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Mark D. Rosen

IIT Chicago-Kent College of Law, mrosen1@kentlaw.iit.edu

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Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances

*Mark D. Rosen**

I. INTRODUCTION

Many constitutional principles apply to more than one level of government (federal, state, local) or more than one branch of government. For example, equal protection has been applied to both the federal government and to cities,² and the establishment clause has been applied to legislative and judicial actions.³ Call these “multi-institutional constitutional principles.” Under current doctrine, multi-institutional constitutional principles are almost categorically presumed to operate identically to the different institutions of government to which they apply.⁴ So, for example, once it had been decided that state affirmative action programs were subject to strict scrutiny, the Court treated it as a foregone conclusion that strict scrutiny also applied to federal affirmative action plans.⁵

A recent article of mine (“*The Surprisingly Strong Case for Tailoring Constitutional Principles*”) showed that the fact that a single constitutional principle applies to two (or more) governmental institutions does not entail that the principle need apply identically to each institution.⁶ It is conceivable, for example, that equal protection could subject state affirmative action programs to strict scrutiny but federal programs to only intermediate scrutiny,

* Visiting Professor, University of Minnesota Law School (2005-06); Professor and Norman & Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. Comments from Richard Briffault, Clay Gillette, Rick Hills, Laurie Reynolds, Rick Schragger and many other symposium participants refined the arguments that appear in this Essay. Also, I’d like to warmly thank Rick Schragger for organizing a spectacular conference.

² See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying equal protection to cities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying equal protection to federal government).

³ See, e.g., *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (applying establishment clause to the legislature); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir.), *cert. denied*, 540 U.S. 1000 (2003) (applying establishment clause to judicial action).

⁴ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 580 (1992) (holding that the Establishment Clause is a provision that “the Fourteenth Amendment makes applicable *with full force* to the States and their school districts”) (emphasis supplied); *Adarand*, 515 U.S. at 226-27 (1995) (equal protection rules apply equally as between federal and state governments under the principle of “congruence”).

⁵ See *Adarand*, 515 U.S. at 227, *discussed in* Mark D. Rosen, *The Surprisingly Strong Case For Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1562-63 (2005).

⁶ See Rosen, *supra* note 5, at 1563-65.

with the result that a federal program would be constitutional whereas an otherwise identical state program would not.⁷

More generally, *Surprisingly Strong Case* critiqued the widespread assumption that multi-institutional constitutional principles perforce are “One-Size-Fits-All” in respect of all the governmental institutions to which they apply. Instead, the article argued that constitutional doctrine should be receptive to the possibility that the different levels and branches of government may be sufficiently different institutional contexts such that some multi-institutional principles may apply differently to the different levels or branches of government.⁸ Continuing to draw on sartorial metaphors, the article suggested that doctrine should permit multi-institutional constitutional principles to be “Tailored” to the different institutions to which they apply, rather than conclusively presuming that multi-institutional constitutional principles are “One-Size-Fits-All.” Concretely, this means that, under a Tailored approach, a constitutional principle applicable to both the federal and state governments might permit states to regulate in ways that the federal government cannot, or vice-versa. Similarly, a single constitutional principle’s application to municipalities might vary from the way it applies to states and the federal government. Or a constitutional principle might apply differently to the different branches of the federal government.

Surprisingly Strong Case pointedly did not advocate that any particular constitutional doctrine be Tailored, contenting itself with identifying a plausible new doctrinal option that merits consideration.⁹ This Essay picks up where that Article left off, applying a jurisprudence of Tailoring to three constitutional doctrines: term limits, speech restriction in relation to judicial elections, and content-based speech regulations.

As this Essay shows, the awareness that multi-institutional constitutional principles are not necessarily One-Size-Fits-All, but that they potentially can be Tailored, brings about many benefits. It encourages careful thought about the distinctive characteristics of the many different governmental institutions found in our society. Tailoring potentially frees units or branches of government from constitutional restraints that appropriately limit other units or branches. Awareness of Tailoring helps one to see analogies and precedent

⁷ See *id.* at 1562-63.

⁸ To support its conclusion, the Article showed that neither the Supreme Court nor commentators have offered a compelling theoretical justification for One-Size-Fits-All, that numerous Supreme Court Justices have advocated that particular constitutional principles be Tailored, and that several contemporary doctrines are best conceptualized as instances of Tailoring. The Article also identified numerous systemic differences across the different levels of government that could justify Tailoring. See generally *id.*

⁹ See Rosen, *supra* note 5, at 1581.

that otherwise might be missed. Tailoring also brings to light underlying normative questions that One-Size-Fits-All problematically obscures. By doing all these things, the jurisprudence of Tailoring holds out the prospect for generating more intelligent constitutional doctrine.

