# Notes

## Explanation/Guide

### File Description and General Tips

This file contains a counterplan to read against either Title I or Hazelwood (make sure to read the appropriate 1NC shell). There are general extensions that apply to both affirmatives and also specific extensions for each.

The affirmative also has a set of answers.

A counterplan is a type of negative argument that proposes a different policy than the plan. It is introduced as an off-case position in the 1NC. The 1NC shell for the counterplan is included in this file. To extend the counterplan in the negative block, the negative should prepare blocks to each affirmative response. When doing so, the negative can make use of the backline evidence contained in this file. Students should carefully choose which extension evidence to read; it is very unlikely that students will be able to read *all* extension cards in any 2NC or 1NR.

When answering this counterplan, the affirmative should use the materials in this file to construct a 2AC. For some of the 2AC arguments, the affirmative is provided with additional extension cards that could be useful for the 1AR. Due to the intense time constraints of that speech, students should carefully choose which (if any) extension evidence to read.

### Explanation of the Negative

The counterplan argues that instead of having the federal government do the plan, the fifty states should do so. The net benefit is the Federalism DA — by having the states act, the counterplan does not link.

### Explanation of the Affirmative

The affirmative has a number of responses to the counterplan:

* They argue that the counterplan does not compete. They have a permutation to do both the plan and the counterplan.
* They also have substantive responses to the counterplan, arguing that the states do not solve as well as the federal government does for a variety of reasons. This is called a solvency deficit.
* Finally, the affirmative can make theoretical objections to the counterplan — arguing that conditional counterplans are unfair to the affirmative.

### Explanation of Conditionality

Conditionality refers to the “status” or “disposition” of the counterplan: is the negative defending only the counterplan or can they “kick” the counterplan at any time and revert to defending the status quo? When the negative defends a counterplan but reserves the right to revert to defending the status quo, they are defending the counterplan conditionally. In response, the affirmative can argue that conditionality should not be allowed. When the affirmative makes this argument, the negative must respond by defending the desirability of conditionality. This is called a theory argument.

# States CP

## 1NC — States CP

### 1NC — States CP vs. Title I

#### The fifty states and relevant territories should distribute adequate and equitable funding to schools and prohibit the use of local property tax revenue for school funding.

#### The Counterplan creates equal educational opportunities

BURNET ’12 (Kerry P.; J.D. – University of Illinois, “Never a Lost Cause: Evaluating School Finance Litigation in the Face of Continuing Education Inequality in Post-Rodriguez America,” 2012 U. Ill. L. Rev. Online 1225, l/n)ww

To establish an equalized funding system, state taxes must replace local property taxes as a main source of school revenue. Increased state funding for schools should serve to redistribute otherwise segregated tax wealth to schools across the state. n287 To ensure the system remains equal, states should either eliminate or severely limit the ability to raise local revenue. n288

State taxes should provide the necessary level of funding to ensure that every school meets a certain level of adequacy. That level includes a competitive salary for teachers so that superior teachers will consider working at schools in lower-income areas. n289 The state-mandated funding [\*1259] level should also ensure a basic level of facilities, school supplies, and equipment. The level should be enough to maintain schools that give students a reasonable opportunity to learn basic skills like reading, writing, and math, and to graduate from high school and be accepted to a four-year college. Admittedly, foundational levels are already set in many states, but these levels have proven insufficient when they are not accompanied by comprehensive reform and limits on local revenue. n290

While some may argue that this proposed system should be disfavored because it eliminates the tradition of localism in schools, localism is to blame for this crisis. n291 Because reliance on local property-tax revenue for schools caused the problem of unequal education funding, reform must include an end to the local revenue system. n292 Localism allows wealthier people to concentrate themselves in the suburbs and pool together high property values to fund their children's education while insulating themselves from the problems of urban and rural areas with concentrated poverty. n293 To break this cycle, states have to end the local property-tax revenue system and redistribute taxes to schools across the state. Nonetheless, local control over the operation of schools could still be maintained; it is the funding of schools that must change. n294

Along with setting higher state funding levels, local property-tax revenues to schools should be prohibited altogether. n295 Under this system, politically and economically powerful parents will be motivated to lobby to raise the state spending level for schools because it will benefit the schools their children attend. At the same time, because the state level will be uniform for all children in the state, lobbying efforts will also benefit the poorest children.

### 1NC — States CP vs. Hazelwood

#### The 50 states and relevant territories of the United States of America should increase their regulation of elementary and or secondary education by implementing laws that prevent censorship of student publications in public schools.

#### State legislation solves free speech protections – Washington bill proves

Lee ’16-Seattle Times staff reporter (Jessica, “Student journalists in state may get more free-speech protection,” 2-16-16, <http://www.seattletimes.com/seattle-news/amid-national-push-state-lawmakers-consider-student-free-press-protections>)//JD

Student journalists at some Washington public high schools and colleges would have greater control over their media content under a bill that would ensure they’re not subject to unnecessary censorship by school authorities. [Senate Bill 6233](http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6233.pdf), sponsored by Sen. Joe Fain, R-Auburn, follows a wave of efforts nationwide to clarify students’ rights to free speech in publications and broadcasts, regardless of whether students are participating in a class or if schools financially support the media. “In order for journalists to do what they need to, they need to be free of censors,” said Nick Fiorillo, 18, former editor-in-chief of Mountlake Terrace High School’s newspaper, The Hawkeye. “They need to be free of any attempts of the government to come in and tell them what they can and cannot print.” Washington would join fewer than a dozen other states that have enacted similar legislation meant to offset a 1988 U.S. Supreme Court ruling, Hazelwood School District v. Kuhlmeier. That ruling says administrators can control expression of their schools’ publications so long as the regulation is “reasonably related to a legitimate pedagogical concern.” The bill, modeled after legislation North Dakota enacted last year, gives students at public schools the ability to publish content without prior restraint, so long as it is not slanderous or libelous; unjustly invades privacy; violates federal or state law; or encourages students to break school rules or commit crime. Educators, such as student-media advisers, may review content but not censor it, unless it violates those standards. Private schools would not be affected. The legislation also protects advisers from retaliation for content and limits the extent to which schools can be held civilly or criminally liable for student media. Many public colleges and high schools in Washington already operate under similar guidelines. Before the 1988 case, school authorities were unable to regulate student expression that did not invade others’ rights or interfere with school operations after a 1969 ruling. Opponents say the measure goes too far in removing school officials’ editorial judgment. They say authorities should be allowed final say before publication, especially if the journalism program’s adviser lacks experience. “The school district is the publisher and therefore should have some control over what is published, just like a [professional] publisher would with their editors and reporters,” Jerry Bender, of the Association of Washington School Principals, said at a Jan. 21 public hearing. Washington state representatives considered the legislative change in 2007. Lawmakers in the Senate Early Learning and K-12 Education Committee on Feb. 2 approved the latest bill — which has both Republican and Democratic sponsors — and the proposal awaits a vote on the Senate floor. Rep. Matt Manweller, R-Ellensburg, is pushing for a broader legislative change in his chamber to declare college campuses public forums to strengthen free speech. The session ends March 10. Supporters of the bill say that in some cases officials abuse the Hazelwood ruling by trying to ensure the school is portrayed in a positive light. Or, they prevent student journalists from covering controversial issues due to their lack of experience, supporters say. Journalist Madison Lucas, 18, said at the public hearing that she was a victim of such censorship while she was an editor and writer at Puyallup High School’s newspaper before she graduated last year. She faced pushback over a story on a building sewage leak, she said, among other issues.“[The Hazelwood ruling] has evolved into a device for schools to suppress complaints by people who are dissatisfied with the level of education services they’re receiving, and to us, that’s exactly the kind of speech the public most needs to hear,” said Frank LoMonte, director of the Student Press Law Center. He is helping to coordinate the New Voices USA campaign, which is leading the push for legislative changes to clarify student journalists’ free-speech rights nationwide. North Dakota began the trend, and now advocates in 20 states are working to do the same, LoMonte said. “Our phone rings hundreds and hundreds of times a year from students who have been told you can’t publish something solely because it’ll make the school look bad,” he said.

## 2NC/1NR — General Extensions

### State Action Good

#### State action promotes innovation and accountability – overlapping mandates fail

CHOPIN ‘13 (Lindsey; JD, associate in the Labor & Employment Law Department and a member of the Employee Benefits & Executive Compensation Group, focusing on complex employee benefits litigation, “COMMENT: UNTANGLING PUBLIC SCHOOL GOVERNANCE: A PROPOSAL TO END MEANINGLESS FEDERAL REFORM AND STREAMLINE CONTROL IN STATE EDUCATION AGENCIES,” *59* *Loyola Law Review 399*, l/n)

