those efforts to check federal power. That defensive posture was necessary—and, for the Republic, crucial. But now Texas and other states must seize the field of education policy, exercising their own power with bold policy initiatives.

The timing for Texas policymakers is perfect. The state's biennial legislative session has just begun, and the momentum for an education overhaul has never been stronger. At the National School Choice Week rally earlier this week, both Gov. Greg Abbott and Lt. Gov. Dan Patrick gave rousing, full-throated endorsements of school choice reforms.

There are obstacles, to be sure, but even the defenders of the status quo recognize that it's hard to defend the mediocrity of the status quo.

Among the many school choice vehicles, the most far-reaching—for Texas and the United States—is an Education Savings Account (ESA). Built on the successes of early choice vehicles such as tax-credit scholarships, ESAs offer wider and easier usage, removing the barriers to access that have been foisted on choice programs by opponents. Parents may use an ESA to pay for a host of education-related expenses, including private school tuition, tutoring, special needs programs and books.

In sum, an ESA gives parents an unprecedented means for customizing their child’s education—the exact opposite of the conveyor-belt, cookie-cutter approach that has become modern American education.

Though some reformers have advocated for federal ESAs, the inefficiency inherent in the large federal bureaucracy begs for states to take the lead. Texas, the most populous state with a bent toward conservative, free-market reforms, has a unique opportunity to show that states, as our Founders expected, can be at the forefront of policy innovation.

There could not be more at stake. Our children deserve an end to zip-code discrimination, which dramatically limits their access to decent educational options. Furthermore, the civic health of our American Republic—in particular, the long-standing view that states, not the feds, would lead—hangs in the balance.

#### ESSA returned power to the states

BLACK ’17 (Derek W.; Professor of Law – University of South Carolina, “Abandoning the Federal Role in Education: The Every Student Succeeds Act,” California Law Review, vol. 105:101)ww

In December 2015, Congress passed the Every Student Succeeds Act (ESSA), which redefined the role of the federal government in education. The ESSA attempted to appease popular sentiment against the No Child Left Behind Act’s (NCLB) overreliance on standardized testing and punitive sanctions. But in overturning those aspects of the NCLB, Congress failed to devise a system that was any better. Congress simply stripped the federal government of regulatory power and vastly expanded state discretion. For the first time in fifty years, the federal government lacks the ability to prompt improvements in student achievement and to demand equal resources for low-income students. Thus, the ESSA boldly presumes that states will voluntarily improve educational opportunities for low-income students despite their historical tendency to do the contrary.

#### ESSA reverses the federal role in education – moves away from bad NCLB practices

DULGERIAN ’16 (Deena; J.D. Candidate – Georgetown University, “The Impact of the Every Student Succeeds Act on Rural Schools,” 24 Geo. J. Poverty Law & Pol'y 111, Fall, l/n)ww

The one-room rural schoolhouse is reminiscent of Laura Ingalls Wilder's Little House on the Prairie series depicting late nineteenth century settlements in the Midwest: one teacher, a dozen or so students of varying ages, and a long walk home. A century and a half later, the imagery of the one-room schoolhouse has faded, but the existence of rural schools is still very much alive in the United States. Instead of one teacher, there are now an average of thirty-two teachers in a rural school. n1 Up to one-third of the country's students are educated in rural schools, n2 and rural school districts make up around 50% of all the districts in the United States. n3

Despite the significant number of rural schools and students, some rural educators believe that federal education law has historically neglected to appropriately address the unique needs of rural schools. n4 They believe that [\*112] federal laws are "designed primarily for urban and suburban districts and are poorly suited for rural districts." n5 Not only is the substance of federal education law out of touch with the reality in rural districts, but administrative logistics and procedures are beyond the scope and financial capabilities of most rural schools and districts. n6 While "rural" does not automatically imply poverty, n7 rural areas are more susceptible to poverty and deep poverty than urban areas n8 : [\*113] about one-fourth of children living in rural areas are poor, compared to one-fifth of children living in urban areas. n9 This means there are fewer individuals who have developed specific skill sets and, subsequently, fewer employment opportunities to develop rural economics. Despite this disparity, there are scattered examples of successfully-structured and efficiently-run rural schools. n10

These disparities became evident with No Child Left Behind (NCLB), the 2002 reauthorization of the Elementary and Secondary Education Act (ESEA). NCLB, from the perspective of some rural educators and non-rural educators, became synonymous with an overreach of the federal government into what was historically a state-controlled arena. n11 NCLB was labeled as a "one size fits all" n12 accountability scheme that compelled state standardized testing to assess student progress and teacher quality standards without recognizing the differences between rural and non-rural districts that would affect meeting those standards. n13 One size fits all or not, it was NCLB's lack of guidance to states on how to adopt its requirements in rural areas that was the problem. n14

The most recent reauthorization of ESEA was the Every Student Succeeds Act (ESSA). A similar bi-partisan effort to NCLB, ESSA is seen as a retreat of the federal role in education. n15 It offers state education agencies (SEAs) and local education agencies (LEAs) flexibility in defining their standards, [\*114] controlling their assessments, and adjusting their penalization of failing schools. n16 Alternatively, this flexibility, especially in state assessment reporting where states can choose to submit to the Department of Education ("Department") one score or combined scores from multiple interim tests, could offer new challenges for which states may be unprepared. n17

This Note argues that ESSA is an improvement from NCLB for rural schools, although there are still some areas that require further revision. Part II emphasizes the distinction between rural and non-rural schools and why federal education law should reflect those differences. It also describes the link between rural areas and poverty to emphasize the impact education law can have on rural economics. Part III highlights the six major problems facing rural schools that NCLB either exacerbated or ignored: (1) administrative handicaps due to short-staffing at schools, (2) funding formulas that disproportionately affect schools with low enrollment rates regardless of the percentage of low-income students, (3) challenges retaining teachers, (4) teacher quality requirements that are difficult for teachers teaching multiple subjects, (5) low student enrollment, and (6) limited and unfinanced access to technology. Part IV discusses which of these problems ESSA sufficiently addresses: administrative handicaps and teacher quality requirements. Part V discusses which of the problems ESSA does not sufficiently address but can be revised by Congress or the Department: funding formulas and access to technology.

#### The ESSA returned control of education to the local level

GROSS and HILL ’16 (Betheny; Research Director at the Center on Reinventing Public Education at the University of Washington Bothell and Paul T.; Research Professor of Public Affairs, University of Washington Bothell and Founder of the Center on Reinventing Public Education, “The State Role in K--12 Education: From Issuing Mandates to Experimentation,” 10 Harv. L. & Pol'y Rev. 299, Summer, l/n)ww

In this environment, the backlash against federal education policy became intense enough to overcome Congressional inertia. n61 In late 2015, Congress enacted a new version of ESEA, this time called the Every Student Succeeds Act (ESSA). n62

The new act's chief congressional sponsor, Senator Lamar Alexander, described it as "the single biggest step toward local control of public schools in 25 years . . . . [I]t will unleash a flood of innovation and student achievement across America, community by community and state by state." n63 The newest version of ESEA maintains the state obligation to test students but, unlike NCLB, it eliminates the AYP requirement and does not specify how states will use performance data or what states must do when schools and groups of students fall behind. At the time this paper was written, the Department of Education was just beginning to develop detailed regulations. n64

### They Say: “Non-Unique — Trump”

#### The election of Trump guarantees a return to state control of education

MILLER 17 (S.A.; The Washington Times, “Trump to pull feds out of K-12 education,” April 26th, http://www.washingtontimes.com/news/2017/apr/26/donald-trump-pull-feds-out-k-12-education/)ww

President Trump signed an executive order Wednesday to start pulling the federal government out of K-12 education, following through on a campaign promise to return school control to state and local officials.

The order, dubbed the “Education Federalism Executive Order,” will launch a 300-day review of Obama-era regulations and guidance for school districts and directs Education Secretary Betsy DeVos to modify or repeal measures she deems an overreach by the federal government.

“For too long the government has imposed its will on state and local governments. The result has been education that spends more and achieves far, far, far less,” Mr. Trump said. “My administration has been working to reverse this federal power grab and give power back to families, cities [and] states — give power back to localities.”

He said that previous administrations had increasingly forced schools to comply with “whims and dictates” from Washington, but his administration would break the trend.

“We know local communities know it best and do it best,” said Mr. Trump, who was joined by several Republican governors for the signing. “The time has come to empower teachers and parents to make the decisions that help their students achieve success.”

Ms. DeVos and Vice President Mike Pence were on hand for the ceremony, which was attended by about 25 people, including teachers, lawmakers and the governors.

The executive order is not expected to have an immediate impact on school districts. Policy changes will follow a report on the findings of the review.

The review will be spearheaded by the Department of Education’s Regulatory Review Task Force, according to the order.

Ms. DeVos already has authority to modify or repeal regulations that are deemed a violation of federal law. The order, however, creates a review for identifying those areas and makes clear her mandate from the president to take action.

Reducing the federal government’s role in K-12 is part of Mr. Trump’s reform agenda, which also includes the expansion of school choice programs.

Among those at the signing ceremony were Govs. Kay Ivey of Alabama, Gary Herbert of Utah, Paul LePage of Maine, Brian Sandoval of Nevada and Terry Branstad of Iowa, who also is Mr. Trump’s nominee for ambassador to China.

Also in attendance were Sen. Lamar Alexander of Tennessee and Rep. Virginia Foxx of North Carolina, the Republican chairs of the two chambers’ education committees.

#### Trump’s sending power to subnational governments across the board

Mayer, President @ Buckeye Institute for Public Policy, 17

(Matt, “An Era of True Competitive Federalism”, https://www.usnews.com/opinion/economic-intelligence/articles/2017-03-20/donald-trump-ushers-in-era-of-true-competition-for-states-with-his-budget)

With the release of his federal budget, President Donald Trump [appears to be making good](https://www.washingtonpost.com/politics/in-trumps-blueprint-to-reorder-the-federal-government-echoes-of-reagan-81/2017/03/15/af4b5c44-09bd-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.398db3e43b5e) on his promise to send power back to the states. This proposed devolution over federal programs, long demanded by the right (and, [after Trump's election, on the left](https://www.washingtonpost.com/opinions/liberals-are-learning-to-love-states-rights/2017/03/15/c40044e6-098c-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.f9b2c95db295)), pits theory and rhetoric against reality and governing. This power shift must come with tax reform that lowers the federal taxes on Americans and businesses, as well as a reduction in the federal bureaucracy connected to devolved programs. After all, it is fundamentally unfair for the federal government to devolve power but keep the money taxpayers send to it for that power and force states to fund the inefficient federal bureaucracy built up around these programs. Some on the right promote the use of block grants, but that vehicle is a poor substitute for cutting federal taxes by the amount currently appropriated to those federal programs. Under block grants, the federal government still determines how much each state gets and ties strings to those grants. Block grants are better than the status quo, but we can do even better by cutting federal taxes and letting states determine how best to fund the programs they design with the funds that used to head to Washington, which now remain in the states. With decentralization, federal tax cuts and shrinkage of the administrative leviathan, states will be able to compete against each other more meaningfully than at any point in the last 85 years. Specifically, under the current nationalized model, states really can only compete on the margins of areas like welfare, education, transportation and energy, as they are burdened by federal rules, regulations and mandates and limited to act based on the amount of funds they get from and waiver requests approved by Washington.

### They Say: “Past Education Laws Make Not-Unique”

#### Education remains the responsibility of the states despite previous incursions

ROBINSON ’16 (Gerard; Resident Fellow at the American Enterprise Institute for Public Policy Research and former Secretary of Education for the Commonwealth of Virginia, “A Federal Role in Education: Encouragement as a Guiding Philosophy for the Advancement of Learning in America,” 50 U. Rich. L. Rev. 919, March, l/n)ww

Education is the responsibility of state and local governments. Each state has an education clause in its constitution. n8 Each state also maintains a funding formula to determine the costs for educating a student in elementary and secondary public schools, the appropriate taxing methods to generate revenue for it, and the percentage of funding coming from state, local, and federal government [\*921] sources. n9 And, contrary to popular belief, the federal government is not the biggest investor in public education.

According to The State Expenditure Report, state governments spent $ 344.6 billion on elementary and secondary education in 2014. n10 Although Medicaid was the largest state expenditure at $ 445 billion, of which the federal government paid 58.2% of the costs, elementary and secondary education remains the largest recipient of general funds in the states (i.e., revenue generated by state taxes). n11 When you disaggregate funding sources for education, a clear picture emerges about who funds America's schools: state funding accounts for 45.6%, local governments provide 45.3%, and the federal government provides 9.1%. n12 Table 1 shows the sources of state expenditures for elementary and secondary education for the 2014 fiscal year.

These data reveal that the federal government is not the biggest investor in elementary and secondary public schools. This is not to say the federal contribution is insignificant. In 2014, for example, the federal government contributed $ 37.2 billion to elementary and secondary education programs administered [\*922] through the U.S. Department of Education ("DOE"). n14 The federal contribution has risen significantly over time. For instance, the federal government allocated $ 6.9 billion to education when the DOE gained cabinet status in 1980. n15 The amount increased to $ 10.7 billion in 1990 and tripled to $ 38.9 billion in 2010. n16

The increase in federal spending on elementary and secondary education came with additional federal regulations. This trend began with the passage of the Elementary and Secondary Education Act of 1965 ("ESEA"), n17 which was a signature piece of legislation in President Johnson's War on Poverty. Other Presidents reauthorized or amended ESEA during the next fifty years to put their stamps on education federalism. For example, President Carter's reauthorization of ESEA through the Education Amendments of 1978 expanded the definition of Title I to include school-wide programs. n18 President Reagan's reauthorization of ESEA in 1988 required improvements in student achievement and greater accountability. n19 President Clinton's reauthorization through the Improving America's Schools Act of 1994 supported state standards and federal rules for schools. n20 President George W. Bush's reauthorization through the No Child Left Behind Act of 2001 created rewards and sanctions for students and districts alike. n21 And President Obama's reauthorization through the Every [\*923] Student Succeeds Act of 2015 provides states with more flexibility for innovation while curtailing some DOE oversight of standards for students and teachers. n22

When assessing the growth of federal spending on education, it is important to note that the increase in federal spending has not resulted in improved student achievement on the National Assessment of Educational Progress ("NAEP"), referred to as "The Nation's Report Card." During testimony before a congressional education committee in 2012, Neal McClusky of the Cato Institute said, "the last 40-plus years of Federal involvement [in education] are a clear demonstration of futility." n23 In essence, education achievement remained flat for forty years while spending escalated. Two tables produced in conjunction with McClusky's remarks illustrate this point.

Naturally, a discussion about federal spending on education and lackluster student achievement results raises several questions. Why has additional federal spending not resulted in greater student achievement? Does money matter? n26 What is the impact of poverty? n27 How does race, ethnicity, or the history of segregation in schools influence academic outcomes? n28 Is the role of the [\*925] federal government too big or too small? n29 Scholarly dialogue about these questions is ongoing and will continue.

#### Trump is a functional reset button — states will continue to win across the board.

AP, writing in the Minneapolis Star Tribune, 17

(Associated Press, “Walker calls for more states' rights under Trump”, http://www.startribune.com/walker-calls-for-more-states-rights-under-trump/414620243/)

MADISON, Wis. — Gov. Scott Walker says he is optimistic that states will get more power under President Donald Trump's administration. Walker spoke about transferring more power to the states Thursday at the Conservative Political Action Conference's annual meeting in suburban Washington. He says other than the military and "maybe preserving things like Social Security and Medicare, I think just about everything else is better done by the states." Walker says he "loved" Trump's Cabinet and hoped it, along with Congress, would make transformational changes to send more power back to the states. He says "this is a unique opportunity in time to have transformational change."

#### Republican control of the government has created an opportunity to return to federalism, but there is much uncertainty

GOELZHAUSER and ROSE ’17 (Greg; Associate Professor of Political Science – Utah State University, and Shanna; Associate Professor of Government – Clarement McKenna College, “The State of American Federalism 2016–2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations,” 6/8, Publius, 47.3)ww

The state of American federalism in 2016–2017 is characterized by transition and uncertainty following the presidential handover from Barack Obama to Donald Trump. The arrival of a new administration with radically different priorities foretells broad policy reversals in arenas such as health care, immigration, and the environment, with potentially important implications for federalism and intergovernmental relations. The preceding six years were characterized by divided government and congressional deadlock, with the resulting policy vacuum filled by a variety of political actors including state lawmakers, voters (through direct democracy), and judges (Rose and Bowling 2015). The 2016 election ushered in a period of unified Republican control of the federal government, as Republicans kept control of the House (which they have held since the 2010 election) and the Senate (held since the 2014 election) and won the presidency. This could translate into a more productive Congress in 2017–2018, assuming Trump and congressional leaders can work out their differences. It also gives the GOP a historic opportunity to pursue its conservative agenda not only at the federal level but also in the states, where Republicans control a majority of governorships and legislative chambers.

#### Federalism is on the brink – decisions now will echo for an eternity

BLACKMAN ‘17 (Josh; Constitutional Law Professor – South Texas College of Law and Adjunct Scholar – Cato Institution, “How the States Can Help Trump Make Federalism Great Again,” 1/18, http://www.nationalreview.com/article/443943/federalism-state-attorneys-general-donald-trump-should-work-entrench-federalism)ww

I am not Pollyannaish. It is easy enough for a law professor to extoll the value of federalism, but on the ground, elected attorneys general may face a backlash if they actively challenge the Trump administration in court. Three important values should guide this important decision. First, Donald Trump will only be president for the next four to eight years. Sooner, rather than later, a progressive will be in the White House. The precedents that are established now will serve as a check on the havoc a President Elizabeth Warren could unleash on the states. Second, there is a powerful value to gaining buy-in from the liberal justices — especially those who will serve for decades to come — for the principles of federalism. True, Justices Kagan or Sotomayor may be able to distinguish California’s present challenges with Texas’s future challenges — but the feebleness of those flip-flops will be visible to all.

Finally, and most importantly, state officials take an oath to the Constitution, not to the Republican party. They bear the unique responsibility for enforcing the Tenth Amendment, in all of its dimensions: “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.” The mission of reining in the federal government’s powers, and restoring the Constitution’s separation of powers, should continue for the next four years, eight years, and beyond.

## 2NC/1NR — Links

### Link — Title I

#### Title I is a federal intrusion on state education authority

LIPS ’08 (Dan; Senior Policy Analyst – Heritage Foundation, “A Nation Still at Risk: The Case for Federalism and School Choice,” 4/21, http://www.heritage.org/education/report/nation-still-risk-the-case-federalism-and-school-choice)ww

When President Lyndon Johnson signed the Ele­mentary and Secondary Education Act into law in 1965, he declared that "all of those of both parties of Congress who supported the enactment of this leg­islation will be remembered in history as men and women who began a new day of greatness in Amer­ican Society."[30] But after more than four decades, widespread greatness in America's public schools continues to prove elusive.

The most recent federal intervention in K-12 education-the No Child Left Behind (NCLB) Act of 2001-has demonstrated the limits and potential dangers of federal intervention. This 1,100-page law established new regulations and requirements for states to receive federal funding for education. Most important, the law requires the states to test students annually from grades three to eight and once in high school and to report student perfor­mance (including disaggregated scores for student subgroups) and progress toward proficiency, known as adequate yearly progress (AYP).[31] Schools that fail to meet AYP goals are subject to remedies, including school choice, after-school tutoring, and school restructuring.[32]

These new requirements came with increases in both federal funding and regulation. The Bush Administration, for instance, requested $24.5 bil­lion for NCLB programs for fiscal year 2009-an increase of 41 percent over 2001 levels.[33] But the new funding has come with added costs for states and localities, including significant increases in the amount of resources that must be devoted to com­plying with the federal requirements.[34]

After six years, NCLB has demonstrated the lim­its and potential dangers of expanding federal authority in education. A central purpose of NCLB was to require states to adopt high academic stan­dards and provide other options-the possibility to attend another school-to children enrolled in per­sistently low-performing schools, but there is rea­son to believe that NCLB is failing to meet either of these objectives.

First, a number of researchers have highlighted how NCLB's requirement that states demonstrate students' proficiency on state examinations has cre­ated an incentive for states to weaken standards to make tests easier to pass.[35] A 2006 study by Univer­sity of California researchers found that the gap between state and NAEP proficiency scores had widened in 10 of 12 states examined since NCLB was enacted.[36]

Second, few children are benefiting from NCLB's limited school choice options. The Department of Education reported that only 1 percent of eligible students took advantage of the federally mandated public-school-transfer option between 2004 and 2005.[37] Only 17 percent took advantage of the "supplemental services" (tutoring) option.[38] A Department of Education survey of parents in eight urban school districts found that 27 percent of those who were eligible had been notified about the school-transfer options.[39] This suggests that many public school districts are failing to comply with the federal policy.

The Title I program-a centerpiece of federal K-12 education policy since 1965-demonstrates the limits and problems associated with federal inter­vention. Currently funded at $14 billion for 2008, the purpose of Title I has been to provide greater opportunities and resources for disadvantaged chil­dren. But Title I has grown increasingly complex and bureaucratic over time. A 2007 evaluation found that the current Title I funding formula was overly complex and bureaucratic:

Rather than delivering effectively on good intentions for helping poor children, con­gressional action over eight reauthorizations has led to a convoluted, bureaucratic sys­tem that is less student-centered, less trans­parent, and therefore less accountable to the public.[40]

### Link — Hazelwood

#### Plan destroys education federalism — federal courts would replace important judgements of states and local school boards.

Brownstein 9 — Alan Brownstein, Professor of Law, and Chair for the Study and Teaching of Freedom and Equality at UC Davis, JD from Harvard, 2009 (“The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities,” *UC Davis Law Review*, Vol. 42, Available Online at <http://lawreview.law.ucdavis.edu/issues/42/3/the-control-of-student-expression/42-3_brownstein_article.pdf>, Accessed 08-19-2017)

Federalism and Separation of Powers Concerns

The second factor that distinguishes a nonforum from the state’s control of expressive activities in other circumstances is the importance of federalism and separation of powers concerns to the governmental function at issue. Judicial abdication of free speech review is particularly appropriate in a nonforum for reasons relating to federalism or separation of powers concerns (or in some circumstances both). The federalism basis for justifying and identifying a nonforum is relatively straightforward. The speech decisions of certain governmental institutions may be uniquely suitable to, and are recognized to be reserved for, local as opposed to national control. The national uniformity and reasoned application of rules intrinsic to constitutional adjudication may have little utility in a nonforum where cultural distinctions among communities and the need for compromises among stakeholders lead to ad hoc and shifting solutions to problems.

In adjudicating free speech claims in these circumstances, the federal courts would displace government officials in directing the ongoing performance of state and local employees in fulfilling their professional responsibilities. If citizens can sue municipal art museum directors on the basis of content or viewpoint discrimination to contest their choices in selecting artwork to display, for example, courts will take on the task of determining what paintings will appear on the museum’s walls. The idea of government by the national judiciary would take on new meaning as the federal courts became de facto library boards, school boards, museum directors, principals, and classroom teachers.

