

FREE SPEECH FEDERALISM

Adam Winkler*

For decades, constitutional doctrine has held that the Constitution’s guarantee of freedom of speech applies equally to laws adopted by the federal, state, and local governments. Nevertheless, the identity of the government actor behind a law may be a significant, if unrecognized, factor in free speech cases. This Article reports the results of a comprehensive study of core free speech cases decided by the federal courts over a 14-year period. The study finds that speech-restrictive laws adopted by the federal government are far more likely to be upheld than similar laws adopted by state and local governments. Courts applying strict scrutiny in free speech cases upheld federal speech laws in 56% of cases, state speech laws in 24% of cases, and local speech laws in a remarkably low 3% of cases. It turns out that one of the best predictors of whether a law impinging on speech rights will be upheld is the identity of the governmental actor who adopts the law. The reasons for this “free speech federalism” and the implications of this phenomenon for constitutional adjudication are explored.

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* Professor of Law, UCLA School of Law. Terrific substantive suggestions were provided by Devon Carbado, Joe Doherty, Noah Zatz, Rick Sander, Jon Varat, Jennifer Mnookin, Stephen Gardbaum, Kent Greenfield, Ken Karst, Ron Collins, Robert Goldstein, Ernie Young, Eugene Volokh, and the participants at conferences and workshops at UCLA, Northwestern, Boston College, Pepperdine, the University of Pennsylvania, and the First Amendment Center. Greg Martin provided fine research assistance.

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INTRODUCTION

Ever since the Supreme Court first held that the First Amendment's guarantee of free speech was incorporated to apply to the states, the Court has maintained that there is no formal distinction between laws burdening speech adopted at the federal, state, or local level. Regardless of their place in the federal system, all levels of government are formally treated to the same standards of review in speech doctrine.¹ A content-based speech restriction, such as a campaign-finance law or a measure restricting indecent speech, is adjudicated under strict scrutiny regardless of whether it was enacted at the federal, state, or local level.² A content-neutral speech restriction, such as a limitation on the time, place, or manner of speech, is adjudicated under a form of intermediate scrutiny no matter the governmental source.³ According to Fred Schauer, First Amendment doctrine is thus marked by "institutional blindness,"⁴ with "the government" usually envisioned as a single, monolithic entity.⁵

The identity of the governmental institution behind a law restricting free speech rights may nonetheless be a significant, if hidden, factor in free speech cases. In this Article, I report the results of an empirical study of free speech decisions in the federal courts and reveal the ways in which the level of government behind a speech law—federal, state, or local—affects the degree of constitutional protection. This study shows that speech restrictions

1. See William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 143 (1982) ("Since 1925, it has been assumed . . . that the fourteenth amendment pulls up the first amendment's speech clause into its own provisions. Indeed . . . the standard of judicial review for state or local laws affecting speech is coextensive with the standard applicable to acts of Congress.").

2. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to a federal content-based speech restriction); *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (applying strict scrutiny to a state content-based speech law).

3. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) ("We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral." (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–50 (1986)). Intermediate scrutiny is also proper for federal content-neutral laws. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 180 (1997) ("[T]his Court held these so-called 'must-carry' provisions to be subject to intermediate First Amendment scrutiny . . . whereby a content-neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

4. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1259–64 (2005) [hereinafter Schauer, *Institutional First Amendment*] (citing examples of the Court's unwillingness to "draw lines among institutions or speakers" when crafting First Amendment speech doctrine).

5. *Id.*; see also Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1328–30 (1994) (citing the tendency of scholars and judges to view local, state, and national governments as a single institution referred to as "the government," rather than as the distinct institutions the Framers intended).

adopted by the federal government are far more likely to be upheld than speech restrictions adopted by other levels of government. Between 1990 and 2003, federal speech restrictions were upheld in 56% of federal court rulings, while only 24% of state speech restrictions were upheld. Even more striking is the fate of speech restrictions adopted by local governments; these were invalidated in almost every case, with only 3% surviving judicial review. In short, the level of government is a very good predictor of whether a speech restriction is likely to be upheld by the federal courts. This Article details these findings and considers potential explanations for, and implications of, this “free speech federalism.”

Part I provides a bit of historical background on the incorporation of the First Amendment and early arguments for distinct judicial treatment of federal and state speech laws. Part I then proposes two reasons why the level of government behind a speech burden might matter despite formally equal doctrinal standards: (1) deference by the federal courts to federal laws and (2) variation in the constitutional quality of lawmaking at the different levels of government.

Part II reports the results of a comprehensive census of published federal court decisions adjudicating restrictions on core free speech rights issued between 1990 and 2003. The cases show that federal speech restrictions fare much better in federal court than do state and local speech restrictions. This Part then estimates a model for predicting the likelihood that a speech law will survive federal judicial review. Even if we control for differences in the types of speech laws adopted by the different levels of government, federal laws are still far more likely than state and local speech restrictions to be upheld. This Part concludes with a closer examination of each doctrinal subgroup of free speech cases in which there are overlapping federal, state, or local restrictions. This examination uncovers deference to the federal government by the courts in some cases and poor lawmaking by the lower levels of government in others.

Finally, Part III considers a few implications of the federalism effect in free speech law. As part of the larger movement advocating decentralization in the field of constitutional law, some have advocated giving more authority to state and local governments to burden even fundamental individual rights. To the extent state and local laws fail due to poor quality, the free speech cases suggest that these governments may not be trustworthy when it comes to individual rights. A second implication is tied to the emerging literature on rights “tailoring”—that is, the practice of permitting some governmental actors, such as prisons or public schools, more leeway to regulate in ways that burden rights. The free speech cases suggest that tailoring occurs in ways that doctrine has not recognized. The cases also call into question the underlying rationale courts have offered for applying constitutional provisions differently to distinct government entities.

I. FREE SPEECH TAILORING IN HISTORY AND THEORY

A. *First Amendment Incorporation and Its Discontents*

By its terms, the First Amendment is a limitation only on the federal government: “*Congress* shall make no law . . . abridging the freedom of speech”⁶ For the first 130 years of its existence, the amendment remained applicable only to federal laws. In a series of cases decided in the 1920s and 1930s, however, the Supreme Court read the Constitution to extend the principles of free speech to state and local governments through the Fourteenth Amendment.⁷

During the early years of First Amendment incorporation, the Court flirted with the idea of treating federal speech restrictions differently than state and local speech restrictions. “[P]erhaps,” Justice Oliver Wendell Holmes wrote in a 1925 case, the Fourteenth Amendment afforded the states “a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States” under the First Amendment.⁸

Holmes did not elaborate on this idea, but later Justices did. Justice Robert Jackson argued that “the powers of Congress and of the States over [libelous speech] are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.”⁹ The second Justice John Marshall Harlan echoed this view in a series of obscenity decisions in the 1950s and 1960s.¹⁰ According to Harlan, “Congress has no substantive power over sexual morality,”¹¹ a matter “primarily entrusted to the care, not of the Federal Government, but of the States.”¹² The Court, he wrote, “should keep in the forefront the question of whether those [government] interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must . . . often produce different results.”¹³ Harlan also worried that “nationwide federal censorship” posed a danger to free thought “far greater than anything the States may do.”¹⁴ As a result, the states should have “wide, but not . . . unrestricted, scope” to regulate speech, while the federal government should be held “with a tight rein.”¹⁵

6. U.S. CONST. amend. I (emphasis added).

7. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925).

8. *Id.* at 672 (Holmes, J., dissenting).

9. *Beauharnais v. Illinois*, 343 U.S. 250, 288 (1952) (Jackson, J., dissenting).

10. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring in part and dissenting in part) (“[H]istorical evidence does not bear out the claim that the Fourteenth Amendment ‘incorporates’ the First in any literal sense.”).

11. *Id.* at 504.

12. *Id.*

13. *Id.*

14. *Id.* at 505–06.

15. *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Harlan, J., dissenting).

Despite these arguments, free speech doctrine accepted a formal congruence among federal, state, and local speech laws. Indeed, by 1954, a note in the *Harvard Law Review* could unhesitatingly state that “no distinction was made between state and federal regulation”¹⁶ in free speech cases. According to William Van Alstyne:

[T]he standard of judicial review for state or local laws affecting speech is coextensive with the standard applicable to acts of Congress. The result is that Supreme Court cases adjudicating state or local laws are fungible with those adjudicating acts of Congress; each is as valid a source of precedent for the other as it is valid for a case of its own kind.¹⁷

Scholars still occasionally call for reviving the idea of treating federal and state speech laws differently. Like Justice Harlan, they argue that state speech restrictions be given more leeway than federal ones.¹⁸ Nevertheless, the notion of disparate free speech treatment has been dormant in the courts now for over half a century. At least that is what First Amendment doctrine tells us.

B. *Why Federalism?*

Regardless of the doctrinal equivalence between federal, state, and local speech restrictions, there are numerous reasons to suspect that the identity of the government actor could shape judicial outcomes in free speech cases and potentially other areas of individual rights. But many of these reasons point in the opposite direction from that suggested by Justice Harlan and his occasional brethren: federal laws should survive more often than state and local laws.

First, federal courts might defer to federal lawmakers relative to state and local lawmakers. A growing literature in political science and law argues that judges often act strategically when exercising judicial review.¹⁹ In

16. Note, *Limiting State Action by the Fourteenth Amendment: Consequences of Abandoning the Theory of First Amendment Incorporation*, 67 HARV. L. REV. 1016, 1017 (1954). Justice Harlan’s opinions on treating federal and state free speech laws differently appeared after this Note, suggesting he was trying to tear down a doctrinal wall already built.