II. TERM LIMITS: A CRITIQUE OF *U.S. TERM LIMITS V. THORNTON*

In *U.S. Term Limits, Inc. v. Thornton*,¹⁰ the Supreme Court struck down an amendment to Arkansas' constitution that set term limits for Arkansas' federal representatives, which had been adopted by a state-wide referendum. I hope to show here that what the *Thornton* majority called its "most important" argument¹¹ was an illogical One-Size-Fits-All approach to a legal principle identified in the earlier decided case of *Powell v. McCormick*.¹² After critiquing the Court's analysis in *Thornton*, I then analyze term limits with the insights that Tailoring affords. I conclude that although Arkansas' term limits provision was properly struck down, not all term limits would be unconstitutional — a conclusion at variance with *Thornton*'s analysis. This in turn generates some concrete suggestions as to how term limits provisions should be structured.

A. Critique

Because *Powell* figured so prominently in the *Thornton* Court's analysis, I will briefly review the Court's holding in that case. After Adam Clayton Powell, Jr. had been elected by a majority of citizens in New York's Eighteenth Congressional District, Congress sought to prevent Powell from taking his seat, ostensibly due to miscellaneous alleged ethical lapses on Powell's part.¹³ The Supreme Court ruled that Congress was "without power to exclude Powell from its membership."¹⁴ The Court relied, *inter alia*, on the "fundamental principle of our representative democracy" that "the people should choose whom they please to govern them."¹⁵

To the extent that such a "fundamental principle" exists as a matter of constitutional law,¹⁶ it was a thoroughly sensible one for the Court to rely

¹⁰ 514 U.S. 779 (1995).

¹¹ *See id.* at 806.

¹² 395 U.S. 486 (1969).

¹³ *Id.* at 490-93.

¹⁴ *Id.* at 550.

¹⁵ *Id.* at 547.

¹⁶ It is interesting to inquire as to the source of this "fundamental" constitutional principle. The Court suggested that the principle was inferred on the basis of "basic principles of our democratic system." *See*

upon in *Powell*. This is so because the additional ethical qualifications for Representatives that Congress sought to impose on Adam Clayton Powell, Jr. interfered with the choice that had been made by those who lived in Powell's congressional district — the people whose preferences mattered in respect of selecting their representative for Congress — that Powell should be their representative. The members of Congress who tried to block Powell from taking his congressional seat were not members of the relevant political community in respect of selecting the Eighteenth Congressional District's representative. Congress thus had interfered with the choice of the relevant political community, running afoul of the principle that "the people should choose whom they please to govern them."¹⁷

Careful thought suggests, however, that *Powell*'s "fundamental principle of our representative democracy" did not seamlessly carry over to the *Thornton* context in the manner the *Thornton* majority believed. Of critical significance is that the amendment to the Arkansas State Constitution that provided term limits for Arkansas' federal representatives had been passed by a ballot initiative that won nearly sixty percent of the popular votes and — most importantly — that *had carried every congressional district in the State*.¹⁸

The term limits thus were imposed by the relevant political community upon itself. As such, the term limits cannot be said to have interfered with the relevant political community's ability to "choose whom they please to govern them." To the contrary, term limits were an instantiation of this fundamental principle.

Unfortunately, the *Thornton* Court specifically rejected the argument that *Powell*'s principle was inapplicable since the additional qualifications were the product of a state referendum.¹⁹ This aspect of *Thornton*'s reasoning is a flawed "One-Size-Fits-All" approach to a constitutional principle that by its nature must be Tailored. *Thornton* viewed *Powell* as standing for the principle that additional qualifications for congressional eligibility violated the "fundamental principle of our representative democracy,"²⁰ but that is a mistake. The principle that "the people should choose" was violated in *Powell* not on account of the substance of the additional eligibility

id. at 548. Perhaps the principle that the "people should choose whom they please to govern them" could be understood as a reverse incorporation of the Guaranty Clause, *see* U.S. CONST. art. IV, § 4, though any such suggestion would confront the challenge that the Court long has ruled that the Guaranty Clause is not justiciable. *See* *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), *aff'd* by *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁷ *Powell*, 395 U.S. at 547.

¹⁸ *U.S. Term Limits Inc. v Thornton*, 514 U.S. 779, 845 (Thomas, J., dissenting).

¹⁹ *See id.* at 820 ("[T]he source of the qualification is of little moment in assessing the qualification's restrictive impact.").

²⁰ *See id.*

requirements, but because the requirements were imposed by political “outsiders,” that is, by people (*i.e.*, members of Congress) who were not part of the political community that appropriately selected who was to represent the Eighteenth Congressional District.

In other words, *Powell*’s “fundamental” principle is an anti-extraterritoriality limitation. There are several others.²¹ By their nature, anti-extraterritoriality principles limit what polities can make political decisions, not the substance of the political decisions.²² For this reason, a One-Size-Fits-All jurisprudence is illogical vis-à-vis anti-extraterritoriality principles. Rather, anti-extraterritoriality principles *must* be Tailored.