#### The Hazelwood decision itself cites federalism — overturning it decimates state and local control.

SCOTUS 88 — US Supreme Court opinion, delivered by Justice White, 1988 (“Hazelwood Sch. Dist. v. Kuhlmeier,” 484 U.S. 260, 1988, Available Online at <https://supreme.justia.com/cases/federal/us/484/260/case.html>, Accessed 08-19-2017)

Accordingly, we conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the disseminationof student expression. [Footnote 5] Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns. [Footnote 6]

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, e.g., Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U. S. 176, 458 U. S. 208 (1982); Wood v. Strickland, 420 U. S. 308, 420 U. S. 326 (1975); Epperson v. Arkansas, 393 U. S. 97, 393 U. S. 104 (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," ibid., as to require judicial intervention to protect students' constitutional rights. [Footnote 7]

#### Free speech in schools is a local issue — the plan hurts federalism in education.

Brownstein 9 — Alan Brownstein, Professor of Law, and Chair for the Study and Teaching of Freedom and Equality at UC Davis, JD from Harvard, 2009 (“The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities,” *UC Davis Law Review*, Vol. 42, Available Online at <http://lawreview.law.ucdavis.edu/issues/42/3/the-control-of-student-expression/42-3_brownstein_article.pdf>, Accessed 08-19-2017)

The secondary thesis of this Part of the Article is that school sponsored activities constitute a nonforum, and as such, government control of student speech in such activities should be shielded from free speech scrutiny. Accordingly, the remainder of the Article describes the application of the three nonforum factors, noted above, to the context of student speech in school-sponsored activities. This analysis demonstrates that school-sponsored activities are intrinsically and pervasively expressive and that for important federalism and separation of powers reasons, the regulation of speech in school-sponsored activities should not be subject to Free Speech Clause review.

### Link — Constitution

#### The constitution leaves control over education policy to the states

HORNBECK ’17 (Dustin; Ph.D. Student in Educational Leadership and Policy – Miami University, 4/26, “Federal role in education has a long history,” http://theconversation.com/federal-role-in-education-has-a-long-history-74807)ww

President Donald Trump has directed the United States Department of Education to evaluate whether the federal government has “overstepped its legal authority” in the field of education. This is not a new issue in American politics.

Ever since the Department of Education became a Cabinet-level agency in 1979, opposition to federalized education has been a popular rallying cry among conservatives. Ronald Reagan advocated to dismantle the department while campaigning for his presidency, and many others since then have called for more power to be put back into the states’ hands when it comes to educational policy. In February of this year, legislation was introduced to eliminate the Department of Education entirely.

So, what is the role of the state versus the federal government in the world of K-12 education?

As a researcher of education policy and politics, I have seen that people are divided on the role that the federal government should play in K-12 education – a role that has changed over the course of history.

Growth of public education in states

The 10th Amendment to the United States Constitution states:

“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.”

This leaves the power to create schools and a system for education in the hands of individual states, rather than the central national government. Today, all 50 states provide public schooling to their young people – with 50 approaches to education within the borders of one nation.

#### Federal control of education is not legally valid

KLEVEN ’10 (Thomas; Professor of Law – Thurgood Marshall School of Law, “Federalizing Public Education,” 55 Vill. L. Rev. 369, l/n)ww

An increased federal role may be necessary, but whether it is legally valid or politically viable is another matter. The validity of all the models depends on the scope of federal power. The Supreme Court has interpreted the Tenth Amendment’s protection of states’ rights to forbid the federal government from ordering states to pass laws or implement federal programs.74 Consequently, the federal government could not simply mandate states and localities to run their educational systems in accordance with federal standards. So far the Court has not used the Tenth Amendment to limit the federal spending power. Thus, strings attached to federal money, as with most of the existing federal interventions into public education, is currently an available route.75 Whether the Court would invoke the Tenth Amendment if the federal government tried to use the spending power to fully finance public education and prohibit state and local supplementation, to take over the states’ role in superintending local school districts, or to totally federalize education and establish a federal public school system, is hard to say and likely depends on the ideological tilt of the Court at the time. The basis of a decision striking down federal intervention would likely be that public education is a traditional state function that the federal government may control to a limited degree but not so extensively as per the three models.76 While such a decision is certainly conceivable, my view is that the extent of the federal role should be treated as a political question, on the ground that tradition should not stand in the way of progress in education and that the political process is the appropriate place to resolve whether an increased federal role would be progressive.77

#### The constitution prohibits federal intervention in education

VANCE ’16 (Laurence M.; policy adviser for the Future of Freedom Foundation, an associated scholar of the Ludwig von Mises Institute “The Supreme Court, Federalism, and Limited Government,” 11/2, <https://www.fff.org/explore-freedom/article/supreme-court-federalism-limited-government/>)ww

The United States was set up as a federal system of government where the states, through the Constitution, granted a limited number of powers to a central government. As explained by James Madison in Federalist No. 45,

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

There are about thirty enumerated congressional powers listed throughout the Constitution. Everything else is reserved to the states just as Madison says — even without the addition of the Tenth Amendment.

The Constitution nowhere authorizes the federal government to have anything to do with education or even mentions education. Under the American federal system of government, if there are to be public schools, they must be totally and completely under the authority of state governments — all of which currently have provisions in their constitutions for the operation of K-12 schools, colleges, and universities in their state.

That means that on the federal level, there should be no Elementary and Secondary Education Act, no Title IX, no Higher Education Act, no Common Core, no Pell Grants, no student loans, no teacher-certification standards, no school accreditation, no No Child Left Behind Act, no school breakfast or lunch programs, no Head Start funding, no bilingual-education mandates, no teacher-education requirements, no vouchers, no busing mandates, no Education for All Handicapped Children Act, no standardized-testing requirements, no special-education mandates, no math and science initiatives, no diversity mandates, no Race to the Top funds, no research grants, no regulations, and no funding. And of course, there should be no Office of Civil Rights in the Department of Education because there should be no Department of Education in the first place.

It doesn’t matter what one believes about the merits of public education. The Constitution is clear: the federal government should have nothing to do with schools, colleges, universities, or the education of any adults or their children.

### Link — Regulation/Education Reform

#### Resisting calls to increase intervention in education would restore federalism

LIPS ’08 (Dan; Senior Policy Analyst – Heritage Foundation, “A Nation Still at Risk: The Case for Federalism and School Choice,” 4/21, http://www.heritage.org/education/report/nation-still-risk-the-case-federalism-and-school-choice)ww

Although the word "education" is not mentioned in the Constitution, the federal government has played a growing role in the funding and regulation of elementary and secondary education since the 1960s. This interventionist policy has hindered rather than advanced the progress of educational improvement in America. The following principles should form the basis for full reform in American education.

Resist increasing federal authority. Decades of increased federal intervention have failed to deliver significantly improved student perfor­mance in long-term measures of academic achievement. No Child Left Behind has once again demonstrated the limited and potential unintended consequences of increased federal authority.

The federal government provides 9.2 percent of the funding for public education.[47] Members of Congress should recognize the limits of federal authority in education and resist increasing fed­eral power even more.

Streamline federal programs and bureaucracy. The federal government currently spends more than $71 billion on elementary and secondary education through more than a hundred pro­grams run by more than a dozen agencies.[48] In 2008, the Bush Administration proposed the ter­mination of 47 Department of Education pro­grams (funded at $3.3 billion in 2008), which had achieved their purpose, are duplicated by other programs, are focused too narrowly, or are unable to demonstrate effectiveness.[49]

Each year, Congress also appropriates hundreds of millions of dollars for education earmarks tar­geted for specific purposes chosen by Members of Congress.[50] Federal education reform should consolidate or eliminate federal programs, cut down severely on bureaucracy, and provide funding directly to state and local govern­ments-and let them determine how to allocate resources to best assist students.

Reform NCLB to protect transparency and restore state authority. Congress should reform No Child Left Behind to liberate states from excessive federal regulations and bureaucracy and give state and local authorities the opportu­nity to implement reforms designed to meet local students' needs most effectively. This approach was proposed by Senators Jim DeMint (R-SC) and John Cornyn (R-TX) in their Academic Partnerships Lead Us to Success (A-PLUS) Act.[51]

This policy would restore federalism and greater state and local control in education, moving decisions affecting students and schools closer to parents and taxpayers and encouraging state-led innovation. A participating state would be allowed to receive its share of funding for NCLB programs free of federal requirements and regu­lations if the state meets basic requirements that include (1) maintaining academic standards and continued annual testing, (2) reporting test per­formance of specific groups of students by dis­aggregating data and reporting information to parents and the public, and (3) continuing to use federal funding to assist disadvantaged stu­dents. The Secretary of Education would have the power to review and terminate the perfor­mance agreement if these terms are not met. This approach would protect state-level aca­demic transparency by removing incentives for states to reduce standards to make tests easier to pass.

### They Say: “No Spillover”

#### Federalism is fragile and increasing centralization in education threatens the entire model in other policy areas

Kurzweil 15 – Director, Educational Transformation Program, Ithaka S+R; Lecturer in Law, Columbia Law School, (Martin A., “Disciplined Devolution and the New Education Federalism,” 103 Cal. L. Rev. 565 (2015), HeinOnline, p.628-632)//sy

IV. A FRAGILE BALANCE

The new education federalism demonstrates the potential of disciplined devolution. It has generated sincere and intensive participation by states, fostered collaboration among intrastate stakeholders (at least at the initial policy formulation stage), yielded policy diversity and experimentation (at least within states), and demonstrated strong accountability mechanisms. It is a promising model for education governance and supports the promise of disciplined devolution as a model in other policy domains.

Yet achieving the full potential of disciplined devolution may prove elusive. The ways in which the education example fell short of disciplined devolution's predicted benefits reflect a precarious balance of centralizing and decentralizing forces. While the internal pressure of these competing forces has disrupted implementation, exogenous forces pose a potential systemic risk. Political change, premature legislative lock-in of substantive policy changes, a decrease in the federal government's leverage, or a failure to recognize the nature and benefits of the new structure could each tip the model into a mandate-based, top-down governance structure or leave policy making to states without adequate oversight.

The political risk to disciplined devolution takes three forms. First, a change in administration could lead to a change in the agency's approach to policy or interstate relations. Second, a continuing administration may change its approach as the political calculus changes. Finally, changes in the political climate in states may disrupt the model. The potential for each of these political changes exists in the education context, as national Republican politicians have positioned themselves against the Obama Administration's policies, 360 teachers' unions and other Democrat-leaning advocates continue to pressure the Administration to roll back elements of the initiatives,361 and aspects of the reforms remain controversial in the states.362

A second risk for disciplined devolution is federal legislation that prematurely locks in substantive policies without preserving the governance structure. Success of some policies in some contexts may convince Congress to require those policies in all contexts. Legislative incorporation of the lessons learned through policy experimentation is helpful to disciplined devolution, but only if flexibility to deviate is retained. Such flexibility is necessary to motivate critical policy analysis on the part of state and local actors and to permit continued experimentation and adaptation. Legislators are liable to mistake success of a particular policy for success of the policy-making process and act on that mistake to cripple the policy-making process. There is some evidence of this risk in existing bills to reauthorize ESEA. 363

Although premature legislative incorporation of substantive policy runs a risk of shifting the balance to uniform centralization, excessively delaying an update to default legislation may also undermine the framework. It is critical for disciplined devolution that the default statutory scheme remains credible. If it is not, states will have no reason to take it seriously, and the federal agency's leverage will be diminished. The risk of legislative obsolescence is illustrated by NCLB's requirement that all students achieve grade-level proficiency on statewide tests by the end of the 2014 school year. The 2014 deadline, and its related funding penalties, was a major motivator for states to participate in ESEA Flexibility. Now that the deadline has passed, states with waivers may assume that the provision is moot, or that the Education Department's threats to withdraw funding are not credible, and cease to take their commitments under ESEA Flexibility seriously. The NCLB default has also been weakened by the Education Department's willingness to negotiate alternative arrangements with the handful of states that did not apply for or were denied a waiver.365

A final, pervasive risk is that the relevant federal and state actors fail to recognize the nature of the new governance structure and therefore unwittingly take steps that weaken it. In other words, disciplined devolution might disappear without anyone realizing it existed in the first place. There is a high risk of such a category error in the education case study. As discussed above, most education commentators have not focused on the structural changes of Race to the Top and ESEA Flexibility at all, and those who have generally mistake them for federal incursion or unaccountable decentralization.366 If the Administration or Congress takes action on the basis of either of these characterizations, rather than the disciplined devolution understanding, it would jeopardize the regime. Lessening the rigor of evaluation and monitoring to mitigate a perceived federal incursion would lead some states to shirk their substantive commitments and reduce the incentive for collaborative policy experimentation. Conversely, making the federal role more prescriptive to combat a perceived lack of accountability or standardization would limit states' flexibility to tailor policies and experiment. It might also lead them to demonstrate formal compliance while ignoring or undermining the underlying federal goals (as under NCLB and ESEA).

## 2NC/1NR — Warming Impact

### Turns Case — Inequality

#### Global warming exacerbates inequality

MEYER ’17 (Robinson; The Atlantic, “Are We as Doomed as That New York Magazine Article Says?” 7/10, https://www.theatlantic.com/science/archive/2017/07/is-the-earth-really-that-doomed/533112/)ww

Over the past decade, most researchers have trended away from climate doomsdayism. They cite research suggesting that people respond better to hopeful messages, not fatalistic ones; and they meticulously fact-check public descriptions of global warming, as watchful for unsupported exaggeration as they are for climate-change denial.

They do this not because they think that climate change will be peachy. They do it because they want to be exceptionally careful with facts for such a vital issue. And many of them, too, think that a climate-changed world will look less like a starved wasteland and more like our current home—just more unequal and more impoverished.

What does that world look like? We got a fairly good look late last month, actually, when a new consortium of economists and scientists called the Climate Impact Lab published their first study in the journal Science. Their research looks at how global warming will afflict Americans economically, on a county-by-county level. It tells a frightening but much more mundane story.

Climate change, they say, will not turn us into idiots before broiling us in our sleep. Instead, it will act as a kind of ecological reverse Robin Hood, stealing from the poor and giving to the rich. It will impoverish many of the poorest communities in the country—arrayed across the South and Southwest, and especially along the Gulf Coast—while increasing the fortunes of cities and suburbs on both of the coasts.

“This study—the climate equivalent of being informed that smoking carries serious risk of lung cancer—should be enough to motivate us,” says Katharine Hayhoe, an atmospheric scientist and professor of political science at Texas Tech University. “The NYMag article is the climate equivalent of being told that everyone in the world’s life will end in the most grisly, worst-case possible scenario if we keep on smoking.”

### They Say: “States Can’t Solve Alone”

#### State action solves warming

MAHARREY ’17 (Michael; Communications Director for the Tenth Amendment Center, “The Left Proves You Don’t Need D.C. to Address Environmental Policy,” https://blog.tenthamendmentcenter.com/2017/06/the-left-proves-you-dont-need-d-c-to-address-environmental-policy/)ww

Within weeks of Donald Trump pulling the U.S. out of the Paris climate accord, the left has already begun to prove you don’t need the federal government forcing environmental policies to address climate issues. State and even local action can effectively move things forward.

To date, 285 U.S. mayors have agreed to align their cities with provisions in the Paris agreement and work toward its climate goals. This includes nine of the 10 largest cities in America — New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Diego, Dallas, and San Jose.

“We will continue to lead. We are increasing investments in renewable energy and energy efficiency. We will buy and create more demand for electric cars and trucks. We will increase our efforts to cut greenhouse gas emissions, create a clean energy economy, and stand for environmental justice. And if the President wants to break the promises made to our allies enshrined in the historic Paris Agreement, we’ll build and strengthen relationships around the world to protect the planet from devastating climate risks.”

This builds on a local movement to address environmental issues that started earlier this spring. In March, a group of mayors declared they would not enforce a Trump administration executive order to roll back some environmental policies Pres. Obama implemented. Crubed.com compared these local efforts on the environment to so-called sanctuary city policies.

Much like the sanctuary city battle playing out between the federal government and cities that have refused to cooperate with federal immigration enforcement, these 75 cities are squaring off against Trump’s new policies with pointed, collective actions that defy the new administration. When Trump announced he was changing vehicle fuel-efficiency standards, a group of Climate Mayors banded together to order $10 billion worth of electric vehicles for their city fleets to prove that the future of transportation is not fossil fuels.

Meanwhile, some states are taking action on the climate as well. Last week, Hawaii Gov.David Ige signed two bill relating to environmental policy. Senate Bill 559 “expands strategies and mechanisms to reduce greenhouse gas emissions statewide,” and House Bill 1578 to “identify agricultural and aquacultural practices to improve soil health and promote carbon sequestration – the capture and long-term storage of atmospheric carbon dioxide to mitigate climate change.”

Upon signing the bills Ige said, “and with that signature, Hawaii becomes the first state in the nation to join the Paris agreement.”

New York Gov. Abdrew Cuomo, California Gov. Jerry Brown and Washington state Gov. Jay Inslee have agreed to form a United States Climate Alliance. The group hopes to convene a coalition of U.S. states committed to upholding the Paris agreement.

“New York State is committed to meeting the standards set forth in the Paris Accord regardless of Washington’s irresponsible actions. We will not ignore the science and reality of climate change, which is why I am also signing an Executive Order confirming New York’s leadership role in protecting our citizens, our environment, and our planet,” Cuomo said in a statement.

When it comes to environmental and immigration policy, the left has discovered federalism. Progressives have embraced James Madison’s blueprint for addressing “unwarrantable” federal actions – refuse to cooperate with the federal government.

Whether or not you agree with the specific policies, this was how the system was designed to work. A decentralized approach allows various jurisdictions to experiment with different policies. If they prove effective, others will do the same. If not, others will reject them and try different approaches. That’s how the system is supposed to work. But when you force one-size fits all solutions down from Washington D.C., you will always meet resistance. In a local setting, you have a better chance of forming something close to a consensus on certain issues. You won’t get much resistance to fighting “climate change” in a city like Santa Monica. You will almost never develop broad support with a national initiative, And when you do succeed in getting a policy implemented at the federal level, a new administration can end what you worked for in one fell swoop. Environmentalist have learned this the hard way with the transition from the Obama to the Trump administration.

State and local reaction to the Trump administration’s withdraw from the Paris agreement proves an important point. You don’t have to force solutions from D.C., even on so-called global issues like the environment.

### They Say: “Federalism Increases Warming”

#### Federalism is key to prevent climate change

IBBITSON ’17 (John; The Globe and Mail, “Federalism might be out best hope in fighting climate change,” 6/2, https://www.theglobeandmail.com/news/politics/federalism-might-be-our-best-hope-in-fighting-climate-change/article35197342/)ww

Federal systems of government are splendid things: robust, flexible, able to accommodate conflicting local values. When it comes to the fight against global warming, federalism is the ace up Canada’s sleeve, while south of the border it’s America’s last, best hope.

Conservative prime minister Stephen Harper was right to withdraw Canada from the Kyoto Protocol on climate change in 2011. The Chrétien government had made promises at Kyoto that no Canadian government could keep without wrecking the economy. The expanding oil sands in Alberta had become a major driver of growth. The U.S. Congress was blocking president Barack Obama’s efforts to fight global warming.

Any Canadian tax on carbon without an equivalent American action would simply kill Canadian jobs, without lowering the planet’s temperature even a smidgeon, Mr. Harper argued, and that argument made sense.

But, although Ottawa wasn’t ready to fight climate change, some provincial governments thought differently. Quebec had a natural advantage, because most of its electricity is generated by hydro. The Liberal government in Ontario wanted to replace lost manufacturing jobs in traditional industries by developing green-energy technology. British Columbia premier Gordon Campbell believed that a carbon tax was the most business-friendly way to lower emissions.

When Rachel Notley’s NDP came to power in Alberta, committed to bringing that province in line with others in the fight against climate change, Mr. Harper shrugged. Ottawa’s job, he believed, was to get a pipeline to tidewater somehow, somewhere. If the provinces wanted to go all green, they were welcome to knock themselves out.

But then Mr. Harper was replaced by Justin Trudeau, and Mr. Obama by Donald Trump. The White House is now even more of a climate-change-denier than the House of Representatives or Senate, while the Liberal government is as enthusiastic about fighting climate change as any province.

In Canada’s case, federalism worked to provide in advance what Ottawa now seeks: a national (if piecemeal) strategy to reduce carbon emissions through provincial cap-and-trade or carbon tax schemes, with only Saskatchewan’s Brad Wall seriously offside.

In America’s case, federalism and the entrepreneurial energy of the private sector have combined to limit the damage inflicted by Washington. About 30 states have green-energy strategies in place. Elon Musk resigned Thursday from two of Mr. Trump’s advisory councils in protest over the President’s decision to withdraw the United States from the Paris accord on climate change. Of course he resigned: His Tesla Model 3 electric car will soon hit the streets in an increasingly competitive electric vehicle market, going head-to-head with, among other competitors, the Chevy Bolt and the Volkswagen eGolf.

The battle in North America against global warming will be most successfully fought in dealer show rooms. Mr. Trump, with his Luddite refusal to recognize the transformation under way in his own country’s economy, is making that battle harder to win, which is why dozens of mayors and CEOs vowed to continue efforts to reduce carbon dioxide emissions in the wake of the President’s announcement.

Federations aren’t perfect, as both Canadians and Americans know. Local turf wars can prevent unified action – just witness the years of effort, mostly futile, to eliminate internal barriers to trade in Canada.

And while the Trump White House is egregious in its foolishness on climate change (and so much else), the Trudeau Langevin Block has its own issues. Threatening to punish recalcitrant provinces with a federally imposed carbon tax is a mistake; in federal politics coercion is generally a mistake.

And if Washington has replaced the eagle with the ostrich (thank you, Bob Rae, for that tweet), Mr. Trudeau’s green rhetoric fails to match his actions: The Liberal climate-reduction targets are essentially identical to the old Conservative climate-reduction targets.

Still, this is a good time to celebrate the diversity of federalism, which is working both to Canada’s and America’s advantage on the climate-change file.

Something to remember the next time we grind our teeth at the unwieldiness of federalism. Unwieldy is good. It limits the damage of stupid.

#### Federalism key to environmental law

THOMPSON ’03 (Barton H., Jr.; Vice Dean and Robert E. Paradise Professor of Natural Resources Law – Stanford, “Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions,” 64 Mont. L. Rev. 157, Winter, l/n)ww

State environmental provisions, nonetheless, remain exceptionally important. Despite the federalization of U.S. environmental law, states remain on the front line of a wide number of important issues. n70 The national government has yet to pass laws in some areas, abandoning effective regulation for the moment to the states. Examples here range from global climate change, where the national government has adopted an approach consisting largely of research and voluntarism, and the overdrafting of groundwater aquifers. n71 In other areas, national environmental laws have purposefully addressed only some aspects of a problem, carving other aspects out for state regulation. The Clean Water Act, for example, does not directly regulate non-point pollution from agriculture, mines, construction sites, and other diffuse sources, leaving regulatory [\*175] choices over non-point pollution largely to the states. n72 The Endangered Species Act focuses most of its attention on species at the brink of extinction, leaving more general biodiversity management largely to the states. n73 Even where the national government has chosen to regulate an environmental problem, state governments have chosen to adopt additional or stricter environmental policies in fields as diverse as air pollution and hazardous waste cleanups. n74 Most national environmental laws, moreover, adopt a policy of "cooperative federalism" under which the national government sets overall environmental policy but delegates authority over implementation and many of the regulatory details to states. n75 In summary, although the environmental field has changed dramatically since the 1972 Montana Constitution, state constitutional provisions are still of great importance.