17. Van Alstyne, *supra* note 1, at 143.

18. See, e.g., GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 180–81 (1971); Earl M. Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & PUB. POL’Y 163, 189 (1989); Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223, 244–47 (2005) [hereinafter Rosen, *Context*].

19. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING 43, 48–51 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing the scholarly support for the “separation of powers” game); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 566 (1992); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 51–56 (1993). Often referred to as a “separation of powers” game, strategic judging is mostly studied in the context of statutory interpretation

deciding cases, judges often anticipate the potential reaction of other governmental actors and shape their decisions in ways designed to minimize backlash—what has been termed a “separation of powers” game.²⁰ In the federal government, Congress and the Executive have both carrots and sticks to encourage judicial compliance with their policies. Among the carrots are judicial promotion; numerous scholarly studies suggest that federal judges may shape their behavior to enhance their chances of being elevated to a higher court.²¹ Among the sticks are constitutional amendment,²² intentional reshaping of the judiciary through a politicized nomination process,²³ court packing²⁴ (or unpacking²⁵), impeachment,²⁶ and budget²⁷ and salary reduction.²⁸ Congress can also adopt laws stripping the courts of jurisdiction over particular matters, as happened during Reconstruction²⁹ and has been threatened repeatedly since the Warren Court days.³⁰ According to William Eskridge and Philip Frickey, “there is a growing body of empirical evidence indicating that the Court bends its decisions to avoid overrides or other political discipline.”³¹

but, as Barry Friedman argues, the phenomenon has salience in constitutional cases. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 313–16 (2005).

20. See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1556–57 (2000) (noting that the judiciary must maintain a good relationship with Congress to avoid backlash).

21. Cf. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 313–15 (2004) (proposing a method whereby judges are scored according to various metrics, which would result in the highest scorers being elevated to higher courts).

22. See Friedman, *supra* note 19, at 313 (noting that amending the Constitution is one way to constrain a “troublesome judiciary”).

23. See Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 624 (2003) (noting that Presidents have always “looked to ideology in making judicial picks”); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1071 (1999).

24. See William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 592–93 (2004) (describing Roosevelt’s court-packing plan).

25. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 39 (2002) (recognizing that the Reconstruction Congress reduced the number of Justices on the Supreme Court to prevent President Andrew Johnson from nominating his allies).

26. See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 356–57 (1999) (discussing the possibility of Congress impeaching judges for political reasons).

27. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345–46 (1988).

28. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 85 (1991).

29. Friedman, *supra* note 19, at 25–37 (describing jurisdiction stripping in the Reconstruction era).

30. See generally Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 378–83, 386–94 (1992) (describing modern-era jurisdiction-stripping efforts).

31. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 37 (1994).

In contrast to Congress and the Executive, state and local governments have relatively little ability to discipline federal courts for overly aggressive judicial review. Prior to the adoption of the Seventeenth Amendment, state officials had “institutional weapons” that “could be used to influence outcomes at the Supreme Court and other federal courts if those courts threatened the institutional interests of state legislatures.”³² For example, state legislators could appoint Senators who might threaten to vote against judicial nominees thought to be hostile to state interests. But once Senators were popularly elected rather than accountable to state legislatures, courts were “free to hold state laws unconstitutional without significant fear [of] . . . retaliation.”³³ Local lawmakers have even less ability than state lawmakers to discipline federal judges, with little more than the power to complain about judicial rulings. State interests are still presumably represented, at least in part, by popularly elected senators—even though the direct interests of the state legislature no longer impinge on the confirmation process. Local lawmakers don’t even have that small remnant of influence on federal judicial nominees. William Landes and Richard Posner have recognized that federal courts tend to be reluctant to invalidate federal laws, yet such hesitation diminishes “as we move from regulation that is less local to regulation that is more local.”³⁴

Even if federal judges do not fear discipline, they might still defer to federal lawmakers because they trust them more than state and local lawmakers when it comes to matters of fundamental rights.³⁵ The Supreme Court has given voice to a certain prejudice against state and local governments before. In *West Virginia Board of Education v. Barnette*, the famous flag salute case, the Court wrote that “small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.”³⁶ In terms of individual rights, the state and local governments earned a reputation for being untrustworthy in the most important high-profile constitutional controversy of the twentieth century: the struggle for civil rights for racial minorities.³⁷ Localism in

32. Donald J. Kochan, *State Laws and the Independent Judiciary: An Analysis of the Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding State Laws Unconstitutional*, 66 ALB. L. REV. 1023, 1026 (2003).

33. *Id.* Indeed, in the wake of the Seventeenth Amendment, the federal courts became much more aggressive in reviewing state laws, as evidenced both doctrinally—incorporation of the Bill of Rights against the states—and quantitatively—a significant rise in the frequency of judicial invalidation of state measures with no corresponding rise in the frequency of federal laws being invalidated. *See id.* at 1047–54.

34. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 891 (1975).

35. Cf. James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1780–81 (2003) (“[T]he Warren Court gained its reputation as a guardian of liberty largely at the expense of state courts, which it repeatedly reversed in reaching many of its most significant rights-protective rulings.”).

36. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637–38 (1943).

37. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990). As Barry Friedman writes, “[t]he states, by the 1950s and 1960s, had

particular has suffered from its association with an ideology of racial segregation. According to David Barron, there is a “deep-seated intuition that local governments are islands of private parochialism which are likely to frustrate the effective enforcement of federal constitutional rights.”³⁸ By contrast, the modern constitutional tradition “asserts that rights-protecting institutions like the Court or the federal government are required to constrain local exercises of power that oppress minorities.”³⁹

Another reason federal laws might survive more often than state or local laws stems from the supply side of constitutional adjudication: federal laws may be of higher quality than state laws, and state laws may be of higher quality than local laws. “Quality,” as I use the term here, refers to the expected fit between the law and existing constitutional doctrine. A high-quality law is one that, *ex ante*, would be predicted to have a strong likelihood of surviving judicial review because it corresponds to controlling precedent. A poor-quality law, by contrast, is one that a reasonable lawyer would predict will be invalidated based on the case law.

To understand why the level of government might affect the constitutional quality of a law, we can return to our original and greatest constitutional theorist: James Madison. Madison in *Federalist 10* focused on the problem of “faction”—groups of citizens united by a “common impulse of passion . . . adverse to the rights of other citizens”⁴⁰ who threatened core rights, such as speech.⁴¹ Although Madison believed that “the causes of faction cannot be removed,”⁴² he reasoned that the national government would better protect against their tyranny than state and local governments. According to Madison, “[t]he smaller the society, the fewer probably will be the distinct parties and interests composing it,” the more risk of “local prejudices and schemes of injustice,” and “the more easily will they concert and execute their plans of oppression.”⁴³ In contrast, the national government would be sufficiently large that no faction could easily achieve dominance.⁴⁴ “Extend the sphere and you take in a greater variety of parties and interests;

sullied their reputations as protectors of civil rights,” with “state’s rights” a rallying cry of those opposed to the inclusion and equality of racial minorities. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 372 (1997).

38. David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487–88 (1999).

39. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1822 (2004). As Friedman notes, after mid-century the courts did not forsake deference to lawmakers in matters of civil rights; rather, that deference was just reoriented away from states and toward national decisionmakers. See Friedman, *supra* note 37, at 372.

40. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

41. See Norman R. Williams II, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 970 (1994).

42. THE FEDERALIST NO. 10, *supra* note 40, at 80.

43. *Id.* at 83–84.

44. See Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 929 (1985) (“Madison looked to the federal legislative process, in which no interest group could achieve dominance, to prevent oppression by locally entrenched factions.”).

you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens”⁴⁵

Modern public-choice theory largely concurs with Madison’s assessment. Lawmaking is often the product of bargains between politically influential interest groups and government officials. But because of differences in interest group pressures—akin to Madison’s “factions”⁴⁶—one would expect, in the words of Jonathan Macey, federal law to be a “higher quality product than state law.”⁴⁷ Owing to the relatively large number of interests represented by both elected officials and lobbying groups, federal lawmaking tends to require compromise and moderation,⁴⁸ diluting the likelihood of any piece of legislation catering to a specific, potentially oppressive interest.⁴⁹ Such bargaining is especially hard for an interest that is out of the mainstream, as it must co-opt mainstream elements in order to be successful. At the state (and even more so, the local) level, by contrast, the range of represented interests tends to be smaller and the constituencies more homogenous.⁵⁰ As a result, oppressive legislation is easier to achieve in a single state or municipality than at the national level.⁵¹ This is especially true for groups out of the national mainstream that nevertheless fit comfortably within the culture or demographics of a single state or locality.

45. THE FEDERALIST NO. 10, *supra* note 40, at 83; *see also* Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 734 n.208 (1997). Madison also believed that, at the federal level, factions would be enfeebled by the rivalries among the three branches of government. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 276 (1998).

46. *See* Easterbrook, *supra* note 5, at 1329; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 102–03 (2000); Williams, *supra* note 41, at 966–67. Many scholars use special-interest groups and factions interchangeably. *See, e.g.*, Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1315–16 (1991).

47. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 272 (1990); *see also* John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 218–21 (1997); William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 723 (1995); Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921, 940–41 (1998); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 76–77 (2004).