In abandoning the current system of fad reforms, it must be accepted that "large-scale educational reform is unlikely in the absence of an institutional center to shape policy, aggregate interests, and control and channel conflict." 245 This realization begs the question: Where should this institutional center be placed? Three options exist: (1) the federal government, (2) local schools, or (3) states. This Comment proposes that the states become centers of education reform that work directly with the local schools to propel constructive change. History has taught us that extensive local control was fragmented and unreliable, and the modern failure of increased federal intervention should make us wary of complete federal control. 246 Furthermore, it has become clear that overlapping governance by multiple bodies creates a confusing and unaccountable system. 247 With a cooperative of state and local control, led by strong state institutional centers, this proposal has the potential to create a balanced system in which real reform can occur. Section IV(A) will outline the proposed changes and why those changes will create a better chance for useful reform. Section IV(B) will then address and rebut possible challenges to this proposal, including why the federal government and local schools should not be centers of reform, and how the federal government will be removed from reform. A. The Case for the States In 1973, the Supreme Court of the United States noted that Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even [\*443] philosophical problems." The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, "the [State] legislature's efforts to tackle the problems" should be entitled to respect. 248 Despite this sage advice, the federal government persisted in trying to control education. It is time for the power struggle to come to an end, and for states to take control of the complex endeavor of regulating public education. Section IV(A)(1) will discuss this Comment's proposed changes to state education agencies, and Section IV(A)(2) will analyze why this proposal would succeed. 1. Proposed Changes to State Education Agencies This Section does not suggest another bureaucratic structure, but rather suggests learning-centric bodies that facilitate the education process. Under this proposal, systemic changes to the current system would be necessary. State education agencies would not be mere paper-pushers who dole out funds; they would be involved in the learning and reform process. This would require a massive expansion of state education boards to include enough experts to cover all schools. State education agencies would serve a proactive and reactive regulatory function. Their regulation will be proactive in terms of funding. All funds raised for education should be deposited into the state agency. The state will then adequately and equitably disburse these funds to ensure that poorer districts are not short-changed. 249 The reactive regulatory function of the proposed agency would be charged with monitoring the progress of local schools. As is currently the case, data would be kept on all schools concerning test scores, dropout rates, suspension rates, etc. However, rather than using the data to enforce an arbitrary scheme of winners and losers, the proposed state agency would [\*444] simply be there to ensure upward movement and provide support to those schools that stagnate or decline. This regulation may be achieved, in part, by an overhauled system of professional development. For many, the notion of professional development conjures images of overworked teachers, excited to have an afternoon off from teaching, eating Danishes and discussing new methods of instruction in the school library. 250 The professional development espoused by this proposal differs in that it does not flatly present new strategies for the curious teacher to try on her own, but consists of "mutual education for teachers [that serves as] a lever for reorganizing schools and districts in response to (ever more refined) diagnoses of their shortcomings." 251 This type of professional development consists of master teachers working with other teachers to determine what needs to be fixed and how to fix it. 252 Data would be used to inform change instead of to determine who wins or loses. This proposal maintains that this type of gradual, flexible, and informed change that is a result of ground-level educators and state-level experts working together is the best method by which to improve achievement in all schools. 253 For example, imagine the following: in the ABC Local School District, achievement across schools varies. The lowest performing school has a passing rate of only thirteen percent on the state exam; the highest performing school enjoys a ninety percent rate. Two years after working with master teachers to improve both schools, the thirteen percent school has climbed to fifty percent and the ninety percent school has climbed to ninety-four percent. Under the restrictive programs with arbitrary cut-offs for "success," both schools could be in trouble. The fifty percent school would likely still be considered to be failing because only half of its students passed the state exam. The other school could be in trouble for only gaining four percent on [\*445] the exams. Under this Comment's proposal, neither school would face sanctions. Although it would be ideal to see a school with a thirteen percent proficiency rate move to 100 percent in two years, it is unlikely. Under this proposal, so long as the thirteen percent school was moving upwards, towards a goal of 100 percent, its doors would stay open and it would continue to receive funding, perhaps more funding than other schools. Conversely, the school with the ninety percent proficiency rate would need to progress differently. Obviously, such a school will not be able to jump five percent a year like a lower achieving school could because the school will only be doing fine-tuning. As part of their reactive function, the state education agency would be responsible for tracking this data and making adjustments and interventions where necessary by collaborating with the school and its teachers. Because upward movement will be the focus rather than timelines and thresholds for success, the pressure on local schools can be alleviated and real progress can be made. 2. Why This Structure Will Work Centering education governance in the states will create a balance that local and federal governance has yet to find. States are small enough to respond to local needs, yet large enough to have the resources to respond to those needs. They can respond through a continuation of their current programs, the innovation of new programs, or by looking to other states for guidance. Further, states are small enough to oversee their classrooms, and to partner with the teachers in order to get to the root of their local problems. This Section explores these attributes. Section IV(A)(2)(a) will discuss local solutions for local problems; Section IV(A)(2)(b) will detail the continuation of successful solutions; Section IV(A)(2)(c) will introduce the innovation of new solutions; and Section IV(A)(2)(d) will present a combination of Top and Bottom Down Reform. a. Local Solutions for Local Problems This proposal calls for people to end their reliance on a "Big Idea." 254 As noted earlier, the same reform that fails on a large [\*446] scale may prove successful on a small scale. Under this proposal, all reforms would be imposed on a fairly small scale with close monitoring and tailoring. For example, despite the general finding that charter schools are not the cure-all that many claim them to be, charter schools do have positive effects in some locales. 255 Most notably, in Louisiana, a state whose failures in public education were highlighted nationally after Hurricane Katrina, charter schools actually showed statistically significant growth in both reading and math scores. 256 The growth shown by these charters was significantly more promising than in other states. 257 Thus, Louisiana may want to continue researching this option for reform in some areas. Conversely, Ohio, which showed statistically significant declines in achievement in charter schools, may want to consider other avenues. 258 Regardless of the reform, this proposal allows local solutions. b. Continuation of Successful Solutions As noted earlier, expansive federal oversight can force states to replace successful programs with non-specialized and un-researched federal reforms. This would not happen under the proposed system because the federal government is out of the equation. Rather than scrambling to meet new mandates, states can continue the programs they have and use funds that would be spent on innovating completely new reforms to tweak current systems that are doing well or show promise of future success. Such attention to detail and persistence in implementation is not possible under the federal timeline for reform. c. Innovation of New Solutions As noted earlier, the federal government does not have the resources to enforce and monitor its reforms in a meaningful way. 259 Under federal reform, situations like Jane's useless Smartboard in the hypothetical in the Introduction often arise. The federal government provides money for a certain purpose, like innovation through technology, and the school must find a way to use that technology within the confines of the mandate and can make decisions that are forced and illogical, such as [\*447] purchasing Smartboards. Because implementation is lacking and funding is insufficient, the forced innovations fail, as did the Smartboard innovation, where the boards were purchased but not integrated. It seems more effective to spend resources on developing successful innovations that are needed rather than prescribed. Before the federal reforms tied state education agencies up in red tape, states had begun to innovate their own solutions. 260 Under the most recent federal mandates, this innovation has been both stifled (in the case of NCLB) and rushed (in the case of RTF). The hallmarks of federal reform are limited funding and implementation by the carrot and stick approach. 261 Thus, under the federal system there must be winners and losers, those who pass and those who fail. The lines that divide these categories are completely arbitrary, and in the case of NCLB, have led schools to take drastic measures to meet arbitrary goals. 262 Under the proposed system, arbitrary federal goals would be removed, thus freeing states to innovate at a calm, thoughtful pace. For years, the federal government has assumed that states have the capacity to innovate, as evidenced by their skeletal reforms. This proposal allows states the chance to do exactly that.

### Federal Follow On

#### Counterplan fosters sharing and innovation to move state policies along – it’s superior to top-down action – and spurs federal follow on to compensate for straggling states

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

Deregulation, a key feature of a democratic experimentalism regime, comes with risks. The new federal education law, ESSA, eliminates requirements that states take specific actions on behalf of children in low-performing schools. This opens up the possibility that some or all states will adopt a laissez-faire approach toward local schools and districts. Given that low-performing schools are most likely to serve low-income and disadvantaged students, deregulation puts those students at risk. Compared to a rule-based system, which requires states do something to avoid charges of non-compliance and loss of federal subsidies, deregulation relies heavily on state-and local-level motivation and capacity. Though the new federal policy is risky in these ways, democratic experimentalism neither causes nor exacerbates these hazards. Experimentalism ensures that states share their experiences and measure results.

Critics of democratic experimentalism contend that the certainty of mandates protects policies that might be vulnerable to competing political interests. David Super, for example, argues that under a decentralized anti-poverty policy the nation failed to reach consensus on goals, left under-resourced government agencies in control of enforcement, and created lengthy negotiations and debates on policy that consumed the resources of anti-poverty advocates. n123 While we agree with Super's argument, it is not clear that a mandate-based regime would have been more effective without a very different political environment and a great deal more money. Nor is it likely that a mandate-based regime would have allowed the diversity of practice that could lead to innovation and long-term improvement. Top-down rights enforcement can reallocate money and access, but it cannot mandate the discovery of a solution to a heretofore unsolved problem.

Local education leaders who lack capacity or motivation will also not make progress. States will differ in whether they have the leadership, intellectual capacity, and political support necessary to move intransigent localities. Such realities of a decentralized system are not caused by democratic experimentalism, which creates some transparency and pressure for improvement. Low-performing localities that refuse to experiment will be identifiable through the outcome data that states are still required to gather. But identifying such jurisdictions and overcoming high-inertia organizations takes time, and in the meantime, improvements in schooling for low-income and disadvantaged students might not happen.

[\*325] It is safe to say that not all states will seize the opportunity that ESSA provides. Some will charge ahead, learning, adapting, and improving. The aggregation and sharing of knowledge via democratic experimentalism may accelerate their progress. But, as has been the case in every reform movement before, other states will not move. Just as states varied tremendously in their response to the more prescriptive requirements of NCLB, some will undoubtedly change as little as they can under ESSA.

Proponents of democratic experimentalism do not expect policy to remain stagnant, or for higher levels of government never to play any role. As Sabel explains, a democratic experimentalism regime requires an "ongoing revision of norms at various levels in the light of [what is learned from the continuous pooling of experiences]." n124 With this expectation, state and national leaders may revise policy to reflect new knowledge as they draft laws, construct programs, and allocate money. One possible result of a period of experimentalism would be federal incentives to move states and districts that have been stagnant to adopt particular programs or policies that have proven to be successful elsewhere.

### They Say: “Conditionality Bad”

#### Conditionality is good —

#### ( ) Most Logical — the judge should never be forced to choose between a bad plan and a bad counterplan when the status quo is a logical third option. Logic is an objective and fair standard that teaches valuable decision-making skills.

#### ( ) Argument Innovation — because debaters are risk-averse, they won’t introduce new positions unless they retain a reliable fallback option. Innovation keeps the topic interesting and encourages research and preparation.

#### ( ) Gear-Switching — being able to change gears and defend different positions over the course of a debate teaches valuable negotiation skills and improves critical thinking. Deciding what to go for is a useful skill.

#### ( ) No Infinite Regression — each additional position has diminishing marginal utility. We’ve only read one counterplan. This is reciprocal: they get the plan and permutation and we get the counterplan and status quo.

#### ( ) Strongly Err Neg — the judge should be a referee, not a norm-setter. Unless we made the debate totally unproductive, don’t vote on conditionality — doing so gives too much incentive for the aff to abandon substantive issues in pursuit of an easy theory ballot.

## 2NC/1NR — Title I Extensions

### Solves Federalism

#### Counterplan prevents future federal intrusions

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

It is also worth remembering that the new, flexible regime created by ESSA is not permanent. Key Title I constituencies--civil rights groups and advocates for poor and minority children--suspect that states will neglect disadvantaged children unless they are under strong federal pressure. These groups will not go away. They will be on alert for any evidence that states have used the new flexibility under ESSA to reallocate federal funds away from poverty-area schools, or have allowed struggling schools and districts to decline further. If states' actions confirm these advocates' suspicions, the coalition that steadily built up the regulatory burden associated with federal aid to K-12 schools could become dominant again. Whether democratic experimentalism catches hold or becomes a footnote in the history of state and federal relations will depend on whether states seize the new opportunities they now have.

### They Say: “Uniformity Key/Interstate Disparities”

#### Uniformity isn’t key to solvency or even desirable

McGOVERN ’11 (Shannon K.; JD – New York University School of Law, “A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy,” 86 N.Y.U.L. Rev. 1519, November, l/n)ww

Moreover, to be effective, education reforms do not necessarily require nationwide uniformity. The drinking limitation in South Dakota v. Dole was predicated upon findings that variable state drinking ages encouraged young people to drive "to border States where the drinking age [was] lower." n118 State education policies may have some similar "spillover effects." n119 To cite one example, a single state may impose its educational content preferences upon its sister states because states are served by a nationwide textbook market. n120 But, for the most part, local and regional conditions present unique challenges in the implementation of policy, n121 meaning uniformity is not always possible or even desirable. Nor is education policy analogous to industry regulation, which, unless nationalized, presents collective action problems. If state participation in the Clean Air Act, for example, were not encouraged through conditions and sanctions, n122 economic incentives might exist for states to under-or deregulate. The failure of NCLB, in contrast, is not a manifestation of classic collective action theory but rather the product of a shortsighted statutory mechanism for federal oversight.

While there may be no legal difference between tying federal funding to the implementation of a statute requiring seatbelts and tying it to the passage of a statute authorizing charter schools, the [\*1541] cooption of state policy making in the latter example is less justifiable. Education reforms generally do not require uniform application or collective action and may be difficult to evaluate empirically. In the absence of both a need for uniform collective action and the ability to predict results, the federal government should not impose pressure on a state legislature to approve a particular statutory enactment.

### They Say: “Progressive Funding”

#### Federal tax code isn’t very progressive

GREENSTONE and LOONEY ’12 (Michael; Milton Friedman Professor of Economics – University of Chicago, and Adam; senior fellow in Economic Studies at Brookings, “Just How Progressive Is the U.S. Tax Code?” 4/13, https://www.brookings.edu/blog/up-front/2012/04/13/just-how-progressive-is-the-u-s-tax-code/)ww

As tax time approaches, many are debating whether high-income taxpayers should pay more or whether their tax rates are already too high. This debate is particularly relevant today because of the economic struggles many Americans are experiencing, and because of the longer-term trend of rising inequality. A host of economic forces, like changes in technology, increases in international competition, and other changes in the labor market, such as the decline of unions and a falling real minimum wage, have reduced job opportunities and wages for some American workers, but expanded opportunities and incomes for others. In fact, the earnings and market incomes of many middle-class and lower-income households have stagnated and even declined over time, while incomes at the top of the income distribution have risen dramatically. The United States has traditionally boasted a progressive tax code—one in which the tax rate increases as income increases. A key question for policymakers, then, is how the tax system should respond to the current challenges—how progressive should the tax code be?