### They Say: “Warming is Slow”

#### Warming is occurring fast – feedbacks make it quicker

GRIFFIN ’15 (David Ray; Emeritus Professor of Philosophy of Religion – Claremont Graduate University, “The climate is ruined. So can civilization even survive?” http://www.cnn.com/2015/01/14/opinion/co2-crisis-griffin/index.html)

Although most of us worry about other things, climate scientists have become increasingly worried about the survival of civilization. For example, Lonnie Thompson, who received the U.S. National Medal of Science in 2010, said that virtually all climatologists "are now convinced that global warming poses a clear and present danger to civilization."

Informed journalists share this concern. The climate crisis "threatens the survival of our civilization," said Pulitzer Prize-winner Ross Gelbspan. Mark Hertsgaard agrees, saying that the continuation of global warming "would create planetary conditions all but certain to end civilization as we know it."

These scientists and journalists, moreover, are worried not only about the distant future but about the condition of the planet for their own children and grandchildren. James Hansen, often considered the world's leading climate scientist, entitled his book "Storms of My Grandchildren."

The threat to civilization comes primarily from the increase of the level of carbon dioxide (CO2) in the atmosphere, due largely to the burning of fossil fuels. Before the rise of the industrial age, CO2 constituted only 275 ppm (parts per million) of the atmosphere. But it is now above 400 and rising about 2.5 ppm per year.

Because of the CO2 increase, the planet's average temperature has increased 0.85 degrees Celsius (1.5 degrees Fahrenheit). Although this increase may not seem much, it has already brought about serious changes.

The idea that we will be safe from "dangerous climate change" if we do not exceed a temperature rise of 2C (3.6F) has been widely accepted. But many informed people have rejected this assumption. In the opinion of journalist-turned-activist Bill McKibben, "the one degree we've raised the temperature already has melted the Arctic, so we're fools to find out what two will do."

His warning is supported by James Hansen, who declared that "a target of two degrees (Celsius) is actually a prescription for long-term disaster."

The burning of coal, oil, and natural gas has made the planet warmer than it had been since the rise of civilization 10,000 years ago. Civilization was made possible by the emergence about 12,000 years ago of the "Holocene" epoch, which turned out to be the Goldilocks zone - not too hot, not too cold. But now, says physicist Stefan Rahmstorf, "We are catapulting ourselves way out of the Holocene."

This catapult is dangerous, because we have no evidence civilization can long survive with significantly higher temperatures. And yet, the world is on a trajectory that would lead to an increase of 4C (7F) in this century. In the opinion of many scientists and the World Bank, this could happen as early as the 2060s.

What would "a 4C world" be like? According to Kevin Anderson of the Tyndall Centre for Climate Change Research (at the University of East Anglia), "during New York's summer heat waves the warmest days would be around 10-12C (18-21.6F) hotter [than today's]." Moreover, he has said, above an increase of 4C only about 10% of the human population will survive.

Believe it or not, some scientists consider Anderson overly optimistic.

The main reason for pessimism is the fear that the planet's temperature may be close to a tipping point that would initiate a "low-end runaway greenhouse," involving "out-of-control amplifying feedbacks." This condition would result, says Hansen, if all fossil fuels are burned (which is the intention of all fossil-fuel corporations and many governments). This result "would make most of the planet uninhabitable by humans."

Moreover, many scientists believe that runaway global warming could occur much more quickly, because the rising temperature caused by CO2 could release massive amounts of methane (CH4), which is, during its first 20 years, 86 times more powerful than CO2. Warmer weather induces this release from carbon that has been stored in methane hydrates, in which enormous amounts of carbon -- four times as much as that emitted from fossil fuels since 1850 -- has been frozen in the Arctic's permafrost. And yet now the Arctic's temperature is warmer than it had been for 120,000 years -- in other words, more than 10 times longer than civilization has existed.

According to Joe Romm, a physicist who created the Climate Progress website, methane release from thawing permafrost in the Arctic "is the most dangerous amplifying feedback in the entire carbon cycle." The amplifying feedback works like this: The warmer temperature releases millions of tons of methane, which then further raise the temperature, which in turn releases more methane.

The resulting threat of runaway global warming may not be merely theoretical. Scientists have long been convinced that methane was central to the fastest period of global warming in geological history, which occurred 55 million years ago. Now a group of scientists have accumulated evidence that methane was also central to the greatest extinction of life thus far: the end-Permian extinction about 252 million years ago.

Worse yet, whereas it was previously thought that significant amounts of permafrost would not melt, releasing its methane, until the planet's temperature has risen several degrees Celsius, recent studies indicate that a rise of 1.5 degrees would be enough to start the melting.

What can be done then? Given the failure of political leaders to deal with the CO2 problem, it is now too late to prevent terrible developments.

But it may -- just may -- be possible to keep global warming from bringing about the destruction of civilization. To have a chance, we must, as Hansen says, do everything possible to "keep climate close to the Holocene range" -- which means, mobilize the whole world to replace dirty energy with clean as soon as possible.

## 2NC/1NR — Progressive Federalism Impact

### 1NC/2NC — Progressive Federalism Impact

#### Progressive federalism is the *basis* for resistance to Trump’s agenda.

Chemerinsky 17 — Erwin Chemerinsky, Founding Dean, Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California-Irvine School of Law, Fellow of the American Academy of Arts and Sciences, former Alston & Bird Professor of Law and Political Science at Duke University, holds a J.D. from Harvard Law School, 2017 (“Embracing Federalism,” *Take Care*—a scholarly legal blog, March 16th, Available Online at <https://takecareblog.com/blog/embracing-federalism>, Accessed 06-14-2017)

It is time for progressives to embrace federalism and to use Supreme Court precedents protecting states’ rights to fight against Trump administration policies. Throughout American history, “states’ rights” have been used by conservatives to oppose progressive change. In the early 19th century, those opposing abolition of slavery did so in the name of states’ rights. In the late 19th and early 20th centuries, the Supreme Court struck down many progressive federal laws, including the first federal statute restricting the use of child labor, on federalism grounds. In the 1950s and 1960s, Southerners opposed desegregation by invoking states’ rights. In more recent decades, the Supreme Court, in a series of ideologically split 5-4 decisions, used federalism to strike down desirable federal laws, including provisions of the Violence Against Women Act, the Brady Handgun Control Act, and the Patient Protection and Affordable Care Act.

But now, with the Trump administration taking far right positions on almost every issue, state and local governments are a key hope. For example, President Donald Trump’s threat to withhold federal funds from “sanctuary cities” is coercion of local governments that violates principles of federalism long advocated by the conservative justices on the Supreme Court.

A great deal of confusion exists over what it means for a city to declare itself to be a “sanctuary.” It does not mean that a city will conceal or shelter undocumented immigrants from detection. Instead, when a city says that it is a “sanctuary,” it means that the city will not be an arm of federal immigration authorities. For example, a sanctuary city will not investigate, arrest, or detain individuals on the basis of immigration status. Rather, the city will provide services to all, regardless of immigration status, and generally will not turn over undocumented individuals to federal immigration authorities.

There are compelling reasons for cities to adopt such policies. Victims of crime and witnesses to crime will not come forward to the police if they fear deportation. Public health officials worry that sick people, including those with communicable diseases, will not go for treatment if they fear that it could lead to their deportation. Of course, their untreated communicable diseases can spread to all of us. Education officials worry that parents will not send their children to school if they think it might lead to deportation. Educating children, whether documented or undocumented, is a moral obligation and obviously essential for society.

Nonetheless, President Trump issued an executive order on January 25, 2017, which threatens sanctuary cities with loss of federal funds. But this violates the Tenth Amendment. The Supreme Court has held that it is unconstitutional for Congress to commandeer state and local governments and force them to administer federal mandates.

For example, in United States v. Printz, in 1997, the Supreme Court declared unconstitutional a provision of the federal Brady Handgun Control Act that required that state and local governments do background checks before issuing permits for firearms. The Court, in an opinion by Justice Scalia, said that such coercion violated principles of federalism and the Tenth Amendment.

Nor may Congress do this by putting strings on grants to state and local governments. The Supreme Court has said that such strings are constitutional only if the conditions are clearly stated, relate to the purpose of the program, and are not unduly coercive. None of these requirements are met by the Trump Executive Order. No federal statute conditions federal funds on cities denying themselves sanctuary status. And most federal grants to local governments have nothing to do with immigration.

But most of all, the Trump Executive Order is impermissibly coercive. In 2012, in National Federation of Independent Businesses v. Sebelius, the Supreme Court, 7-2, declared unconstitutional the Medicaid provisions of the Patient Protection and Affordable Care Act. These provided that if a state accepted federal Medicaid funds, it had to provide coverage for those within 133% of the federal poverty level. The federal government paid 100% of these costs until 2019 and 90% thereafter. The Court, in an opinion by Chief Justice Roberts, declared this unconstitutional as impermissibly coercing state governments in violation of the Tenth Amendment. The Court referred to this as like “a gun to the head” of the states and as “dragooning” them. The Trump Executive Order does exactly the same thing.

The federal government can use its agencies and agents to enforce federal immigration law however it chooses. But it cannot turn local governments into enforcement arms of the federal government. That is exactly what the Trump Executive Order does.

This is just one of many examples where principles of federalism must be used by progressives. In the area of environmental law, it will be crucial for state governments to adopt stricter pollution control laws in the face of the dismantling of federal environmental protections. Just last week, Scott Pruitt, the head of the Environmental Protection Agency, once more denied any link between greenhouse gas emissions and climate change. It is clear that he and the Trump administration will gut federal environmental regulations. But there long has been a principle that states can have stricter environmental laws, so long as Congress does not explicitly preempt this.

Another important area concerns decriminalization of marijuana. A number of states, including California, have repealed laws that make it a crime to possess small amounts of this drug. Attorney General Jeff Sessions has expressed opposition to these laws. But Congress cannot force state governments to enact or enforce laws. A state does not need to have any law prohibiting marijuana, or can have one with exceptions for possession for medical use or for small amounts. To be sure, the federal government can enforce its own drug laws however it wants, but it cannot compel state governments to do so.

States, of course, will vary enormously in their policies. But that, too, is what federalism and states’ rights are about. Progressives should not be hesitant to use conservative decisions to achieve desirable results. We will need all the tools we can find to fight over the next four years.

#### Resisting Trump’s agenda is essential to lower the risk of multiple existential threats.

Baum 16 — Seth Baum, Co-Founder and Executive Director of the Global Catastrophic Risk Institute, Affiliate Researcher at the Center for Research on Environmental Decisions at Columbia University, and Affiliate Scholar at the Institute for Ethics and Emerging Technologies, and a Research Scientist at Blue Marble Space Institute of Science, earned a Ph.D. in Geography from Pennsylvania State University, an M.S. in Electrical Engineering from Northeastern University, and a B.S. in Optics and a B.S. in Applied Mathematics from the University of Rochester, 2016 (“What Trump means for global catastrophic risk,” *Bulletin of Atomic Scientists*, December 9th, Available Online at <http://thebulletin.org/what-trump-means-global-catastrophic-risk10266>, Accessed 07-09-2017, Lil\_Arj)

In 1987, Donald Trump said he had an aggressive plan for the United States to partner with the Soviet Union on nuclear non-proliferation. He was motivated by, among other things, an encounter with Libyan dictator Muammar Qaddafi’s former pilot, who convinced him that at least some world leaders are too unstable to ever be trusted with nuclear weapons. Now, 30 years later, Trump—following a presidential campaign marked by impulsive, combative behavior—seems poised to become one of those unstable world leaders.

Global catastrophic risks are those that threaten the survival of human civilization. Of all the implications a Trump presidency has for global catastrophic risk—and there are many—the prospect of him ordering the launch of the massive US nuclear arsenal is by far the most worrisome. In the United States, the president has sole authority to launch atomic weapons. As Bruce Blair recently argued in Politico, Trump’s tendency toward erratic behavior, combined with a mix of difficult geopolitical challenges ahead, mean the probability of a nuclear launch order will be unusually high.

If Trump orders an unwarranted launch, then the only thing that could stop it would be disobedience by launch personnel—though even this might not suffice, since the president could simply replace them. Such disobedience has precedent, most notably in Vasili Arkhipov, the Soviet submarine officer who refused to authorize a nuclear launch during the Cuban Missile Crisis; Stanislav Petrov, the Soviet officer who refused to relay a warning (which turned out to be a false alarm) of incoming US missiles; and James Schlesinger, the US defense secretary under President Richard Nixon, who reportedly told Pentagon aides to check with him first if Nixon began talking about launching nuclear weapons. Both Arkhipov and Petrov are now celebrated as heroes for saving the world. Perhaps Schlesinger should be too, though his story has been questioned. US personnel involved in nuclear weapons operations should take note of these tales and reflect on how they might act in a nuclear crisis.

Risks and opportunities abroad. Aside from planning to either persuade or disobey the president, the only way to avoid nuclear war is to try to avoid the sorts of crises that can prompt nuclear launch. China and Russia, which both have large arsenals of long-range nuclear weapons and tense relationships with the United States, are the primary candidates for a nuclear conflagration with Washington. Already, Trump has increased tensions with China by taking a phone call from Taiwanese President Tsai Ing-wen. China-Taiwan relations are very fragile, and this sort of disruption could lead to a war that would drag in the United States.

Meanwhile, Trump’s presidency could create some interesting opportunities to improve US relations with Russia. The United States has long been too dismissive of Moscow’s very legitimate security concerns regarding NATO expansion, missile defense, and other encroachments. In stark defiance of US political convention, Trump speaks fondly of Russian President Vladimir Putin, an authoritarian leader, and expresses little interest in supporting NATO allies. The authoritarianism is a problem, but Trump’s unconventional friendliness nonetheless offers a valuable opportunity to rethink US-Russia relations for the better.

On the other hand, conciliatory overtures toward Russia could backfire. Without US pressure, Russia could become aggressive, perhaps invading the Baltic states. Russia might gamble that NATO wouldn’t fight back, but if it was wrong, such an invasion could lead to nuclear war. Additionally, Trump’s pro-Russia stance could mean that Putin would no longer be able to use anti-Americanism to shore up domestic support, which could lead to a dangerous political crisis. If Putin fears a loss of power, he could turn to more aggressive military action in hopes of bolstering his support. And if he were to lose power, particularly in a coup, there is no telling what would happen to one of the world’s two largest nuclear arsenals. The best approach for the United States is to rethink Russia-US relations while avoiding the sorts of military and political crises that could escalate to nuclear war.

The war at home. Trump has been accused many times of authoritarian tendencies, not least due to his praise for Putin. He also frequently defies democratic norms and institutions, for instance by encouraging violence against opposition protesters during his presidential campaign, and now via his business holdings, which create a real prospect he may violate the Constitution’s rule against accepting foreign bribes. Already, there are signs that Trump is profiting from his newfound political position, for example with an end to project delays on a Trump Tower in Buenos Aires. The US Constitution explicitly forbids the president from receiving foreign gifts, known as “emoluments.”

What if, under President Trump, the US government itself becomes authoritarian? Such an outcome might seem unfathomable, and to be sure, achieving authoritarian control would not be as easy for Trump as starting a nuclear war. It would require compliance from a much larger portion of government personnel and the public—compliance that cannot be taken for granted. Already, government officials are discussing how best to resist illegal and unethical moves from the inside, and citizens are circulating expert advice on how to thwart creeping authoritarianism.

But the president-elect will take office at a time in which support for democracy may be declining in the United States and other Western countries, as measured by survey data. And polling shows that his supporters were more likely to have authoritarian inclinations than supporters of other Republican or Democratic primary candidates. Moreover, his supporters cheered some of his clearly authoritarian suggestions, like creating a registry for Muslims and implying that through force of his own personality, he would achieve results where normal elected officials fail.

An authoritarian US government would be a devastating force. In theory, dictatorships can be benevolent, but throughout history, they have been responsible for some of the largest human tragedies, with tens of millions dying due to their own governments in the Stalinist Soviet Union, Nazi Germany, and Maoist China. Thanks to the miracles of modern technology, an authoritarian United States could wield overwhelming military and intelligence capabilities to even more disastrous effect.

Return to an old world order. Trump has suggested he might pull the United States back from the post-World War II international order it helped build and appears to favor a pre-World War II isolationist mercantilism that would have the United States look out for its unenlightened self-interest and nothing more. This would mean retreating from alliances and attempts to promote democracy abroad, and an embrace of economic protectionism at home.

Such a retreat from globalization would have important implications for catastrophic risk. The post-World War II international system has proved remarkably stable and peaceful. Returning to the pre-World War II system risks putting the world on course for another major war, this time with deadlier weapons. International cooperation is also essential for addressing global issues like climate change, infectious disease outbreaks, arms control, and the safe management of emerging technologies.

On the other hand, the globalized economy can be fragile. Shocks in one place can cascade around the world, and a bad enough shock could collapse the whole system, leaving behind few communities that are able to support themselves. Globalization can also bring dangerous concentrations of wealth and power. Nevertheless, complete rejection of globalization would be a dangerous mistake.

Playing with climate dangers. Climate change will not wipe out human populations as quickly as a nuclear bomb would, but it is wreaking slow-motion havoc that could ultimately be just as devastating. Trump has been all over the map on the subject, variously supporting action to reduce emissions and calling global warming a hoax. On December 5th he met with environmental activist and former vice president Al Gore, giving some cause for hope, but later the same week said he would appoint Oklahoma Attorney General Scott Pruitt, who denies the science of climate change, to lead the Environmental Protection Agency. Trump’s energy plan calls for energy independence with development of both fossil fuels and renewables, as well as less environmental regulation. If his energy policy puts more greenhouse gas into the atmosphere—as it may by increasing fossil fuel consumption—it will increase global catastrophic risk.

For all global catastrophic risks, it is important to remember that the US president is hardly the only important actor. Trump’s election shifts the landscape of risks and opportunities, but does not change the fact that each of us can help keep humanity safe. His election also offers an important reminder that outlier events sometimes happen. Just because election-winning politicians have been of a particular mold in the past, doesn’t mean the same kind of leaders will continue to win. Likewise, just because we have avoided global catastrophe so far doesn’t mean we will continue to do so.

### Extend: “Federalism Checks Trump”

#### Federalism prevents executive overreach while helping minorities get political power.

Somin 16 — Ilya Somin, Professor of Law at George Mason University, former John M. Olin Fellow in Law at Northwestern University Law School, holds a J.D. from Yale Law School and an M.A. in Political Science from Harvard University, 2016 (“Heather Gerken on Trump and progressive federalism,” *The Washington Post*, December 14th, Available Online at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/14/heather-gerken-on-trump-and-progressive-federalism/?utm\_term=.b6e833c4f04d&tid=a\_inl, Accessed 06-19-2017)

Yale Law School Professor Heather Gerken has long argued that liberals should take a more favorable view of federalism. In an important new article on Vox, she outlines a variety of ways in which they could potentially use state and local power to resist the Trump administration. There are a number of parallels between Gerken’s argument and my own analysis of the same subject. For example, we both outline similar strategies that sanctuary cities could use to resist Trump’s efforts to deport undocumented immigrants.

Perhaps the most notable difference between Gerken’s position and mine is that she puts little if any emphasis on judicially enforceable limits on federal power. This is part of a longstanding disagreement between Gerken and other modern progressive champions of federalism on the one hand, and conservative and libertarian federalists on the other. In my view, the new progressive federalism would be on a sounder footing if its advocates accept the need for strong, binding constitutional limits on federal power rather than resist it. In some of her recent writings, Gerken has shown greater openness to such limits on than in the past. But I think she and other liberals should move further in that direction.

Gerken’s Vox article actually underscores this point very well, even if perhaps unintentionally. Many of her suggested strategies for resisting Trump implicitly depend on constitutional limits on federal power for their effectiveness. For example, her (and my) recommendation that sanctuary cities should refuse to cooperate with federal deportation efforts relies on Supreme Court decisions forbidding federal “commandeering” of state and local governments. Otherwise, Trump and the GOP-controlled Congress could simply enact laws ordering the states to comply, and potentially imposing severe punishment on officials who refuse to do so.

Both the sanctuary city policy and some of Gerken’s other ideas might be undermined if the federal government could use conditional spending grants to pressure dissenting states into obedience. As Gerken briefly notes, such pressure tactics are rendered more difficult by Supreme Court decisions requiring that any such conditions be unambiguously clear, related to the purpose of the federal grant in question, and not so sweeping as to be “coercive.”

Tighter constraints on federal power could also curb other dangers posed by Trump to blue states, such as efforts to undermine state-level marijuana legalization. In addition, liberal efforts to use federalism to resist Trump are more likely to succeed in both courts of law and the court of public opinion if they attract at least some conservative and libertarian support. That support is more likely to be forthcoming if it is based on acceptance of generalized limits on federal power that can protect right and left alike, as opposed to ad hoc opposition to specific Trump policies.

Some liberals will likely continue to oppose nearly all hard-wired structural constraints on federal power for fear that they might be used to impede federal efforts to protect racial, ethnic, and other minorities. But as both Gerken and I have explained in the past, greater political decentralization can often benefit vulnerable minorities, particularly under modern conditions. Moreover, it is possible to impose tighter limits on federal power in many other areas, while still leaving the federal government broad power to combat invidious discrimination by state and local authorities.

Ultimately, the greatest threat to both unpopular minorities and many other groups is a largely unconstrained federal government dominated by their political enemies. In a diverse and increasingly polarized society with deep reservoirs of partisan hatred, both right and left have much to fear from such concentrated power. Recent political history shows that neither side can hope to stave off the threat by establishing a stranglehold over Washington that eliminates the possibility that the other will return to power. Rigorous enforcement of tight constitutional constraints on federal authority cannot completely eliminate the danger posed by the combination of polarization and the vast power of the modern state. But it can make it less menacing than it would be otherwise.

#### States can constrain Trump and create innovative policies — federalism is key.

Somin 17 — Ilya Somin, Professor of Law at George Mason University, former John M. Olin Fellow in Law at Northwestern University Law School, holds a J.D. from Yale Law School and an M.A. in Political Science from Harvard University, 2017 (“Why we need enforceable constitutional limits on federal power,” *The Washington Post*, January 3rd, Available Online at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/03/why-we-need-enforceable-constitutional-limits-on-federal-power/, Accessed 06-19-2017)

Yale Law School Professor Heather Gerken has a posted a thoughtful response to my commentary on her analysis of the ways in which liberals and others could use federalism to resist the upcoming Trump administration. We agree that federalism can play a valuable role in many ways. But Gerken argues that we don’t need judicially enforceable constitutional limits on federal power in order to do so.