48. *See* Reza Dibadj, *Delaying Corporate Law*, 34 HOFSTRA L. REV. 469, 471 n.5 (2005) (noting the wider array of interest groups at the national level); Deborah Tussey, *UCITA, Copyright, and Capture*, 21 CARDOZO ARTS & ENT. L.J. 319, 346 (2003) (“Federal legislators should be less subject to capture than state legislators, because a greater number of interest groups have a voice at the federal level than at the state level.”).

49. *See* DENNIS C. MUELLER, PUBLIC CHOICE 49–50 (1979); *see also* Andrew J. Green, *Public Participation, Federalism and Environmental Law*, 6 BUFF. ENVTL. L.J. 169, 191 (1999); Williams, *supra* note 41, at 978.

50. As Richard Revesz explains with regard to environmental interest groups, “the national aggregation of environmental interests results in the loss of homogeneity of interests” Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 563 (2001).

51. *See* Mary E. Kostel, Note, *A Public Choice Perspective on the Debate over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2153 (1993) (“[L]obbying efforts at the federal level are more costly than at the state level.”).

Moreover, where constituents are relatively homogenous, legislators can gain political capital by pursuing policies that run directly counter to prevailing national norms, even constitutional ones.⁵² That the federal courts are likely to overturn a law that mandates, say, prayer in school, may provide an additional reason for some local politicians to enact it. Their constituents may like that they are “standing up” to the federal courts and the erroneous decisions of the Supreme Court. Additionally, as one moves down the federalist hierarchy, we might expect more speech burdens to be adopted without the attention of the press and organized national interest groups. When a local public library considers denying access to one of its meeting rooms to a religious group, no organized interests are likely to even know about it much less lobby to stop it. The ACLU may not notice the local public library’s decision, but it will know about every proposed federal law or federal agency regulation that burdens speech.

There are also differences in the resources available to lawmakers at the different levels of government which enhance the possibility of constitutionally unsound laws being adopted as we descend from the federal to the local. The federal government has comparatively greater resources behind its legislative processes to devote to ensuring the durability of its laws than do state and local governments. Federal lawmakers have large staffs, both individually and in committees, that vet legislation and that are often made up of skilled lawyers. Moreover, the wealthier, larger interest groups competing on the national stage can devote more resources to examining legislation and uncovering its flaws. State legislative staffs are smaller, less well funded, and have fewer skilled lawyers.⁵³ At the local level the problem is even worse; city councils, policymakers in school boards and libraries, and other municipal-level officials often have little or no legal staffing whatsoever.⁵⁴

One is tempted to try to sort out the differences between judicial deference and qualitative differences in legal output. But these reasons are likely to be mutually reinforcing rather than exclusive. If, for instance, federal courts are relatively hostile to state and local laws restricting fundamental

52. See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1503 (1987) (book review) (noting that decentralized decisionmaking coupled with factional politics makes it “more, not less, likely that communities will adopt a radical, controversial form of social organization”).

53. See Patrice M. Arent, *Lawyers Needed in the State Legislative Process*, UTAH B.J., Oct. 1997, at 24 (noting that Utah’s state assembly has only fourteen lawyers on staff, some of whom work only part time).

54. At least this is what local lawmakers and the lawyers who represent them tell me. When I presented this paper to a group of lawyers who represent local governments in free speech cases, they told me that local lawmakers rarely consider the constitutionality of proposals with any depth. They reported that lawmakers rarely even talk to them, their lawyers, until it’s too late and litigation has begun. This problem affects even the largest cities. Former Los Angeles City Councilman Jack Weiss, in a talk to the UCLA law faculty, recounted how he was the only trained lawyer on the council when he was elected. He requested a copy of the Los Angeles municipal code for his office, but the request took two years to be fulfilled. If the lack of legal training and access to legal materials in Los Angeles is typical, one would expect that local lawmakers are relatively likely to adopt laws that run afoul of constitutional standards.

rights, it may be due to the exposure of the federal courts to state and local laws that too often stray from existing constitutional standards. Indeed, as noted, state and especially local lawmakers earned a degree of distrust by fighting against civil rights and other expansions of fundamental rights in the mid-twentieth century. In turn, the perception of hostility to their laws may make lower-level lawmakers even less inclined to concern themselves with the eventual judicial reaction to their legal product. Conceptually, judicial hostility to state and local laws can be distinguished from poor-quality lawmaking; practically, they may be part and parcel of the same underlying phenomenon.

So good reasons exist to believe that the identity of a governmental actor may shape the outcomes of judicial decisions on the constitutionality of free speech burdens. Some of these reasons emphasize the incentives for federal judges to treat federal laws more leniently, while others suggest that the quality of lawmaking varies depending on the level of government. To what extent do recent free speech decisions in the federal courts reflect these theories of free speech federalism? It is to this question that we now turn.

II. FREE SPEECH TAILORING IN PRACTICE

A. *The Case Law: An Overview*

To analyze the role of different levels of government in free speech cases, I first collected⁵⁵ 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

55. The free speech cases were originally collected as part of a study of all strict scrutiny cases during the relevant years. The methodology for that study is discussed in Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 809–12 (2006).

56. Many free speech controversies are the subject of multiple rulings in the federal courts, such as when a published district court decision is subsequently appealed to the circuit court, which also publishes an opinion. To avoid double counting, this study reports only the final ruling on the merits within a given litigation; if there was an appeal, only the last court to issue an opinion on the relevant free speech issue was counted. Because some free speech issues are the subject of preliminary-injunction rulings but no subsequent final ruling on the merits, for purposes of this study I have also counted these preliminary-injunction rulings within the dataset. (Preliminary-injunction rulings are not final rulings on the merits, but to succeed a plaintiff must show a “substantial likelihood of success on the merits.” *See, e.g., Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006).) Only those preliminary-injunction rulings that decided issues that were not subsequently dealt with by a later court in that same litigation were included. These final preliminary-injunction rulings were included to gain as much traction as possible in core free speech cases, where due to the long

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.⁵⁸ As Table 1 indicates, the federal courts upheld a much higher percentage of federal laws than state and local laws.

expressed fear of a chilling effect from legislation burdening speech, preliminary injunctions are very common.

In some decisions, courts considered the constitutionality of more than one speech restriction under strict scrutiny. For purposes of this study, each application of strict scrutiny was counted as a single observation; if a court applied that standard three different times to three different provisions of a law within a single decision, each application was treated as its own separate occurrence. Moreover, while controls were used to ensure that individual controversies were not double counted, some laws were subject to multiple lawsuits in different jurisdictions, leading to multiple rulings and thus multiple observations. So a federal law challenged in two different circuits created two observations (unless the Supreme Court ruled on the issue, in which case only that final appellate ruling counted).

57. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (government as employer); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral laws).

58. The smaller the number of observations, the harder it is for statistical analysis to provide robust, dependable results. Having only thirty-nine federal court decisions is sufficient for ordinary statistical analysis, but of course it would be helpful to have even more observations.

TABLE 1
SURVIVAL RATE OF SPEECH LAWS
BY LEVEL OF GOVERNMENT (STATE & LOCAL COMBINED)⁵⁹

<i>Level of Government</i>	<i>Survival Rate</i>	<i>Applications (N)</i>
State & Local	15%	227
Federal	56%	39
Total	21%	266
F = 37.760, df = 1, p < .000		

According to this data, state and local speech laws were rarely upheld, while more than half of the federal speech laws survived. State and local laws survived only 15% of the time and federal laws survived 56% of the time. This difference is statistically significant ($p < .000$).

Even before analyzing the differences between the various levels of government, these numbers are notable. The cases included in this study are exclusively strict scrutiny cases. That standard, which is supposed to be the most rigorous form of judicial scrutiny, has been famously called “‘strict’ in theory and fatal in fact.”⁶⁰ Yet not only do many speech laws survive strict scrutiny, but well over half of the federal laws do. Clearly, strict scrutiny is not really fatal in fact. This finding corresponds to other recent empirical work I have done on the strict scrutiny standard.⁶¹

Table 1 combines all state and local laws together. This is sensible on one hand because local governments are considered part of the larger government of the state in which they are located. Under existing constitutional doctrine, local governments are not independent sovereignties; they are subsets of the state governments.⁶² But what if we distinguish between state and local governments? Table 2 breaks out the free speech cases into federal, state, and local governments, revealing how judicial scrutiny becomes less likely to be satisfied as one descends the hierarchy of American government.

59. The numbers in the bottom row of this and other similar tables reflect statistical tests to ensure the reliability and significance of the variation reported in the table. In other words, they tell us how likely the variation between, say, the federal survival rate and the state–local survival rate is just random error and not associated with the identity of the governmental actor. Most readers will be primarily interested in the “p-value,” which measures the probability that the numbers reported in the table are random. The lower the p-value, the less likely the variation between the survival rates is due to chance alone. The number reported with the “F” reflects an “F-Test,” which is a measure to determine if the differences between two standard deviation values are too large to be explained by random error. And the “df,” which is of interest only to more experienced readers of statistics, refers to degrees of freedom, or the number of values that are free to vary.

60. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

61. See Winkler, *supra* note 55.

62. See Barron, *supra* note 38, at 487 (“The text of the Constitution does not mention local governments, and black-letter constitutional law formally deems them to be the mere administrative appendages of the states that ‘create’ them.”); Schragger, *supra* note 39, at 1850 (“[T]he Court has held that local governments are instrumentalities of the states and therefore do not have any independent constitutional status . . .”).