The purpose of any tax system is to raise revenues to fund government programs. But the challenge to designing a good tax system is raising revenues in a way that minimizes economic harm. That means being concerned not just with economic incentives in the tax code, but also the ability to pay of hard-hit middle- and lower-income households, whose incomes and employment prospects have been hurt by economic forces beyond their control. By basing tax rates on income and one’s ability to pay, a progressive tax system prevents these households from suffering the double burden of hard economic times and higher taxes.

In this post we examine the progressivity of the U.S. tax code and highlight two facts: the current U.S. tax system is less progressive than the tax systems of other industrialized countries, and considerably less progressive today than it was just a few decades ago.

The figure below shows how much influence taxes and transfers have in reducing inequality (measured using a common metric called the “Gini coefficient”) in various countries around the world. As indicated in the chart, the U.S. tax and transfer system does less to counteract pre-tax income inequality than the tax systems of most of our peer countries, meaning that our system is actually less progressive.

In addition to being less progressive relative to other countries, the U.S. tax system has also become less progressive over time. Over the last fifty years, tax rates for the wealthiest Americans have declined by 40 percent, while tax rates for average Americans have remained roughly constant. This is illustrated in the figure below.

This decline in tax rates for the wealthy has coincided with an increase in income inequality, where most of the wage gains have been concentrated among a relatively small portion of the American people. For example, since 1979, earnings for households in the top 1 percent of the income distribution have risen by over 250 percent. At the same time, many households at the middle and bottom of the income distribution have experienced stagnating incomes or even declines in earnings (figure below, blue bars). This means that the very people who have received the biggest income gains in the past three decades have also seen the largest tax cuts (figure below, red bars).

These estimates may come as a surprise to observers focused on the share of federal taxes paid by high-income individuals, rather than the tax rates that those individuals face. Without a doubt, the share of taxes paid by high-income individuals has increased. But the reason why the share of taxes paid by the top 10 percent has increased is because their share of income has increased.

In 1979, the top 1 percent of Americans earned 9.3 percent of all income in the United States and paid 15.4 percent of all federal taxes. While the share of income earned by the top 1 percent had more than doubled by 2007—to 19.4 percent—the share of federal tax liability paid by that group only increased by about 80 percent, to 28.1 percent. The share of taxes increased less for this group because high-income tax rates fell by more than the tax rates for everyone else—reductions that made the system less progressive.

### They Say: “Capacity”

#### Lack of Capacity undermines the plan too

McGOVERN ’11 (Shannon K.; JD – New York University School of Law, “A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy,” 86 N.Y.U.L. Rev. 1519, November, l/n)ww

It also means that federal policy is constrained by both the DOE's capacity and each state's capacity. In implementing NCLB, the Bush Administration was forced to make a number of concessions, including individual waivers from requirements, blanket revisions, and reversals of policy in the face of state incapacity and its own inability to enforce the law as written. n157 Following the announcement of President Obama's proposal for NCLB reauthorization, which includes a shift from absolute to growth-based measurement of student achievement, n158 experts predicted it would take several years for states to develop the requisite capacity to monitor students' academic growth. n159 The limited capacity of state education departments justifies a strong federal role in education, but the interdependence of state and federal bureaucracies in implementing federal policy simultaneously serves to check sudden expansions of federal power. n160 The federal government simply cannot do it alone.

### They Say: “Data Collection”

#### State data collection is improving

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

The federal government's influence over state and local policy is receding. ESSA now offers states more latitude in how states structure and implement accountability systems and pursue educational improvement. NCLB faced harsh criticism for placing so much emphasis on standardized testing, encouraging teaching-to-the-test (sometimes leading to score tampering), and threatening consequences (some punitive) without helping schools and districts improve. n68 With powerful interests levying these critiques, pressure on states to shift course as they gain more authority is likely to be strong. Will states act on their own to sustain activities they adopted during the NCLB era, particularly monitoring performance and intervening to transform the opportunities of children who are not learning in their schools, or will they revert to a pre-NCLB, input-oriented approach to oversight?

Turning back the clock seems unlikely. Federal pressure has permanently remodeled state politics and capabilities, and has brought a new brand of activist individuals into the leadership of state education agencies. The data systems and analytical capacities states have developed will not go away. To be sure, a particular governor or state schools chief might choose to neglect those capacities and functions for a while, but independent analysts [\*313] and advocacy groups that appeared during the NCLB era probably will not. We expect analysts and interest groups will keep officials under pressure to acknowledge achievement gaps and the existence of consistently unproductive schools. Though some officials might be able to ignore these pressures, it is likely that at least some governors and chief state school officers will continue to use school and district performance information and take actions to improve options for children being left behind.

The prediction that tools and postures created in the NCLB era will continue, even after the federal government reduces its role, is consistent with the theory of policy feedback. n69 Policy feedback theory argues that policies leave behind remnants--beneficiaries, governmental capacities and routines, and advocacy organizations--that continue to have influence even after policies change or are abandoned. n70

The accountability provisions of NCLB have left many such remnants. These include expanded data infrastructure and bureaucratic units with the capacity to provide growth measures for students. For example, in 2014, the Data Quality Campaign (DQC), a nonprofit that tracks the data capacity of states, reported that forty-six states had statewide data repositories including student-level data, a feature required for analyses of the growth of students over time. n71 The DQC also reported that forty-five states produced and made available on public websites annual reports showing school and district performance trends. n72

#### State data collection is superior to the DOE

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

Alternatives to these USDOE analysis and dissemination networks might include interstate compacts. To some extent, such groups already exist. The Council of Chief State School Officers (CCSSO) n115 and the Education Commission of the States, n116 for example, are long-standing organizations that provide research syntheses on a variety of state policy concerns. More recently, a consortium of state agency chiefs formed the [\*323] Innovation Lab Network n117 as a subgroup within CCSSO to pursue a collective effort to design new accountability and assessment methods, among other projects. Innovation Lab Network members, including New Hampshire and Kentucky, have stepped forward to pilot new methods in their own states. n118 methods, among other projects. Innovation Lab Network members, including New Hampshire and Kentucky, have stepped forward to pilot new methods in their own states. n118

Of course, the analytic capacity to support democratic experimentalism can come from the federal government, interstate consortia, or both. Indeed, both approaches offer complementary advantages and disadvantages. The USDOE is highly resourced and has historically allocated significant resources to its research arm, IES. For fiscal year 2016, the federal government appropriated $ 68 billion of discretionary funding to the USDOE with almost $ 620 million to IES. n119 Department leadership and management, however, are often distant from the day-to-day issues in public school systems, making it difficult for them to judge the most pressing priorities facing states, districts, and schools. n120 Likewise, USDOE has a history of operating prescriptive grant programs and enforcement processes, and has been staffed largely with those purposes in mind, rather than supporting democratic experimentalism. n121 Still, if the enactment of ESSA moves the USDOE away from centralized program administration, it could play an important role in promoting and sustaining democratic experimentalism.

A cross-state consortium might more credibly claim a commitment to evidence-based improvement. Unlike the USDOE, current state leaders are often active participants in these networks, providing the consortium with a direct connection to those who are sorting through the challenges of educational policy in their local context. CCSSO, for example, regularly convenes state leaders to engage in dialogue on salient policy issues from across the country. The Innovation Lab Network provides a forum for self-selected states committed to piloting innovative policy solutions to share and learn from others' experiences. n122

At the same time, these organizations often do not have ready access to government funds and would either have to gain stable foundation support or depend on states' contributions. These sources of support could prove too [\*324] small and unstable to be the sole source of analytic capacity for the nation. They could, however, provide early proving grounds for small-scale experiments and a forum for state leaders to share new knowledge and innovation.

## 2NC/1NR — Hazelwood Extensions

### They Say: “State Court Rollback”

#### Durable fiat prevents rollback – word “should” in the resolution means counterplan will happen in perpetuity – reciprocal with aff fiat

#### State courts will protect free speech legislation – California proves

**Beard, ‘8** - Principal Attorney with the Pacific Legal Foundation in Sacramento, California (Paul J., “California Court Broadens Student Speech Protections in Public Schools,” Engage, v9, iss1, Feb. 2008, p64-67, 20080313\_Smith.Case.Engage.9.1.pdf)//CT

For decades California has been a leader in protecting the free speech rights of students in public high schools. Last year, a state court issued a decision expanding California law’s already broad protection of even the most offensive and politically incorrect student speech. In Smith v. Novato Unified School District, the California Court of Appeal decided that two politically charged student articles in a school paper that angered students and parents (one on immigration and the other on “reverse racism”) were not unprotected incitement, as school offi cials argued, but rather protected speech that could not be restrained or punished.1 In doing so, the court adopted a narrow interpretation of “incitement” under California law that confers on student speech perhaps the greatest protection of any state in the country—and much greater protection than the First Amendment provides. Besides setting an important precedent for California students, Smith exemplifies federalism at work. While California law has become increasingly protective of student speech rights, the U.S. Supreme Court’s First Amendment jurisprudence has become decreasingly so. This article explores this and other issues raised in Smith.

#### Their evidence assumes states are restricting free speech – not protecting it, which means this evidence doesn’t apply to States CP that fiats protecting free speech

# States CP Answers

## Aff — Title I Affirmative

### Permutation

#### Permute: do both. The permutation solves better because schools get additional funding, and it shields the link to the federalism DA because the states would be perceived as leading the effort.

### Solvency Deficit – Progressive Funding

#### Federal funding is superior – it relies on a progressive tax system

ROBINSON ’12 (Kimberly Jenkins; Professor of Law – University of Richmond, “The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism,” 79 U. Chi. L. Rev. 427, Winter, l/n)ww

A prominent federal role also will be needed to remedy the current disparities in educational opportunity because effective intervention will require a substantial redistribution of educational opportunity that decouples the link between low-income, typically minority families and substandard educational opportunities. Several education scholars have noted that the federal government would most effectively accomplish the redistribution of educational opportunity that equal educational opportunity would require. For [\*457] example, one education scholar has explained that the federal government is the most appropriate level of government to undertake redistribution

for two reasons: first, the progressivity of the federal tax system, as against the regressivity of the sales and property taxes on which states and localities heavily rely; and, second, the ability of the well-off and of business interests to thwart redistribution more persuasively by threatening to leave a state than to depart the country. n88

Another has noted that the federal government may be the only level of government that would engage in the redistribution that educational equity requires. n89 Similarly, Ryan acknowledged in an earlier work that research shows that redistribution is a task that the federal government performs far better than the states. n90 Thus, charging the federal government with this task enlists the involvement of the level of government that is the most efficient and effective at accomplishing it. n91

#### Regressive state taxation fuels inequality

KADES ’16 (Eric; Thomas Jefferson Professor of Law at William & Mary, “Giving Credit Where Credit is Due: Reducing Inequality with a Progressive State Tax Credit,” Louisiana Law Review, v. 77 n. 2, Winter)ww

Anyone not living in a cave knows that since about 1980, income inequality in America has exploded. Top incomes have soared while middle and lower class paychecks have stagnated.1 Just as income inequality has exploded, so too has the scholarly literature surrounding inequality.2 Commentators have proposed a number of stock policy measures to deal with inequality, from increasing the minimum wage to reinvigorating unions to imposing a global tax on capital.3 This Article, by contrast, takes a new tack. First, it identifies a key driver of today’s income inequality entirely within the control of governments: unfair, regressive state taxation. Second, it proposes a novel means of ameliorating that inequality through the use of a federal income tax credit.