Gerken argues that such limits are both infeasible and undesirable. I think she is mistaken on both counts. We need enforceable limits on federal power so that dissenting states and localities don’t get trumped by Trump – or any other federal enforcer.

In Gerken’s view, “judicial efforts to hold back the tide of federal power have been a failure.” They have indeed not gone as far as I and many others would like. But there has been important progress in recent years. That progress has gone far enough that many of the liberal proposals for resisting Trump actually rely on Supreme Court decisions limiting federal power. As I noted in my earlier post on Gerken’s work, this is true of her own and other liberals’ suggested strategies for protecting “sanctuary cities.”

Moreover, judicial enforcement of federalism could be much more effective if it enjoyed broader support, particularly from liberals. If Gerken and other leading liberal scholars and judges come around on the issue, the courts could do a lot more to restrict federal power than is currently the case. As with most forms of judicial review, judicial protection for federalism is likely to be stronger if it enjoys substantial bipartisan support. There is much that liberals could accomplish if they join with libertarians, conservatives, and others to help make federalism great again.

Gerken also wants the federal government to retain the power to “trump” state policies because she wants a form of federalism that enables states to help “forge national norms rather than allow us to shield ourselves from the federal policies with which we disagree.” As discussed in my earlier post and earlier critiques of Gerken’s work, I think the idea of a federal trump card is at odds with Gerken’s own emphasis on the value of federalism in protecting vulnerable dissenters and minorities. I cannot resist adding that the trump card looks even more dubious than usual in the soon-to-be era of Donald Trump. A trump card that regularly falls into the hands of Trump and his ilk is not one that liberals – or the rest of us – should support.

States that adopt innovative policies can indeed help create better norms that spread to other parts of the nation. But they don’t have to do that through federal coercion that compels the rest of the country to adopt them. In many cases, the better approach is a combination of competition and expanding opportunities for people to “vote with their feet” for better jurisdictions. Competition and foot voting put pressure on underperforming states and localities to improve their policies, while giving citizens greater freedom and more choice than is available with top-down federal norm-setting through trump cards (or even Trump cards).

Finally, Gerken reiterates her longstanding argument that states don’t need enforceable constitutional protections to resist the federal government, because they can often do so in other ways. She is surely right to argue that state resistance to federal dictates does not always depend on formal constitutional rules. But, in the absence of enforceable limits on federal power, such resistance will often be either ineffective, or unlikely to arise in the first place.

For example, state and local resistance to Trump’s potential attacks on sanctuary cities is not likely to succeed if the federal government could simply order local officials to do its bidding, on pain of severe penalties. State and local resistance to this and other federal policies can also be undermined (and often has been) by conditional federal grants, especially if there are no limits on the scope and extent of the conditions and associated penalties for violators.

It is true, as Gerken famously put it, that, absent enforceable constitutional limits on federal power, states and localities can still wield the “power of the servant.” But they can accomplish a lot more if they were also masters of their own domain. There is a reason why we normally assume that masters have greater autonomy than servants do. To adapt one of Gerken’s other famous phrases, those who value “dissenting by deciding” should help ensure that dissenting states actually have the final power of decision over some range of important issues. Otherwise, they might get trumped by Trump.

#### Only strong states’ rights can constrain Trump executive overreach.

Hamilton 17 — Marci A. Hamilton, a columnist for *News Week*, 2017 (“How to stop Trump? The founding fathers thought of that,” *Newsweek*, January 30th, Available Online at http://www.newsweek.com/how-stop-trump-founding-fathers-thought-550014, Accessed 06-22-2017)

For those panicking at President Donald Trump’s speedy signing of a pile of executive orders that reverse longtime policies during his first week, take a deep breath.

The Framers crafted a system to check men like Trump, and in fact they expected most everyone to hold power to abuse it.

The Framers of the Constitution, intellectually led by James Madison and James Wilson, were informed by an attitude toward human nature that is the key to the Constitution’s enduring success: Assume anyone who holds power will be tempted to abuse it, and then limit it.

It is related to Presbyterian-based Calvinism at the time, and the influence of now-Princeton University’s Reverend John Witherspoon, but they took that principle out of its theological underpinnings and crafted a Constitution for all Americans, whether Deists, Christians, Jews or other believers.

This core insight that humans can’t be trusted and need to be checked is the reason the United States will survive and even thrive during a Trump presidency.

For the Framers, the question to be addressed for every provision of the Constitution was this: If we give this amount of power to this individual/institution, how do we check it? The result in broad outline produced the following checking structures: separation of powers (between the three branches of government—legislative, executive and judicial); separation of power between the federal government and the states; and separation of power between church and state.

### They Say: “Progressive Federalism Fails”

#### Liberal states set a national agenda and level out inequity — spillover is real.

Gerken and Revesz 17 — Heather K. Gerken, J. Skelly Wright Professor of Law at Yale Law School, former Professor of Law at Harvard Law School, holds a J.D. from the University of Michigan Law School, and Joshua Revesz, Student at Yale Law School, 2017 (“Progressive Federalism: A User’s Guide,” *Democracy: A Journal of Ideas*, Number 44, Spring, Available Online at http://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/, Accessed 06-14-2017)

Spillovers

Even when the Trump Administration repeals a statute or rescinds a regulation, leaving no law to enforce, states and cities can often make law themselves. As they do so, they can take advantage of another powerful weapon in the federalist toolkit: the “spillover.”

When one state regulates, it often affects its neighbors. When Texas insisted that its textbooks question evolution, for instance, its market power ensured that textbooks used in blue states did the same. When Virginia made it easy to buy a gun, guns flooded into New York City despite its rigorous firearms prohibitions. When West Virginia failed to regulate pollution, toxic clouds floated over Ohio.

Spillovers, like federalism, aren’t just the tools of conservative governments. Economists would call spillovers an “externality,” and externalities can be positive or negative depending on your point of view. Just as there are spillovers conservatives cheer, there are some spillovers for progressives to celebrate as well.

Consider car emissions. Even if the Trump Administration were to lower environmental standards to protect gas-guzzling cars, it wouldn’t matter. Why? Because California has set higher emissions standards than the federal government. No company wants to give up on the California market. As a result, all cars, whether sold in San Francisco or Texarkana, meet California’s high standards.

California is an unusual state. It is the biggest in the nation, with almost 40 million residents. Were it a country, it would be the sixth-largest economy in the world. Its economic significance means that it can enact sweeping nationwide regulation even though it nominally regulates only itself. Democrats have won a super-majority in both houses of the California legislature, and its governor, Jerry Brown, seems to be spoiling for the fight against Trump. The state is more than capable of sending some more spillovers other states’ ways.

Like uncooperative federalism, spillovers are a form of agenda-setting—they force debate on issues Washington might want to avoid. But they are also a tool for encouraging compromise. If left to their own devices, politicians in red and blue states will rarely negotiate with their colleagues on the other side. But when a liberal policy spills over to a conservative state (or vice-versa), the other half of the country is impossible to ignore. Politicians must reach out across state or party lines to fix the problem. Spillovers thus force politicking, negotiation, and moderation. They force politicians to do their jobs, in other words.

The possibility of progressive spillovers answers another progressive objection to federalism. Liberals are often concerned that federalism leaves too many people behind. They worry that those who are most in need of government action are unaided by blue-state policies. But sometimes that worry is misguided. If New York regulates lead in toys, children everywhere will be safer because of spillovers. If Illinois increases its minimum wage, that may pressure businesses to raise salaries nationwide.

#### Federalism enables states to fuel national change from the bottom up.

Gerken and Revesz 17 — Heather K. Gerken, J. Skelly Wright Professor of Law at Yale Law School, former Professor of Law at Harvard Law School, holds a J.D. from the University of Michigan Law School, and Joshua Revesz, Student at Yale Law School, 2017 (“Progressive Federalism: A User’s Guide,” *Democracy: A Journal of Ideas*, Number 44, Spring, Available Online at http://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/, Accessed 06-14-2017)

Winning the War of Ideas

As mentioned, many think of federalism as a means of entrenching the worst aspects of our politics. But it can also be a tool to change our politics for the better. Many of the best progressive ideas were born in cities and states, and social movements have long used state and local governments as testing grounds for their ideas.

The most remarkable example in recent years has been the same-sex marriage movement. LGBT advocates realized that nationwide marriage equality would be a heavy lift. So instead they started local—first in Hawaii, then in Massachusetts, then in San Francisco. Some early state and local battles were lost, but same-sex marriage proponents used those fights as staging grounds for organizing and debate. This process built popular acceptance of same-sex marriage and explains why the Supreme Court’s nationwide ruling in Obergefell v. Hodges—a decision that would surely have caused intense controversy before states started to act—was greeted enthusiastically by an overwhelming majority of Americans.

Many crown jewels of the national progressive agenda are similarly the product of progressive federalism. The Affordable Care Act, for example, has its origins in Massachusetts, where it was enacted by then-governor Mitt Romney. A regional initiative of ten northeastern states laid the groundwork for the Clean Power Plan. If the next Democratic presidential nominee pushes for universal pre-kindergarten, he or she can look to states and cities for support: Places as different as Oklahoma and New York City have successfully implemented the policy.

If progressives want to take a lesson from the conservative handbook, they will have to consider which parts of the equality project—reforming immigration, policing, sentencing, to give just a few examples—they can directly advance. They should remember the crucial lessons of the same-sex marriage movement: In the United States, change generally comes from the bottom, not from the top. And they should remember that working through state and local institutions to enact progressive ideas is just as important as opposing whatever comes out of Washington. Social movements need pragmatic insiders, forging compromise from within, not just principled outsiders putting pressure from without.

Finally, states and cities should remember that they have the power to set the agenda. In the Obama years, red states took full advantage of their power to shape the national conversation. They enacted tough abortion limitations that forced that issue to the front of the political agenda. They sought to reframe the same-sex marriage debate into one about bakers and florists by enacting expansive religious freedom legislation. And they liberalized gun regulations at a time when the national consensus seemed poised to shift the other way.

These states understood that action can grab headlines and shape debate in a way that protest alone simply cannot. If blue states and cities wish to follow suit, they should take early lessons from Jerry Brown and Michael Bloomberg. The former made headlines in December by boldly claiming that California would launch its own satellites if the federal government abandoned its climate research. The latter drew attention to environmental issues by pledging that progressive cities would seek to join the Paris climate agreement if the Trump Administration withdraws. These sorts of bold pronouncements are not mere bluster. Rather, they’re essential for keeping important issues in the news and for denying President Trump sole control of the political agenda.

We don’t mean to suggest that federalism is a cure-all for either progressives or conservatives. During the next four years, many of the President’s actions will be hard to counter. Heavily indebted cities and states may find fighting the federal government is too expensive. And local politicians will always have to devote time and resources to addressing local concerns.

But progressives would be foolish to treat cities and states as nothing more than enclaves sheltered from national policies they don’t like. They can use all the tools we’ve suggested to encourage moderation and reshape the national conversation. Federalism is for everyone, and it’s time that liberals took notice.

### They Say: “Fair-Weather Federalism Fails”

#### Coalitions with fair-weather federalists are key to incremental progress.

Somin 16 — Ilya Somin, Professor of Law at George Mason University, former John M. Olin Fellow in Law at Northwestern University Law School, holds a J.D. from Yale Law School and an M.A. in Political Science from Harvard University, 2016 ("Federalism as insurance," *The Washington Post*, December 20th, Available Online at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/federalism-as-insurance/?utm\_term=.a43be5e90a65, Accessed 07-09-2017, Lil\_Arj)

Like Hills, I am also very critical of “fair weather federalists” who support constitutional limits on federal power only when it is politically convenient to do so. Sadly, as he notes, this kind of behavior is all too common on both left and right. I too wish that there were more consistent supporters of enforcing tight limits on federal power. In that happy scenario, we might all be better off than we are now, and it would be easier to resist overreach by Democrats and Republicans alike.

But fair weather federalists’ situational opposition to federal overreach has greater value than Hills suggests. Intellectually, the validity of an argument does not depend on the motives, sincerity, or consistency of those who advance it. In my view, many of the federalism objections to Trump’s likely policies are valid regardless of whether the people making these arguments are being consistent with their own previous views.

Fair weather friends of federalism can also often be valuable allies for more consistent ones. Efforts to enforce constitutional limits on government power almost always involve a coalition of principled advocates and people who only care about the issue when their own ox is the one being gored. For example, many of the most important Supreme Court decisions protecting freedom of speech involved the rights of communists, Nazis, and others whose own commitment to free speech was dubious at best.

As Lord Acton famously put it, “[a]t all times sincere friends of freedom have been rare, and its triumphs have been due to minorities, that have prevailed by associating themselves with auxiliaries whose objects often differed from their own.” The same is true of constitutional federalism. Where it prevails, it is usually by virtue of similar coalitions of convenience. In the same passage, Acton also warned that “this association [with situational allies], which is always dangerous, has sometimes been disastrous, by giving to opponents just grounds of opposition.” Fair enough. But, often, the risk is worth taking, especially when the alternative is near-certain defeat. By allying with fair weather federalists of the left in some cases and their right-wing counterparts in others, consistent federalists can gradually make important incremental progress.

Moreover, situational coalitions can sometimes lead to a more permanent consensus. So it proved over time on issues such as freedom of speech and religion, where groups that started out seeking to protect only their own rights gradually came to accept more general principle that government power in these areas should be strictly limited. In recent years, both liberals and conservatives have learned the painful lesson that they are unlikely to achieve secure, long-term dominance over the federal government anytime soon. Both should realize that they are likely to need a federalism insurance policy in the future. That might make some of them more willing to pay their dues than they were previously.

Be that as it may, sincere advocates of federalism, like Acton’s “sincere friends of liberty,” must be willing to make situational coalitions to further their goals. I argued for enforcing tight constitutional limits on federal power under both Bush and Obama. Today, I am doing it yet again in the face of Trump’s likely policies. And I’m happy to work with anyone who will join me in that cause, regardless of where they might have stood in the past.

#### Fair-weather federalism is inevitable due to political polarization — liberals should still embrace the tool.

Gerken 17 — Heather K. Gerken, J. Skelly Wright Professor of Law at Yale Law School, former Professor of Law at Harvard Law School, holds a J.D. from the University of Michigan Law School, 2017 ("Balkinization: Federalism or Politics: A reponse to Rick Hills," *Balkinization*, January 2nd, Available Online at https://balkin.blogspot.com/2017/01/federalism-or-politics-reponse-to-rick.html, Accessed 07-09-2017, Lil\_Arj)

I’ve spent a long time arguing that federalism doesn’t have a political valence, so it’s been nice to see “progressive federalism” and the “nationalist school of federalism” getting some attention in the wake of the election. While I’m glad to be in conversation with a new group of academics, I’ve nonetheless found myself gravitating to the work of those with whom I’ve been debating these issues for a long time. Two of them have recently written quite thoughtful posts on this federalism revival – Rick Hills and Ilya Somin. I’ll respond to Rick today and Ilya tomorrow.

As Rick correctly notes, it’s a political ritual for those who lose the presidency to discover a love for federalism. Rick wonders, though, whether progressives have paid their “federalism insurance premium.” He compares federalism to “an insurance policy, protecting the risk averse against loss of national power” and insists that “the protection comes at a price: One must pay the ‘premium’ of protecting subnational power when one controls the national government, tolerating subnational experiments that one regards as more Frankenstein than Brandeis.”

I think Rick is both right and wrong. He’s surely right that those who control national power can be more or less tolerant of disagreement. I just don’t think this phenomenon has much to do with federalism. A handful of people – including Rick and myself – are committed to the notion that states and localities play a useful role in a well-functioning democracy (though I take a nationalist’s view as to what constitutes a well-functioning democracy). Rick and I also agree that federalism and localism allow for a distinctively American variant of a loyal opposition. But as Rick himself observes, most people – including most politicians – are fair-weather federalists. Issues, not institutional commitments, drive debates.

That’s why I don’t think it matters that much whether one side or the other has paid up its “federalism insurance premium.” Even if progressives learn to love federalism, I don’t think blue states will be more likely to win concessions from a conservative federal government. Nor do I think that conservatives – who have often allied themselves with federalism – will hesitate to impose national mandates where they can. This isn’t a knock on conservatives; progressives would behave in exactly the same fashion were the tables turned.

Rick’s core point, though, is right – we should worry about a give-and-take between liberals and conservatives. It’s just that the give-and-take has more to do with politics than institutions. Put differently, it’s not federalism that matters here, but pluralism. And a pluralist system only flourishes when both sides are willing to live and let live. Rick writes of the need to “tolerat[e] subnational experiments that one regards as more Frankenstein than Brandeis,” but the real problem is the underlying assumption that one’s opponent is closer to Frankenstein rather than to Brandeis. Maybe skepticism of one’s political foes depends on debates over decentralization, but I suspect it has a great deal more to do with the forces that political scientists have identified as the sources of polarization.

Federalism, after all, is just one of many institutional and legal strategies we use to instantiate pluralist politics. As Rick notes in the close of his post, “through the exercise of self-control across different political regimes, each Party can slowly confer on institutional arrangements a permanence (sentimentalists would even say "sanctity") that survives change of regimes, sending a signal to their opponents that their self-control will be reciprocated when the tables are turned.” That includes not just federalism and the filibuster (Rick’s example), but a range of institutional practices.

Unfortunately, we’re seeing lots of evidence these days that our “pluralism premiums” are not paid up; federalism is just part of that story. Progressives would point to the efforts of North Carolina’s GOP-controlled legislature to disempower their newly elected Democratic governor and the Senate’s refusal to grant Merrick Garland a hearing. Conservatives would point to the efforts of the Obama administration post-election efforts to protect his environmental policies from reversal or the blue states and cities promising to resist the new administration’s policies before Trump has even set foot in the White House. Perhaps the best proof of pluralism’s decline is the fact that I have to provide separate lists to make my case, precisely because conservatives and liberals agree on so little these days. We are all watching the same story unfold during Obama’s last days in office, but we have completely different views of whether Trump is violating “sacred” norms . . . or Obama is. Is Obama merely “cement[ing]his legacy” or “putting up policy roadblocks”?

In sum, federalism is like pretty much everything else in a well-functioning democracy; while it can help politics works, it also depends on politics to work. Needless to say, reciprocity and trust are hard to build but easy to dismantle in a system like our own. I take it that is Rick’s core concern, and on that point we agree entirely.

## 2NC/1NR — Constitution Impact

### 1NC/2NC — Constitution Impact

#### Upholding the constitution is key to survival

HENKIN ‘02 (Louis, University Professor Emeritus – Columbia Law School, “Nuclear Defense Policy: The Constitutional Framework,” in The Constitution and National Security, ed. By Shuman and Thomas, p. 275)ww

Lawyers, even constitutional layers, argue “technically” with references to text and principles of construction, drawing lines, insisting on sharp distinctions. Such discussion sometimes seems ludicrous when it addresses issues of life and death and Armageddon. But behind the words of the Constitution and the technicalities of constitutional construction lie the basic values of the United States – limited government even at the cost of some inefficiency, safeguards against autarchy and oligarchy, democratic values represented differently in the Presidency and in Congress and in the intelligent participation and consent of the governed. In the nuclear age, the technicalities of constitutionalism and of constitutional jurisprudence safeguard also the values and concerns of all civilized people committed to human survival.

## 2NC/1NR — Answers to Impact Turns

### They Say: “Federalism is Racist/Increases Inequality”

#### Historical views of federalism are flawed – local control is empowering for racial minorities

GERKEN ’12 (Heather K.; J. Skelly Wright Professor of Law at Yale Law School, “A New Progressive Federalism,” Spring, http://democracyjournal.org/magazine/24/a-new-progressive-federalism/)ww

Progressives are deeply skeptical of federalism, and with good reason. States’ rights have been invoked to defend some of the most despicable institutions in American history, most notably slavery and Jim Crow. Many think “federalism” is just a code word for letting racists be racist. Progressives also associate federalism—and its less prominent companion, localism, which simply means decentralization within a state—with parochialism and the suppression of dissent. They thus look to national power, particularly the First and Fourteenth Amendments, to protect racial minorities and dissenters from threats posed at the local level.

But it is a mistake to equate federalism’s past with its future. State and local governments have become sites of empowerment for racial minorities and dissenters, the groups that progressives believe have the most to fear from decentralization. In fact, racial minorities and dissenters can wield more electoral power at the local level than they do at the national. And while minorities cannot dictate policy outcomes at the national level, they can rule at the state and local level. Racial minorities and dissenters are using that electoral muscle to protect themselves from marginalization and promote their own agendas.

Progressives have long looked to the realm of rights to shield racial minorities and dissenters from unfriendly majorities. Iconic measures like the First and Fourteenth Amendments, the Civil Rights Act, and the Voting Rights Act all offer rights-based protections for minorities. But reliance on rights requires that racial minorities and dissenters look to the courts to shield them from the majority. If rights are the only protections afforded to racial minorities and dissenters, we risk treating both groups merely as what Stanford Law Professor Pam Karlan calls “objects of judicial solicitude rather than efficacious political actors in their own right.”

Minority rule, by contrast, allows racial minorities and dissenters to act as efficacious political actors, just as members of the majority do. Think, for example, about where groups we would normally call a “minority” now actually constitute a majority: a mostly African-American city like Atlanta, a city such as San Francisco where the majority favors same-sex marriage, or a state like California or Texas where Latinos will soon be in the majority. In each of those cases, minority rule—where national minorities constitute local majorities—allows minorities to protect themselves rather than look to courts as their source of solace. It empowers racial minorities and dissenters not by shielding them from the majority, but by turning them into one.

#### Even if states are imperfect, governance at the local level empowers minorities.

Gerken 12 — Heather K. Gerken, J. Skelly Wright Professor of Law at Yale Law School, former Professor of Law at Harvard Law School, holds a J.D. from the University of Michigan Law School, 2010(“Foreword: Federalism All the Way Down,” Yale Law School Legal Scholarship Repository, January 1st 2010, Available online at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4835&context=fss\_papers, Accessed 7-21-17)

Localism as a Double-Edged Sword. - Once we move federalism all the way down, it becomes clear that localism is a double-edged sword. The benefits of minority control can extend not just to Southern racists, but to blacks and Latinos. And yet we continue to look with suspicion upon institutions where racial minorities dominate. Federalism thinks about states as sites of political integration precisely because they allow national minorities to rule. So why don't we think of cities or juries or school committees as sites of racial integration precisely because they allow racial minorities to rule? Such an account requires us to move not just past sovereignty, but past history, rejecting the assumption that federalism's future can only reproduce its past. That move depends on two premises. First, while rights are a necessary condition for equality, they may not be a sufficient one. Too often we assume that rights alone will suffice, as if the path to equality moves straight from civic inclusion to full integration. We thus miss the possibility that there is an intermediary stage: empowerment. An empowerment strategy would be fruitless if times had not changed, of course, and civil rights enforcement played a crucial role in bringing about that change. The question, though, is where we go from here. It should be possible to believe in, even revere, the work of the civil rights movement and still wonder whether a rights strategy, standing alone, will bring us to full equality. Civic inclusion was the hardest fight. But it turns out discrimination is a protean monster and more resistant to change than one might think. We may require new, even unexpected tools to combat discrimination before we reach genuine integration. Second, this is not your father's federalism. To restate the obvious, my arguments are premised on the notion that it is perfectly acceptable for the national majority to play the Supremacy Clause card whenever it sees fit. While this is not a complete answer, for the reasons discussed below,185 at the very least the absence of sovereignty substantially mitigates the potential costs associated with local power.