My analysis might be challenged as follows: Although the holding in *Powell* is not controlling in respect of state-imposed eligibility requirements, perhaps *Powell*’s holding is derived from a categorical constitutional requirement that the relevant political community be able to select *whomever* it wants to represent it. A study of the Constitution and well-established precedent, however, conclusively shows that as a purely descriptive matter there is no such categorical principle. To begin, the Constitution itself establishes eligibility requirements that limit who can be elected to Congress.²³ Moreover, the Court has upheld many state regulations that interfere with citizens’ ability to vote for whom they wish. For example, the Court has upheld state statutes that require persons seeking ballot positions as independent candidates for Congress or the presidency to have been unaffiliated with a political party for at least one year prior to the primary election.²⁴ State statutes that “impose burdens on the development and growth of third parties” and thereby aid the two-party system also have been upheld.²⁵ Each of these state statutes that have the effect of limiting citizens’ voting choices have been upheld on the ground that the limitations facilitate operation of the democratic process.²⁶ Advocates of term limits similarly

²¹ This is true, for example, of the Dormant Commerce Clause and the Privileges and Immunities Clause. See Rosen, *supra* note 5, at 1583.

²² For example, the dormant commerce clause does not proscribe protectionist legislation, only protectionist legislation that is enacted by states. See *id.* at 1518.

²³ See U.S. CONST. art. I, § 2, cl. 2.

²⁴ *Storer v. Brown*, 415 U.S. 724, 734-36 (1974).

²⁵ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 378 (1997) (Stevens, J., dissenting). As the Court has noted, “Many features of our political system – e.g., single-member districts, ‘first past the post’ elections, and the high costs of campaigning – make it difficult for third parties to succeed in American politics.” *Id.* at 362.

²⁶ See, e.g., *Storer*, 415 U.S. at 736 (justifying the one-year unaffiliation requirement on the ground that it protected the electoral process from splintered parties and unrestrained factionalism).

argue that they facilitate representative democracy by eliminating the entrenchment of incumbents.²⁷

In short, the jurisprudence of Tailoring serves two crucial roles in analyzing term limits. First, it clarifies the scope of *Powell*'s holding; state-imposed eligibility requirements are relevantly different from congressionally-imposed eligibility requirements vis-à-vis the anti-extraterritorial limitation found in *Powell*. Second, by spotlighting the true constitutional question that is raised by term limits, the jurisprudence of Tailoring illuminates additional case law that is relevant to analyzing the question at hand. Importantly, this body of precedent reveals that voters do not have a categorical constitutional right to select whomever they wish to be their representative; limitations on who may run for office that are designed to aid the operation of the democratic process repeatedly have been upheld.

B. Positive Implications

Although term limits are not *per se* unconstitutional under the fundamental principle of our representative democracy that was identified in *Powell*, the Arkansas amendment nonetheless was properly struck down under *Powell*'s principle. After explaining why this is so, this subsection explains how a term limits provision could be structured so as to avoid running afoul of *Powell*. To be clear, the analysis below does not purport to defend term limits against all conceivable constitutional challenges.²⁸ What it does is to show that the *Thornton* Court's self-acknowledged "most important[]" argument²⁹ does not lead to *Thornton*'s conclusion that term limits *per se* violate the *Powell* principle.

As shown above, the jurisprudence of Tailoring makes clear that whether a particular congressional eligibility requirement (such as term limits) runs afoul of fundamental democratic principles turns on what political community imposes the limitation. This insight uncovers two problematic aspects of Arkansas' term limits provision. First, although a majority of voters in every congressional district had voted in favor of Arkansas' term limit amendment,³⁰ this was a fortuity. Under Arkansas' ballot initiative law, a ballot initiative must receive a majority of state-wide votes, not a majority of

²⁷ See, e.g., Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 143-51 (1991).

²⁸ For an illuminating examination of some of the other challenges that can be made to term limits, see *id.* at 102-51 (ultimately concluding that term limits are constitutional).

²⁹ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995).

³⁰ *Id.* at 845 (Thomas, J., dissenting).

votes in each and every congressional district.³¹ *Powell's* analysis makes clear that the relevant political community for purposes of congressional districts instead is the congressional district itself. As structured, Arkansas' state-wide initiative thus posed the danger of running afoul of the fundamental principle identified in *Powell*.

For purposes of the as-applied challenge brought in *Thornton*,³² this characteristic of the Arkansas voter initiative should not have doomed the term limits provision to unconstitutionality since majorities in every Arkansas congressional district had voted in favor of term limits.³³ Tailoring makes clear, however, that rather than relying on fortuity, other states that wish to pursue term limits should structure them differently than Arkansas': term limits should be decided not on a state-wide basis, but on a congressional district-by-congressional district basis, so that term limits are applicable only in those congressional districts in which a majority of voters support them.³⁴

The second problematic aspect of Arkansas' term limits provision was not remediable through serendipity. Implicit in *Powell's* principle is the conclusion that any term limit requirement should be waivable in a congressional district in which a contemporary majority no longer wished to be bound by a term limits constraint. As structured, however, Arkansas' amendment only could have been repealed by a majority of Arkansas citizens. While this deficiency was fatal to Arkansas' term limits provision, it could be overcome by structuring term limits provisions so that they can be activated or deactivated on a congressional district-by-congressional district basis.³⁵

³¹ See ARK. CONST. amend. 7.