TABLE 2
SURVIVAL RATE OF SPEECH LAWS BY LEVEL OF GOVERNMENT:
FEDERAL, STATE, AND LOCAL SPEECH LAWS

<i>Level of Government</i>	<i>Survival Rate</i>	<i>Applications (N)</i>
Federal	56%	39
State	24%	134
Local	3%	93
Total	21%	266
F = 28.314, df = 2, p < .000		

This breakdown of the speech cases uncovers a severe linear descent in survival rates as we move from federal to state to local speech laws. State laws survive less than half as often as federal laws (24% to 56%). The truly remarkable number, however, is the survival rate of local speech laws (3%). Local speech restrictions almost never survive strict scrutiny; of the 93 rulings in the 14-year period covered by this study, in only 3 instances did the courts uphold a local law burdening core speech rights. Strict scrutiny, which is more often than not found to be satisfied when the federal government is behind the challenged speech law, effectively amounts to a categorical rule that local speech restrictions are unconstitutional.

Within the free speech decisions, there is a variety of different types of speech laws. For example, there are campaign-finance laws, restrictions on access to public forums, restrictions on commercial or residential signage, laws regulating ballot-petition circulators, and other sorts of speech laws subject to the strict scrutiny standard. Even though the same standard of review applies to all of the speech laws in this study, it is worthwhile to break out the laws by their doctrinal subgroup because there may be distinctions in the controlling doctrine in each area of law that make laws within that area more or less likely to survive. Table 3 shows the considerable variation in survival rates for different subgroups of core free speech burdens.

TABLE 3
SURVIVAL RATE OF SPEECH RESTRICTIONS BY DOCTRINAL SUBGROUP

<i>Type of Speech Law</i>	<i>Survival Rate</i>	<i>Applications (N)</i>
Right of Access to Courts	50%	26
Charitable Solicitation	47%	15
Indecent Speech	33%	21
Campaign Speech	30%	83
Petition-Circulator Speech	6%	16
Miscellaneous	6%	35
Public Forum	4%	51
Sign Ordinances	0%	19
Total	21%	266
F = 7.618, df = 7, $p < .000$		

Given the variation in survival rates for different types of speech laws, one might hypothesize that the variation in the success rate of federal, state, and local laws is due to the types of laws each level of government adopts. If, for example, the federal government adopts only right-of-access and charitable-solicitation laws, then its relative success may simply be a function of the relatively lenient doctrinal rules in that area of law. It would not be the identity of the governmental actor that mattered; it would be the type of law that entity adopted.

To determine whether the variation in the survival rates between the different levels of government is simply a function of the types of laws they adopt, we can examine areas of law in which both the federal government and either the state or local governments legislate. Do the different levels of government fare the same when they legislate in the same area? Table 4 reports the survival rate of federal, state, and local speech laws cross-tabulated by type and level of enacting government where there was overlapping regulation.

TABLE 4
SURVIVAL RATE OF SPEECH LAWS BY TYPE AND
BY LEVEL OF GOVERNMENT⁶³

<i>Type of Law</i>	<i>Level of Government</i>	<i>Survival Rate</i>	<i>Applications (N)</i>
Campaign Speech	Federal	100%	4
	State	29%	73
	Local	0%	6
Chi-Square = 11.93, df = 2, $p = .003$			
Access to Courts	Federal	63%	19
	State	14%	7
	Local	-	0
Chi-Square = 4.887, df = 1, $p = .027$			
Miscellaneous	Federal	50%	2
	State	8%	12
	Local	0%	21
Chi-Square = 8.706, df = 2, $p = .013$			
Indecency Laws	Federal	50%	10
	State	17%	6
	Local	20%	5
Chi-Square = 2.40, df = 2, $p = .301$			
Public Forum	Federal	0%	4
	State	0%	8
	Local	5%	39
Chi-Square = 0.641, df = 2, $p = .726$			

The results reported in Table 4 suggest that federal laws fare better than state and local laws even when they adopt similar types of speech burdens. There are five areas with overlapping regulation: campaign speech, right of access to courts, indecency, public-forum restrictions, and the miscellaneous (or default) category. With regard to campaign-speech laws, federal restrictions were upheld in every case, whereas only 29% of state laws and no local laws were upheld. This variation was statistically significant ($p = .003$). Federal restrictions on the media's right of access to judicial proceedings were upheld more often than such restrictions adopted by the state governments, 63% to 14%. This variation was also statistically significant ($p = .027$). In the third category, miscellaneous speech laws, federal laws fared better (50%) than state (8%) and local (0%) laws. While this variation was

63. The "Chi-square" test evaluates the numbers reported by reference to the chi-square distribution. This tells us how good the fit is between the results and a theoretical distribution and how independent the variation between the variables is.

statistically significant ($p = .013$), the number of federal laws was very small (2), making the comparison somewhat less useful.

The cross-tabulation results are not uniform. Indecency laws adopted by the federal government appear more likely to be upheld than state or local indecency laws (50% to 17% and 20% respectively) but the variation was not statistically significant ($p = .301$).⁶⁴ In the public-forum cases, local laws actually fared somewhat better (5%) than federal (0%) and state laws (0%), although the variation was again not statistically significant ($p = .726$) and it appears that federal courts are relatively unkind to restrictions on access to public forums as a general matter.

B. *The Case Law: A Model*

Further confirmation that, even if we control for the substantive type of speech regulation, the enacting level of government matters is provided by an estimated regression model. This model indicates the likelihood of a speech law surviving federal court scrutiny, controlling for two types of variables: one, the enacting level of government; and two, the substantive category of speech law involved in the controversy.⁶⁵

64. A statistical test in which the state and local indecency laws were combined and then compared to federal indecency laws made the variation more robust but the result was still below the threshold for statistical significance.

65. Regression analysis is a common statistical tool that measures the relationship between an observed result—here the survival rates—and the variables included in the analysis. The model employs complementary log-log regression. The constant was comprised of state laws and charitable-solicitation laws. Prior to estimating the model, simple descriptive statistics were employed to test other potential variables for significance. Among those tested and rejected were 1) the party of the president who appointed the deciding judge, which was used as a proxy for the judge's ideological leanings; 2) the deciding circuit, which was used as a proxy for regional variation; and 3) the date of decision, which was used to determine if courts were becoming more or less willing over time to uphold a speech restriction. None of these variables, however, showed any significant relationship with surviving judicial review.

TABLE 5
THE DETERMINANTS OF SURVIVING FEDERAL COURT
REVIEW IN FREE SPEECH CASES

<i>Level of Government</i>	
Federal	1.737*** (0.495)
Local	-0.776 (0.660)
<i>Type of Law</i>	
Campaign Speech	-0.652 (0.437)
Right of Access	-1.337* (0.653)
Indecency	-1.517* (0.684)
Public Forum	-2.769** (0.878)
Petition Circulator	-2.255* (1.071)
Miscellaneous	-2.278** (0.847)
Constant (State, Charitable Solicitation)	-0.412 (0.386)
Chi-Square	61.37
<p>*$p < .05$; ** $p < .01$; ***$p < .001$ Constant = state laws, charitable-solicitation laws $N = 257$ (sign ordinances omitted) Dependent variable = surviving judicial review Standard errors in parentheses</p>	

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 ($p < .001$). 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.

66. Note that there is one type of law omitted from the regression model: sign ordinances. There were no sign ordinances in the data set that survived judicial scrutiny. Clearly, therefore, this type of law is a significant predictor of failing review; the courts effectively employ a hard-and-fast rule that none of these laws will be constitutional under strict scrutiny analysis. Yet, the total lack of any survivors within the data set interfered with the regression model. In essence, the statistical program was unable to predict the change in the likelihood of being upheld for a variable in which there were no cases upheld. The sign-ordinance cases were therefore omitted from the model, but simple logic tells us that this is a significant predictor of failure in the courts.

C. The Case Law: A Granular Examination

The patterns found above require further examination. In this section, I look more closely at the subgroups of free speech cases to see what lessons the decisions have for free speech federalism. In some subgroups, there is evidence that the federal courts are applying a relatively lenient form of judicial review to federal laws while being more demanding of state and local laws. In others, there is evidence that state and local laws suffer from relatively poor quality—that is, the laws stray far from existing rules of constitutional doctrine.

This examination of the cases is not meant to sort out precisely the impact of deference as compared to quality of lawmaking in free speech cases. As noted earlier, these notions are likely to be reinforcing, not mutually exclusive. Moreover, the cases do not lend themselves to determinate assessments of the relative impact of deference or quality of lawmaking. To obtain a reliable determination of deference, for example, would require having sets of rulings on the same or very similar laws from each of the levels of governments; these simply do not exist. While there is overlap in the types of laws adopted, the precise details of the laws vary and, in constitutional law, the details matter. Additionally, the courts will not be explicit that they are employing deference to federal lawmakers when controlling Supreme Court doctrine declares that free speech principles apply equally to all levels of government. Finally, the reasons for federal courts to defer to federal actors are not the type of reasons that judges are likely to admit, even to themselves. Indeed, such deference may be completely subconscious.

This granular consideration of subgroups of speech laws also reveals some other surprising aspects of free speech law. For example, the cases show that many federal speech restrictions are not the product of the legislature or executive branch agencies—as traditional constitutional theory supposes—but rather stem from the federal judiciary itself. Federal courts often find themselves reviewing the constitutionality of speech restrictions imposed by other federal courts. In this way, courts are not merely the protectors of rights, but also the lawmakers behind infringements of rights. Moreover, the dynamics of judicial review might change when the “lawmakers” whose product is being reviewed by federal courts are themselves federal court judges. Comity concerns may make reviewing courts even more likely to uphold this type of federal law. Even in the absence of comity, we might expect that federal judges will adopt laws that are unusually likely to meet existing constitutional standards due to their expertise and desire to avoid being overturned.