#### Federalism protects minority rights by harnessing local power.

Gerken 12 — Heather K. Gerken, J. Skelly Wright Professor of Law at Yale Law School, former Professor of Law at Harvard Law School, holds a J.D. from the University of Michigan Law School, 2012 (“A New Progressive Federalism,” *Democracy: A Journal of Ideas*, Number 24, Spring, Available Online at <http://democracyjournal.org/magazine/24/a-new-progressive-federalism/>, Accessed 06-14-2017)

More importantly, what we have today is not your father’s federalism. The federalism that haunts our history looks quite different from the form of local power that prevails now. Federalism of old involved states’ rights, a trump card to protect instances of local oppression. Today’s federalism involves a muscular national government that makes policy in virtually every area that was once relegated to state and local governments. The states’ rights trump card has all but disappeared, which means that the national government can protect racial minorities and dissenters when it needs to while allowing local forms of power to flourish.

It would be foolish to insist that every state and local policy must be progressive for progressives to favor federalism. Decentralization will produce policies that progressives adore, and it will produce policies that they loathe. The same, of course, is true of a national system. Progressives have to make their case to the American people, just like everyone else. The point here is that progressives can fight for their causes in our current system, and they can win. Gone are the days of policy-making enclaves shielded from national power. If progressives are simply looking for guaranteed wins, it’s not decentralization that they should worry about—it’s democracy.

Moreover, progressives tend to overstate the problem of parochialism. When progressives talk about democracy, they celebrate the idiosyncratic dissenter, the nobility of resistance, the glory of getting things wrong, and the wild patchwork of views that make up the polity. When progressives turn to governance, however, they crave administrative efficiency, worry about local incompetence, and have a strong impulse to quash local rebellion. We join de Tocqueville in celebrating the eccentric charms of local democracy, but our tastes in bureaucracy run with Weber: impersonal, rationalized, and hierarchical. It should come as no surprise that de Tocqueville’s democracy fails to produce Weber’s bureaucracy. But rather than spending all of our time worrying about that failure, maybe we should acknowledge the fact that decentralization offers so many benefits that progressive nationalists can value.

Progressive nationalists have long worried that decentralized power needlessly fractures the national, exercising a centrifugal force on the polity. But ours is a system where local power can turn outsiders into insiders, integrating them into a political system and enabling them to protect themselves. It is one where the energy of outliers can serve as a catalyst for the center, allowing them to tee up issues for national debate. It is, in short, a form of federalism that progressive nationalists can celebrate.

Progressives were right to worry about federalism in the past. They are wrong to worry about it now. Minority rule and minority rights are tools for achieving the same ends. Both can help further equality and nurture dissent. Progressives have long endorsed the nationalist case for national power. Now is the time to acknowledge the nationalist case for local power.

# Federalism Affirmative

## Uniqueness Answers

### 2AC — Non-Unique — Education

#### Many federal laws concerning education have been passed over the last 50 years

DYSON ’16 (Maurice R.; Harlan Fiske Stone Scholar, J.D. Columbia University School of Law; Scholars Fellow, Teachers College, Columbia University, “Rethinking Rodriguez After Citizens United: The Poor as a Suspect Class in High-Poverty Schools,” 24 Geo. J. Poverty Law & Pol'y 1, Fall, l/n)ww

Within the field of education, one can also argue that the deference that once characterized the Rodriguez Court's concern with federal intermeddling in complex state educational affairs has now been eclipsed by the expansion of the role the federal courts and government have since played in education. n31 Indeed, one need only look at the No Child Left Behind Act, n32 The Race to the Top [\*10] Initiative n33 and the Every Student Succeeds Act n34 enacted over the past decade or more to see that federal oversight into complex educational affairs is now largely a foregone conclusion.

### 2AC — Non-Unique — Trump

#### Trump has merely eliminated certain Obama sponsored regulations. He hasn’t undone the federal role in education.

WONG 3/27 (Kenneth K.; Walter and Leonore Annenberg Professor of Education Policy – Brown University, “Redefining the federal role in public education: The 1st quarter of the Trump “insurgent” presidency,” https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/27/redefining-the-federal-role-in-public-education-the-1st-quarter-of-the-trump-insurgent-presidency/)ww

Trump’s White House aims to significantly repurpose the federal role in K-12 education. The administration has dismantled key initiatives that were associated with the Obama administration. At this point, Trump’s proposed initiatives constitute a critical reassessment, but do not yet amount to an all-out dismantling of the federal role in K-12 as embedded in the long-established “marble cake” federalism. In the FY18 budget proposal, for example, the Trump administration maintains federal funding for major categorical programs for high-needs students, such as Title I and the Individuals with Disabilities Education Act. The Every Student Succeeds Act (ESSA) reporting requirement on performance among student subgroups remains a central federal focus.

It is too early to tell whether the Trump administration plans to fundamentally reconstruct the terms of federal engagement in public education, which have been largely framed since the Great Society era of the Lyndon Johnson administration. But the administration could be headed in that direction, considering that the first quarter of the Trump presidency has included the following education policy initiatives:

Scaling back federal direction and shifting substantial decisionmaking to state and local government;

Proposing substantial budgetary reduction of the U.S. Department of Education, such as programs in college and career access, arts, health, after-school programs, teacher education, and technology;

Expanding federal support for a broad portfolio of school choice, including charter schools, vouchers for parents to enroll their children in public and private schools, federal tax credit scholarship program, and magnet programs;

Easing possible entry of for-profit providers in K-12 education;

Placing limits on federal capacity to promote equal education access, such as limiting the scope of Title IX enforcement; and

Reducing investment in data and research infrastructure.

### 1AR — Extend: “Non-Unique — Education”

#### Local control of education hasn’t existed for decades

ROBINSON ’15 (Kimberly Jenkins; Professor of Law – University of Richmond, “Disrupting Education Federalism,” 92 Wash. U. L. Rev. 959, l/n)ww

Some may critique my proposed theory for reducing state and local control of and accountability for education. As analyzed in Part I.B.1, it is important to remember that state and local control of education has greatly diminished over the last few decades and that scholars have noted that local control has not characterized the nation's schools for quite some time. n328 In addition, local control is not typically considered an end in itself. As political scientist Douglas Reed insightfully noted, "Local control is a good thing to the extent that it improves educational performance and builds strong communities; to the extent that it isolates, excludes, and homogenizes our schools, rendering them grossly unequal, localism is a problem." n329 Therefore, my theory seeks to reduce harmful aspects of state and local control of education while simultaneously empowering beneficial and collaborative aspects.

#### ESSA doesn’t eliminate federal involvement in education

BULMAN-POZEN ’16 (Jessica; Associate Professor of Law – Columbia, “Executive Federalism Comes to America,” 102 Va. L. Rev. 953, June, l/n)ww

Education policy for the past decade has been set by a series of executive agreements - among the states, between groups of states and the federal executive branch, and between individual states and the federal executive branch. Recent federal legislation challenges such executive federalism in both form and substance. The area in which state and federal executive policymaking has been most aggressive thus now offers a test for the practice. It is too soon to say whether the Every Student Succeeds Act ("ESSA") reveals executive federalism's limits or, instead, demonstrates its durability, but there is reason to suspect the latter.

Between 2007, when the No Child Left Behind Act ("NCLB") was due to be reauthorized, and December 2015, when the ESSA was passed, state and federal executives assumed control of national education policy in Congress's absence. n137 States collaborated with one another, and the Department of Education, together with the White House, embraced, further incentivized, and remolded interstate agreements. Although NCLB imposed a set of requirements for states to receive federal funding, it left the content of educational standards and assessment to [\*988] states. n138 In April 2009, governors and commissioners of education from 48 states launched an effort to develop common proficiency standards for English language and mathematics, resulting in the Common Core State Standards. n139 The adoption of these standards largely occurred through state executive branches n140 and prodded additional interstate collaboration around implementation. n141

As state executives were collaborating on the Common Core, the federal executive branch was grappling with the nonamendment of NCLB and concerns about enforcing federal statutory requirements that no state would be able to satisfy. n142 Relying first on Recovery Act funds and then on its broad waiver authority under NCLB itself, n143 the federal executive incentivized states to adopt the Common Core standards. n144 The Department of Education did not simply bless interstate governance, but effectively required it as an aspect of participation in a federal scheme. Although the federal executive was not responsible for the establishment of the Common Core, then, it was largely responsible for its rapid diffusion. n145 The Department further stimulated state collaboration through funding to "consortia of states" that would develop assessment systems for the Common Core standards. n146 The resulting consortia - the Partnership [\*989] for Assessment of Readiness for College and Careers ("PARCC") and the Smarter Balanced Assessment Consortium - received funding by entering into "cooperative agreements" that provided for "communication, coordination and involvement" with Department of Education officials. n147

The federal executive branch also engaged in ongoing negotiations with individual states around the NCLB waivers in particular. n148 For instance, Oklahoma lost its NCLB waiver after the Governor repudiated her support for the Common Core and state membership in the PARCC consortium. State officials then entered into discussions with the Department of Education, and the waiver was ultimately reinstated, leading one critic to cite "an interesting mix of federal influence and state persistence in resolving the intergovernmental tension over decisions on state standards." n149

Insofar as interstate action facilitated federal executive action and was then altered by it - with Congress sitting on the sidelines all the while - education policymaking has exemplified executive federalism over the past decade. It may now reveal the practice's limits. In December 2015, Congress passed and President Obama signed into law the ESSA, a lengthy statute that reauthorizes the Elementary and Secondary Education Act on new terms, replacing NCLB. The ESSA stands out as substantial federal legislation enacted during a period of divided government, with a thoroughly bipartisan vote in Congress. n150 In addition to complicating (though by no means undermining) claims of polarization-induced congressional dysfunction, the ESSA also raises questions about the robustness of executive federalism. In form, the very fact of such federal legislation is a challenge to strong variants of executive federalism. In substance, the ESSA renders "null and void" the waivers granted in recent years by the Department of Education to states and consortia, [\*990] and it curbs federal executive supervision of state education policy going forward. n151

Even as the ESSA curtails federal involvement in education policy, however, it also blesses certain arrangements that arose from the Department of Education's negotiations with the states. For instance, while the ESSA has been celebrated for authorizing states to design their own academic standards and intervention approaches for low-performing schools, this is what states have been doing pursuant to waivers from NCLB's requirements. The White House's suggestion that the ESSA codifies "many of the key reforms the Administration has ... encouraged states and districts to adopt in exchange for waivers" is no more exaggerated than claims that the ESSA offers a thorough "rebuke" to the federal executive branch. n152 The Act also does not affect horizontal interstate collaboration, such as that which produced the Common Core. n153 Indeed, although the ESSA expressly provides that it does not prohibit states from withdrawing from the Common Core, neither does it invalidate that initiative. n154

More notably, the ESSA creates some fertile new conditions for executive federalism. For one thing, it expands the federal role in discrete areas, providing annual funding for preschool education, for example. Because the ESSA entrusts these portions of the Act to HHS, the need for interagency coordination may spur not only federal executive, but also [\*991] more centralized, White House involvement. n155 Even as the ESSA expressly restricts the Secretary of Education's authority, n156 moreover, it retains federal executive oversight, with few parameters set by Congress. Although states will now devise their own accountability goals for schools, for example, they must submit their plans to the Department of Education. n157 Instead of a congressional judgment about metrics by which to hold schools accountable, the ESSA provides for state decision making with federal executive superintendence. Further, although the ESSA narrows the Department's waiver authority, it does not eliminate it; as under NCLB, the federal executive branch may free states from particular statutory or regulatory requirements. n158 And in crafting a more state-centric law, the ESSA codifies a framework for back-and-forths between state and federal executives around state plans and waivers. n159

The ESSA thus diminishes federal involvement in education principally in the form of congressional decisions. It is not clear that it will appreciably reduce state-federal executive collaboration, and contestation, around education policy. As one early critic summarized the federalism implications of the ESSA, "States would be stuck in a dance with whoever happens to be running the Department [of Education] at any given moment." n160

## Link Answers

### 2AC — No Link: Title I

#### The plan is relatively small and still leaves many aspects of control to the states.

ROBINSON ’15 (Kimberly Jenkins; Professor of Law – University of Richmond, “Disrupting Education Federalism,” 92 Wash. U. L. Rev. 959, l/n)ww

Under my proposed theory, states admittedly would lose some control over education because they would be accountable to the federal government for ending longstanding disparities in educational opportunity. A hallmark of the American education system has been the freedom that mostly affluent parents enjoy: to provide their children a better education than the one given to less privileged children. n330 In addition, some states and localities also may contend that they should retain the ability to focus their resources on some children rather than spreading them more equitably to all children. n331 I contend that the loss of this type of state and local control would benefit the nation's education system.

At the same time, other aspects of state and local control of education would remain if my theory was adopted. Under this theory, states would [\*1015] retain authority to control education policymaking through education governance, the nature and content of a school finance system, state assessments and graduation standards, and a wide variety of teaching and curricular decisions. n332 Localities would continue to administer education, manage the daily operation of schools, hire teachers and staff, build and maintain schools, and transport students. n333 Issues such as class size and governance would remain within the purview of state and local government. Furthermore, maintaining these functions under state and local authority fosters continuance of most of the existing levels of state and local accountability for education.

### 2AC — No Spillover

#### No federalism spillover

ROBINSON ’15 (Kimberly Jenkins; Professor of Law – University of Richmond, “Disrupting Education Federalism,” 92 Wash. U. L. Rev. 959, l/n)ww

In offering a theory for how education federalism should be restructured to strengthen the federal role over education, and thus reduce reliance on states to ensure equal access to an excellent education, I build upon Yale Law Professor Heather Gerken's argument that federalism theory should eschew advancing a single theory for all occasions because "both in theory and practice ... there are many federalisms, not one." n39 She astutely contends that scholars developing and critiquing federalism theory should consider the appropriate balance of institutional arrangements for a specific context. n40 Therefore, my theory for how [\*968] education federalism should be restructured does not attempt to propose a federalism theory for other policymaking arenas such as environmental law or healthcare policy. Instead, it solely proposes a shift in the balance of federal, state, and local authority in order to strengthen the federal role in ensuring equal access to an excellent education while preserving the aspects of state and local autonomy over education that do not undermine equal access to an excellent education.

### 1AR — They Say: “Constitution Link”

#### Federal action on education doesn’t violate the constitution

PORTZ ’11 (John; Fulbright Scholar – Department of Political Science – Northeastern University, “Federalism and Education Policy in the United States: Allocating Authority and Responsibility Among Levels of Government,” November, http://www.puc-rio.br/catedrafulbright/downloads/federalism\_and\_education\_policy.pdf)ww

The structures and practices of American federalism are grounded in the U.S. Constitution, which is one of the oldest national constitutions in the world. Approved in 1789, the Constitution is based upon a broad ´framework´ approach to constitutional design. It is relatively short and provides general parameters for government structures and responsibilities, but few details. In contrast, the 1988 Brazilian Constitution is much longer and provides considerably more details on the structures and responsibilities of government. The U.S. Constitution, including its 27 amendments, is only 18 pages in length, whereas the Brazilian Constitution is over 110 pages.

The U.S. Constitution focuses primarily on the structure and authority of the national government, along with some description of the powers and authority of state governments. With respect to the national government, specific powers are listed, such as supporting an army and providing for a national currency. Importantly, however, there is no reference to education; this word is not in the Constitution. Unlike the Brazilian Constitution that describes education as a right of all citizens and obligation of the government, the U.S. Constitution makes no reference to education. Furthermore, the U.S. Constitution makes no reference to municipalities or other local governments that could deliver educational services. Again, the Brazilian Constitution outlines an important role for municipalities in education policy, but the U.S. Constitution is silent on a local role in education and, in fact, makes no mention of local governments at all.

What does this mean for education policy? From a constitutional perspective, it is not clear what role the national government might play in the development and delivery of educational services. Indeed, in the 1973 court case of San Antonio School District v. Rodriguez, which involved claims of inequitable financing for public schools, the U.S. Supreme Court declared that since there is no right to education in the U.S. Constitution, the national government is not responsible to address inequities in funding for public schools. The Court suggested that state government would be the more appropriate venue for such cases.

The 50 states, then, are central actors in education policy. Each state has a constitution that includes a reference to the state’s responsibility to provide educational services for the citizens of the state. The Illinois Constitution, for example, declares that Illinois state government is responsible “to provide for an efficient system of high quality public educational institutions and services.” The New York Constitution states that “the legislature shall provide for the maintenance and support of free common schools, wherein all the children of this state may be educated.” Pursuant to these constitutional provisions, every state has created a system to provide educational services in that state.

Furthermore, it is up to each state to establish local governments that can assist in the delivery of educational services. States have done this, although in different ways. Most states have created local school districts in which a school board, elected or appointed locally, hires a superintendent who is responsible for then hiring principals and teachers to work in individual schools. A school district might have the same boundaries as a municipality, but many do not. In Maryland, for example, school districts are much bigger and cover an entire county, which is a larger unit of government established by the Maryland state government.

Does this leave the national government without a role in education policy? No, but from a constitutional perspective, the national government must turn to other, less specific, parts of the Constitution for its bases of action. For example, there are several important clauses or sections of the Constitution that create opportunities for a more expansive national role, if the national government should pursue such a path. These clauses include:

• The “necessary and proper” clause empowers the national government to engage in activities needed – “necessary and proper” – to carry out existing powers.

• The “general welfare” clause empowers the national government to engage in activities that support the general welfare of the country.

• The “interstate commerce” clause allows the national government to regulate activities between the states.

• The “equal protection of the laws” clause in the 14th Amendment empowers the national government to remedy discriminatory actions that might exist in states, such as racial discrimination in the assignment of children to schools.

These clauses raise the possibility that the national government might engage in activities beyond the ones specifically mentioned in the Constitution. If aspects of education policy, for example, are considered to be part of the “general welfare” or subject to “equal protection of the laws,” the national government might use this as a basis for direct involvement in education policy.

Furthermore, Article VI of the Constitution states that the Constitution, and all laws passed by the national government, shall be the “supreme law of the land.” This statement appears to make clear that national laws are supreme over laws passed by state governments, should there be a conflict.

These parts of the Constitution give the national government potential authority, but the Tenth Amendment, approved in 1790, is viewed by many as an important limitation on the national government. This amendment states that powers not “delegated” to the national government or prohibited to the states are “reserved to the states or to the people.” Since education is not specifically delegated to the national government, the argument is often made that the national role in education policy should be very limited.

From a constitutional perspective, then, the primary relationship in education policy is between the states and local units of government, principally school districts and municipalities, which are themselves created by the states (see figure 1). The national government plays a more ambiguous role and when it does act, it acts primarily through the states rather than directly with local school districts.

### 1AR — Extend: “No Spillover”

#### Federalism isn’t zero sum

RYAN ’12 (Erin; Professor of Law – Lewis & Clark Law School, “Spending power bargaining after Obamacare,” 7/3, https://blog.oup.com/2012/07/spending-power-bargaining-after-obamacare/)ww

It’s important to get these things right because an awful lot of American governance really is negotiated between state and federal actors this way. Federalism champions often mistakenly assume a “zero-sum” model of American federalism that emphasizes winner-takes-all competition between state and federal actors for power. But countless real-world examples show that the boundary between state and federal authority is really a project of ongoing negotiation, one that effectively harnesses the regulatory innovation and interjurisdictional synergy that is the hallmark of our federal system. Understanding state-federal relations as heavily mediated by negotiation betrays the growing gap between the rhetoric and reality of American federalism—and it offers hope for moving beyond the paralyzing features of the zero-sum discourse. Still, a core feature making the overall system work is that intergovernmental bargaining must be fairly secured by genuine consent.

## Impact Answers — Warming

### 2AC — Warming Impact Answers

#### States can’t solve warming alone

KRANE ’17 (Jim; Wallace S. Wilson Fellow for Energy Studies at Rice University’s Baker Institute for Public Policy, “Can America Comply With The Paris Accords Without Trump?” 6/7, https://www.forbes.com/sites/thebakersinstitute/2017/06/07/can-america-comply-with-the-paris-accords-without-trump-only-if-red-states-join-in/)ww

Hours after President Trump ejected America from the Paris climate agreement, a group of US state, local and corporate leaders vowed to pursue America’s abandoned pledge – without the help of the federal government.

Heartening as it was to see Americans reject Trump’s plan to free-ride on the backs of the rest of the world, there are serious questions about any climate plan that sidelines the federal government.

Can an insurgent group of CEOs, governors and mayors cut a quarter of America’s greenhouse gas emissions by 2025?

The goal is a noble one, but difficult.

First of all, the Trump administration is not just withdrawing from Paris. The administration is actively working at cross-purposes to the treaty’s goals.

Trump and his appointees have gone out of their way to favor coal over natural gas and renewables. They’d like to see coal companies return to past dumping practices, while freeing petroleum producers from fixing methane leaks, and encouraging Detroit to walk away from fuel efficiency standards. Each of these moves takes America further from its pledge.

In other words, the new United States Climate Alliance won’t be starting its anti-GHG drive from the 20-yard line. They’ll be starting deep in their own end zone.

Even then, making an end-run around the White House is the easy part. The federal government has only modest influence over US energy policy. More control is devolved to statehouses, two-thirds of which sit in Republican hands. With few exceptions, Republican Party leaders publicly claim that global warming is either a hoax or caused by natural phenomena. As Fig. 1 shows, this stance is unusual outside the United States.

Denial is a big problem because, when it comes to cutting emissions, the low-hanging fruit lies in Republican states, where political leaders are least likely to act. In fact, a state’s carbon intensity is a strong predictor of the way its residents voted.

Each of the top 13 per capita emitting states – led by Wyoming, with 110 metric tons per person per year – went for Trump. In Wyoming, nearly 90% of voters backed the New York tycoon. Wyoming also happens to produce 40% of America’s coal that emits about 13% of US CO2. Unsurprisingly, Wyoming’s state and federal leaders are still grappling with science.

Following Wyoming in the carbon intensity rankings are West Virginia, North Dakota, Louisiana and Montana. Attorneys general from two of those states, West Virginia and Louisiana, went so far as to send Trump a letter backing the Paris pullout. (So did AGs from Alabama, Arkansas, Kansas, Missouri, Nebraska, South Carolina, Texas and Wisconsin.)

By contrast, Hillary Clinton won states with the lowest carbon intensity, including the bottom five: New York, Massachusetts, Connecticut, California and Maryland.

The highest per capita emissions from a Hillary state flowed from New Mexico, which ranks at No. 14, with 24 metric tons/resident/year.