Simply put, the tax regimes of all 50 states4 are unfair. From the perspective of fairness and equity, tax systems come in three flavors. If the percent of income paid in taxes—the “average” or “effective” tax rate— increases with income, the tax is progressive; if this percent is equal across all incomes, it is a “flat” tax; and if percent tax burdens fall as income rises, the tax is regressive. The federal income tax is and always has been progressive—the percent of total income paid in federal taxes rises with income.5

Although the flat tax rate structure has advocates,6 it is hard to find friends of regressive taxation. Yet, despite the almost complete absence of express support for regressive taxation, it turns out that every single state in the United States taxes regressively.7 This regression occurs primarily because widely used, highly regressive sales taxes and potentially regressive property taxes outweigh slightly progressive state income taxes—for those states that tax income. States that lack income taxes and rely almost exclusively on sales and property taxes have the most regressive overall tax systems.8 One of the most egregious examples is the state of Washington, where the lowest-income households must devote 16.8% of their income to state taxes while those at the top pay less than 2.8%.9 This is an astounding level of regressivity, and many states have only modestly less regressive tax systems.10

Regressive state tax schemes gratuitously contribute to inequality. Some of the market forces driving the divergence between the top 1% and everyone else are so elemental that governments can do little to counteract them.11 Taxation, however, is an animal entirely of government creation and entirely under government control. It is disturbing and perverse that state tax codes are “piling on” to inequality instead of offsetting it, as the federal income tax does.

### Solvency Deficit – Capacity

#### States lack the capacity to act

McGOVERN ’11 (Shannon K.; JD – New York University School of Law, “A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy,” 86 N.Y.U.L. Rev. 1519, November, l/n)ww

The second principal justification for federal involvement is, unlike the first, structural and process oriented. In the education field, [\*1547] state bureaucratic capacity is, like its federal counterpart, fairly new. On the eve of the enactment of NCLB's antecedent, the ESEA, the Johnson Administration was concerned that state education departments were too weak to implement its provisions. n154 While state departments have been charged with implementation of an increasing number of federal education statutes in the intervening forty years, they have built up their compliance capacity at the expense of true policy expertise. n155 Limited state funds, the "sheer magnitude of the reforms states have initiated since the early 1980s," and a poor research base from which to assess policy have further limited their capacity. n156 This lack of capacity means that states do not, on average, possess sufficient resources and expertise to implement education reform unilaterally.

#### State action is susceptible to various problems

KURZWEIL ’15 (Martin A.; Lecturer in Law – Columbia Law School and Director – Educational Transformation Program, “Disciplined Devolution and the New Education Federalism,” June, 103 Calif. L. Rev. 565, l/n)ww

The proliferation of these devolutionary approaches to progressive policy making also bears risks, however. Most notably, devolving policy-making authority to states without sufficient accountability for their adherence to federal goals may result in inadequate implementation of the federal policy. That risk is particularly salient when the federal government seeks to provide a benefit or protect vulnerable populations that lack political power in the states. For instance, resistance by Republican-led states to the ACA's Medicaid expansion came at the expense of providing medical coverage to uninsured individuals. n87 Further, without strong federal involvement, states may end up regulating in a way that is in their narrow self-interest but contrary to the broader national interest. For example, devolution raises the classic concern of a "race to the bottom" in the provision of social services or regulation of corporate or environmental practices. n88

Moreover, although the aforementioned examples of creative policy making serve as an important counterpoint, many state and local government agencies are themselves organized as hidebound bureaucracies. n89 Transferring policy-making responsibility from the federal bureaucracy to a state or local bureaucracy may result in the same rule-based, compliance-focused governance. Although disaggregating policy making may result in more differentiation by jurisdiction, the same problems of uniformity, inflexibility, and street-level arbitrariness may persist within each jurisdiction. Relatedly, national political disputes are increasingly replicated at the state or even local levels, further rendering the devolutionary strategy simply a microcosm of the traditional federal structure's dysfunction. n90

Furthermore, state and local officials may lack the resources, perspective, or expertise to address particularly challenging problems. Resource constraints may result from limited appropriations, an overly broad or burdensome portfolio of responsibilities, or both. Moreover, state and local officials are likely to be focused on the design and effects of policy in their jurisdictions, but what makes sense locally may not make sense nationally, because of either [\*582] externalities or aggregation problems. In addition to concerns about conflicting local and national incentives, state and local officials may have little awareness of successes or failures outside their jurisdiction and therefore be unable to learn from those experiences. And while policy expertise can be built through experience, the distribution of talent is such that there are undoubtedly state and local offices struggling with policy problems for which they lack expertise.

### Solvency Deficit – Data Collection

#### States lack the capacity and expertise to solve – Federal research and technical assistance is key to achieving educational equality

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

For the federal government to lead a comprehensive national effort to ensure equal access to an excellent education, the federal government must provide generous support for the rigorous, objective research and effective technical assistance state and local governments will need to reach this goal. Substantial variations exist in the educational, economic, and administrative capabilities of states. n203 One of the principal hindrances to NCLB's success was insufficient capacity at the state and local level to implement the required changes. n204 Comprehensive reforms to ensure equal access to an excellent education will demand even more from states than NCLB. Therefore, federally supported research and technical assistance must help state and local governments develop the capacity to implement effective reforms. n205

Fortunately, Congress already has begun to recognize the need for rigorous educational research through its passage of the Education Sciences Reform Act (ESRA). n206 Congress passed ESRA in 2002 to provide research that would assist the states in complying with NCLB. n207 ESRA created the Institute of Education Sciences (IES) and authorized IES to engage only in research based on science. n208 This congressional requirement represents a substantial shift in how the federal government is [\*995] conducting and funding education research. n209 This change has been noted as a promising development in congressional support for education research and some believe that IES has helped emphasize evidence-based approaches for education research that could focus attention on reforms that could be replicated. n210 The passage of ESRA indicates that Congress recognizes the need for federal support for high-quality education research to enable the United States to reach its essential educational goals.

Rigorous, objective research that supports a national effort to ensure equal access to an excellent education should build on this success while also establishing an agenda that identifies the critical research states need as they enact reforms to achieve this goal. This research would examine the most cost-effective and efficient state funding methods that ensure equal access to an excellent education. n211 It also could propose and test funding models that states have not yet adopted. In addition, federal research could assess school governance and funding models from other countries that provide a more equitable distribution of educational resources.

Additionally, federally supported research could help identify and disseminate research regarding the essential characteristics of high-quality educational offerings. For example, scientifically based research on such topics as the essential characteristics of a high-quality prekindergarten program should serve as the foundation for identifying how to close opportunity gaps in prekindergarten education. n212 Harvard scholar Hirokazu Yoshikawa has found that these characteristics include involving children in planning activities and creating low student-teacher ratios. n213 In [\*996] addition, the federal government should ensure that existing rigorous research on this topic is disseminated to states so that states can avoid costly duplication of research as they develop new programs.

A federal research agenda also should identify the primary impediments to ensuring equal access to an excellent education. For instance, research indicates that challenging work environments in urban schools discourage highly qualified teachers from teaching in such schools. n214 Once common impediments are identified, research should examine the costs and benefits of potential reforms to address these impediments. The federal government could assist states and localities as they undertake and support research that responds to regional, state, and local conditions that present unique challenges. n215

Establishing a federal research agenda to ensure equal access to an excellent education would capitalize on the federal government's substantial comparative advantage over states and localities in conducting and supporting research. n216 It would eliminate the inefficiencies caused by each state conducting its own research. This research also would reduce the cost of state efforts to achieve this goal by offering research that supplies the possible reforms for achieving this goal. n217 Once this research is disseminated, it would provide state and local governments sufficient models to consider as they develop state-and district-specific plans of action.

In addition to research assistance, the federal government should offer technical assistance that supports state efforts to ensure equal access to an excellent education. This component would strengthen the existing federal-state relationship because the federal government offers technical assistance on a wide variety of issues, including assistance on how to achieve the core goals of RTTT, n218 early childhood education, n219 and [\*997] special education. n220 To achieve this goal, the states may need federal technical assistance on the most effective and efficient funding mechanisms and other reforms and the common barriers to successful reforms. In addition, state and local governments may need federal technical assistance regarding how to develop data collection systems that enable states and localities to document the scope of opportunity gaps and the effectiveness of efforts to reduce those gaps. Although NCLB provided a strong impetus for states to develop new data systems in order to comply with the law's standards for teacher quality, this issue received less attention from states once it became clear that those requirements would not consistently be enforced. n221 Federal technical assistance should help preclude any unnecessary diversion of resources and duplication of effort that would occur if each state had to develop such technical expertise on its own. n222

Additional federal technical assistance is essential to supplement the limited capacity of some state education agencies to implement comprehensive reform. n223 As education scholar Paul Manna insightfully noted in his comprehensive analysis of NCLB implementation:

Despite being charged with implementing education policy in a state, these agencies have tended to possess little expertise in actually working on substantively important education initiatives, such as the development of standards, curriculum, and tests. Instead, their main purpose has been to distribute state and federal money to local communities and then monitor to ensure that those dollars have been spent appropriately. n224

Although the capacity and expertise of state education agencies has grown as they have implemented NCLB, these agencies, along with state legislatures, may still lack the capacity and expertise to implement a comprehensive reform agenda to ensure equal access to an excellent education. The federal government could address this capacity gap by providing essential expertise on effective reforms as its understanding of these issues deepens through the implementation of the research agenda.

#### Federal data collection is necessary to solve for experimentation

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

To make real progress in the common search for instructional improvements and greater equity, states need to adopt a collaborative, evidence-based project like democratic experimentalism, an idea pioneered by Columbia University law professor Charles Sabel and used by the European Community. n98 As explained by Sabel and colleagues, democratic experimentalism is appropriate for situations in which independent entities like U.S. states can collaborate and benefit from one another's experience without giving up their freedom of action to some higher level of government. Proponents do not claim that it is always more efficient than centralized decision-making, but rather that it is a way to make progress when, as is the case with state governments, the entities involved will not or cannot give up their independence.

Under democratic experimentalism, independent communities (e.g., states) engage in four related activities: (a) they work together to test out alternative approaches to reach a goal that none has yet attained, (b) they rigorously assess the results and evidence about conditions leading to success and failure, (c) they create a mechanism by which these results are fully [\*320] shared, and (d) they commit to using past results as the starting point for further experimentation. n99

Charles Sabel and his colleague Michael Dorf have shown how democratic experimentalism has been used in the European Community and suggest how it can work in the United States. As they argue, it is ideal for a federal system in which all units are struggling with a problem that none has solved. n100 As Sabel writes:

The more uncertain the world--the harder it is to know what it can become--the riskier and potentially more costly it is to rely on familiar strategies (and associated conceptions of self-interest) resting on complex assumptions about the way the world must be; the more prudent it becomes to the contrary to entertain the possibility of elaborating next steps with others similarly at sea, on condition that they share what they learn and bear a share of the costs of exploration. n101

In the United States, this approach has been used in environmental resource management, n102 environmental regulation, treatment of substance abusers, provision of child-protective and other services to at-risk families, and reform of sentencing and police practices. n103 Sabel also cites the 1989 devolution of governance of Chicago city schools to local site councils as an example of democratic experimentalism. In the European Union, democratic experimentalism has been used in refinement of social service delivery and, in Britain, a broad devolution of governing power from Whitehall to Scotland. n104

The established United States tradition of cooperative federalism, with its independent action and lack of disciplined analysis, "falls short of creating an experimentalist regime. What is missing is the continuous pooling, at the national level, of local experience and ongoing revision of norms [e.g., of what can be accomplished] at various levels in the light of it." n105

Democratic experimentalism goes beyond mutual imitation and sharing of fads in two ways. n106 First, entities (e.g., states) have to create internal conditions under which diverse experimental initiatives can be fully implemented [\*321] and tested. In K-12 education, states need to make it possible for localities, and even individual schools, to experiment with factors that in the past have been standardized by law and regulation. In many respects, this approach is a departure from the inputs-driven policy of the first part of the twentieth century, but potentially consistent with the more recent performance orientation sparked in part by NCLB.