³² Though the statement in text oversimplifies matters, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (providing an illuminating analysis of the nature of as-applied challenges), the conclusion in text nonetheless likely is valid. Space limitations preclude a more nuanced discussion of this issue here.

³³ *Thornton*, 514 U.S. at 845 (Thomas, J., dissenting) (noting this fact).

³⁴ There are several ways that this could be accomplished under state law. State law, either statutory or constitutional, could delegate lawmaking powers to enact and repeal term limits to political subdivisions that coincide with federal congressional districts. Alternatively, either state statute or constitutional amendment could authorize the enactment and repeal of term limits subject to majority vote on a congressional district-by-congressional district basis.

³⁵ It is worth noting that the requirement that contemporary majorities (in a congressional district) be able to deactivate a term limit does not mean that the term limit would have to be statutory rather than constitutional. After all, a constitutional amendment itself could authorize opt-outs on a district-by-district basis upon vote of a majority of voters in a district. Moreover, it is not the case that state constitutional law is metonymic with supermajority rule. In fact, the states that currently permit constitutional amendments by voter initiatives all require only a simple majority for adoption of constitutional amendment. See Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 148-49 & n.23 (1995).

C. The Really Hard Questions Presented by Arkansas' Term Limits.

Although this Essay does not purport to defend term limits against all possible constitutional challenges,³⁶ it would seem that the most difficult question presented by Arkansas' term limits amendment is the issue raised in Justice Kennedy's concurrence in the *Thornton* decision.³⁷ Justice Kennedy argued that nationwide uniformity with regard to congressional qualifications is necessary because the elected officials will sit in the national legislature. Put a bit differently, Kennedy's argument raises the following question: does our nation's political culture require nationwide uniformity in respect of the qualifications for who may run for Congress?³⁸ This in turn raises several corollary queries: (1) what are the appropriate criteria for answering the question of whether state-by-state variations in respect of term limits is an acceptable aspect of American constitutional law?, (2) what institutions in society properly play a role in answering that question?, and (3) what if any judicial deference should be given to their judgments? I cannot hope to answer these difficult questions here, but only to identify them as the core considerations that properly guide the analysis of state-imposed term limits.

II. JUDICIAL CAMPAIGN CODES: A CRITIQUE OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

A. A Crucial Overlooked Question

In *Republican Party of Minnesota v. White*,³⁹ a 5-4 majority applied strict scrutiny to strike down a state law that barred candidates for judicial office from announcing their views on "disputed legal or political issues."⁴⁰ The

³⁶ See text accompanying note 28.

³⁷ *Thornton*, 514 U.S. at 838-45 (Kennedy, J., concurring).

³⁸ Cf. Rosen, *supra* note 5, at 1624-28 (noting that the determination of whether Tailoring is advisable in any particular doctrinal context requires an analysis of whether the nonuniformity that Tailoring permits is consistent with American constitutional culture).

³⁹ 536 U.S. 765 (2002).

⁴⁰ See *id.* at 770 (quoting Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002)). The crux of the majority's holding was that Minnesota's Announce Clause was "woefully underinclusive" because it "prohibit[ed] announcements by judges (and would-be judges) only at certain times and in certain forms." *Id.* at 783. The majority's application of strict scrutiny in *White* was very exacting indeed. The Court's conclusion that the Announce Clause was underinclusive turned largely on the fact that the Clause's proscriptions were triggered only after a person announced her candidacy for office. In so concluding, the Court rejected a highly plausible justification of this trigger, namely, "that judges feel significantly greater compulsion . . . to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign." *Id.* at 780. The Court declared that this proposition

is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. . . . In any event, it suffices to say that respondents have not carried

four dissenting Justices also applied strict scrutiny, but they concluded that Minnesota's so called "Announce Clause" was narrowly tailored to achieve a compelling governmental interest.⁴¹ The four dissenters and Professor Richard Briffault rightly critique the majority's analysis for inadequately distinguishing between elections for legislatures and the executive branch, on the one hand, and judicial elections, on the other.⁴² I join this critique, which in fact is a form of the Tailoring that I champion. Neither the dissenters' nor Briffault's analysis, however, goes far enough. Both the dissenters⁴³ and Professor Briffault⁴⁴ adopt strict scrutiny without pausing to inquire whether it appropriately applies in this context. A forthright consideration of the appropriate level of review, which Tailoring invites, strongly suggests that a lower level of review was appropriate.

To begin, Tailoring's sensitivity to institutional context opens one's eyes to doctrinal options that otherwise can readily be overlooked. All the case law relied on by the majority in support of strict scrutiny concerned speech restrictions in the context of elections for legislative and executive officials.⁴⁵

In other words, prior to the *White* decision itself, there was no case law that spoke to what level of scrutiny applied to speech restrictions in relation to *judicial* elections.