This red-blue carbon dichotomy begs the question whether can blue states cut 25% of US emissions by themselves.

#### Federalism increases environmental destruction and warming — causes a race to the bottom.

Beasley 17 — Ally Beasley, a Junior Editor on the Michigan Journal of Environmental & Administrative Law, earned a MPH in Public Health from the University of California, Berkeley, and a B.S. in Zoology Biomedical Science from the University of Oklahoma, 2017 ("The Challenges of Federalism in Environmental Regulations: Scott Pruitt and the EPA," *Michigan Journal of Environmental & Administrative Law* Online, June 15th, Available Online at http://www.mjeal-online.org/the-challenges-of-federalism-in-environmental-regulations-scott-pruitt-and-the-epa/, Accessed 07-10-2017, Lil\_Arj)

On February 17, 2017 Congress confirmed former Oklahoma Attorney General Scott Pruitt, an outspoken critic of “federal overreach”[1] as the new Administrator of the U.S. Environmental Protection Agency.[2] The subsequent release of his close ties to major agricultural and oil and gas industry stakeholders[3], put the influence of extractive industries on environmental decision-making in the national spotlight. Does Pruitt’s problematic history in Oklahoma and determination to fight “federal overreach” indicate a grim future for the EPA?

Pruitt’s legacy in Oklahoma and statements about his future plans do not bode well for an EPA whose mission is to “protect human health and the environment.”[4] First, his demonstrated collusion with the oil and gas industry as Oklahoma Attorney General is not likely to subside when he is acting as Administrator of the EPA. At the time of this writing, additional information is still emerging regarding the full nature and extent of these industry ties.[5] Second, and relatedly, Pruitt’s dedication to a concept of federalism that prioritizes the interests of extractive industries in the name of “state sovereignty”[6] is not compatible with leading a federal agency in combating environmental problems such as climate change and pollution that transcend geopolitical boundaries.

Pruitt’s biography page on the EPA website emphasizes his zeal for minimizing federal regulations.[7] The bio states, “he is recognized as a national leader in the cause to restore the proper balance between the states and federal government, and he established Oklahoma’s first federalism unit to combat unwarranted regulation and overreach by the federal government.”[8] The Oklahoma Attorney General’s Office describes the “federalism unit” as “dedicated to representing the interests of the state and challenging the federal government when it has overreached its authority and encroached on the state’s ability to craft its own solutions…”[9]

One need only look to environmental and public health disasters such as Love Canal[10] and Valley of the Drums[11], which prompted the enactment of CERCLA (aka the Superfund act) in 1980, for reminders of the potentially dire consequences of leaving environmental regulation to the states. Then again, Pruitt has espoused skepticism about anthropogenic climate change, including during his confirmation hearing, in which he acknowledged that “human activity contributes to [climate change] in “some manner” but questioned the conclusiveness of the science on the need to implement mitigation and adaptation measures and curtail greenhouse gas emissions.[12] Most recently, he has expressed doubt that Carbon Dioxide is a major contributor to climate change.[13] Accordingly, some states might actually be better equipped to combat these pressing environmental issues than the federal government under the current administration. Overall, however, the highly variable and uneven nature of states’ willingness to prioritize protection of public health and the environment both illustrates and exacerbates the problem with Pruitt at the helm of the EPA.

Oklahoma provides a case study for these problems. The oil and gas industries have long been an integral and controversial segment of Oklahoma’s economy. A short drive through downtown Oklahoma City reveals several buildings, office parks, and sports arenas bearing the names of prominent energy companies such as Devon and Chesapeake.[14] As of 2016, Oklahoma ranked 5th in the nation in crude oil and total energy production,[15] and 3rd in the nation for natural gas production,[16] producing about 1/10th of the nation’s natural gas.[17] It also ranked 17th in CO2 emissions as of 2014,[18] despite ranking 28th in population and 35th in population density.[19]

However, jobs and environmental protection are not and do not need to be diametrically opposed. For one, renewable energy can be a promising option for energy-producing states like Oklahoma, which already contributes considerably to wind-energy production and has the potential to supply wind power to about 10% of the nation.[20] That said, certain existing industry practices with detrimental effects on the environment and public health can and should be curtailed. For example, several Oklahoma citizens, academics, and environmental groups have expressed concern over the effects of hydraulic fracturing (fracking) on drinking water and seismic activity in the state.[21] In a November 2016 letter, EPA Region 6 leaders expressed concern that Oklahoma was not doing enough to address these issue.[22] Despite Pruitt’s assurance that fracking is “nothing new” and Oklahoma has had a “robust regulatory scheme” since the 1940s,[23] the number of earthquakes registering over a 3.0 has increased over tenfold since 2010, with a dramatic jump from a range of 35-67 in 2010-2012 to 110 in 2013 and a range of 579 to a high of 903 in 2014-2016.[24] The Oklahoma Geological Survey consensus is that these quakes cannot be attributed entirely to “natural causes”[25] and the quakes have already caused considerable damage in parts of the state, particularly in tribal communities. The Pawnee Nation recently sued several oil companies for wastewater injection activity near the epicenter of a damaging 5.8 earthquake last fall.[26] Additionally, despite the skepticism and outright denial of anthropogenic climate change by Pruitt and by Oklahoma senators such as Jim Inhofe[27], Oklahoma is already seeing detrimental effects of climate change[28]. Increased drought, heat, and extreme weather events such as the tornadoes and severe storms for which Oklahoma is already infamous will continue to threaten public health and agricultural production.[29]

Despite these scientifically valid concerns, Pruitt has continued to place industry interests above public health and environmental protection in Oklahoma. He has sued the Environmental Protection Agency of which he is now in charge of 14 times, and in 13 of those suits, stakeholders from regulated industries (primarily agriculture/factory farms and energy) were parties.[30] In these suits, Pruitt and his industry allies and fellow state Attorney Generals tied to extractive industries challenged the EPA’s cross-state pollution rule,[31] limits on mercury that would save tens of thousands of lives,[32] the Clean Power Plan (multiple times)[33] and even the Clean Water Rule (aka the Waters of the United States Rule, expanding federal jurisdiction over certain surface waters to combat pollution),[34] despite his espoused commitment to preserving clean water. The legal hook for Pruitt in most of these cases rested on assertions that the EPA was overstepping its authority and unduly intruding on state sovereignty, although in many instances, he also mentioned what he saw as unnecessarily burdensome costs to industry imposed by EPA regulations.[35] In many of these cases, such as the 2013 opposition to the Clean Air Rule, the Courts didn’t buy appellants’ arguments about federal overreach.[36]

While some states may indeed be well-equipped to tackle challenges such as climate change and pollution, and states are already charged with several aspects of environmental protection under the current EPA structure, Oklahoma illustrates that leaving environmental protection solely to the states could leave states with heavy ties to extractive industries unprotected or even encourage a “race to the bottom” to attract ostensibly lucrative polluting industries to states with lax environmental standards.[37]

Pruitt’s plans for the EPA are not yet set in stone, and not all of them may come to fruition. However, his industry ties and recent statements he has made about climate change are cause for concern. In statements to CNBC just last week[38] Pruitt expressed that he does not believe that Carbon Dioxide is a primary contributor to global warming, despite scientific consensus to the contrary.[39] If his attitudes towards the role of the federal government in regulating polluting industries and his statements about climate change are indicative of the EPA’s future under his auspices, he may attempt to delay the development of new rules and standards (including elements of the Clean Power Plan, which, as mentioned previously, he repeatedly challenged while Oklahoma Attorney General), scale back enforcement of environmental regulations, place more industry-friendly voices on his scientific advisory boards, and attempt to shrink the EPA’s budget. Recent news reports indicate that the EPA’s budget could be cut by as much as 25%, severely diminishing not only capacity at federal headquarters, but also in the regional offices that play a more direct role in assisting states with their own environmental regulatory efforts.[40] In a recent speech to EPA employees, Pruitt emphasized the importance of states and his concept of federalism, and, in a telling omission, listed the “stakeholders” with whom he was committed to working: “industry, farmers, ranchers, and business owners” but not community groups (particularly those in overburdened or under-resourced communities), concerned citizens, scientists, health organizations, or environmental groups.[41] Given the lengthy process by which EPA promulgates new rules and re-writes old ones,[42] and the opportunity for groups to sue the EPA when it fails to enforce its own statutes,[43] it seems likely that Pruitt’s EPA will scale back environmental regulation through inaction, deference to industry and “state sovereignty,” and budget cuts rather than overt re-writing of the law. With issues such as climate change, however, the nation and the planet cannot afford stagnation. Global average CO2 levels already appear to have permanently surpassed the symbolic threshold of 400 parts per million (ppm), significantly reducing the chances of curtailing global temperature rise beyond the 2° Celsius goal reached in the Paris Agreement,[44] an critical international climate agreement that Pruitt has called “a bad deal.”[45] An issue so urgent, with causes and effects that do not obey state or national borders, cannot be left solely to the states.

#### No Extinction – warming will take centuries, mitigation and adaptation will moderate any impacts

MENDELSOHN ’15 (Robert; Edwin Weyerhaeuser Davis Professor at the Yale School of Forestry and Environmental Studies, “Climate Change Demands We Change. Why Aren't We?” Social Research, Fall)ww

The popular literature on climate change is rife with claims that climate change is equivalent to an apocalypse. Whether climate change leads to an apocalypse depends on many factors, including no mitigation, no adaptation, and unlucky uncertain events. Probably the three most frightening images of climate change are tropical cyclones, floods, and droughts. Although all these events are likely to occur in a future climate, they are also an integral component of the current climate. We already have droughts, floods, and tropical cyclones. The question is, how will these things change?

According to economic models of fossil fuel consumption, emissions of greenhouse gases are expected to double the concentrations of greenhouse gases from preindustrial levels of 275 part per million equivalent (ppme) to 550 ppme by 2040–2050. It will take more than another 100 years to double concentrations again to 1,100 ppme in the absence of mitigation. So despite the fact that fossil fuel consumption is causing a vast quantity of annual emissions, it takes a very long time for the concentrations of greenhouse gases in the atmosphere to double.

According to climate models, a doubling of concentrations is expected to increase long-run average global temperature by 3°C, with a range between 1.5 and 4.5 degrees (IPCC 2014a). However, there is a long lag between an increase in concentrations and the resulting temperature increase. One must warm the ocean to warm the climate. It takes several decades just to warm the upper layers of the ocean. It takes centuries for the long-run temperature to be reached.

The rising temperature is expected to increase the speed of the hydrological cycle. This will lead to an increase in evaporation, an increase in precipitation, and an increase in the amount of water in the atmosphere. Water vapor itself is a greenhouse gas. It represents a positive feedback mechanism and it contributes significantly to the prediction of a 3°C increase from doubling greenhouse gases. So the expectation of increased rainfall is part of the explanation why there is such a large temperature increase. That does not mean there will be increased rainfall everywhere. It simply means that average global rainfall will increase.

The level of CO2 has a direct effect on ecosystems. All plants respond to higher CO2 levels in a positive fashion. Grasses respond only slightly to CO2 fertilization, whereas the yields of most crops respond vigorously. Hundreds of laboratory studies reveal an average increase in crop yields of 30 percent as CO2 concentrations double (Kimball 2007).

Climate change is expected to melt ice formations. Many glaciers on land have already shrunk in response to warming, increasing flows in nearby rivers. The Arctic ice covering the sea in the North Pole is shrinking rapidly, exposing the Arctic air to the warm sea underneath and causing the most rapid warming on the planet (IPCC 2014a). Large remaining glaciers in Greenland and Antarctica might melt over the next thousand years (IPCC 2014a). The melting of the large ice deposits in Greenland and Antarctica would cause the oceans to rise to new levels never before experienced by mankind.

Climate change is expected to have one final impact. In addition to the mean temperature and precipitation levels rising, there may be a change in the distribution of weather. Seasonal patterns may change with more warming in winter than summer. Interannual variance might change. Diurnal variance may drop as nights become warmer relative to days. Tropical cyclones may become more powerful. The pattern of global winds may change, shifting moisture from one place to another. More is known about global mean changes than these other changes in the distribution. It is more difficult to study variance and even more difficult to study extreme events. But it is likely that the distribution of weather events will change.

What then is the consequence of climate change if greenhouse gases cause all these changes? What sectors of the economy are vulnerable? What nonmarket goods and services are at risk?

The literature on impacts has long identified most of the sectors likely to be affected by climate change (Pearce et al. 1996). The vulnerable economic sectors include agriculture, coasts, forests, water, and energy. Important sectors outside the economy that would be affected include recreation, ecosystem change, human health, and aesthetics. The controversy about impacts does not concern what will be affected. The controversy is measuring the magnitude of the impact. Some studies report damages to mankind equal to 20 percent of total income (Stern 2007). Other studies suggest more modest effects of less than 2 percent of income (Pearce et al. 1996; Nordhaus 1991). Yet other studies suggest impacts may be closer to 0.2 percent of income (Mendelsohn et al. 2006). What explains estimates that vary by orders of magnitude?

Although some authors speculate about exponentially increasing damage (Stern 2007), empirical analysis suggests that most sectors respond to temperature in a hill-shaped fashion (Mendelsohn and Schlesinger 1999; Tol 2002a). For each sector, there is an ideal temperature where the net value of that sector is highest. If temperatures are either colder or warmer than this ideal, warming will be either beneficial or harmful, respectively.

Three important insights follow from this result. First, warming will be beneficial to relatively cool countries and harmful to relatively warm countries. Warming will not have the same universal effect on everybody. Low-latitude countries may well suffer 60 to 80 percent of the global damage (Mendelsohn et al. 2006). This is problematic because these low-latitude countries collectively contribute only a small fraction of global emissions. A large fraction of the damage from climate change is not suffered by the countries causing the emissions. There is an inherent inequity in the distribution of the costs and benefits of greenhouse gas emissions.

Second, the warmer the planet gets, the more damage that warming will cause. More and more countries will be pushed beyond the ideal temperature range, and the more local temperatures exceed that range, the greater the damage will be. Third, because the most serious damage requires relatively high temperatures, a large fraction of the damage will not occur until far into the future. The present value of damage is consequently quite small.

The literature also contains one other important insight. Adaptation is very effective at lowering climate damage (Mendelsohn and Neumann 1999; Mendelsohn and Dinar 2009). Firms, farms, and people will all change their behavior as climate changes. They will subtly adjust their timing, their choices, and their management to take into account the climate that they actually live in. One can see this today by comparing the behavior of people who happen to live in different climates. Farmers in warmer places plant crops suitable for that climate. People wear clothing appropriate to their climate and season. Buildings have heating and cooling systems appropriate for each climate. People and firms adapt to climate because it is in their interest to do so. Adaptation makes them better off. That does not imply there are no damages. It simply points out that assuming zero adaptation is not realistic. The damage is much lower when people adjust. It may be more difficult to predict what will happen with adaptation, but simply assuming it away leads to overly pessimistic predictions of damage. Predictions of impacts from climate change must take private adaptation into account in order to provide accurate measures of future damages (Mendelsohn 2000).

### 1AR — Extend: “Warming Takes Too Long”

#### No impact for a century — IPCC agrees.

Ridley 15 — Matt Ridley, Fellow of the Royal Society of Literature and of the Academy of Medical Sciences, Foreign Honorary Member of the American Academy of Arts and Sciences, Conservative Member of the House of Lords (UK), Author of several popular science books including *The Rational Optimist: How Prosperity Evolves* and *The Evolution of Everything: How Ideas Emerge*, former Science Editor at *The Economist*, former Visiting Professor at Cold Spring Harbor Laboratory in New York, holds a D.Phil. in Zoology from Magdalen College, Oxford, 2015 (“Climate Change Will Not Be Dangerous for a Long Time,” *Scientific American*, November 27th, Available Online at http://www.scientificamerican.com/article/climate-change-will-not-be-dangerous-for-a-long-time/, Accessed 07-17-2016)

The climate change debate has been polarized into a simple dichotomy. Either global warming is “real, man-made and dangerous,” as Pres. Barack Obama thinks, or it’s a “hoax,” as Oklahoma Sen. James Inhofe thinks. But there is a third possibility: that it is real, man-made and not dangerous, at least not for a long time.

This “lukewarm” option has been boosted by recent climate research, and if it is right, current policies may do more harm than good. For example, the Food and Agriculture Organization of the United Nations and other bodies agree that the rush to grow biofuels, justified as a decarbonization measure, has raised food prices and contributed to rainforest destruction. Since 2013 aid agencies such as the U.S. Overseas Private Investment Corporation, the World Bank and the European Investment Bank have restricted funding for building fossil-fuel plants in Asia and Africa; that has slowed progress in bringing electricity to the one billion people who live without it and the four million who die each year from the effects of cooking over wood fires.

In 1990 the Intergovernmental Panel on Climate Change (IPCC) was predicting that if emissions rose in a “business as usual” way, which they have done, then global average temperature would rise at the rate of about 0.3 degree Celsius per decade (with an uncertainty range of 0.2 to 0.5 degree C per decade). In the 25 years since, temperature has risen at about 0.1 to 0.2 degree C per decade, depending on whether surface or satellite data is used. The IPCC, in its most recent assessment report, lowered its near-term forecast for the global mean surface temperature over the period 2016 to 2035 to just 0.3 to 0.7 degree C above the 1986–2005 level. That is a warming of 0.1 to 0.2 degree C per decade, in all scenarios, including the high-emissions ones.

At the same time, new studies of climate sensitivity—the amount of warming expected for a doubling of carbon dioxide levels from 0.03 to 0.06 percent in the atmosphere—have suggested that most models are too sensitive. The average sensitivity of the 108 model runs considered by the IPCC is 3.2 degrees C. As Pat Michaels, a climatologist and self-described global warming skeptic at the Cato Institute testified to Congress in July, certain studies of sensitivity published since 2011 find an average sensitivity of 2 degrees C.

Such lower sensitivity does not contradict greenhouse-effect physics. The theory of dangerous climate change is based not just on carbon dioxide warming but on positive and negative feedback effects from water vapor and phenomena such as clouds and airborne aerosols from coal burning. Doubling carbon dioxide levels, alone, should produce just over 1 degree C of warming. These feedback effects have been poorly estimated, and almost certainly overestimated, in the models.

The last IPCC report also included a table debunking many worries about “tipping points” to abrupt climate change. For example, it says a sudden methane release from the ocean, or a slowdown of the Gulf Stream, are “very unlikely” and that a collapse of the West Antarctic or Greenland ice sheets during this century is “exceptionally unlikely.”

If sensitivity is low and climate change continues at the same rate as it has over the past 50 years, then dangerous warming—usually defined as starting at 2 degrees C above preindustrial levels—is about a century away. So we do not need to rush into subsidizing inefficient and land-hungry technologies, such as wind and solar or risk depriving poor people access to the beneficial effects of cheap electricity via fossil fuels.

### 1AR — Extend: “No Extinction from Warming”

#### Climate change is not catastrophic — their impacts exaggerate.

Tol 14 — Richard Tol, Professor of Economics at the University of Sussex, Professor of the Economics of Climate Change at the Vrije Universiteit Amsterdam, Member of the Academia Europaea—a European non-governmental scientific association, served as Coordinating Lead Author for the IPCC *Fifth Assessment Report Working Group II: Impacts, Adaptation and Vulnerability*, holds a Ph.D. in Economics and an M.Sc. in Econometrics and Operations Research from the VU University Amsterdam, 2014 (“Bogus prophecies of doom will not fix the climate,” *Financial Times*, March 31st, Available Online at <https://next.ft.com/content/e8d011fa-b8b5-11e3-835e-00144feabdc0>, Accessed 07-15-2016)

Humans are a tough and adaptable species. People live on the equator and in the Arctic, in the desert and in the rainforest. We survived the ice ages with primitive technologies. The idea that climate change poses an existential threat to humankind is laughable.

Climate change will have consequences, of course. Since different plants and animals thrive in different climates, it will affect natural ecosystems and agriculture. Warmer and wetter weather will advance the spread of tropical diseases. Seas will rise, putting pressure on all that lives on the coast. These impacts sound alarming but they need to be put in perspective before we draw conclusions about policy.

According to Monday’s report by the Intergovernmental Panel on Climate Change, a further warming of 2C could cause losses equivalent to 0.2-2 per cent of world gross domestic product. On current trends, that level of warming would happen some time in the second half of the 21st century. In other words, half a century of climate change is about as bad as losing one year of economic growth.

Since the start of the crisis in the eurozone, the income of the average Greek has fallen more than 20 per cent. Climate change is not, then, the biggest problem facing humankind. It is not even its biggest environmental problem. The World Health Organisation estimates that about 7m [million] people are now dying each year as a result of air pollution. Even on the most pessimistic estimates, climate change is not expected to cause loss of life on that scale for another 100 years.

#### No catastrophic impact — they overestimate the predictive power of models.

Ridley 15 — Matt Ridley, Fellow of the Royal Society of Literature and of the Academy of Medical Sciences, Foreign Honorary Member of the American Academy of Arts and Sciences, Conservative Member of the House of Lords (UK), Author of several popular science books including *The Rational Optimist: How Prosperity Evolves* and *The Evolution of Everything: How Ideas Emerge*, former Science Editor at *The Economist*, former Visiting Professor at Cold Spring Harbor Laboratory in New York, holds a D.Phil. in Zoology from Magdalen College, Oxford, 2015 (“My Life As A Climate Lukewarmer,” *Times* (UK), January 19th, Available Online at <http://www.rationaloptimist.com/blog/my-life-as-a-climate-lukewarmer.aspx>, Accessed 07-16-2016)

I was not always a lukewarmer. When I first started writing about the threat of global warming more than 26 years ago, as science editor of The Economist, I thought it was a genuinely dangerous threat. Like, for instance, Margaret Thatcher, I accepted the predictions being made at the time that we would see warming of a third or a half a degree (Centigrade) a decade, perhaps more, and that this would have devastating consequences.

Gradually, however, I changed my mind. The failure of the atmosphere to warm anywhere near as rapidly as predicted was a big reason: there has been less than half a degree of global warming in four decades — and it has slowed down, not speeded up. Increases in malaria, refugees, heatwaves, storms, droughts and floods have not materialised to anything like the predicted extent, if at all. Sea level has risen but at a very slow rate — about a foot per century.

Also, I soon realised that all the mathematical models predicting rapid warming assume big amplifying feedbacks in the atmosphere, mainly from water vapour; carbon dioxide is merely the primer, responsible for about a third of the predicted warming. When this penny dropped, so did my confidence in predictions of future alarm: the amplifiers are highly uncertain.

Another thing that gave me pause was that I went back and looked at the history of past predictions of ecological apocalypse from my youth – population explosion, oil exhaustion, elephant extinction, rainforest loss, acid rain, the ozone layer, desertification, nuclear winter, the running out of resources, pandemics, falling sperm counts, cancerous pesticide pollution and so forth. There was a consistent pattern of exaggeration, followed by damp squibs: in not a single case was the problem as bad as had been widely predicted by leading scientists. That does not make every new prediction of apocalypse necessarily wrong, of course, but it should encourage scepticism.