Second, states must commit to serious analysis of results and sharing them through an objective mechanism that no single set of states or policy advocates controls. Professors Dorf and Sabel suggest that federal entities like the European Union or the United States national government can perform this function. n107 Again, many states are currently well positioned to participate in this function, given the data and analytic capacity they have developed through NCLB and RTTT.

#### Federal data collection is effective

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

Despite unending controversy over its role and warrant for existence, USDOE seems equipped to manage and fund the aggregation and use of data from state and local experiments. The USDOE's Institute for Educational Sciences (IES), for example, is a comprehensive center that provides funding for research on a wide range of educational priorities. IES also funds Regional Education Labs that provide research and analysis capacity to multi-state geographic regions. These labs operate with a mandate to evaluate state and district policies and to aggregate and disseminate this research throughout the region. In addition, the USDOE has funded a system of Comprehensive Centers, including five special content centers and fifteen geographically-organized regional centers. The USDOE charges Content Centers with synthesizing the latest research and policy thinking in their respective domains, including Capacity and Productivity, College and Career Readiness, Early Learning, Teachers and Leaders, Innovations in Learning, School Turnaround, and Standards and Assessments. These Content Centers then funnel what they learn to states via the Regional Centers, which work directly with state agency staff to design and implement educational policy. n114

### Solvency Deficit – Interstate Disparities

#### Interstate disparities prevent solvency

ROBINSON ’12 (Kimberly Jenkins; Professor of Law – University of Richmond, “The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism,” 79 U. Chi. L. Rev. 427, Winter, l/n)ww

States lack the capacity and resources to remedy the full range of inequalities in educational opportunities in this country. Ryan's book focuses on intrastate disparities and the reforms that have attempted to address such disparities. However, as noted in Part II.B, the intrastate disparities that Ryan examines in his book are not the greatest source of educational inequality in the United States. Instead, education law scholar Goodwin Liu has documented that "the most significant component of educational inequality across the nation is not inequality within states but inequality between states" and that "the burden of such disparities tends to fall most heavily on disadvantaged children with the greatest educational need." n86 His research also shows that states differ substantially in their capacity to fund education, and thus significant federal intervention is needed to remedy interstate educational inequality. n87 Given the prevalence of intrastate and interstate inequality and the disparate capacities of states to fund education, the capacity and resources of the federal government must be enlisted to remedy the full scope and depth of inequality in educational opportunity in this nation.

#### Counterplan doesn’t solve for interstate disparities

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

Throughout this nation's history - even acknowledging state reforms of education and school finance - the states have not taken sustained and comprehensive action to ensure that all students receive equal access to an excellent education. n115 Redistributive goals and equity concerns are simply not consistent state priorities for education. n116 Indeed, the 2013 report from the Equity and Excellence Commission found that: Any honest assessment must acknowledge that our efforts to date to confront the vast gaps in educational outcomes separating different groups of young Americans have yet to include a serious and sustained commitment to ending the appalling inequities - in school funding, in early education, in teacher quality, in resources for teachers and students and in governance - that contribute so mightily to these gaps. n117 [\*979] Furthermore, intrastate reforms cannot address significant and harmful interstate disparities in funding. n118

### They Say: “Sufficiency Framing”

#### Disregard sufficiency framing – adequacy can’t be determined independent of equality – resolving disparities in education is necessary to solve

LIU ’06 (Goodwin; Assistant Professor of Law – University of California-Berkeley, “Education, Equality, and National Citizenship,” November, 116 Yale L.J. 330, l/n)ww

In its broad outlines, the content of educational adequacy follows directly from citizenship's several facets. Citizenship requires a threshold level of knowledge and competence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like freedom of speech. It also requires sufficient education for productive work and the self-reliance, respect, and autonomy that work entails. [\*346] Beyond these thresholds, the concept of citizenship admits variation and inequality in educational opportunity. Not all citizens of a society will enjoy the same advantages as the relatively well-off. As a practical reality, some will have greater influence over public decision-making than others, some will have greater access to economic opportunity than others, and the field will be tilted in favor of those with better education. But these inequalities need not threaten equal dignity and full membership so long as they occur above a sufficiently high threshold. n60

Importantly, educational adequacy, as I understand it here, is a relational concept whose content is contingent upon social norms. The essential substance of citizenship cannot be specified by a fixed or objective minimum that is independent of the range of human welfare and capabilities existing in a particular society. Because citizenship marks full participation and belonging "according to the standards prevailing in the society," n61 the level of educational opportunity, civic competence, and material well-being necessary for equal dignity and mutual respect depends on what other members of the society have. Children in Mississippi, for example, have far better educational opportunities than children in Mozambique. n62 But the social meaning of a particular level of education - what it means to an individual's ability to enjoy full membership in her society - must take into account the society's circumstances and norms. Thus, adequacy is not distinct from, but rather informed by, the conditions of inequality in a given social context. n63 This relationship between adequacy and equality is what I have in mind when I say that the Fourteenth Amendment guarantees educational adequacy for equal citizenship.

[\*347] In defining adequacy this way, I reject the sharp dichotomy between equality and adequacy that is often drawn in the education law and policy literature. The conventional view is that "equality is necessarily comparative or relational while sufficiency is not." n64 Adequacy is thought to require only "a static, non-relational, non-comparative, definition of "proficiency'" in educational standards. n65 So conceived, adequacy is criticized for setting too low a standard for distributive justice and for failing to ensure fairness in competitive fora, such as university admissions and employment, that reward educational advantage. n66 But this criticism rests on a conception of adequacy that is artificially thin and unduly divorced from notions of equality. For in defining educational adequacy, it is impossible to avoid the question "adequate for what?" The answer necessarily vests adequacy with a relational quality.

If equal citizenship is the object, then several implications follow. First, the floor of educational opportunity must be sufficiently high to ensure not bare subsistence, but the achievement of the full range of human capabilities that constitute the societal norm. Second, the notion of educational adequacy must be dynamic, evolving as societal norms evolve. And third, adequacy must entail a limit to inequality, a point at which the maldistribution of educational opportunity puts too much distance between the bottom and the rest of society. Adequacy is thus a function of the range and contours of the overall distribution. It is a principle of bounded inequality. n67

[\*348] Thus, in calling attention to educational disparities between states, my purpose is not to suggest a rigid requirement of national leveling, but instead to situate the concept of educational adequacy within a framework of national norms. The fact of interstate variation in educational opportunity does not itself offend the notion of equal citizenship. But the sheer magnitude of current disparities is at least strong evidence that an average education in many states does not adequately prepare students for equal citizenship in the national community.

#### The magnitude of the problem demands a federal response

ROBINSON ’12 (Kimberly Jenkins; Professor of Law – University of Richmond, “The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism,” 79 U. Chi. L. Rev. 427, Winter, l/n)ww

The federal government will also need to shoulder a significant burden to accomplish equal educational opportunity because the problem of inequality is a deeply entrenched and vast problem that a state or district would have difficulty tackling alone. The disparities in educational opportunity exist at the intersection of numerous inequalities that reinforce each other. n82 Inequality is extremely difficult to eradicate because different types of inequality combine to create "the additive nature of inequity - that poor kids live in poor neighborhoods with poor schools that produce poor academic [\*456] outcomes that lead to poor job prospects." n83 Indeed, these inequalities have been apparent since the early twentieth century and have remained in place ever since. n84 The research of critical race theorist and comparative law scholar Daria Roithmayr explains how inequalities reinforce each other and then become "locked in" and thus extremely difficult to remedy. n85

### They Say: “Accountability”

#### Plan doesn’t bypass accountability – it adds an additional layer

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

Federal reform consistent with my theory for disrupting education federalism might diminish some state and local accountability for education. Once the federal government takes responsibility as the final guarantor of equal access to an excellent education and thereafter monitors state progress toward achieving this goal, the public will begin to hold the federal government accountable for educational disparities. This accountability is more diffuse and less effective than state and local accountability because federal officials are more removed from state and local electorates and are held accountable for a wider range of decisions. n336

However, it is important to note two responses to this concern. First, the public has not effectively held state and local officials accountable for closing opportunity gaps. For that reason, adding an additional layer of accountability - even a diffuse layer - could facilitate achievement of this objective. Second, as noted above, this proposed theory would not remove state and local accountability for ensuring equal access to an excellent education. Instead, state and local officials would be charged with designing and implementing plans to achieve this goal and thus critical aspects of state and local accountability would be preserved. n337 Federal officials would be responsible for offering some of the incentives, research, expertise, and financial support that is needed to accomplish this objective. In these ways, my proposed theory ultimately would increase total government accountability for achieving this goal. For these reasons, it would more effectively reap some of the benefits that education federalism is designed to achieve.

### They Say: “History of Failure”

#### Past failures aren’t indicative of the plan – we’ve learned from the mistakes of flawed policies

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

Others may contend that the United States should rein in the growing federal role in education. In some ways, this criticism points to the failures of past federal initiatives as evidence that the federal government's role in education should be curtailed. Most recently, some scholars condemn the shortcomings and implementation of NCLB and RTTT. n265 Undeniably, the federal government has undertaken a variety of unsuccessful education reforms. n266 Yet, an established track record in education over the last fifty years has given us ample evidence to identify the strengths and weaknesses of federal education policymaking. My theory intentionally builds upon identified federal strengths in innovative and progressive ways. In particular, the theory builds on the foundational premise that in the face of inconsistent and overwhelmingly ineffective state reform, the [\*1005] federal government enjoys a superior and more consistent reform record on issues of educational equity. n267 Education scholars Charles Barone and Elizabeth DeBray confirmed this superior track record in stating that:

Over the past half century, Congress has most frequently sought, and in most cases successfully enacted, sweeping changes to federal law when (1) a segment of U.S. Society was judged as having been denied equal educational opportunity and (2) states and municipalities were unable or unwilling to remedy those inequities. In education, as in other areas, like voting rights or retirement security for seniors, this has unquestionably been its most important and powerful role. n268

My theory builds upon this superior record in proposing a theory for disrupting education federalism that can guide the United States toward equal access to an excellent education.

#### Responsibility and Empirical Success mean federal action is key

ROBINSON ’12 (Kimberly Jenkins; Professor of Law – University of Richmond, “The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism,” 79 U. Chi. L. Rev. 427, Winter, l/n)ww

A primary reason that the federal government would need to play a central role in ensuring equal educational opportunity in the future is because the overwhelming majority of states have steadfastly refused to take consistent and meaningful action to minimize disparities in educational opportunity. Ryan's discussion of school finance litigation reveals that even when plaintiffs have been successful, increases in funding have been minimal and the basic structure of educational opportunity and finance has remained unchanged (pp 153, 178). Other research similarly concludes that numerous states successfully resisted school finance reform even in the face of court mandates. n72 Similarly, Ryan chronicles how localities have placed limits on school choice that hamper its ability to have a substantial impact on student achievement and racial isolation (pp 209, 215). Given past resistance to reform at the state and local level, it seems unlikely, at best, that states and localities would suddenly have a change of heart and champion equal educational opportunity.