But is it plausible to draw a constitutional distinction between the context of judicial elections, on the one hand, and legislative and executive elections,

the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests.

Id. at 780-81. One is led to wonder precisely how a state legislature could carry so heavy a burden.

Furthermore, the Court's application of strict scrutiny in *White* sheds constitutional doubt on any limitations of judicial speech. Because the Announce Clause's proscriptions were triggered only after a person announced her candidacy for judicial office, a person was allowed to make public statements regarding disputed political and legal questions before announcing her candidacy. Rejecting announcement time as a legitimate trigger of the speech limitations would appear to mean that *no* limitation on candidate speech could pass muster, for surely extending the Announce Clause's proscription to a time preceding the candidate's publicized decision to run would be overinclusive. Professor Briffault makes a similar observation. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 209-10, 213-14 (2004).

⁴¹ See *White*, 536 U.S. at 800 (Stevens, J., dissenting) (concluding that Minnesota had a "compelling interest in sanctioning" statements by judicial candidates that announce their views); *White*, 536 U.S. at 819 ("The Announce Clause . . . is equally vital to achieving these compelling ends . . .") (Ginsburg, J., dissenting).

⁴² See *id.* at 797-803 (Stevens, J., dissenting); *id.* at 803-809, 813-21 (Ginsburg, J., dissenting); Briffault, *supra* note 40, at 206-08.

⁴³ See *White*, 536 U.S. at 803-821.

⁴⁴ See Briffault, *supra* note 40, at 206-08.

⁴⁵ See *White*, 536 U.S. at 774-75.

on the other? Both precedential and functional analyses suggest that such line-drawing is plausible.

B. Precedent for "Separation-of-Powers" Tailoring

Strong evidence that a constitutional principle might vary in its application across the different branches of government exists in contemporary precedent. The defendant/appellant in the 2001 case of *Rogers v. Tennessee*⁴⁶ had been convicted of second-degree murder and appealed on the basis that the victim had died more than a year and a day after having been stabbed. At the time of the crime, Tennessee unquestionably had a common-law "year and a day rule," which precluded conviction of murder unless a victim had died by the defendant's act within a year and a day of the act.⁴⁷ The Supreme Court of Tennessee abolished the "year and a day rule" and applied a new rule to the defendant,⁴⁸ upholding the conviction despite the fact that fifteen months had elapsed between infliction of stab wounds and the victim's death.⁴⁹

The question presented to the Court in *Rogers* was whether such retroactivity was constitutional. The Ex Post Facto Clause by its terms applies only to state legislatures,⁵⁰ and the *Rogers* Court assumed that the Clause would have been violated if the Tennessee legislature had abolished the year and a day rule after the defendant had stabbed his victim.⁵¹ Retroactivity limitations on courts are derived from due process, but the *Rogers* Court held that it was "undoubtedly correct" that "the Due Process and Ex Post Facto Clauses safeguard common interests — in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws."⁵² The 1964 Supreme Court decision of *Bowie v. City of Columbia* had treated the retroactivity limitations applicable to legislatures and courts in a One-Size-Fits-All manner, stating that "[i]f a state legislature is barred by the Ex Post Facto Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."⁵³ The *Rogers* Court specifically rejected

⁴⁶ 532 U.S. 451 (2001).

⁴⁷ *Id.* at 453.

⁴⁸ *Id.*

⁴⁹ *Id.* at 454.

⁵⁰ See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law.").

⁵¹ *Rogers*, 532 U.S. at 458; see also *Id.* at 462 (restating, and not disputing, Justice Scalia's contention that "there is no doubt that the Ex Post Facto Clause would have prohibited a legislative decision identical to the Tennessee court's decision here").

⁵² *Id.* at 460.

⁵³ 378 U.S. 347, 353-54 (1964).

Bouie's One-Size-Fits-All jurisprudence, adopting instead a rule that treated the state legislature and judiciary divergently: *Rogers* held that whereas the legislature may not make changes in the criminal law subsequent to the criminal act that work to the defendant's disadvantage, the judiciary is prevented only from making *unforeseeable* changes.⁵⁴

C. Functional Considerations for Applying a Lower Level of Scrutiny

Functional considerations — the determination that two institutions are sufficiently different such that a multi-institutional constitutional principle appropriately applies differently to each — are what drive Tailoring.⁵⁵ Functional analysis led *Rogers* to Tailor the constitutional principle of fundamental fairness: the Court pointed to the “important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.”⁵⁶ The Court has engaged in similar functional,

⁵⁴ *Rogers*, 532 U.S. at 462 (holding that the judiciary can make changes to common law unless it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” (quoting *Bouie*, 378 U.S. at 354)). The *Rogers* Court then upheld the conviction on the ground that because the year and a day rule was “widely viewed as an outdated relic of the common law,” it “was not unexpected and indefensible” for the Tennessee Supreme Court to abolish it. *Id.* at 462.