What sealed my apostasy from climate alarm was the extraordinary history of the famous “hockey stick” graph, which purported to show that today’s temperatures were higher and changing faster than at any time in the past thousand years. That graph genuinely shocked me when I first saw it and, briefly in the early 2000s, it persuaded me to abandon my growing doubts about dangerous climate change and return to the “alarmed” camp.

Then I began to read the work of two Canadian researchers, Steve McIntyre and Ross McKitrick. They and others have shown, as confirmed by the National Academy of Sciences in the United States, that the hockey stick graph, and others like it, are heavily reliant on dubious sets of tree rings and use inappropriate statistical filters that exaggerate any 20th-century upturns.

What shocked me more was the scientific establishment’s reaction to this: it tried to pretend that nothing was wrong. And then a flood of emails was leaked in 2009 showing some climate scientists apparently scheming to withhold data, prevent papers being published, get journal editors sacked and evade freedom-of-information requests, much as sceptics had been alleging. That was when I began to re-examine everything I had been told about climate change and, the more I looked, the flakier the prediction of rapid warming seemed.

I am especially unimpressed by the claim that a prediction of rapid and dangerous warming is “settled science”, as firm as evolution or gravity. How could it be? It is a prediction! No prediction, let alone in a multi-causal, chaotic and poorly understood system like the global climate, should ever be treated as gospel. With the exception of eclipses, there is virtually nothing scientists can say with certainty about the future. It is absurd to argue that one cannot disagree with a forecast. Is the Bank of England’s inflation forecast infallible?

### 1AR — They Say: “Methane Means Runaway Warming”

#### Methane won’t cause run-away warming

MEYER ’17 (Robinson; The Atlantic, “Are We as Doomed as That New York Magazine Article Says?” 7/10, https://www.theatlantic.com/science/archive/2017/07/is-the-earth-really-that-doomed/533112/)ww

It’s a scary vision—which is okay, because climate change is scary. It is also an unusually specific and severe depiction of what global warming will do to the planet. And though Wallace-Wells makes it clear that he’s not predicting the future, only trying to spin out the consequences of the best available science today, it’s fair to ask: Is it realistic? Will this heat-wracked doomsday come to pass?

Many climate scientists and professional science communicators say no. Wallace-Wells’s article, they say, often flies beyond the realm of what researchers think is likely. I have to agree with them.

At key points in his piece, Wallace-Wells posits facts that mainstream climate science cannot support. In the introduction, he suggests that the world’s permafrost will belch all of its methane into the atmosphere as it melts, accelerating the planet’s warming in the decades to come. We don’t know everything about methane yet, but the picture does not seem this bleak. Melting permafrost will emit methane, and methane is an ultra-potent greenhouse gas, but scientists do not think so much it will escape in the coming century.

“The science on this is much more nuanced and doesn’t support the notion of a game-changing, planet-melting methane bomb,” writes Michael Mann, a climate scientist at Penn State, in a Facebook post. “It is unclear that much of this frozen methane can be readily mobilized by projected warming.”

## Impact Answers — Progressive Federalism

### 2AC — Progressive Federalism Impact Answers

#### Fair-weather federalism fails — it’s political opportunism without emotional force.

Hills 16 — Roderick M. Hills Jr., William T. Comfort, III Professor of Law at the New York University School of Law, earned a J.D. from Yale Law School and a B.A. in History from Yale University, 2016 (“Message to Trump-anxious decentralizers: Is your federalism insurance premium paid up?,” *PrawfsBlawg*, December 18th, Available Online at <http://prawfsblawg.blogs.com/prawfsblawg/2016/12/message-to-trump-anxious-decentralizers-is-your-federalism-insurance-premium-paid-up.html>, Accessed 07-09-2017, Lil\_Arj)

In a politico-legal ritual as timeless as the Gridiron Dinner, supporters of the Party that lost the Presidency are now discovering the virtues of federalism. Noah Feldman assures that "sanctuary cities" are safe from having their federal money yanked, because the Medicaid portion of NFIB v. Sebelius prohibits "coercive" conditions on federal grants. Jeff Rosen reminds us to take heart in Heather Gerken's "Progressive Federalism," in which national minorities can press ahead with state and local initiatives that would perish in a pigeonhole if suggested in the halls of Congress. The basic idea is that our constitution, with a small "c," contains norms about preserving decentralized political power that can serve as a firewall against Trump's excesses and foibles.

Far be it for me, a certified fan of federalism and decentralization, to look a gift horse in the mouth. If Trump's victory spurs my colleagues to endorse an institutional arrangement the benefits of which are timeless, that is a silver lining to a calamity, even if one suspects that the endorsing of federalism is a little bit opportunistic.

For the rhetoric of federalism to sound convincing, however, one needs to have paid up one's "federalism insurance premium." Otherwise, one's op-ed in favor of those labs o' democracy, those deciding dissenters, will sound (to quote Kurt Vonnegut) about as inspiring as the 1812 Overture played on a kazoo. What do I mean by "federalism insurance premium"? Think of a federal regime as an insurance policy, protecting the risk averse against loss of national power. When one's Party loses the commanding heights of the federal government, federalism insurance allows that Party to retreat into the provinces as a semi-loyal opposition, a shadow government waiting in the wings, advertising its virtues with Massachusetts Miracles and the Texas Way with Deregulated Housing and so forth.Like all insurance, however, the protection comes at a price: One must pay the "premium" of protecting subnational power when one controls the national government, tolerating subnational experiments that one regards as more Frankenstein than Brandeis.

So here is my question to all those new friends of federalism: Is your federalism insurance premium paid up? For instance, when the Obama Administration was forcing colleges and universities to adhere to federal procedural standards for sexual assault hearings contained in its "Dear Colleague" letter, did you stand up for those subnational institutions' right to resist coercive Title IX conditions on federal money? No? Then do not be surprised if your pro-federalism rhetoric about the immunity of sanctuary cities to "coercive" conditions falls a little flat.

We pay for constitutional insurance through self-control when we have power, not through rhetoric when we lose it. Through the exercise of self-control across different political regimes, each Party can slowly confer on institutional arrangements a permanence (sentimentalists would even say "sanctity") that survives change of regimes, sending a signal to their opponents that their self-control will be reciprocated when the tables are turned. The filibuster in the Senate is such a semi-permanent convention; Honored by both parties when the other was a minority who could use it to the incumbent Party's disadvantage, it has become entrenched by convention. Federalism, however, has never been favored by the Party in power long enough to make their pro-federalism protests convincing to their opponents (or even bystanders like myself) when they lose power. No one has paid their premium, so the insurance fund -- the emotional force of pro-federalism rhetoric -- is empty.

#### Constraints solve Trump lash-out

Goldsmith 17 (Jack, Henry L. Shattuck Professor at Harvard Law School, a Senior Fellow at the Hoover Institution, and co-founder of Lawfare. He teaches and writes about national security law, presidential power, cyber security, international law, internet law, foreign relations law, and conflict of laws. He served as Assistant Attorney General at the Office of Legal Counsel from 2003-2004, and Special Counsel to the Department of Defense from 2002-2003. “Checks on Presidential Power Are Stronger Than You Think” 1-20-17 https://www.thecipherbrief.com/article/north-america/checks-presidential-power-are-stronger-you-think-1091)

TCB: Which are the most resilient currently existing checks on his power, and which need to be bolstered?

JG: There are many, both inside and outside the Executive branch. On the inside, a bevy of lawyers, ethics monitors, inspectors general, and bureaucrats in the intelligence and defense communities have expertise, interests and values, and infighting skills that enable them to check and narrow the options for even the most aggressive presidents. On the outside, the press, which did such an extraordinary job of holding Bush, and to a lesser extent Obama, to account, is more motivated than ever to hold Trump accountable. The same goes for civil society groups like the ACLU, which have used lawsuits, reports, and Freedom of Information Act requests to expose government operations and misdeeds since 9/11, and whose coffers have ballooned since Trump’s election. Spurred on by the press and civil society, the judiciary, which often stood up to Bush, will stand up even more to Trump if he engages in excessive behavior. Finally, Congress has been more consequential in constraining the national security president since 9/11 than people realize. And as we have already seen in some pushback from Senators John McCain (R-AZ), Lindsey Graham (R-SC), and Rand Paul (R-KY), it will stand up to Trump on many issues, even though his party nominally controls Congress.

None of these institutions are perfect. They are especially ill-suited to prevent the President from using military force as he sees fit, which is why the Obama Administration’s precedents in this context are so troubling. But the institutions do a much better job in other national security contexts than they have been given credit for, and they will be watching president Trump with a very skeptical eye and an array of powers to push back.

#### Progressive Federalism fails — skewed local elections.

Jordan 15 — Samuel P. Jordan, Professor of Law and Associate Dean for Research and Faculty Development at Saint Louis University School of Law, 2015 (“Federalism, Democracy, and The Challenge of Federalism,” *Saint Louis University Law Journal* (59 St. Louis U. L.J. 1103), Available Online to Subscribing Institutions via Hein Online, Accessed 06-26-2017, p. 1111-1115, Lil\_Arj)

Now, let me to turn to what is perhaps the core argument put forward by Professor Gerken in her attempt to establish a detente. Contrary to what is often explicitly stated or assumed by proponents of nationalism, Professor Gerken presses the descriptive point that the devolution of power away from the federal government (or, the "center") does not always equate to a diminution of federal power or an erosion of federal interests.3 1 Instead, "devolution can further nationalist aims.' 32 Federalism can be a means to nationalist ends-thus, the nationalist school of federalism.

The justifications for this claim are numerous and are recounted eloquently in Professor Gerken's Article.33 For present purposes, I want to emphasize one: the "discursive benefits of structure." 34 The core idea is that decentralized locations of power can provide additional points of contact at which citizens can engage with the government, and that those multiple points of contact can, in Cristina Rodriguez's phrase, "simultaneously shape political consensus and channel ideological diversity." 35

Some of what we have seen in response to the events of Ferguson may be viewed through this lens. State and local structures have certainly served as sites of contestation and pluralist competition, and they have arguably facilitated interactions and conversation that may not have occurred through federal channels alone. That said, there is a dimension to the Ferguson experience that is deeply at odds with the descriptive account. As part of the "discursive benefits of structure," Professor Gerken posits that federalism can benefit racial minorities and dissenters by providing them with localized opportunities to "turn the tables" and wield the power of the majority.36 This is [End Page 1111] an account that runs counter to the traditional narrative of the nationalists that casts federalism as a threat to minority rights.37 It is an account that preferences insider status and the ability to exercise real power (even if subject to override) over tokenism that allows minorities to always be present but never to rule. 38 And it is an account that sets up structure as a companion to rights in the quest to further the federal project of protecting and empowering minorities. 39

One might expect that St. Louis County would be Exhibit A for this vision of decentralization as empowerment. St. Louis County is characterized by a highly fractured set of governance sites.40 And unlike in the federal context, where redistricting can distort the effects of shifts in residential patterns, the electoral boundaries for municipalities are (relatively) fixed. Thus, if residential patterns shift, electoral power should shift with it. The structure of St. Louis County government therefore seems well-suited to produce plentiful opportunities for minorities to be cast in the role of insider, to protect themselves through politics rather than through courts, and to build loyalty and promote civic identity.

And yet the experience in Ferguson does not bear that out. At the time of the Michael Brown shooting, roughly two-thirds of Ferguson's residents were African American. 4 1 But the mayor of Ferguson was white, five of six City Council members were white, the police force was overwhelmingly white, and six of seven members of the school board (which also includes parts of nearby Florissant) were white.42 [End Page 1112]

Much of the concern recently expressed by residents of Ferguson relates to their feeling that their government-their municipal government-is not responsive to their needs or respectful of their rights.43 And the actions taken in response to the events there have largely been the actions of outsiders. Rather than being in the position of a minority who feels oppressed by the tyranny of the majority, what has been expressed by residents of Ferguson are the frustrations of a majority who feels oppressed by the tyranny of the minority.

Why has this occurred? Part of the story may be the relatively rapid changes in demographics in the area. In 1990, Ferguson was seventy-four percent white; in 2000, it was fifty-two percent black; and in 2010, that new black majority had risen to sixty-seven percent.44 Because elections are occasional events, it may take time for electoral outcomes to catch up to the reality on the ground. More importantly, however, this is a story of turnout. Like many municipalities across the country, Ferguson holds municipal elections in odd-numbered years, and it holds them in April rather than November.45 One result of this scheduling is to substantially reduce voter turnout.4 6 Consider: in the 2012 general election, voter turnout in Ferguson was somewhere around fifty-four percent, but in the 2013 municipalities election a few months later, turnout was a relatively paltry 11.7%.47 This alone might be cause for some concern. Even more concerning is the fact that this reduction is far from uniform. Although Missouri does not track the race of voters, fairly sophisticated modeling suggests that the turnout among black and white voters was almost identical in the general election-fifty-five percent for whites and [End Page 1113] fifty-four percent for blacks. 48 In the municipal election, on the other hand, turnout was both much lower and dramatically skewed-seventeen percent for whites and only six percent for blacks.49 This three-to-one difference in turnout is enough to overcome the two-to-one difference in overall population, meaning that whites constituted the majority of voters in the municipal elections.50 There are a number of potential explanations for this discrepancy in turnout. First, the rapid shift in demographics in Ferguson is reflected in the average age of the white and black population. The white population is older, and older citizens tend to vote more regularly. 51 Patricia Bynes, the Democratic committeewoman for Ferguson, and others have also pointed to the transience of the minority population in Ferguson as an explanation for why blacks may be less inclined to participate in local elections. 52 This explanation is roughly consonant with William Fischel's "homevoter hypothesis," which posits that homeowners are more likely to vote than renters in local elections because they are more invested in the community. 53 If homeownership is not evenly distributed across races-and it is not in Ferguson or many other places 54—[End Page 1114] then this hypothesis has implications for the demographics of who actually votes in local elections relative to the voting population.55

Ultimately, this mismatch between demographics and electoral outcomes poses a challenge to the "discursive benefits of structure." Indeed, one prominent defender of localism has worried openly that Ferguson suggests the "problem of promoting the power of racial minorities through local autonomy ... seems to face some intractable obstacles. '56 More worrying still is that these obstacles are not unique to Ferguson, but are instead created by voting behavior and our democratic process.57

The response to these obstacles may simply be to say that they have little to do with a theory of federalism. After all, politics will always be imperfect, and yet we still have to come up with a workable system. By calling attention to them, perhaps I am just casting myself in the role of Mary Hume by claiming "almost perfect ... but not quite." 58 But many of these problems are unique to local elections, or are at least exacerbated by local elections. As a result, I worry that they pose a particular challenge to the claim that we may use decentralization as a mechanism to produce structural benefits for minorities. Professor Gerken's argument ultimately is that we need federalism to secure "a well-functioning democracy." 59 But the experience of Ferguson suggests that it may be equally true that we need democracy to secure a well-functioning federalism.

### 1AR — Extend: “Fair Weather Federalism Fails”

#### Formal institutional restraints are key — Gerken’s federalism fails.

Hills 17 — Roderick M. Hills Jr., William T. Comfort, III Professor of Law at the New York University School of Law, earned a J.D. from Yale Law School and a B.A. in History from Yale University, 2017 ("A response to Heather Gerken: Why the politics of tolerant pluralism need the legal institutions of federalism," *PrawfsBlog*, January 3rd, Available Online at http://prawfsblawg.blogs.com/prawfsblawg/2017/01/a-response-to-heather-gerken-why-the-politics-of-tolerant-pluralism-need-the-legal-institutions-of-f.html#more, Accessed 07-09-2017, Lil\_Arj)

Heather Gerken has a characteristically thoughtful response to my post on the “federalism insurance premium.” Heather agrees with me that willingness of the party in power decentralize controversial issues is weakened by each side’s intolerance toward ideological disagreement. She also agrees that more tolerance would be a good thing: When Democrats hold the Presidency, they should allow Red states more latitude to adopt conservative policies, and vice versa.

Heather disagrees with me, however, about whether constitutional conventions and institutions of federalism are relevant solutions to this problem. In her words,

“… the give-and-take has more to do with politics than institutions. Put differently, it’s not federalism that matters here, but pluralism. And a pluralist system only flourishes when both sides are willing to live and let live…”

The core of our disagreement is, in short, about whether and how legal institutions promote pluralist politics. After the jump, I will explain why I think that Heather is mistaken to contrast institutions and politics as if they are distinct mechanisms for promoting pluralism. As I have argued in yet another post, politics depends on – indeed, are defined by – legal institutions. Saying that achieving pluralism is rooted in politics, not institutions is like saying that scoring touchdowns is rooted in athletic ability, not the rules of football. Of course, the sort of athletic ability needed to score a touchdown depends on the rules of football. Likewise, the particular sort of politics needed to entrench a convention of decentralization depends on legal institutions. Even tolerant voters and politicians need some assurance that their tolerance will be reciprocated by their rivals before surrendering their cherished policy priorities for the sake of allowing the rivals to impose dissenting subnational policies. Without some credible commitment of reciprocity, such tolerance brands the politician who practices it as a chump, not a pluralist.

Legal institutions allow such politicians to make such credible commitments such that they can be assured that their forbearing to centralize power when they control the presidency will later be rewarded by their rival's similar forbearance. To see this relationship between legal institutions and political pluralism, however, it helps to focus on a specific example.

1. Why is "tolerance" without institutions insufficient to protect pluralism?

Consider, for example, the question of whether a university should be permitted to use a "clear and convincing evidence" standard to determine whether or not a constituent of the university (student, staff, faculty, etc.) committed sexual assault against another constituent. As I have argued elsewhere, whether or not Title IX requires a mere "preponderance of the evidence" ("POTE") standard to insure adequate protection from gender-based inequality is a tricky question. The Party in Power (call them "PIP") could "be tolerant" by acknowledging the uncertainty and let different public and private institutions make the call. This "tolerant" stance will bitterly disappoint the supporters of the PIP who ardently believe that POTE test is the statutorily required standard. Such supporters, however, might be mollified if they were assured that, by honoring a norm of decentralization, PIP would protect the supporters from having the POTE standard prohibited when the rival party comes to power. After all, the rival party might believe that POTE denies the accused of due process -- that only "clear and convincing evidence" ("CACE") would insure adequate protection against false positives. In order to prevent the very worst-case scenario, the PIP's supporters might grudgingly accept limits on their power to impose what they regard as the ideal rules.

The problem, of course, is that there is no obvious mechanism by which the PIP can make an enforceable deal with the Party out of Power ("POOP") to insure that present forbearance will be reciprocated. Because the POOP cannot give assurance that they will reciprocate, the PIP's supporters rationally insist that the PIP go ahead and impose the PIP's ideal policy. PIP would be rational to do so even if POOP's and PIP's supporters both were "tolerant and pluralist" -- that is, even if each side would prefer to forgo their own best-case scenarios in order to insure against the triumph of their opponent's best-case scenarios. Without legal institutions to enforce a deal, the two sides are trapped in a prisoner's dilemma from which their political good faith, their tolerance, their pluralistic character -- all the stuff that, I am guessing, Heather would classify as "politics" -- cannot save them.

Heather argues that we suffer from too much polarization rather than bad institutions. "[T]he real problem," she notes, "is the underlying assumption that one’s opponent is closer to Frankenstein rather than to Brandeis." I suggest, however, that polarization should increase rather than decrease the willingness to cut deals with one's opponents in the name of tolerance. After all, if one's opponents' views are closer to one's own, then the prospect of being governed by their norms is not so terrible. It is precisely when we fear our opponents' values most intensely that we need to take out an insurance policy against being subject to those values. The Thirty Years' War was not settled by good character or pluralist politics: It was settled by good rules in the Treaty of Osnabruck that gave each side credible assurances that they would be protected from their rivals. Likewise, during intensely polarized periods of U.S. history, legalistic norms like the Missouri Compromise flourished precisely because high levels of distrust created incentives for each side to seek institutional protection from their rivals. (Barry Weingast argues that such institutional protections fell apart not because of polarization but because the parties tinkered with the rules, admitting California as a free state and thereby eliminating the enforcement mechanism that forced each side to stick with the deal).

2. How might legal institutions help us achieve the pluralism that we want?

I heartily agree with Heather that, without a minimum amount of good will as lubricant, the gears of even the most sophisticated constitutional mechanism will lock up. I think, however, that we have not exhausted the benefits of good institutions that can help distrustful parties achieve the repose that both sides might really want.

Consider, for instance, the possibility of taking issues off the national agenda more aggressively. Heather's "national federalism" depends on the idea that, by giving Congress plenary power to decide everything, the two political parties will have better incentives to "dissent by deciding," enlivening our political debate with subnational policies that they hope eventually to nationalize. (By scoring a hit Off-Broadway, as it were, the POOP can move their show to a Broadway Theater as a PIP). In Heather's world, every subnational government is a farm team for the Big League, so voters in every local election rationally think about the effects of their ballot on national issues.

The problem with such a world is that, by raising the stakes of subnational politics, it destroys those politics for subnational government. David Schleicher has nicely explained how our subnational elections have been transformed into "second-order elections" in which voters vote on city council members, state legislators, and (to a lesser extent) mayors and governors solely based on their assessment of the national parties. As David notes, the cost is the destruction of subnational politics for subnational government.

One solution to go back to your father's federalism -- i.e., that old-fashioned idea that certain issues should be presumptively walled off from national decision-making, if not with barbed wire fences and trenches, then at least with speed bumps that slow down national legislation and regulation. Require more rules to go through notice-and-comment rule-making. (Such a requirement would likely have stalled OCR's "Dear Colleague" letter on sexual assault). Invoke Pennhurst and anti-coercion norms to limit the degree to which new interpretations can be given to cross-cutting grant conditions like Title IX. Beef up anti-commandeering norms to protect sanctuary cities.

Such doctrines provide political cover to PIPs against their own followers, allowing them to be tolerant and pluralistic to the other side by explaining to their impatient followers that certain centralizing policies will take too long to enact and are a waste of political capital. Such rules also provide reassurance to POOPs governing subnational jurisdictions who can thereupon relax the perpetual campaign at the subnational level to nationalize every local experiment and instead focus on subnational government. (As an example, consider Governor Hickenlooper's focusing on purely subnational politics of regional transit without any agenda of nationalizing the result, building up trust through initiatives like Colorado's FasTracks regional light rail program).

My point is not to attack Heather's "national federalism" but only to suggest that her brand of federalism, lacking formal legal institutions to constrain national power, might have consequences for the politics of pluralism. To the extent that our rules reward defection from decentralizing norms and dangle the brass ring of total national power before our subnational politicians, it should not be astonishing that they follow the incentives we give them. Even well-meaning pluralists will abandon self-restraint, after all, if their own restraint is never reciprocated. Rather than give up on the rules and hope for less polarization, it might be a good idea to think about ways in which our rules makes polarization a little more rewarding and self-restraint, a bit less attractive.