Before examining why the federal government should lead the nation's efforts to achieve equal educational opportunity, it is important to recognize that the federal government also bears substantial responsibility for the current disparities in educational opportunity. For instance, the Supreme Court's decisions on desegregation ultimately sanctioned a return to segregated schools and thus eviscerated the ability of desegregation litigation to ensure educational equity. n73 President Nixon also directed executive branch officials charged with enforcing desegregation to slow down their actions and to challenge the National Association for the Advancement of Colored People in litigation (pp 59-60). NCLB also encouraged states to set low academic standards and thus hindered the ability of the standards movement to raise the bar for academic achievement in low-achieving schools (p 250).

Nevertheless, the federal government enjoys a far superior track record in promoting educational equity than states and localities. The federal government has a solid - but not unblemished - [\*455] historical record in promoting equal educational opportunity. n74 In fact, a primary impetus for federal involvement in education has been ensuring the equitable provision of educational opportunity since the 1950s. n75 Federal legislation prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. n76 Federal legislation requires that students with disabilities receive a free, appropriate public education. n77 Indeed, some view guaranteeing equal educational opportunity as the central federal role in education. n78 Most importantly, the nation's historical reliance on federal intervention to promote equal educational opportunity also indicates that the federal political process is more amenable to embracing such efforts than state political processes. n79 This may be the case because it is easier for the wealthy and others invested in the current system to threaten that they will depart from a state than from the entire country. n80 As a result, "the federal government is uniquely positioned to mobilize a national effort and encourage state and local action whenever a critical educational need arises." n81

### Perm Solvency – Data

#### State data collection fails – the permutation is best

GROSS and HILL ’16 (Bethany; 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,” Summer, 10 Harv. L. & Pol'y Rev. 299, l/n)ww

Of course, the analytic capacity to support democratic experimentalism can come from the federal government, interstate consortia, or both. Indeed, both approaches offer complementary advantages and disadvantages. The USDOE is highly resourced and has historically allocated significant resources to its research arm, IES. For fiscal year 2016, the federal government appropriated $ 68 billion of discretionary funding to the USDOE with almost $ 620 million to IES. n119 Department leadership and management, however, are often distant from the day-to-day issues in public school systems, making it difficult for them to judge the most pressing priorities facing states, districts, and schools. n120 Likewise, USDOE has a history of operating prescriptive grant programs and enforcement processes, and has been staffed largely with those purposes in mind, rather than supporting democratic experimentalism. n121 Still, if the enactment of ESSA moves the USDOE away from centralized program administration, it could play an important role in promoting and sustaining democratic experimentalism.

A cross-state consortium might more credibly claim a commitment to evidence-based improvement. Unlike the USDOE, current state leaders are often active participants in these networks, providing the consortium with a direct connection to those who are sorting through the challenges of educational policy in their local context. CCSSO, for example, regularly convenes state leaders to engage in dialogue on salient policy issues from across the country. The Innovation Lab Network provides a forum for self-selected states committed to piloting innovative policy solutions to share and learn from others' experiences. n122

At the same time, these organizations often do not have ready access to government funds and would either have to gain stable foundation support or depend on states' contributions. These sources of support could prove too [\*324] small and unstable to be the sole source of analytic capacity for the nation. They could, however, provide early proving grounds for small-scale experiments and a forum for state leaders to share new knowledge and innovation.

## Aff — Hazelwood Affirmative

### Permutation

#### Permute: do both. The permutation solves better because both levels of government are protecting free speech, and it shields the link to the federalism DA because the states would be perceived as leading the effort.

### Solvency Deficit – Court Rollback

#### Federal action necessary – state and local laws are rolled back -- level of government is the most significant predictor of survivability for judicial review

**Winkler, ‘9** – Professor of Law, UCLA School of Law (Adam, “Free Speech Federalism,” 108 Michigan Law Review 153, Available at: http://repository.law.umich.edu/mlr/vol108/iss2/1)//CT

The model indicates that the level of government is a significant predictor of surviving judicial review, controlling for the substantive type of speech restriction. That a speech restriction is adopted by the federal government is highly correlated with the likelihood of surviving a legal challenge (p < .00 1). All else being equal, federal laws are far more likely to be upheld than state or local laws. 66 The model indicates that the level of government is a significant predictor of the likelihood that a speech restriction will be upheld.

#### This model is comprehensive

**Winkler, ‘9** – Professor of Law, UCLA School of Law (Adam, “Free Speech Federalism,” 108 Michigan Law Review 153, Available at: http://repository.law.umich.edu/mlr/vol108/iss2/1)//CT

To analyze the role of different levels of government in free speech cases, I first collected 55 and coded every published federal court decision that considered the constitutionality of a restriction on "core" free speech rights decided over a 14-year period. I choose the years 1990 through 2003 to secure a sufficient number of cases to derive robust results. I focus here on free speech cases where, under existing doctrine, the courts impose the most rigorous form of constitutional review, strict scrutiny. Courts use this test for speech restrictions that touch the heart of the First Amendment, namely, political speech and similar content-based restrictions on expression. I included only "final" district, circuit, and Supreme Court decisions; overturned or affirmed decisions were omitted to avoid double counting.56 These data have their limitations. First, only federal court decisions are included. State court rulings on free speech issues, whether stemming from the federal or state constitutions, are not included and they may come out differently. Second, the data are comprised only of free speech cases where the federal courts applied strict scrutiny. Although the courts apply strict scrutiny to the most important types of speech restrictions, not all speech restrictions are adjudicated under this standard57 and other speech restrictions may or may not follow the patterns uncovered in strict scrutiny cases. Third, I include only published decisions, which may or may not replicate the larger set of decided free speech cases. My research uncovered a total of 266 relevant free speech rulings. Of those, only a small fraction (7, or 3%) was comprised of Supreme Court rulings and the vast majority of decisions came from the circuit courts of appeals (106, or 40%) and the district courts (153, or 56%). The overall rate at which "core" free speech restrictions survived judicial review was 21%. Courts upheld 56 of 266 speech restrictions in the given period. Of the 266 rulings on the constitutionality of speech restrictions, the vast majority involved state and local laws. There were 227 rulings on state and local laws and 39 rulings on federal laws. 8 As Table 1 indicates, the federal courts upheld a much higher percentage of federal laws than state and local laws.

### Solvency Deficit – Enforcement

#### State action fails- state level first amendment protections are incomplete, subject to circumvention/nonenforcement, and allow indirect censorship through retaliation