The claim that *Rogers* is an example of Tailoring across the branches of government can be challenged on the ground that each branch was governed by a different constitutional provision (the Ex Post Facto Clause applied to the legislature and the Due Process Clause to the judiciary). That *Rogers* both confirmed that the same constitutional principles applied to both governmental institutions and rejected the view that the principles applied identically to legislatures and courts together justify treating the decision as an instance of Tailoring.

One also might ask: if the *Rogers* Court indeed Tailored, why didn't the Court Tailor in *White*? First, the Court typically overlooks the possibility of Tailoring because to date it is not a doctrinal option that has garnered much attention. See *Rosen*, *supra* note 5, at 1518. Second, four Justices in *White* (Justices Breyer, Ginsburg, Souter, and Stevens) were willing to Tailor insofar as they were attentive to the difference between judicial elections and elections for legislators and executives (although, as discussed above in text, they did not consider whether such differences could justify a different level of scrutiny). Justices Kennedy and O'Connor, who had joined the tailoring opinion in *Rogers*, joined the majority opinion in *White* for reasons unrelated to Tailoring. Justice Kennedy is a free speech absolutist who is of the view that “content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests,” *White*, 536 U.S. at 793 (Kennedy, J., concurring), and Justice O'Connor is deeply skeptical of judicial elections, see *Id.* at 788-90 (O'Connor, J., concurring).

⁵⁵ See *Rosen*, *supra* note 5, at 1563-79.

⁵⁶ *Rogers*, 532 U.S. at 460. The Court provided two reasons why the two institutions were meaningfully different for constitutional purposes. First, constitutional constraints on the judiciary could be less strict because courts are less susceptible to “political influences and pressures” since they only “constru[e] existing law in actual litigation.” Second, because the judiciary is responsible for the case-by-case development of the law, preventing courts from imposing retroactive rules would “unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system.” *Rogers*, 532 U.S. at 460-61.

institution-context analysis when it has opted to Tailor other multi-institutional constitutional principles.⁵⁷

Institution-sensitive analysis counsels the wisdom of Tailoring free speech doctrine in a manner that would have applied something less than strict scrutiny to Minnesota's judicial codes. The first subsection examines the constitutional significance of what governmental institution was the source of the speech code. The second subsection discusses the constitutional significance of what societal institution was the regulatory object of the speech code.

1. Institutional Distrust: Attentiveness to the Source of the Regulation

Our analysis appropriately begins with a consideration of why the Court applies strict scrutiny to content-based regulations. Unfortunately, the Court has not provided much in the way of explanation as to why it has chosen strict scrutiny as opposed to some other standard with regard to content-based regulations.⁵⁸ Scholars have stepped into the justificatory void.⁵⁹ Professor David Strauss has provided the powerful suggestion that strict scrutiny for content-based regulations is a doctrine that reflects "the Court's assessment of the institutional capacities of the actors involved: the legislatures and the courts."⁶⁰

Strauss' thesis that the level of judicial scrutiny is correlated to a judgment concerning the capacities of the institution regulating the speech⁶¹ is particularly strong because it accounts for domains of free speech doctrine that otherwise can be difficult to explain. For example, content-based regulations made by military officials — who are part of the government and unquestionably are subject to the First Amendment⁶² — are subject to less

⁵⁷ See Rosen, *supra* note 5, at 1562-79.

⁵⁸ See, e.g., Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-01 (1978) (noting that "surprisingly scant attention has been paid to the . . . question why, within the realm of possible abridgments of free expression, we are so especially wary of restrictions based upon content. On the rare occasion when the question does come up, the answer is all too often simply taken for granted."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 199 (1988).

⁵⁹ See, e.g., Stone, *supra* note 58, at 101-07; Strauss, *supra* note 58, at 199-202; but see Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981) (advocating that the distinction between "content-based" and "content-neutral" first amendment analysis should be abandoned).

⁶⁰ Strauss, *supra* note 58, at 200.

⁶¹ For a similar approach, see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); see generally Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

⁶² See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

than strict scrutiny.⁶³ As the Court has explained, “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular interest” because courts are “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.”⁶⁴ Similarly, although public school principals unquestionably are governmental actors to whom the First Amendment applies, the Court has ruled that principals are “entitled to regulate the contents” of school newspapers and can “refuse to sponsor” a broad swath of unacceptable viewpoints as long as such regulations are “reasonable”⁶⁵ – far less searching judicial review than strict scrutiny. As with military regulations, the Court justified a lower level of scrutiny of school officials’ speech regulations on the basis of the specific institutional character of public schools.⁶⁶

Tailoring’s institution-sensitive analysis suggests that the concerns that have given rise to strict scrutiny of most content-based speech regulation were not present in the *White* case. Professor Strauss justifies strict scrutiny for content-based legislation on the ground that institutional characteristics of legislatures render them susceptible to being influenced by “hostility or favoritism toward certain kinds of speech.”⁶⁷ Tailoring’s sensitivity to institutional differences suggests that a fact mentioned by the *White* Court only in passing was of crucial doctrinal significance: the judicial code at issue in *White* had been promulgated by the Minnesota Supreme Court, not the legislature.⁶⁸ To the extent that courts are institutionally less susceptible to hostility or favoritism toward certain kinds of speech — and indeed, on traditional accounts of the judicial function, courts are deemed the most trustworthy government institutions in regard to protecting speech — Strauss’ justification for strict scrutiny of content-based legislation does not carry over to court-promulgated guidelines.