### 1AR — Extend: “Constraints Solve”

#### International checks reinforce domestic constraints

Burdette 3-1 (Zachary, National Security Intern at the Brookings Institution and M.A. candidate at Georgetown University's Security Studies Program concentrating in military operations. “America’s Counterterrorism Partners as a Check on Trump” 3-1-17 https://www.lawfareblog.com/americas-counterterrorism-partners-check-trump)

President Trump has begun to shift U.S. counterterrorism policies toward an extreme paradigm that departs from both liberal and conservative orthodoxy. In his first weeks in office, Trump recast the enemy as radical Islam, reconsidered U.S. policy on black sites and torture, and instituted a travel ban covering seven Muslim-majority countries. The unifying logic of these approaches is one of defining Islam as the problem, unshackling humanitarian constraints, and adopting extreme tools to combat terrorism. In implementing this vision, Trump inherits an already formidable counterterrorism architecture and an expansive legal interpretation of executive war powers from the Obama administration.

Ideally, the checks and balances of the U.S. political system will force moderation and curtail executive overreach. The national security bureaucracy, Congress, the courts, the press, and civil society are—individually and collectively—powerful impediments to illegal and extreme counterterrorism measures. While there are fierce debates over how effectively these domestic constraints have operated in the past, the early judicial challenges to Trump’s counterterrorism policies suggest that domestic institutions could place meaningful constraints on the new administration.

International dynamics may reinforce these domestic checks and balances. U.S. allies and partners could leverage their continued cooperation on counterterrorism to pressure the Trump administration to exercise uncharacteristic self-restraint. In other words, the United States could soon face an uncomfortable dilemma: President Trump must either restrain his most hawkish impulses or his administration may find itself increasingly going it alone in the war on terror.

The Trump administration may not be concerned about such a possibility, given the President’s dismissive attitude toward American allies throughout the campaign, but it should be. Allies provide important assets in international counterterrorism operations, many of which the U.S. intelligence community would be hard-pressed to replace.

If partners believe the new administration’s counterterrorism policies are illegal or excessive, they will likely turn first to diplomatic condemnation to induce moderation. The collective voice of the international community shapes expectations about what is acceptable, which raises the political costs of crossing certain legal and political thresholds. Global outcry would lend weight and legitimacy to those inside the United States calling for restraint, serving as an external prompt to jumpstart dialogue and the internal processes of U.S. checks and balances. For example, international naming and shaming of the Obama administration helped end the U.S. practice of spying on the communications of certain allied heads of state.

While the Trump administration may prove itself immune to such international condemnation, there is some cause for optimism. In addition to his uncompromising demand for unconditional praise, one of Trump’s few consistencies is his lack of principled commitment to any particular policy. He flip-flopped on proposed counterterrorism measures when domestic audiences criticized him during the campaign. A concerted, global effort may have a similar effect during his presidency, especially if it were combined with fawning praise for his leadership when he moderates.

#### SecDef vetoes US lashout

Picht 16 James Picht, PhD, teaches economics and Russian at the Louisiana Scholars' College, Senior Editor for Communities Politics, CDN, 6/14/2016, “President Trump’s inability to accidentally start a nuclear war”, http://www.commdiginews.com/politics-2/president-trumps-inability-to-accidentally-start-a-nuclear-war-65654/

But we don’t want them used too easily. To set your mind at ease, there is no actual button on the president’s desk that can launch nuclear weapons. We need not worry that in a moment of inattention, the president will accidentally start a nuclear war. The system by which we launch nuclear weapons can’t be so easy that they can be launched by accident or on a whim. It can’t be so difficult that, when we detect Russian missiles flying at our cities and our military installations, the president can’t respond quickly and launch our own missiles before they’re reduced to radioactive slag. Those competing requirements mean that the system will be highly complex. It includes failsafes, backup systems, redundancies, and verification checks. When the order comes to launch the missiles, we want to be sure that it came from an authorized source that really, really meant it. The nuclear button isn’t real. There is a chain of command, and there are verification codes. The president can order the release of nuclear weapons, but the order must be confirmed by the secretary of defense. A “watch alert” is sent to the Joint Chiefs of Staff, and after the president reviews the war plans, an aid contacts the National Military Command Center. Trump seems lackadaisical about nuclear proliferation, speaking casually about the “inevitable” spread of nuclear weapons and the desirability of countries like Japan and Germany building nuclear arsenals of their own. His view of the subject seems predicated more on cost savings than on the history of nuclear non-proliferation or on national security concerns. That’s a real concern. Trump’s thin skin is not. The LBJ campaign’s infamous “daisy ad” against Barry Goldwater was demagoguery at its worst; it was intended to terrify voters and convince them that Goldwater might really launch an attack on the USSR. The evidence is that Trump is careless with his words, crude in his treatment of people he considers unimportant, and ignorant of foreign affairs. It is not that he is insane or looking forward to Armageddon. And unless he managed to fill the Department of Defense with lackeys who were as insane as he would have to be, he couldn’t start a nuclear war for no better reason than an offense to his very thin skin.

#### Pence has all the power – Trump is a puppet with no strings

Oh 16 – Writes for Mother Jones, managing editor of mother jones (INAE OH, “Donald Trump Reportedly Plans to Delegate All Domestic and Foreign Power to his VP”http://www.motherjones.com/politics/2016/07/donald-trump-mike-pence-running-mate-domestic-foreign-policy) RMT

A new report from the New York Times Magazine goes behind the scenes of the VP selection process and claims that Trump's first choice was his former rival, Ohio Gov. John Kasich. Perhaps more interestingly, the report sheds light on the unprecedented level of power Trump plans to delegate to his vice president if elected. According to the Times, Trump's son, Donald Trump Jr., was responsible for vetting the potential candidates. Here's a scene from one conservation he had with a Kasich adviser.

Did he have any interest in being the most powerful vice president in history?

When Kasich’s adviser asked how this would be the case, Donald Jr. explained that his father’s vice president would be in charge of domestic and foreign policy.

Then what, the adviser asked, would Trump be in charge of?

"Making America great again" was the casual reply.

If true, this means that Trump doesn't plan on doing much governing at all. It may also reveal that he actually agrees with Hillary Clinton's claim that he is temperamentally unfit to become president of the United States. As for Kasich, he declined the offer and isn't even showing up to the Republican convention that's taking place in his home state.

## Impact Answers — Constitution

### 2AC — Constitution Impact Answers

#### The Constitution is an open-ended framework, not a “side constraint.”

Litchwick 11 — Dahlia Lithwick, journalist covering courts and the law for *Slate*, 2011 (“Read It and Weep,” *Slate*, January 4th, Available Online at http://www.slate.com/articles/news\_and\_politics/jurisprudence/2011/01/read\_it\_and\_weep.single.html, Accessed 04-30-2012)

This newfound attention to the relationship between Congress and the Constitution is thrilling and long overdue. Progressives, as Greg Sargent points out, are wrong to scoff at it. This is an opportunity to engage in a reasoned discussion of what the Constitution does and does not do. It's an opportunity to point out that no matter how many times you read the document on the House floor, cite it in your bill, or how many copies you can stuff into your breast pocket without looking fat, the Constitution is always going to raise more questions than it answers and confound more readers than it comforts. And that isn't because any one American is too stupid to understand the Constitution. It's because the Constitution wasn't written to reflect the views of any one American.

The problem with the Tea Party's new Constitution fetish is that it's hopelessly selective. As Robert Parry notes, the folks who will be reading the Constitution aloud this week can't read the parts permitting slavery or prohibiting cruel and unusual punishment using only their inside voices, while shouting their support for the 10th Amendment. They don't get to support Madison and renounce Jefferson, then claim to be restoring the vision of "the Framers." Either the Founders got it right the first time they calibrated the balance of power between the federal government and the states, or they got it so wrong that we need to pass a "Repeal Amendment" to fix it. And unless Tea Party Republicans are willing to stand proud and announce that they adore and revere the whole Constitution as written, except for the First, 14, 16th, and 17th amendments, which totally blow, they should admit right now that they are in the same conundrum as everyone else: This document no more commands the specific policies they espouse than it commands the specific policies their opponents support.

This should all have been good news. The fact that the Constitution is sufficiently open-ended to infuriate all Americans almost equally is part of its enduring genius. The Framers were no more interested in binding future Americans to a set of divinely inspired commandments than any of us would wish to be bound by them. As Justice Stephen Breyer explains in his recent book, Making Our Democracy Work: A Judge's View, Americans cannot be controlled by the "dead hands" of one moment frozen in time. The Constitution created a framework, not a Ouija board, precisely because the Framers understood that the prospect of a nation ruled for centuries by dead prophets would be the very opposite of freedom.

#### Federal education policies are consistent with the constitution

BLACK ’17 (Derek W.; Professor of Law – University of South Carolina, “Abandoning the Federal Role in Education: The Every Student Succeeds Act,” California Law Review, vol. 105:101)ww

The ESSA thus raises a fundamental question: What role should the federal government play in education? Traditionally, the federal government is involved in education because education is in our national interest, the Constitution commits the nation to equality, and educational shortfalls by states remain rampant.23 According to national assessments of student achievement, only one-third of students are proficient in math and reading, and low-income and minority students’ achievement lags three years behind their peers by the eighth grade.24 Substantial portions of this gap owe in no small part to the poor educational opportunities that states provide to many students.25 In real dollar terms, thirty-one states funded education at a lower level in 2014 than they did in 2008. Likewise, recent data show that half of the states fund districts serving predominantly poor students at lower levels than they do districts serving predominantly middle-income and wealthy students.27 To achieve their potential, low-income students require more resources than their peers—not less.28

## Impact Answers — Impact Turns

### 2AC — Federalism Bad (Inequality)

#### Education Federalism causes segregation and inequality

ROBINSON ’13 (Kimberly Jenkins; Professor of Law – University of Richmond, “The High Cost of Education Federalism,” 48 Wake Forest L. Rev. 287, Spring, l/n)ww

The emphasis on local control of education in the Court's decisions in Milliken, Dowell, Freeman, and Jenkins harkened back to dual federalism's insistence that the federal government and the [\*304] state governments divide authority based on subject matter. n97 However, consistent with the demise of dual federalism and the rise of cooperative federalism, n98 education law and policy at the time of these decisions had evolved such that, at a minimum, federal authority had been sanctioned and deemed essential to ensuring equal educational opportunity. This occurred not only through the landmark Brown decisions and other desegregation decisions that used federal power to ensure integrated schools but also through the Elementary and Secondary Education Act of 1965 ("ESEA") and its reauthorizations that marshaled federal authority to assist low-income students; n99 numerous additional federal education laws on issues of equal opportunity for girls and women, n100 disabled students, n101 and English language learners; n102 and federal enforcement of these laws by the U.S. Department of Education. In the Milliken, Dowell, Freeman, and Jenkins decisions, this insistence on a dualist understanding of education failed to protect the right to attend a nondiscriminatory school system, just as it has failed to protect individual rights in other areas. n103

These decisions - along with several other factors, such as the retreat of many white and middle class families to the suburbs and the intermittent support for federal action by the executive and legislative branches - have led to resegregation of many of the nation's schools. n104 Despite growing diversity in the public school population, school segregation has been increasing in recent decades [\*305] and has led to increasingly racially isolated schools. n105 For instance, the percentage of Latino and African American students who attend schools composed of 90%-100% minority students has consistently grown since the 1991-92 school year. n106 In the 2009-10 school year, 43.1% of Latino students and 38.1% of African American students attended schools in which 90%-100% of the students are minorities, up from 33.9% and 32.7% respectively in 1991-92. n107 In addition, the percentage of poor students has grown significantly in the last three decades, with the average African American and Hispanic student attending a school that was one-third poor students in the early 1990s while today these students typically attend a school with two-thirds poor students. n108 These trends are made even more troubling when one considers research that consistently documents the harms of racial isolation and the benefits of diverse schools. n109 Furthermore, research reveals that concentrated poverty has a stronger relationship to inequality in education than racial segregation. n110 Education federalism contributed to these troubling trends by serving as one of the impediments to school desegregation.

### 2AC — Federalism Bad (Racism)

#### “Progressive federalism” undermines rights for people of color — Voter ID laws prove.

Charles and Fuentes-Rohwert 15 — Guy-Uriel E. Charles, Charles S. Rhyne Professor of Law Senior Associate Dean for Faculty & Research at Duke Law School, the founding director of the Duke Law Center on Law, Race and Politics, previously was the Russell M. and Elizabeth M. Bennett Professor of Law at the University of Minnesota Law School, received his JD from the University of Michigan Law School and clerked for The Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit, and Luis Fuentes-Rohwert, Professor of Law and Harry T. Ice Faculty Fellow at Maurer School of Law at Indiana University, earned a LL.M. from Georgetown University School of Law, a Ph.D., J.D. and B.A. from the University of Michigan, 2015 (“Race, Federalism, and Voting Rights,” *The University of Chicago Legal Forum* (2015 U. Chi. Legal F. 113), Available Online to Subscribing Institutions via Hein Online, Accessed 06-26-2017, p. 143-148, Lil\_Arj)

III. RACE AND FEDERALISM UP AND DOWN

Return now to the empirical question about the utility of federalism that we left open in the last Part. In this Part we want to introduce a consideration that has not been central to the modern federalism debate: whether federalism enhances the liberty of people of color. Chief Justice Roberts's desire in Shelby [End Page 143] County to return the federalism balance to what it was not only prior to the intervention of the 1965 Voting Rights Act, but also prior to the Nineteenth Century and the Civil War Amendments, could be sensible under the right set of assumptions. One of the supposed great virtues of (our) federalism is that it enhances liberty because it facilitates the ability of national or ethnocultural minorities to rule by becoming local majorities. 1 4 1 From this perspective, defending federalism is defending the liberty of local minorities against national majorities. But the question that anti-nationalists, in particular the anti-nationalists on the Court, often fail to ask is, liberty for whom? The critical inquiry for modern proponents of federalism is whether federalism works for racial minorities in the way that federalist theorists purport. Put differently, states' rights theorists 1 42 never pause to ask whether the states are truly in competition with the federal government for protecting the rights of racial minorities. They never pause to ask whether federalism is good for people of color.

Though past need not be prologue, the concept of states' rights has, to put the point mildly, a sordid past in American history. 1 4 3 Federalism has not generally been viewed as an institutional arrangement that enhances the liberty of racial minorities in the United States; in fact, it has been viewed as doing the opposite. 144 The way that racism has been deployed in the name of federalism is a problem for federalism's advocates. 14 5 Whether fair or not, states' rights in the United [End Page 144] States has generally been associated with racial inequality. 146 Conversely, federal power has generally been associated with racial equality.1 47 From the perspective of citizens of color, liberty has in fact been delivered not by federalism but by nationalism. 148 It thus would take a lot of chutzpah to curtail federal power, which is being deployed to protect liberty in an area where the states have engaged in notorious and rampant race discrimination, in the name of states' rights. But this is precisely what Chief Justice Roberts did in Shelby County.

Central to the Chief Justice's argument in Shelby County for recalibrating the balance between state and federal power is the premise that the states are no longer engaging in systematic racial discrimination of the type that gave rise to the 1965 Act.1 49 This argument prompted a dissenting response from Justice Ginsburg, who maintained that the states might go back to their old ways and use proxies that either directly or indirectly minimize the political power of racial minorities or indirectly do so.o50 Additionally, Justice Ginsburg argued that in the last fifty years, if not since Reconstruction, the federal government has assumed the primary responsibility and has in fact done a better job of protecting the electoral rights of racial minorities. 151 Thus, as between the states and the federal government, the federal government is the less risky option, the safer bet.

For both Roberts and Ginsburg, the federalism question (that is, how much reserved powers do the states have or should the states have as against the federal government in the voting domain) is a function of a predictive judgment: whether the states are likely to engage in racial discrimination in voting as they did before or whether we have we moved well beyond that era. If we think the states are likely to backtrack, we ought to [End Page 145] favor the federal government; but if we think the states are reformed, we should return to them the reserved powers they presumably possessed at the Founding. Both justices used memorable analogies to make their respective points: Roberts that robust federal power is no longer necessary and Ginsburg that the states are likely to backtrack without federal supervision. 152 During the oral arguments in Northwest Austin, Roberts characterized the argument that it is the VRA that is keeping the states from engaging in racial discrimination in voting to be as compelling as the old story that an "elephant whistle" explains the absence of elephants. That is, he continued, "I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work." 15 3 In her Shelby County dissent, Ginsburg retorted by characterizing the argument that the coverage formula is no longer necessary because states are not currently engaged in racial discrimination as "like throwing away your umbrella in a rainstorm because you are not getting wet." 154

Roberts and Ginsburg are undoubtedly engaged in an important debate. But in one critical respect, the battle between Roberts and Ginsburg and the sides that they represent is beside the point, if the point is about federalism. The federalism question should not be whether the states will or will not engage in discrimination if federal supervision is removed. The federalism question ought to be whether the states will compete with the federal government for the allegiance of racial minorities. If one important and central argument in favor of federalism, and thus Shelby County, is that devolution of power enhances liberty by facilitating self-rule by national minorities or ethnocultural minorities, the question that Chief Justice Roberts and Justice Ginsburg should have been debating is whether removing central supervision will now better permit racial minorities-who are also ethnocultural minorities-to engage in self-rule. Instead of asking whether the states are widely or systematically discriminating against their citizens of color, the Court should have asked how well are the states [End Page 146] representing the interests of their citizens of color. What is the congruence between the policy preferences of citizens of color in Alabama, Texas, North Carolina, Georgia, etc., and the legislative outcome of their respective states? How well are these citizens represented by their states? This should be the question for federalism in this context.

If one is inclined to be generous, one can view Chief Justice Roberts's opinion in Shelby County as deeply generative. Roberts wants a restart on race, history, and federalism. Recall here his point in Shelby County that history did not end in 1965.155 We have argued elsewhere Roberts used Shelby County to redeem the states.156 But the states are not all that Roberts wants to redeem; he also wants to redeem federalism from its sordid past, a laudable goal. The anti-nationalists aim to change the states' rights narrative so that the idea of states' rights is no longer synonymous with racial discrimination. Recall also Chief Justice Roberts's claim in Shelby County that the South has changed, or at the very least it does not differ much, if at all, from the North.157

The redemption of federalism is an intriguing and worthwhile project. It would be salutary and productive to get beyond the states' rights as racism meme. And it is not fair to federalism's advocates to constantly tar them with the putridity of the past. But redemption is not cheap. If federalism is to be redeemed, federalism must work for people of color as well. And if federalism is to "work" for people of color, it is not enough for proponents of federalism to show that the states will no longer engage in rampant racial discrimination.

Our task here is to introduce a distinction between an argument for states' rights premised on the idea that the states (or many of them) are no longer engaging in racial discrimination and an argument for states' rights in which the states are actively representing the interests of their citizens of color. From our perspective, the argument for federalism cannot be premised on the idea that the states are no longer discriminating against racial minorities. It is not sufficient to simply say that the states are indifferent. The Court should not interpret the Constitution in a way that would disempower the [End Page 147] federal government, which is the governmental entity that best represents the interests of citizens of color, and leave citizens of color to the indifference of the states. Indifference is not an argument for federalism. Federalism promises better representation, at least as compared to representation from the center or as compared to a unitary system. Our point is that the promise of better representation or the promise of competition for representation ought to be extended to people of color.158

This is why the argument between Roberts and Ginsburg is beside the point. The states' side of federalism must do what federalism theory expects devolution and decentralization to do. Federalism must defend and protect racial representation. The states must rival the federal government for the affections of racial minorities. It is not enough that federalism is not bad for people of color; federalism must be good for people of color. This is the task of federalism.

#### Federalism encourages civil rights abuses — federal regulation solves.

Nivola 17 — Pietro S. Nivola, Vice President and Director of Governance Studies at The Brookings Institution, former Associate Professor of Political Science at the University of Vermont, former Lecturer in the Department of Government at Harvard University, holds a Ph.D. from Harvard University, 2017 (“Respublica Complicata: An Essay in Memory of Martha A. Derthick (1933–2015),” *Publius*—The Journal of Federalism, March, Available Online at <https://academic.oup.com/publius/article/doi/10.1093/publius/pjw035/3063255/Respublica-Complicata-An-Essay-in-Memory-of-Martha>, Accessed 06-26-2017, Lil\_Arj)

Securing Rights and Other Essentials

A state-by-state approach has also too often fallen short in upholding civil rights, ensuring a sound social safety net, and regulating health hazards that cross state lines. Historically, because defaulting to it could beget local abuses, inertia, and freeloading, a strictly state-based agenda would eventually give way to a logical corrective: less federalism. By 1964, a national Civil Rights Act ultimately had to be summoned to meet the resistance of states in the south that were enforcing racial apartheid far into the twentieth century. The New Deal was invoked in large part because most states had been unable to rescue their impoverished inhabitants from the Great Depression. The nation’s Clean Air and Clean Water Acts might have been less necessary if the states, acting independently, had managed to curb extensive pollution that moved past their respective borders. Unless otherwise encouraged, a community whose contaminated air or water flows downstream to other places has little incentive to stop the cross-border spillover for their sake.

Derthick would be the first to recognize that such shortcomings of local control stem not infrequently from a basic difficulty Madison had identified in Federalist No. 10: a propensity of small polities to be captured by entrenched interests. Would a one-company town crack down on a factory that happens to be not only a wide-ranging polluter but also the local economy’s mainstay? Prior to, say, 1954, were recalcitrant state governors and legislatures, left to themselves, prepared spontaneously to desegregate schools? Even now, can individual states and localities, which must compete for investment (hence keep progressive tax rates in check) and avoid degenerating to welfare magnets, be especially eager to redistribute wealth to needy households? (Peterson 1995, 19, 27–30). In no small degree, performing roles like these has posed a challenge for society’s subnational governments if left entirely to their own devices. The remedy, of course, has been for the central government to add inducements and regulations aimed at overcoming the local derelictions.

#### Justifications for state power are historically rooted in racism

SUNDQUIST ’17 (Christian B.; Professor of Law and Director of Faculty Research and Scholarship – Albany Law School, “Positive Education Federalism: The Promise of Equality after the Every Student Succeeds Act,” 68 Mercer L. Rev. 351, Winter, l/n)ww

The divining of the appropriate federal role in public education has historically been rooted in a procedural vision of the negative limits of federal action. The discussion of education federalism, therefore, has largely focused on the degree to which federal law should influence or supersede traditional state "police powers." n168 While negative branches of federalism often purport to balance federal and state interests in an ideologically neutral fashion, it is clear that the federalism debate is also imbued with particular substantive conceptions of the content and preferred outcomes of permissible federal actions.

The original allocation of "police powers" to states - which established local responsibility for the health, education, and safety of residents - has long been derided as a constitutional compromise to allow states to preserve slavery and prevent racial progress. n169 The invocation of "states' rights" following the Brown desegregation decree is just one example of negative federalism being utilized as a tool to resist social progress. n170 Indeed, as Professor Lisa Miller notes, "federalism in the United States was forged in part as a mechanism for accommodating slavery, and it facilitated resistance to racial progress for blacks long after the Civil [\*382] War." n171 Pre-war education federalism thus often strove to forestall federal intervention in state systems of racial control in an effort to preserve educational segregation and inequality. n172