1. Right-of-Access Cases

One notable area of overlap between federal and state speech laws is the right of access to judicial proceedings. Restrictions on the right of access involve legislative enactments or court orders closing trials or government

buildings, or sealing judicial materials from the media. Nearly half of all federal speech regulations in the fourteen years covered by this study were right-of-access restrictions. Federal laws in this area survived at a high rate (63%), especially given the application of the demanding strict scrutiny test. That restrictions on the right of access sometimes survive judicial scrutiny is not entirely surprising given existing constitutional doctrine. The Supreme Court has upheld restrictions on the right of access⁶⁷ and, on several occasions, expressed that such limits are well within constitutional boundaries even under strict scrutiny.⁶⁸ Yet, only federal laws seemed to benefit from this leniency. Similar state laws survived only in a single instance during the fourteen years (14%).

The opinions betray evidence of deference in favor of federal lawmakers. In several decisions, the federal courts go out of their way to justify federal laws while employing greater skepticism to even relatively narrow state laws. In *United States v. McCorkle*, which upheld an order sealing transcripts of in camera proceedings sought by a newspaper, a federal court declined to identify any underlying governmental interest that compelled the secrecy and went so far as to declare that a number of other in camera proceedings were off limits even though the newspaper had not requested access to them.⁶⁹ In *United States v. Valenti*, upholding the closure of bench conferences, another court held that the newspaper seeking access had failed to meet its burden of offering effective alternatives to complete closure.⁷⁰ Yet, under strict scrutiny the burden of showing no less-restrictive alternatives belongs to the government, not the challenger.⁷¹ Moreover, the newspaper had no information about what the subject of the bench conferences was and thus could not reasonably be expected to offer suitable alternatives to closure. In these illustrative cases, federal right-of-access restrictions were upheld because courts seemingly departed from the traditional requirements of the strict scrutiny standard.

In contrast, the federal courts in cases involving state laws often bent over backward to invalidate the restrictions. In *Lind v. Grimmer*, a court invalidated the application of a state law denying media access to pending complaints filed with the state campaign-finance spending commission.⁷² The court reasoned that the government interest in encouraging people to run for office was not protected by the restriction because complainants and

67. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (affirming a right-of-access restriction against reporters seeking to videotape and photograph a prison).

68. See, e.g., *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (holding that closure is allowed where there is a specific finding of a substantial probability of prejudice to the defendant's right to a fair trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (noting that case-by-case determinations of the necessity for closure may be constitutionally permissible).

69. 78 F. Supp. 2d 1311, 1315 (M.D. Fla. 1999).

70. 987 F.2d 708, 715 (11th Cir. 1993).

71. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (“Under the strict-scrutiny test, [the party defending the content-based speech restriction] ha[s] the burden to prove that the . . . clause is (1) narrowly tailored, to serve (2) a compelling state interest.”).

72. 30 F.3d 1115, 1117 (9th Cir. 1994).

others remained free to air their charges informally to the public.⁷³ Yet, the same could be said about any restriction on the right of access. These cases deal only with denials of access to judicial materials, not prior restraints on publication of the information if obtained from another source. In *Rapp v. Disciplinary Board of Hawaii Supreme Court*, which invalidated a state law barring lawyers from ex parte, postverdict communications with jurors,⁷⁴ a court held the law was ill tailored because it applied only to ex parte access.⁷⁵ As a result, “two unscrupulous lawyers who agree to interview jurors together” could “engage in a jury harassment ‘free for all’ with no court supervision.”⁷⁶ The court offered no explanation of why lawyers representing opposing sides in litigation would have any incentive to jointly harass jurors. Indeed, the requirement that all sides to a dispute be present was the safeguard to ensure that harassment did not occur. With that measure invalidated, the unscrupulous lawyer was freed to speak to jurors alone, increasing the likelihood of harassment.

There is also some evidence that federal laws restricting access to court are occasionally of relatively higher quality than such laws adopted at the state level. Of the federal right-of-access cases in the dataset, one finds numerous restrictions that one would expect courts to uphold given the underlying significance of the governmental interests involved. Three involve restrictions on media access to materials in terrorism trials where the denial of access is justified by national-security interests.⁷⁷ Six access restrictions were put in place to protect the identity of minors⁷⁸—a governmental interest that courts traditionally respect. Another three cases involve restrictions designed to avoid disclosure of grand jury deliberations,⁷⁹ the long-established secrecy of which has been repeatedly approved by the Supreme Court.⁸⁰ These laws are often very narrow in their tailoring, too, restricting media access only to an individual hearing,⁸¹ one witness’s testimony,⁸² or a particular document.⁸³ They are not broad, restrictive limits on access.

73. *Id.* at 1120.

74. 916 F. Supp. 1525, 1528 (D. Haw. 1996).

75. *Id.* at 1537.

76. *Id.*

77. *See, e.g.*, *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997); *United States v. Resam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002).

78. *See, e.g.*, *United States v. Three Juveniles*, 862 F. Supp. 651 (D. Mass. 1994); *United States v. Jacobson*, 785 F. Supp. 563 (E.D. Va. 1992).

79. *See, e.g.*, *In re Grand Jury Subpoena*, 103 F.3d 234 (2d Cir. 1996); *In re Grand Jury Proceedings*, 806 F. Supp. 1173 (D. Del. 1992).

80. *See, e.g.*, *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 424 (1983) (“We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) (same).

81. *See, e.g.*, *United States v. McCorkle*, 78 F. Supp. 2d 1311 (M.D. Fla. 1999).

82. *See, e.g.*, *Jacobson*, 785 F. Supp. 563.

83. *See, e.g.*, *Wash. Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991).

Although there were seven state laws restricting the media's right of access, only one survived federal judicial review. A closer look at the cases suggests that the state cases do not deal with access restrictions of equal constitutional strength as the federal laws: a state that essentially made all of its criminal case files inaccessible;⁸⁴ a protective order that barred a reporter from revealing something he had heard in open court;⁸⁵ and legislation closing preliminary hearings in felony cases⁸⁶—a practice the Supreme Court explicitly held was unconstitutional in one of its foundational right-of-access cases.⁸⁷ State lawmakers are imposing restrictions on the right of access that are overly broad, and thus more susceptible to invalidation.

One of the most intriguing revelations in the right-of-access cases is how often federal laws of this sort are the product of the federal judiciary itself rather than Congress or executive agencies. Although traditional constitutional theory posits judicial review as the exercise of authority to adjudicate the validity of laws produced by the elected branches, the vast majority of federal right-of-access restrictions were put in place by federal judges. The judges imposed the orders in unusual cases to close a courtroom or seal documents. Of the 19 observed federal right-of-access restrictions adjudicated, 16 were put in place by federal courts and only 3 were adopted by Congress or the executive. All federal right-of-access laws were about equally likely to survive review—the courts upheld 63% of right of access restrictions imposed by federal judges and 67% of such laws adopted by the elected branches—but the frequency of judicial orders coming up for review suggests a modification to the reasons put forward earlier for judicial leniency toward federal lawmakers.

In addition to federal courts being motivated by a “separation of powers” game in which they maintain the power and legitimacy of the courts by avoiding backlash, there may also be a “shared powers” game. By this, I mean that the federal courts may tend to uphold burdens put in place by other federal judges out of a sense of comity to their institutional colleagues. The federal judiciary as a whole has an interest in buttressing the authority of its members. Hostile appellate review of other federal judges' right-of-access restrictions could also undermine respect for judicial orders more generally or weaken the power of federal judges to issue orders controlling the integrity of their proceedings.

2. Campaign-Speech Cases

Campaign-speech restrictions are adopted by federal, state, and local governments. But despite the formal equivalence in doctrine between campaign-speech restrictions—such as campaign-finance laws and electioneering limits near polling places—federal laws have fared far better than state laws.

84. See *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993).

85. See *Fort Wayne Journal-Gazette v. Baker*, 788 F. Supp. 379 (N.D. Ind. 1992).

86. See *Rivera Puig v. Garcia Rosario*, 785 F. Supp. 278 (D.P.R. 1992).

87. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986).

State laws, in turn, have fared far better than local laws. Over the covered period, federal courts upheld every federal campaign-speech restriction, 29 percent of similar state laws, and none of the local laws.

In campaign-speech decisions, one also finds examples of the courts treating federal laws differently than state and local laws. In one state law case, for example, a court invalidated a law limiting the amount of money registered lobbyists could donate to candidates for elected office.⁸⁸ The court explained that the law had a “direct quantitative effect on political communication and association”⁸⁹ and the threat of corruption between lobbyists and candidates was based wholly on “allegations” with no “showing of actual improprieties.”⁹⁰ By contrast, in considering a broader federal regulation barring municipal securities professionals from making *any* contribution to state candidates with whom they solicit business,⁹¹ another court brushed aside the fact that “the record contains no evidence of specific instances” of impropriety—only “allegations”—by insisting that the underlying corruption was “self-evident[]” and “apparent.”⁹² Departing from strict scrutiny’s traditional rigidity, the court in the latter case wrote that, while the law might be underinclusive, strict scrutiny did not mandate “the best available fit between means and ends.”⁹³ But that is exactly what “least restrictive alternative” means.