Indeed, careful consideration of Minnesota’s Announce Clause confirms that it reflected neither hostility nor favoritism toward certain speech. The regulation did not keep certain categories of information from the public or

⁶³ See, e.g., *Parker v. Levy*, 417 U.S. 733, 739 (1974) (upholding military ban on speech that is “intemperate, . . . disloyal, contemptuous and disrespectful” on XX level of review).

⁶⁴ *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986).

⁶⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270, 272 (1988).

⁶⁶ See *id.* at 272 (positing that if school principals did not have such powers to censor student speech, “the schools would be unduly constrained from fulfilling their role as a ‘principal instrument in awakening the child to cultural values. . . .’” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))).

⁶⁷ Strauss, *supra* note 58, at 202.

⁶⁸ *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002).

otherwise interfere with the public's access to information about substantive issues, but only limited the ability of certain persons — those running for judicial office — from indicating their views on contested subjects. In short, the Announce Clause did not keep content from the public, but instead limited what societal actors could provide certain content to the public. For this reason, the code did not have other qualities that the Court and scholars have suggested justify strict scrutiny: the Announce Clause did not reflect the government's "disapproval of the ideas expressed,"⁶⁹ the code was not a governmental effort to suppress particular ideas,⁷⁰ and the Announce Clause was unlikely to "distort the ordinary workings of the 'market-place of ideas' in a content-differential manner."⁷¹ For all these reasons, the fact that the Announce Clause did not attempt to limit others in society from discussing the contested legal and political issues, but restrained only the candidates,⁷² confirms that the Announce Clause is not the sort of regulation that merits strict scrutiny.

2. *Substantive Plausibility: Attentiveness to the Object of the Regulation*

Tailoring's spotlighting of the question as to the appropriate level of review facilitates recognition that yet another common justification for strict scrutiny was absent in *White*. The Court has suggested that strict scrutiny is appropriate when the regulation under review is of a sort that is unlikely to be legitimate.⁷³ If indeed there is no reason to presume that regulations of judicial candidates' speech are illegitimate, yet another justification for strict scrutiny disappears.

A threshold question concerns the appropriate level of generality at which the regulation is to be described for purposes of ascertaining whether the regulation is of a sort that is likely to be illegitimate. For example, is the Announce Clause an "abridgement of the right to speak out on disputed issues" in the undifferentiated context of the "electoral process"?⁷⁴ Or is the regulation's likelihood of legitimacy (as a threshold determination of what

⁶⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁷⁰ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-6 (3d ed. 2000).

⁷¹ Stone, *supra* note 58, at 101.

⁷² Unlike the analysis in the text above, Professor Briffault interprets the code's inapplicability to "business groups, labor unions, trial lawyers, and other interest groups" counting *against* the code's constitutionality. See Briffault, *supra* note 40, at 206.

⁷³ See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); see also RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 88 (2002) (supporting the view that strict scrutiny is appropriate where statutes "are likely to reflect prejudice that renders the democratic process untrustworthy.").

⁷⁴ *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002).

level of review is to be applied) to be assessed by characterizing it as a speech regulation in the specific context of judicial elections? Assimilating the Announce Clause to the undifferentiated context of elections casts immediate suspicion on it, for precedent clearly and sensibly establishes that “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.”⁷⁵ By contrast, conceptualizing the Announce Clause as a regulation of *judicial* elections invites a careful, context-specific inquiry in which precedent concerning the regulation of election of legislators and executives is not necessarily relevant.

Tailoring embraces the latter context-specific analysis. Elsewhere I have explained at length why such institution-sensitive analysis is better suited to generate intelligent constitutional doctrine.⁷⁶ In addition, it is worth noting that the position advanced here (that the Court should have Tailored in *White*) is not so wildly revolutionary or implausible to be unlikely to fall on receptive judicial ears. The *White* dissenters themselves undertook institution-sensitive analysis, as did Professor Briffault.⁷⁷ Furthermore, there is precedential support for Tailoring free speech principles to different institutional contexts.

For instance, content-based regulations have been upheld by means lower than strict scrutiny in the institutional context of the military and public schools,⁷⁸ and speech principles have been held to permit content-based regulations in the context of elections.⁷⁹

⁷⁵ *Id.* at 781-82 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

⁷⁶ See Rosen, *supra* note 5, at 1580-1629.