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

IV. THE STATE RESPONSE TO HAZEL WOOD The movement to counter Hazelwood's threat to student journalism began immediately following the decision, in the spring of 1988.134 Within four months, at least six states had proposed bills to combat Hazelwood's new standard for censorship of the scholastic press.'35 Bills have been introduced in dozens of states since, but few of these efforts have run the full legislative gauntlet and been signed into law. One writer estimates that 83 percent of attempts to enact a student-press law have failed, either during the legislative process or following gubernatorial veto. 136 At the state level,'37 student-press protections have been included in both statutes and administrative regulations. As discussed below, seven states have enacted legislation that restores at least some of Tinker's protections to student journalists. Two more states have adopted somewhat nebulous administrative regulations that-at least arguably-provide similar protection. A. Seven States Have Adopted Anti-Hazelwood Statutes that Restore the Protections of Tinker to Student Publications. Following Hazelwood, seven states adopted new statutes-or modified laws already on the books-to explicitly reject the degradation of students' free-speech rights. As discussed below, six of the seven statutes generally follow the structure of the first student-press law in California. The other state, Massachusetts, has a substantially different statute that provides less specificity and has been interpreted somewhat differently. 1. The California Model (Six States) To understand the California model of student-press statutes, it is important to first understand the history of the California Student Free Expression Law. The original California statute pre-dates Hazelwood and was adopted in 1971, just two years after Tinker.138 From the outset, California courts have held that the statute embodied at least the protections afforded students by Tinker, if not more.139 The statute's current form was adopted in 1976 as Education Code 48907,140 though it would be more than a decade before that statute saw litigation in a reported case.141 Finally, just two weeks after Hazelwood was decided by the Supreme Court, the California Court of Appeals held that Section 48907 provided broader protection than the federal First Amendment and that "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in [HazelwoodJ is not available to this state's educators."l42 The California State Department of Education adopted a similar position a few months later, in March of 1988.143 In its current form, the California statute reads: (a) Pupils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material that so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. (b) The governing board or body of each school district or charter school and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction. (c) Pupil editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of pupil publications within each school to supervise the production of the pupil staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. (d) There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to a limitation of pupil expression under this section. (e) "Official school publications" refers to material produced by pupils in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee. (f) This section does not prohibit or prevent the governing board or body of a school district or charter school from adopting otherwise valid rules and regulations relating to oral communication by pupils upon the premises of each school. (g) An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution.'44 Portions of this statute have been incorporated into every other enacted anti- Hazelwood statute, with the exception of Massachusetts.145 Each of the statutes modeled on California's-Arkansas, Colorado, Iowa, Kansas, and Oregon- includes two components. First, each includes a positive statement declaring students' statutory free-speech rights.146 Next, the statutes detail an explicit list of materials that may be censored or restrained: those that are obscene,147 libelous, slanderous, incite others to lawless action or to violate lawful school rules,148 or are reasonably forecast to cause a material and substantial disruption to the orderly operation of the school.149 Two statutes-Arkansas and Oregon-also permit censorship of publications that cause an unwarranted invasion of another's privacy,o50 and Colorado permits censorship of gang-related speech."' All of the California-model statutes, with the exception of Arkansas, also require that advisers ensure publications are consistent with standards of journalism and English,152 and half fully immunize school officials from liability when they act pursuant to statute.53 Courts in California, Colorado, and Iowa have all recognized that these statutes codify the Tinker standard in response to Hazelwood and require material and substantial disruption to justify censorship of student speech.154 Commentators also widely agree that the statutes serve as an explicit rejection of Hazelwood in favor of some form of the Tinker standard."' 2. The Massachusetts Model (One State) Unlike the long-standing mandatory California statute, Massachusetts' student- press law was originally enacted as a local-option statute long before the Hazelwood case began working its way through the courts. 156 It includes a positive statement of statutory rights- "[t]he right of students to freedom of expression in the public schools of the commonwealth shall not be abridged"-with only one permitted justification for censorship: speech that causes "any disruption or disorder within the school."'57 Following Hazelwood, legislators acted to make the statute mandatory, rather than optional, but made no other substantive changes.58 The Massachusetts statute has been given fairly detailed treatment by the Massachusetts courts. In Pyle v. South Hadley, the United States First Circuit Court of Appeals certified a question to the Supreme Judicial Court (SJC) of Massachusetts concerning the statute.'59 In answering the certified question, the SJC held that the statute codified Tinker, did not incorporate subsequent Supreme Court case law such as Bethel v. Fraser,160 and did not contain an exception for proscribing any category of lawful speech that is not disruptive.,'6 Essentially, the SJC found that the Massachusetts statute fixed students' free-speech rights permanently in 1969, at the height of the First Amendment's protection for public high school students. B. Two States-Washington and Pennsylvania-Have Administrative Codes that May Provide Greater Protection from Censorship than Hazelwood and Federal Law In addition to state legislatures' statutory responses, two states-Washington and Pennsylvania-have promulgated administrative rules that at least arguably provide students with greater free-speech protection than current First Amendment case law. Washington's administrative code sets forth a series of student rights that parallels the federal Bill of Rights,162 including that "[a]ll students possess the constitutional right to freedom of speech and press . . . subject to reasonable limitations upon the time, place, and manner of exercising such right."163 This provision is entirely untested in the courts, though the Student Press Law Center has taken the position that the code section "may provide students attending Washington public high schools with added protection against administrative censorship."'" Such a position likely reflects an interpretation of the code section that would have those rules codify student-speech rights as they existed when that section was enacted in 1977 and thus imposes the Tinker standard. But another possible interpretation might be that this code section was written to reflect the evolution of "the constitutional right to freedom of speech and press," which would impose the Hazelwood standard, as well as restrictions present in Bethel v. Fraser (concerning lewd and indecent speech)165 and Morse v. Frederick (concerning speech that advocates illegal drug use)'66 in modern litigation. The Pennsylvania administrative code more clearly codifies the Tinker standard, permitting students the right to free speech "unless the expression materially and substantially interferes with the educational process, threatens serious harm to the school or community, encourages unlawful activity or interferes with another individual's rights."l167 The code section also imposes on students "the responsibility to obey laws governing libel and obscenity and to be aware of the full meaning of their expression"'68 and "the responsibility to be aware of the feelings and opinions of others and to give others a fair opportunity to express their views."69 Like the Washington code section, the Pennsylvania administrative code sections pertaining to student speech have not been litigated170 or widely discussed. 17i The Student Press Law Center, however, has taken the position that the regulations "should provide student journalists attending Pennsylvania public high schools with added protection against administrative censorship."72 It is unclear what case law or principles of construction might guide an understanding of this code section. V. PROBLEMS WITH ANTI-HAZEL WOOD STATUTES These statutes share not only a common genesis as a response to Hazelwood, but also a number of substantive flaws and weaknesses that potentially limit their effectiveness and ability to safeguard students' rights. These discrete problems include difficulties in enforcement, vulnerabilities to indirect censorship, mootness of claims, and murky language concerning standards of journalism, profanity, and incitement-all of which are discussed below. In addition to the narrow issues that individually plague a handful of statutes, each of these statutes also shares a common concern: as a group, anti-Hazelwood statutes have seen little-and in some cases, no-litigation. Iowa's statute has only been substantively litigated in one case,173 while the Californial74 and Massachusetts'75 statutes have each been litigated in just a handful of cases. The Arkansas, Kansas, and Oregon statutes have yet to be relied on in a single lawsuit, while the Colorado statute has seen only marginal treatment in a federal graduation-speech case.'76 The scarcity of case law likely shapes the practical effectiveness of these statutes, as both students and administrators often lack clear guidance from the courts about the construction and application of student-press laws. Yet, even in the handful of states where these statutes have been addressed in-depth by the courts, significant flaws and concerns have been exposed. As discussed below, these weaknesses may raise serious questions as to whether the statutes can fulfill their intended purpose of safeguarding students' rights. A. Enforcement: Nearly All Statutes Lack Independent Enforcement Mechanisms and School Districts Often Ignore Statutory Requirements to Adopt Consistent Guidelines Without a mechanism for effective enforcement, student-press laws remain but words on a page, doing little to ensure that students are actually free from administrative censorship. Of the seven statutes and two administrative-code provisions, just one-Oregon's statute-provides a penalty for violations.177 As a result, students are forced to rely on a state's general declaratory-judgment statute or seek injunctive relief, rather than bringing a self-contained cause of action that arises solely out of a student-press statute. This adds additional uncertainty to the litigation calculus by complicating the pleading stage and adding another consideration for students weighing whether to bring a claim.178 Unlike many other civil-rights claims, the state-law rights conferred by student-press statutes are not easily vindicated in the federal courts. Section 1983 of the United States Code-the most common statutory cause-of-action to vindicate civil-rights claims-only permits actions to remedy deprivations of rights under federal law or the federal constitution.'79 This means that, if school officials violate a student's statutory free-speech rights, but not federal law (as would be the case when administrators censor pursuant to Hazelwood in a state with an anti- Hazelwood statute), students cannot obtain federal relief4so and must instead turn to often-underutilized state civil-rights statutes.18' And even then, students may be severely limited in the relief they can seek.182 While six of the seven statutes lack a mechanism for judicial enforcement, five of these statutes (Kansas being the exception) provide a mechanism for local, school-level enforcement by requiring school boards to adopt guidelines consistent with the statutes' requirements.83 Because school board policies "carr[y] the force of law for public employees, students, or visitors on school property,"l84 students can appeal to school officials and elected school board members for enforcement. Unfortunately, there is significant evidence that school districts have, in practice, utterly failed to comply with statutory requirements and some have even adopted policies that directly conflict with student-press statutes. Although there is limited evidence as to whether schools' noncompliance with statutes is willful or ignorant, at least one study suggests that, among administrator-preparation programs, not even school-law instructors (most of whom have graduate-level degrees) are aware of anti-Hazelwood statutes.186 Based on these factors, it is hardly surprising that isolated incidents of censorship continue to crop up in states with anti-Hazelwood statutes.87 In sum, the anti-Hazelwood statutes are difficult to enforce through litigation and compliance is left largely to the whims of individual boards of education and school administrators. This raises serious questions about whether statutory commands to abstain from censoring student publications have any bite for administrators intent on silencing the student press. B. Indirect Censorship: Anti-Hazelwood Statutes Largely Target Direct Censorship and Provide Students Limited Protection from Indirect Censorship Censorship takes many forms. It can be overt, like when a principal cuts pages out of a newspaper, or it can be indirect, such as when a principal retaliates against a journalism adviser or a school board cuts funding for a publication. By their plain language, most anti-Hazelwood statutes are focused only on direct censorship, and are not easily adapted to combat subtler, more insidious attempts to silence students. One of the most widely discussed examples of indirect censorship is retaliation against journalism advisers. Across the country, school officials-unable to censor students directly-apply pressure to the students' journalism adviser through reprimands, threats of transfer or discipline, or even termination.'88 Yet the vast majority of student-press statutes are silent on adviser-retaliation. Only California and Arkansas' statutes contain explicit adviser-protection provisions189 (though the Iowa courts have found at least some implicit protection against adviser-retaliation emanates from the state's statute).190 I have addressed the problems associated with vindicating advisers' rights elsewhere,'91 but suffice to say, school administrators' ability to reach around student-press statutes by punishing advisers instead of students is a massive statutory gap with significant consequences for students and advisers. And, as with all other forms of censorship, adviser-retaliation chills student speech and undermines the First Amendment's guarantees.192 But retaliation against advisers is not the only form of indirect censorship students face. 9 Particularly at the college level, tales abound of university administrations and student governments attempting to control the student press through budget cuts and funding restrictions.194 These concerns may be just as prevalent at the high school level-perhaps even more so, given the complex machinations of public school funding at the local level. It would not be surprising if many attempts to de-fund student newspapers go unreported due to public (and news media) apathy toward local government or because they are buried in the pre- text of budget cuts warranted by an economic slowdown. This inability to combat indirect censorship is a substantial weakness for most of the anti-Hazelwood statutes. Indirect censorship-like adviser-retaliation and budget cuts-is just as effective at silencing student-speech as taking scissors to a newspaper article, yet these statutes do little to protect students' rights from administrators with the creativity or ambition to circumvent existing statutory safeguards.

### Solvency Deficit – Mootness

#### State laws will be rendered moot by standing requirements

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

C. Mootness: Most Statutes Do Not Prevent Students' Claims from Becoming Moot After Graduation Anti-Hazelwood statutes also lose much of their punch when, in the rare case where students can rally the resources needed to litigate a claim,195 lawsuits are dismissed as moot because students lack standing. The procedural barrier of standing has been particularly difficult for students who graduate as their cases wind their way through the federal courts.'96 In one notable case, the Supreme Court of the United States even sua sponte declared students' First Amendment claims moot when the Court learned at oral argument that the student-plaintiffs had graduated; the mootness issue in that case had not been briefed by the students or the school district, or raised in the courts below.'97 Although state statutory claims are not necessarily bound by the requirement of Article III standing,'98 state courts are similarly unlikely to reach the merits of claims for relief that have become moot or where no injunctive relief is possible.'99 As plaintiffs, student journalists are unique: the entire staff of a given student publication is guaranteed to turn over every four years due to routine graduation.200 The window shrinks even further if one assumes that newspaper leadership positions (such as a student editorial board) are likely upper-classmen, and the editor-in-chief is very likely to be a graduating senior. Under these circumstances, the window of time in which a student's statutory free-speech claim survives is months at the longest, or as short as weeks when a principal censors a newspaper's senior- or graduation-edition. It is effectively impossible for students to litigate their claims in such a narrow timeframe. Student-press attorneys have suggested that students may be able to game state or federal standing requirements by substituting current editors as named plaintiffs, suing for damages, filing a class-action suit, or alleging that censorship has caused actual harm to the parties.201 But it is unclear whether many, or any, of these tips have practical value for high school students. Every student-editor is unique and it would not be surprising to find that some editors are uninterested in pursuing censorship claims on behalf of their predecessors-especially when school officials replace the students complaining of censorship with peers more in line with administrators' views.202 Students are also unlikely to seek monetary damages, given the limited financial assets of student publications and students' goal of injunctive relief: often an order to prevent censorship and allow distribution of a student publication.203 While some advocates remain optimistic, it is unclear whether any of these strategies will actually increase students' access to the courts under these statutes. One state, however, has addressed this weakness head-on. California amended its student-press laws in 2008 to explicitly confer standing on aggrieved student journalists even after they have graduated.204 Although this provision has yet to be tested in the courts, its straightforward language suggests that it may effectively combat the problem of standing.

### Solvency Deficit – Definitional Confusion

#### State laws allow censorship due to definitional uncertainty- this can’t be fiated away

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

D. Murky Justifications for Censorship: Several Statutes Permit Censorship of Publications that Do Not Meet "Standards of Professional Journalism" Five of the seven states that have enacted anti-Hazelwood statutes give school officials the power to regulate student publications based on a vague and ill-defined justification: to ensure student speech is consistent with "professional" or "high" "standards of English and journalism . . . ."205 These provisions raise practical problems of proof-exactly who determines "professional standards of English and journalism?"-and offer an easy cover for administrators who seek to silence otherwise protected speech. The most glaring problem with including a standards-based justification for censorship is that courts are not equipped to determine exactly what "professional standards of English and journalism" are. A lack of institutional experience at least partially explains why every court to address these provisions has done so only in passing. In both the California and Iowa cases, appellate courts have skirted the issue of journalism standards by relying on rules of error preservation206-rules that themselves are designed to ensure judges have an adequate record on which to base their decisions. It is not difficult to imagine a scenario in which parties put on a "battle of the experts" to establish what the standards of English and journalism require and whether a given publication complies with those standards. The product of any attempt at judicial fact-finding is unpredictable at best, given the somewhat amorphous nature of "standards" in journalism education.207 But, even in a hypothetical state with unimaginably detailed standards of journalism, the standards provisions likely remain unworkable. Statutes designed to protect student journalists cannot reasonably be construed in a manner that would allow otherwise protected student speech to be censored because a journalism adviser did not teach enough lessons about em-dashes, apostrophes, or semi-colons. To give school officials the benefit of the doubt-that is, to assume they are more concerned with providing for students' academic growth than silencing speech critical of administrators or school policy-it may make sense to allow school officials to censor speech that does not meet certain minimum thresholds of English and journalistic standards. It makes sense to let schools require student reporters learn the fundamentals of grammar, spelling, and how to report factually accurate information. And it makes sense that schools want to instill basic values of journalism ethics in student journalists. Unfortunately, if even a fraction of reported cases of censorship are accurate, school officials are much more likely to create a situation where "all a principal . . . has to do to kill a story or editorial he or she doesn't like is to label it 'poorly written' or 'inconsistent with the shared values of civilized social order . . ."'208 The Lange case from Iowa provides a strong cautionary tale of the dangers that arise when a school official--or even a district court judge-is placed in the position of determining whether student journalism meets appropriate standards of English.209 In Lange, the student newspaper at issue was an April Fool's parody- edition of the Waukon Senior High School newspaper, The Tribe-une.210 By any measurement, this edition of The Tribe-une was not a pinnacle of journalistic excellence. Among its many satirical and parody stories, it included a digitally created photo of an infant smoking a cigarette, a fictional story about a methamphetamine lab found in a biology classroom, and a story quoting students about their (presumably exaggerated) aspirations of becoming exotic dancers.211 During depositions, the school district's superintendent indicated that he justified censorship of the newspaper in part based on his opposition to the "parody, satire type of reporting, editorializing, whatever" that the students had engaged in.212 Not in so many words, the school district advanced the claim that parody-at least of the type practiced by the Waukon Senior High students--did not meet professional standards of journalism or English. Yet the letters of reprimand issued to the newspaper's adviser do not mention disagreement over style or journalistic standards, but rather highlight the school's belief that the material was "inappropriate, "had a negative impact on the [school district]," and "offended" members of the community.213 It would be naive to assume that Lange v. Diercks was an anomaly, and that other school officials would not seek to suppress otherwise lawful student speech based on perceived deficiencies in "journalism standards." Against this backdrop, the best understanding of the statutes' standards-of- journalism component is likely that a school should only be authorized to require students writing for an official student publication to correct gross problems of grammar, spelling, or inadequate research.214 Essentially, these provisions should operate to ensure journalism advisers are able to do their job: to provide students advice on sound principles of journalism, English, and writing, without requiring students to accept every suggested comma or line-edit to escape censorship.215 Much like a coach provides student-athletes advice on how to play-without running onto the field and ripping the football from a player's hands-these statutes should give students the breathing room they need to learn and grow with 216 the advice, support and assistance of teacher-advisers. Until courts come to this conclusion, however, students in states with "standards" provisions should be vigilant against school officials' attempts to abuse statutes and use backdoor- censorship to squelch controversial or unpopular stories.