Another case addressing a federal campaign-speech restriction betrays clear evidence of deference: the Supreme Court’s decision in *McConnell v. Federal Election Commission*, which upheld the “electioneering communications” provision of the Bipartisan Campaign Reform Act (BCRA).⁹⁴ Whereas established doctrine held that campaign-finance restrictions were unconstitutionally overbroad if they restricted speech about candidates that fell short of “express advocacy”—specific exhortations to vote for or against a candidate⁹⁵—the *McConnell* Court upheld a provision that barred corporations and unions from making expenditures merely mentioning a candidate’s name within a given period of time before an election.⁹⁶ Moreover, under strict scrutiny, the provision did not seem to have the close fit required. By barring all expenditures that even pictured a candidate’s face during election season, the law conceivably could have restricted speech having nothing to do with elections at all.⁹⁷ As a result, many election law experts recognized

88. *Barker v. Ethics Bd.*, 841 F. Supp. 255 (W.D. Wis. 1993).

89. *Id.* at 259.

90. *Id.* at 260.

91. *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

92. *Id.* at 944–45.

93. *Id.* at 946.

94. 540 U.S. 93 (2003).

95. *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

96. *McConnell*, 540 U.S. at 190–91 (upholding 2 U.S.C. § 434(f)(3)(A)(i) (Supp. II 2002)).

97. In his *McConnell* dissent, Justice Anthony Kennedy offered an example: just prior to an election of a safe-seat incumbent, an environmental group wishes to take out an advertisement

that the provision was on shaky constitutional grounds under established doctrine.⁹⁸ Indeed, the BCRA even included a backup provision that would become effective should the electioneering communications provision meet its expected doom in the courts.⁹⁹ Yet, the Supreme Court upheld the law, avoiding any real substantive analysis of the fit between the ends and the means.¹⁰⁰

The constitutional quality of the campaign-speech laws may also play a role—although, with the relatively poor constitutional quality of the federal law in *McConnell*, one suspects that deference is an important factor. State and local governments often adopt campaign-speech restrictions about which the Supreme Court has previously expressed constitutional doubts. For example, several states have attempted to ban anonymous campaign literature,¹⁰¹ even though the Supreme Court has directly held that such bans are unconstitutional.¹⁰² Numerous state and local governments have imposed limits on campaign expenditures by candidates,¹⁰³ in obvious contravention of the Supreme Court's clear holding in *Buckley v. Valeo* that expenditure limits violate the First Amendment.¹⁰⁴ Still other states have tried to limit the speech of candidates running for judicial office,¹⁰⁵ another practice the Supreme Court has clearly (though, in fairness to the states, only recently) disapproved.¹⁰⁶ Where states regulate something the Supreme Court has approved, their laws fare much better; state disclosure laws, for instance, survive in nearly 40 percent of observed rulings.

against a logging law sponsored by the incumbent. *See McConnell*, 540 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part).

98. *See, e.g.*, Jan Witold Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769, 776 (2002) (“These proposed ‘electioneering communication’ provisions likely would not survive a constitutional challenge.”).

99. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 401, 116 Stat. 81, 112.

100. *See McConnell*, 540 U.S. 93.

101. *See* *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D. Ind. 1997) (discussing state statute prescribing such restrictions); *W. Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (S.D. W. Va. 1996) (same).

102. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

103. *See* *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir. 2001) (granting injunctive relief to mayoral candidate who brought First Amendment challenge against city charter provision limiting campaign expenditures); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (holding unconstitutional a city ordinance that imposed limits on city council campaign expenditures).

104. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (“We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.”).

105. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (holding unconstitutional a state statute prohibiting candidates from personally soliciting campaign funds).

106. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

3. Indecency Cases

Restrictions on “indecent” speech—that is, speech that is sexually explicit but short of pornography—are also a type of speech law adopted by each of the three levels of government. Like other “core” free speech burdens, indecent (but not obscene or child-pornographic) speech triggers strict scrutiny. Yet, federal laws survived frequently (50%), and at a higher rate than state (17%) and local (20%) laws regulating indecency. These results are consistent with the larger pattern of free speech cases, but the difference in the survival rates of federal, state, and local laws was not found to be statistically significant—a result that may be due to the small number of overall cases.

Some of the language and reasoning of the indecency decisions suggest a measure of deference being applied to federal laws. *Action for Children’s Television v. Federal Communications Commission*¹⁰⁷ is indicative. The Court of Appeals for the District of Columbia Circuit upheld a federal ban on indecent television broadcasts between the hours of 6 a.m. and midnight.¹⁰⁸ The ban, the court admitted, was underinclusive: more than 1 in 5 teenagers between the ages of 12 and 17, and 6 percent of children aged 2 to 11, watch television between 11 p.m. and 11:30 p.m.; 1 in 6 teenagers watch as late as 1 a.m.¹⁰⁹ A more precisely tailored ban might allow indecent broadcasts during school hours on weekdays, when children are unlikely to be watching television. Yet the court discarded this argument first by noting that some children are too young to go to school, without acknowledging that children 4-years old and younger are highly unlikely to channel surf and happen upon indecent programs.¹¹⁰ The court then went further and essentially disregarded the least-restrictive means analysis altogether: “[E]ven if such fine tuning were feasible, we do not believe the First Amendment requires that degree of precision.”¹¹¹ Rather than least-restrictive means, the court explicitly invokes “balancing,” and argues that the question of where “it is most reasonable to permit indecent broadcasts is the kind of judgment better left to Congress [H]ere, we defer to Congress’s determination”¹¹² Commentators have argued that

107. 58 F.3d 654 (D.C. Cir. 1995) (en banc).

108. *Id.* at 656.

109. *Id.* at 665.

110. *Id.* at 666.

111. *Id.*

112. *Id.* at 667. Such strict scrutiny schizophrenia was only made more apparent by the court’s subsequent rejection of an exception for public broadcasters’ programs aired after 10 p.m. After arguing in the first part of the opinion that Congress had a compelling interest in restricting indecent programming between 11 p.m. and midnight, the court turned around in the latter part and held that the public-broadcaster exception shows the interest is not compelling after 10 p.m. and requires the ban to end at that earlier hour. *Id.* at 669–70.

this decision employed “a strict-scrutiny-light algorithm”¹¹³ that was “essentially a less-than-strict scrutiny.”¹¹⁴

Yet *Action for Children’s Television* also shows the difficulty of separating lenient judicial treatment of federal laws from quality of law variation. To the extent that federal indecency restrictions fit more comfortably within First Amendment doctrine than state and local indecency laws, it may be the result of the Supreme Court crafting lower doctrinal hurdles for federal law. Consider that while all indecency restrictions supposedly face the same demanding standard of review, the Court has long recognized that television broadcasting is uniquely open to regulation.¹¹⁵ All broadcast regulation, however, is federal; the state and local governments regulate other types of indecency, such as written matter. Thus, when the Court holds that broadcasting is different, one cannot be sure whether it is really something unique about broadcasting that leads to that holding or whether the Court is employing some degree of deference because such regulation always comes from federal lawmakers. Which comes first—the deference or the doctrine?

4. *Miscellaneous Speech Cases*

The case law was filled with a hodgepodge of speech restrictions that defied easy categorization and which I have grouped together in a default category: “miscellaneous” speech restrictions. The laws categorized in this way do not belong to any recognized subgroup of First Amendment doctrine. Rather, these laws are unusual or unorthodox—or, less charitably, bizarre. They include restrictions such as a policy adopted by a public university that prohibited fraternities from sponsoring “ugly girl” contests;¹¹⁶ a law banning the sale of trading cards representing violent criminals;¹¹⁷ bans on fortunetelling,¹¹⁸ and restrictions on “gangster” rap¹¹⁹ and the sale of violent video games.¹²⁰

Federal laws in this category were few—only 2 federal court rulings, constituting 5% of all federal speech restrictions adjudicated—but survived

113. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1574 (2005).

114. Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, COMM. LAW., Spring 2004, at 1, 27; see also Gregory B. Phillips, Note, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237, 267–68 (2006) (noting that the court’s scrutiny was “less rigid than the strict scrutiny warranted by content-based regulations”).

115. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (explaining that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”). Strict scrutiny “light” is a consequence of the scarcity of broadcasting frequencies, the accessibility available to children, and the captivity of the audience. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

116. *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993).

117. *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997).

118. *Trimble v. City of New Iberia*, 73 F. Supp. 2d 659 (W.D. La. 1999).

119. *Torries v. Hebert*, 111 F. Supp. 2d 806 (W.D. La. 2000).

120. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).

at a higher rate (50%) than state laws (8%) and local laws (0%) falling in the default category. State and local laws in this area were far more common, with 12 state law decisions (9% of all rulings on state laws) and 21 local law decisions (23% of all rulings on local laws).

With so few federal cases to examine, it is difficult to analyze how deference to federal lawmakers might influence these cases. We can gain some traction, however, on the quality-of-law issue. Consider, first, that the fact that the laws are so unusual itself suggests that the laws are not likely to satisfy existing constitutional standards. As the noted state court jurist Hans Linde writes, “[w]hen many states do not pursue a goal, characterizing it as compelling rings hollow.”¹²¹ Furthermore, many of these bizarre laws predictably fail the demands of existing doctrine. For example, the handful of restrictions on speech associated with violence, such as the violent video game or trading-card ban, regulate speech that cannot reasonably be said to threaten an imminent breach of the peace. Yet that is the established standard for unprotected violent speech.¹²² As the data above suggest, such poorly formed laws are rarely adopted at the federal level, but are common at the state and especially local level. This provides support for the idea that state and local governments are relatively prone to adopt speech restrictions that are of questionable constitutional validity.

5. Public-Forum-Access Cases

One area of free speech law where federal laws do not survive at a higher rate than similar state and local laws involves restrictions on access to public forums. Of the 4 federal laws adjudicated, all were invalidated. Of the 8 state laws, all were also invalidated. But local laws fared slightly better—although the difference is not statistically significant—with 2 of 39 laws surviving (5%).

From these rulings, it does not appear that federal lawmakers are receiving any unusual deference when they adopt restrictions on access to public forums. And even though local laws fare slightly better than similar federal and state laws, there is no particularly telling evidence of judicial leniency to local lawmakers. With only 2 survivors and 37 fatalities, local laws restricting access to public forums still face a near categorical rule of invalidity.

What these rulings suggest is that lawmakers generally—and local lawmakers in particular—spend far too much time adopting poor-quality speech restrictions regarding public forums. Public-forum-access restrictions are far from constitutional norms of acceptability. Local governments are especially fond of adopting this type of speech restriction, which make up almost half of all speech burdens at the local level. Consider a few of the public forum

121. Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of “Interest” Scrutiny*, in *PUBLIC VALUES IN CONSTITUTIONAL LAW* 219, 235 (Stephen E. Gottlieb ed., 1993).

122. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

laws adopted by local governments: denials of the opportunity to speak during the public-comment period of a government meeting, justified by the governmental end of avoiding offense to the council members' sense of propriety;¹²³ prohibitions on certain advertisements on public buses to minimize the disruption that might result from controversial ads;¹²⁴ bans on the distribution in a public forum of leaflets advertising erotic dancing, defended as a means of enhancing the community's quality of life;¹²⁵ and bars on display of religious signs at a football stadium designed to avoid upsetting the crowd.¹²⁶ Such justifications all come down to a desire to avoid controversy, but as the Supreme Court explained in *Cornelius v. NAACP Legal Defense and Educational Fund*, "the avoidance of controversy is not a valid ground for restricting speech in a public forum."¹²⁷ Although *Cornelius* was decided in 1985, well before the cases in this study were decided, governments—especially local governments—continue to adopt and defend speech-restrictive laws relying on this same governmental objective.

These public-forum restrictions and others like them—such as access denials to gays,¹²⁸ white supremacists,¹²⁹ antiabortion groups,¹³⁰ or religious groups¹³¹—may nonetheless serve the political interests of local officials, who seek to please locally powerful interest groups by restricting the speech of disfavored minorities. In the absence of sufficiently strong competing interest-group pressures—and perhaps, given the terrible track record of public-forum restrictions in court, sound legal advice—even such constitutionally weak laws continue to be adjudicated in federal court.

The granular examination of the case law offered in this Part is only suggestive. Not every case shows evidence of deference by courts or variation in the quality of lawmaking at the different levels of government. This comes as no surprise because the courts claim to be applying the same strict scrutiny standard and do not formally consider the identity of the governmental actor in adjudicating cases. What is surprising is the good number of instances where evidence of judicial deference comes through in the opinions, or where the relatively poor lawmaking of state and local government officials is readily apparent.

123. See *Zapach v. Dismuke*, 134 F. Supp. 2d 682 (E.D. Pa. 2001).

124. See *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000).

125. See *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998).

126. See *Stewart v. Dist. of Columbia Armory Bd.*, 789 F. Supp. 402 (D.D.C. 1992).

127. 473 U.S. 788, 811 (1985).

128. *Cimarron Alliance Found. v. City of Oklahoma City*, 290 F. Supp. 2d 1252 (W.D. Okla. 2002).

129. *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182 (D. Mass. 1998).

130. *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998).

131. *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

III. IMPLICATIONS

This Part examines two important implications of the federalism effect found in free speech cases. The first is how this pattern and its potential causes might affect recent efforts to promote devolution as part of a “federalism revolution.” The second relates to a burgeoning trend in case law and legal scholarship favoring the formal “tailoring” of rights along institutional lines to allow some governmental entities, such as universities and prisons, special leeway to burden fundamental rights.

A. *The Dangers of Devolution*

Perhaps the most significant constitutional trend of the past two decades has been the so-called “federalism revolution.” After half a century of centralizing constitutional authority in the federal government—and correspondingly diminishing the power of state and local governments—the Rehnquist Court and a cadre of legal scholars argued for reversing course. This states’ rights revolution has centered primarily on Congress’s power to regulate commerce¹³² and state immunity from federally imposed mandates.¹³³ But it has also begun to touch questions of constitutional rights. Justice Clarence Thomas, for example, has called for reinterpreting the First Amendment’s Establishment Clause to impose limits on only the federal government and not the states.¹³⁴ Several notable scholars have similarly called for greater state or local authority to regulate in matters of religious liberty.¹³⁵ Others have argued for devolution in matters of constitutional rights more generally.¹³⁶

The federalism effect in free speech cases casts in bold relief some dangers of devolution, especially in matters of fundamental rights. To the extent that federal speech laws are a higher quality product than state and local speech laws, we ought to be wary of giving state and local governments more leeway to burden fundamental rights.

The justifications for devolution emphasize three arguments. First, devolution is thought to enhance democratic self-governance by making elected officials more responsive to the voters.¹³⁷ By placing authority in the hands

132. See *United States v. Lopez*, 514 U.S. 549 (1995).

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

134. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (arguing against incorporation of the Establishment Clause).

135. See Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006) (analyzing how federalism might impact religious liberty); Schragger, *supra* note 39 (arguing for more deference to local governmental actors on religious issues).

136. Maltz, *supra* note 18, at 189.

137. See, e.g., Dorf & Sabel, *supra* note 45, at 316–23; McConnell, *supra* note 52, at 1493–1511; Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988); Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1183 (1977). For a judicial invocation, see *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

of government officials closer to local communities—rather than in a distant Washington, D.C.—those communities are better able to effectuate policies and control their destinies.¹³⁸ Yet, in light of the poor track record of state and local governments in the area of free speech, one might reasonably question whether enhancing governmental responsiveness to relatively small, geographically compact communities is such a good thing. As Madison warned, in smaller jurisdictions there are fewer interests competing against one another and local prejudices can more easily dictate legal outcomes.¹³⁹ When small, cohesive groups in the electorate control lawmaking, oppression of outsiders and minorities becomes easier. At the federal level, the pressures of competing interest groups make such oppression more difficult to achieve.

Modern-day public-choice theory tells us that elected officials are not simply public spirited; they respond to incentives.¹⁴⁰ Owing to structural features of the national government, these lawmakers are less likely than state and local officials to adopt poorly formed laws that exceed constitutional limits. Democratic self-government loses much of its appeal when it is employed to deny fundamental rights, such as the freedom of speech, to minority interests. One might even conclude that only by vigorous protection of speech rights—an essential element of self-government—can governmental processes be sufficiently worthy of our respect.¹⁴¹

A second and related justification for devolution focuses on the “checking” effect of state and local governmental authority. Under this view, a major threat to individual liberty is concentrated governmental power in the federal government.¹⁴² There is a “danger of irresponsible power at the federal level in the interplay between federal bureaucracies, congressional committees, and interest groups.”¹⁴³ While the fear of concentrated power is legitimate, the free speech cases suggest there ought to be equal or greater concern for decentralized power. Because of structural features of lawmaking at the federal level, the legal output of the national government is the result of a process in which multiple groups exercise their voice. Consequently, that output tends to be moderate rather than radical, constitutionally strong rather than constitutionally weak. As we descend to the state and local level, governmental power is more easily exercised to injure the freedom of speech.

If the First Amendment exists to keep open the channels of communication, especially for minorities, then the free speech cases suggest that state and local regulation often needs the correcting force of federal judicial re-

138. See Stewart, *supra* note 44, at 924–25.

139. See *supra* text accompanying notes 41–45.

140. See *supra* text accompanying notes 46–50.

141. This is, of course, the classic argument for judicial review articulated by John Hart Ely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

142. See *Gregory*, 501 U.S. at 459.

143. Stewart, *supra* note 44, at 918.

view. Indeed, the history of individual rights in the twentieth century, especially the battle against race discrimination, indicates that state and local authority may be “the problem, not the solution.”¹⁴⁴ If anything, the free speech data suggest that the federal government—in the guise of the judiciary—is checking the excesses of state and local governments.

One might nevertheless defend the qualitatively poor output of state and local governments if it is part of an effort to change existing doctrine. If they object to current doctrinal rules, one of the few ways they have of attempting to change them is to enact contradictory laws and try to defend them successfully in court. While I am skeptical that most, if any, of the poor-quality free speech laws found in this study are conscientious efforts to change constitutional doctrine, if they were, then we might say that lawmakers are using their legislative authority to check the federal courts. Unfortunately for them, the federal courts have the last say.

The third argument for devolution is that it creates choice in the marketplace for governmental services and organizations.¹⁴⁵ Here, devolution is valued for reasons akin to those used by Justice Harlan to justify relatively lenient judicial treatment of state obscenity laws: federal regulation homogenizes the law by requiring uniformity throughout the nation. To the extent our pluralistic society wishes more diversity, diminished federal power and augmented state and local authority may serve to create variation in legal regimes. People can then choose to move to the area that most resembles their preferences.¹⁴⁶ In one sense, the free speech cases support the premises of this argument: at lower levels of government, there is a range of unusual speech regimes that mobile citizens could choose from. People opposed to campaign-finance reform or to speech about violence can find jurisdictions with laws that match their desires.