### Solvency Deficit – Studies Prove

#### Studies show state action has no effect on censorship

Buller, AAG Iowa, 14

(Tyler, JD Iowa, The State Response to Hazelwood V Kuhlmeier, 66 Maine L. Rev. 89 https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2064957)

Two studies have explored the effects of student-press laws by testing the impact of changing student-press standards on a single population over time. The first study, by Professor Carol Lomicky, was published in 2000 and focused on editorials published in an anonymous Midwestern high school's student newspaper during the eight years before and after the Hazelwood decision.254 Lomicky found significant differences in the types of editorials published before and after Hazelwood.255 The number of critical editorials decreased from 40 to 12, while the number of editorials appealing to causes and written for entertainment increased significantly.256 The topics discussed also shifted from a criticism of school policies and personnel decisions to "safer issues," like crowded hallways, homecoming activities, and student parking.257 The second study, by high school journalism adviser Jennifer Garner and college journalism professor Bruce Plopper, was published in 2010 and investigated a stratified sample of Arkansas public high schools' student newspapers published before and after enactment of Arkansas's Student Publications Act.258 The Garner and Plopper study found no significant change in the number of controversial259 editorials or news/feature stories published after implementation of the Arkansas anti-Hazelwood statute.260 What differences the study did reveal were hypothesized to be due to school size (urban versus rural) and the level of training and experience for the schools' journalism advisers.261 A related study by Plopper provides some context for these findings, noting that "student-press laws may not have much effect on student-press censorship" given the proliferation of censorship in Tinker states,262 the lack of adviser-awareness about anti-Hazelwood statutes,263 and many districts' failure to comply with requirements of the Arkansas Student Publications Act.264 In the aggregate, the data from these surveys is mixed. In terms of newspaper content, the Lomicky study (finding editorial content at a single high school changed after Hazelwood) seems at odds with the Garner and Plopper study (finding little difference in controversial coverage before and after enactment of a student-press statute). Similarly, the survey data revealing little difference among attitudes of advisers and student-editors after Hazelwood seems at odds with reported differences in the attitudes of principals and other school officials. As many writers in this area have noted, more data is needed to better gauge whether anti-Hazelwood statutes are having the intended effect of allowing student journalism to flourish in the absence of censorship by school officials.265 To that end, the study described in the following subsections was designed to provide additional data concerning differences between student newspapers in Tinker and Hazelwood states.

### Solvency Deficit – Preemption

#### Administrators use federal law- title IX- to justify censorship

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

The university’s vice president for student affairs recognized the article’s satirical nature but believed “there are people out there that do take it literally.”17 As a result, within a month, the university’s student government voted to slash the publication’s funding.18 The school also sanctioned the paper, requiring its staff members to complete Title IX training on sexual discrimination.19 The university administrator said that the university was legally required to act under Title IX, even if such action violated the First Amendment, because he believed that constitutional rights do not supersede Title IX.20 “Title IX is a federal compliance policy,” he asserted, and “[t]hose policies supersede anything else.”21

#### Administrators rely on federal law to justify censorship to hide “image” motivations

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

Universities have their own interests that affect freedom of speech on campus. First, they require order on campus.205 Failing to discipline student speech when it rises to the level of harassment may risk interfering with students’ education or otherwise create a hostile or disruptive environment.206 Additionally, a university has an interest in preserving its reputation—one of the most influential factors in attracting applicants and donors.207 Because many universities fund student publications that may also bear the university’s name, universities may seek to control published content if students or the public reasonably believe the publication “bear[s] the imprimatur of the school.”208 Some scholars have further noted the increasing “corporatization” of the university, whereby colleges treat students as customers or clients.209 In adopting corporate organizational models to compete for students, universities increasingly view student media as part of the institution’s brand and thus may seek to prevent student publications from publishing controversial content that may offend prospective students or otherwise portray the university poorly.210 B. Recent Controversies Several recent events involving student publications on university campuses demonstrate the tension between students’ free speech rights and universities’ interests in protecting the student body from harassing or otherwise offensive speech. These incidents highlight disciplinary action that schools have taken under the color of Title IX and through their own policies. 1. Title IX Disciplinary Action Recently, college administrators and students have invoked Title IX to sanction published student speech, pitting the school’s interests against students’ free speech rights. For example, in April 2013, the University of Alaska Fairbanks, a public university, launched an inquiry into its student newspaper, the Sun Star.211 The university commenced the investigation after the paper, which was funded by both advertising revenue and student activity fees, published a satirical article in its April Fools’ Day issue about the university’s plans to build a “vagina-shaped” building on campus.212 A university professor filed a formal written complaint with the school’s Office of Diversity and Equal Opportunity, alleging that many faculty members found the article objectionable and that the satirical piece “reproduce[d] the ‘rape culture’ that trivializes the forced and non-consensual display and penetration of women’s bodies.”213 The university determined the article’s content did not merit disciplinary action.214 The same professor subsequently appealed the finding and filed a Title IX complaint against the university for failure to investigate, alleging that the article’s “sexual jokes, graphic displays of women’s genitals, and use of sexual slang create[d] a hostile environment because it comprises sexual harassment.”215 Pursuant to OCR’s 2011 Dear Colleague letter, the university was obligated to commence a Title IX investigation, despite its earlier finding, because the professor’s allegations amounted to a prima facie case for harassment and failure to investigate.216 During the course of the investigation, the university’s faculty senate sent a letter to the Sun Star, asking the paper to permanently remove the satirical article from its website.217 The Office of Diversity and Equal Opportunity and the faculty senate conducted a months-long investigation and concluded that the article did not violate Title IX. The university subsequently dismissed each of the professor’s claims.218 The complainant professor appealed the ruling.219 Several months later, an outside review affirmed that the First Amendment protected the Sun Star’s articles, and the expiration of a final opportunity to appeal rendered the decision final.220 Although the school found the paper and its student writers were fully acting within their constitutional rights, it still burdened them with a months-long inquiry, which included the university’s dean advising the paper’s editor not to take classes with certain professors.221 This example is illustrative of the different interests at stake in conflicts regarding potentially harassing speech.222 The American Association of University Professors (AAUP)223 argues that OCR’s failure to distinguish speech and conduct in Title IX guidance threatens constitutionally protected speech.224 Although the AAUP typically focuses on professors’ rights on college campuses, the group addressed how Title IX and resultant university policies infringed on students’ free speech rights in a recent report.225 Specifically, the AAUP argues that, over the past decade, OCR has failed to strike an appropriate balance between preventing sexual harassment and protecting speech and academic freedom essential to the academic environment.226 The AAUP notes that OCR’s initial guidance on sexual harassment specifically addressed First Amendment concerns by confirming that universities should not construe OCR’s guidance to mandate policies that infringe on protected speech.227 However, the AAUP noted that since OCR’s 2011 Dear Colleague letter, the agency has failed to provide an adequate statement reaffirming free speech protections, which leaves uncertain what speech protections—if any—apply in a school’s investigation of hostile environment claims.228 This ambiguity creates a risk of universities overreaching when they pursue disciplinary action they believe Title IX mandates, threatening free speech rights on campuses.229

### They Say: “States Answers Apply to Aff”

#### Lack of federal clarity on first amendment protections drives censorship

Malone, JD Candidate, 17

(Patrick O, THE MODERN UNIVERSITY CAMPUS: AN UNSAFE SPACE FOR THE STUDENT PRESS? Fordham Law Review Vol 85)

In recent years, universities have taken an active role in regulating published student speech.28 Pressure to do so has come from several sources. First, the Department of Education’s Office for Civil Rights (OCR) expanded its definition of harassment in its 2011 Title IX guidance.29 Thus, editorial content can be limited because the school deems it harassing. Second, in addition to OCR’s expanded definition, universities adopted their own prohibitions on speech that the universities’ administrations deem harassing or otherwise impermissible.30 Third, universities and student government associations have implemented broad prohibitions on speech, including written communication, in the name of creating more inclusive campus environments or eradicating speech they deem harassing, hateful, or offensive.31 Recently, the response of several universities and student governments to student newspaper content that has offended some students has raised questions about whether, on the modern university campus, student media can maintain its independence. In the backdrop of these developments is the unsettled question of what protections the Constitution affords student publications on university campuses today.32

### They Say: “Federal Regulation Bad”

#### State tailoring under guise of expertise undermines free speech – removes governments limits

**Winkler, ‘9** – Professor of Law, UCLA School of Law (Adam, “Free Speech Federalism,” 108 Michigan Law Review 153, Available at: http://repository.law.umich.edu/mlr/vol108/iss2/1)//CT

With both educational institutions and prisons, the political safeguards that come from an institutional context in which oppression is minimized and moderation encouraged are conspicuously absent. Institutional mission, expertise, or the hazardous environments in which those governmental actors operate are the wrong elements on which to base a determination to defer in matters of fundamental rights. Those factors are easily met by any number of governmental actors. Environmental agencies, health agencies, transportation agencies, and police and fire departments all have defined institutional missions, possess a degree of expertise in achieving those objectives, and operate in difficult environments with important consequences for the public good. Whether or not these institutions deserve unusual leeway to regulate in ways that impinge on fundamental rights should not turn on those common, easily satisfied criteria. If the courts are going to tailor rights, they should focus on the institutional and structural factors that make the legal output of a governmental entity relatively likely to satisfy existing constitutional standards. Otherwise, the courts are welcoming the deprivation of individual rights in order to protect the "rights" of governmental actors. That calculus turns fundamental rights, which are supposed to protect individuals and limit government, on their head.

## Aff — Theory Arguments

### 2AC — Conditionality

#### ( ) Conditionality is a Voting Issue — the neg should get the status quo or an unconditional counterplan, not both. Conditionality creates an unproductive argument culture because it values coverage more than engagement. This discourages in-depth clash and argument resolution (because less time is spent on each position) and lowers the barrier of entry for low-quality arguments (because the neg is trying to distract the 2AC). Different advocacies should be debated in different debates, not crammed into this one. Vote for the theoretical position that best encourages high-quality debates.