The problem is that choice and diversity are not necessarily values that should be encouraged when it comes to fundamental rights.¹⁴⁷ The right to free speech is supposed to be enjoyed equally by all citizens, regardless of their place of residence. In the traditional understanding of the First Amendment, the citizen choice that is valued is that which comes from unfettered debate in the marketplace of ideas.¹⁴⁸ If state and local governments can restrict speech, the channels of dialogue are restricted and choice diminished, not enhanced.

144. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 50–57 (1995). As Barry Friedman notes, “the states seem to have been hard at work earning a reputation that they are hostile to civil liberty and favor parochial interests.” Friedman, *supra* note 19, at 367.

145. See *Gregory*, 501 U.S. at 458; Stewart, *supra* note 44, at 923–27.

146. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

147. See Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 151 (1989).

148. The classic statement, of course, belongs to Justice Oliver Wendell Holmes. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

A proponent of devolution might nonetheless see in the free speech cases a cause for concern: the courts consistently invalidate local speech laws and usually reject state speech laws. Federal power is thus exercised to diminish state and local regulatory authority. If the variation in survival rates is due exclusively to judicial deference to federal lawmakers and hostility to state and local lawmakers, then the concern is well founded. Yet in light of the evidence that the quality of legislation in the free speech area is also likely a factor, then we should fear state and local authority being exercised in disregard of constitutional doctrine and in an oppressive manner. State and local governments either do not care enough about the constitutional quality of their lawmaking or receive insufficient legal counsel in formulating (and defending) policy. In either case, the trouble for devolution is the same: state and local governments do not adequately protect fundamental rights.

B. Tailoring Rights

In recent years, a growing literature has developed around the idea of “tailoring” rights along institutional lines. The main idea is that rights should not apply identically to all governmental actors.¹⁴⁹ In contrast to traditional constitutional doctrine, according to which constitutional principles impose the same obligations on all governmental actors,¹⁵⁰ proponents of tailoring argue that courts should be much more sensitive to the unique contexts and missions of different governmental actors. Such tailoring can happen vertically with courts treating the federal government differently than state or local governments.¹⁵¹ Or it can happen horizontally, with courts treating different governmental actors at the same level of government (such as educational institutions or prisons) in distinct ways.¹⁵² Perhaps the most notable arguments for such tailoring have come from two Supreme Court opinions authored by Justice Sandra Day O’Connor: *Grutter v. Bollinger*¹⁵³

149. See Lupu & Tuttle, *supra* note 135, at 105; Rosen, *Context*, *supra* note 18; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005) [hereinafter Rosen, *Tailoring*]; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) [hereinafter Schauer, *Principles*]; Schauer, *Institutional First Amendment*, *supra* note 4.

150. The lack of formal “tailoring” of the speech right along federalism lines is not rare in American constitutional law. The Supreme Court has insisted that the equal-protection principle applies in a consistent, congruent manner as between the state and federal governments. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). In addition to affirmative action under equal protection, the Supreme Court in *Hawaii Housing Authority v. Midkiff* specifically rejected the idea that state governments should be allowed more leeway than the federal government under the Fifth Amendment’s takings clause. See 467 U.S. 229 (1984). The identity of the governmental actor was “irrelevant,” the Court wrote, as the states were equally as “capable as Congress” in making determinations of what counts as a public use. *Id.* at 244.

151. See Lupu & Tuttle, *supra* note 135, at 20; Rosen, *Tailoring*, *supra* note 149, at 1515.

152. See Schauer, *Principles*, *supra* note 149, at 86.

153. 539 U.S. 306 (2003).

and *Johnson v. California*.¹⁵⁴ In *Grutter*, O'Connor wrote that law-school affirmative action policies were due "a degree of deference" despite the application of strict scrutiny because the "complex educational judgments" involved lay "primarily within the expertise of the university."¹⁵⁵ Thanks to this deferential strict scrutiny, the Court upheld the use of race in law-school admissions. In *Johnson*, O'Connor wrote that race-based prison policies may nonetheless survive strict scrutiny because "[p]risons are dangerous places, and the special circumstances they present may justify racial classifications."¹⁵⁶

The free speech data shed important light on the recent turn to rights tailoring in two ways. First, the cases suggest that vertical tailoring of rights may already be occurring even when courts formally reject such an approach, as they have in the context of the First Amendment. On the one hand, courts may employ some degree of sliding-scale deference in free speech cases and thus are willing to uphold laws adopted by one level of government (federal) while subjecting the laws of other levels (state and local) to greater scrutiny. If such deference does account for some of the federalism effect in speech cases, then an informal type of tailoring is happening already in the federal courts. Such an approach, however, ought to be openly admitted and justified by the courts. Judicial honesty and forthrightness are particularly important values in constitutional adjudication, where the will of popular majorities is being overturned. A doctrine built on formal equality but operating on the basis of informal tailoring undermines the legitimacy of judicial review. To this extent, *Grutter* and *Johnson* can be admired because at least they are overt about the Supreme Court's tailoring of the equal-protection principle.

Even in the absence of any distinct judicial treatment of laws adopted by different governmental actors, tailoring may nevertheless occur on the supply side: different governmental actors vary in their lawmaking in constitutionally important ways. Tailoring, in other words, may be something that legislatures and executive agencies do. So the right of free speech is going to take on a different shape depending on the governmental actors that adopt regulations. If, for example, only the federal government were to regulate speech, we might find that speech gains protection from the moderating interest-group pressures that work at that level of government. If other institutions, who lack similar pressures, adopt speech regulations, then the right will be effectively different—at least until the courts step in. And that latter step is never certain; one imagines that there are ample numbers of speech restrictions in place that are never challenged because those affected

154. 543 U.S. 499 (2005). Outside of the equal-protection context, the federal courts have tailored constitutional principles to the prison context by adopting a formally lenient standard of review, even where stricter scrutiny would ordinarily apply outside of prisons, *see Turner v. Safley*, 482 U.S. 78, 89 (1987).

155. *Grutter*, 539 U.S. at 328.

156. *Johnson*, 543 U.S. at 515.

do not feel harmed sufficiently to justify bringing suit or simply cannot afford to mount a challenge.

This latter point leads me to the second way in which the free speech data cast new light on the tailoring-of-rights debate. It may be that the movement toward tailoring is occurring for the wrong reasons and with undesirable consequences. In *Grutter*, the Court argues for granting universities some measure of leeway under the equal-protection principle because of their “educational mission” and academic “expertise.”¹⁵⁷ In *Johnson*—and the related, earlier decision of *Turner v. Safley*, which held that deferential scrutiny generally applies to prison regulations burdening some constitutional rights of prisoners¹⁵⁸—it is prison officials’ objective of maintaining discipline and “prison safety” that leads to judicial respect for their policies.¹⁵⁹ Yet, while courts might be justified in considering the unique contexts of different lawmakers, the emphasis on institutional mission obscures the lawmaking dynamics that lead governmental actors to adopt constitutionally strong or weak laws. If one believes that interest-group pressures tend to moderate lawmaking, then one might want to grant leeway instead to those governmental actors whose legal output is subject to such competition.

Consider the university context involved in *Grutter*. Even if a university has an institutional mission to expose students to multiple perspectives and to prepare tomorrow’s leaders, university policies are not likely to have been vetted by numerous competing, well-informed interest groups. As bureaucratic entities, universities (even public ones) will tend to be governed authoritatively from those at the top of the relevant hierarchy—administrators with relatively little accountability and thus unlikely to be influenced by voices outside the university. Thus, one might expect that universities and other educational institutions will often adopt laws that stray from existing constitutional standards. Indeed, there were nineteen university policies and other educational institutions’ rules within the free speech data and each one was declared constitutionally impermissible. At least with regard to core speech rights, educators have not proven to be worthy of any degree of deference.

A similar story might be told about prisons: their policies are not the product of interest-group competition but are bureaucratically ordained from prison administration. Not only are prison officials unlikely to feel the forces of moderation, their understandable desire for order and discipline might have the effect of overwhelming competing constitutional concerns for prisoners’ rights. The unique prison context may be more reason—not less—to distrust even the most well-meaning and conscientious prison officials.

157. *Grutter*, 539 U.S. at 328.

158. 482 U.S. 78 (1987).

159. *Johnson*, 543 U.S. at 514.

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.

CONCLUSION

The impact of the different levels of government on free speech cases has gone unnoticed since the mid-century demise of Justice Harlan’s proposal for First Amendment tailoring. Although Harlan’s proposal for disparate judicial treatment of federal and state speech restrictions was formally rejected, in practice the level of government still matters to judicial review in more or less hidden, unrecognized ways. The empirical analysis of federal court free speech decisions offered here shows that despite the same standard of review, there is a big difference between federal and state and local laws. Federal speech laws survive more than half the time, state laws survive only a quarter of the time, and local laws almost always fail. This free speech federalism is likely attributable to some combination of federal courts deferring to federal lawmakers and the relative poor quality of lawmaking at the lower levels of government.

The free speech cases naturally lead to the question of whether a similar pattern might be found in other areas of constitutional law. Aside from recent cases promoting the notion of rights tailoring, the federal courts usually insist that the enacting governmental entity is not a relevant factor in constitutional decisionmaking. Yet, in a separate study, I found a degree of incongruence in federal court cases on the constitutionality of race-based affirmative action; here, too, federal laws were more likely than state laws to be upheld.¹⁶⁰ Despite doctrinal rules to the contrary, such a result should not be surprising. The institutional dynamics that might lead federal courts to

160. See Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931 (2007).

defer to other federal actors or that lead state and local governments to adopt relatively oppressive laws should influence legislation more or less across the constitutional horizon.