⁷⁷ The dissenting Justices in *White* embraced a Tailored approach to analyzing the Announce Clause. See *White*, 536 U.S. at 797-800 (Stevens, J., dissenting) (criticizing the majority opinion for “obscuring the fundamental distinction between campaigns for the judicial and the political branches”); *White*, 536 U.S. at 803-809 (Ginsburg, J., dissenting) (“the rationale underlying unconstrained speech in elections for political office – that representative government depends on the public’s ability to choose agent who will act at its behest – does not carry over to campaigns for the bench”). So did Professor Briffault. See Briffault, *supra* note 40, at 184 (arguing that “[i]f campaign practices that are unexceptionable (or even constitutionally protected) in the context of legislative or executive elections have a distinct and harmful impact on the judicial function, then they can be restricted in judicial election campaigns”).

⁷⁸ See Rosen, *supra* note 61, at 1148-9, 1152-56 (noting Tailoring in the military context); Rosen, *supra* note 61, at 1159-61 (identifying Tailoring in public schools).

⁷⁹ See Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809-19 (1999). I do not wish to overstate matters. Although the argument proffered in this Essay that the Court should have Tailored is not completely foreign to contemporary American jurisprudence, it represents a plea for doctrinal change, for most speech doctrine is not institutionally-sensitive. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (persuasively arguing that contemporary First Amendment doctrine for the most part is *not* institution-sensitive).

Asking whether speech limits in the context of judicial elections are the sort of regulations that are unlikely to be legitimate yields an answer in the negative because the policy considerations behind the Announce Clause are quite equivoical.⁸⁰ To understand why such speech regulations are not so implausible as to trigger strict scrutiny, it first is necessary to appreciate the logic of judicial elections. Although Article III judges have life tenure,⁸¹ most state judges are subject to periodic elections.⁸² The primary justification for judicial elections is to increase the degree to which judges, and the judicial process more generally, are democratically accountable.⁸³ Holding judges accountable in some form is non inimical to American constitutionalism. Non-Article III federal judges typically have fixed terms that are renewable by other governmental actors.⁸⁴ Indeed, Article III judges' life tenure is subject to the check of impeachment, which is interpreted by some members of Congress as permitting them to consider the judge's substantive decisions.⁸⁵

The question thus is not whether non-Article III judges are to be accountable, but what institutions are to be entrusted with holding them accountable. Whereas the federal system largely leaves judicial checks to the coordinate branches, most states leave it to the people themselves through the institution of elections. Although at least one Supreme Court Justice has expressed deep distrust of state judicial elections,⁸⁶ basic principles of federalism,⁸⁷ as well as longstanding federal court reluctance to determine

⁸⁰ For a fine discussion, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure*, 26 CARDOZO L. REV. 579, 590-97 (2005); see also Briffault, *supra* note 40, at 197-202.

⁸¹ See U.S. CONST. art. III, § 1.

⁸² As Richard Briffault has noted, "[t]he votes of the people select or retain at least some judges in thirty-nine states, and all judges are elected in twenty-one states. By one count, 87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office." Briffault, *supra* note 40, at 181.

⁸³ See Briffault, *supra* note 40, at 193.

⁸⁴ For example, the judges who sit on the Court of Military Appeals are appointed by the executive branch, see Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1913 (1990), bankruptcy judges are appointed and reappointed for 14-year terms by the United States Court of Appeals, see 28 U.S.C. § 152(a)(1) (2005), and judges on the Tax Court are appointed by the President for 15 year renewable terms, see 26 U.S.C. § 7443(b), (c) (2005).

⁸⁵ This is a controversial view of what factors appropriately are taken into account in Congress' exercise of its impeachment powers. Further, what criteria may inform impeachment determinations may not be justiciable under the political question doctrine. I shall not further pursue these difficult but interesting questions here.

⁸⁶ See *Republican Party of Minnesota v. White*, 536 U.S. 765, 788-92 (O'Connor, J., concurring).

⁸⁷ See *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (referring to the "the authority of the people of the States to determine the qualifications of their most important government officials" as "an authority that lies at the heart of representative government" and that "is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States

what qualifies as a republican form of government,⁸⁸ together suggest that states should be free to structure their judiciaries as they deem to be appropriate.⁸⁹

If there are good reasons to conclude that states should be permitted to have their judges selected via election, it readily follows that states should have wide latitude to regulate judicial elections. This is so because mainstream elections (*i.e.* elections of legislative and executive officials) are highly regulated affairs.⁹⁰ Indeed, in the context of elections, free speech doctrine permits all sorts of regulations that would be impermissible in the general domain of public discourse. There are limits on what voters are permitted to express at the ballot box; mandatory disclosure obligations on the identity of political speakers; content-based regulations of electoral speech, ranging from mundane constraints like electioneering near polling places to more dramatic ones, like selective bans on contributions from some speakers.⁹¹

These regulations of speech have been allowed on the ground that they facilitate the electoral process.⁹² As is true with elections of executive and legislative officials, states have imposed all sorts of regulations on judicial elections, of which speech regulations are but a part.⁹³ Judicial elections can imperil rule of law values if judicial candidates are viewed as promising certain judicial outcomes in exchange for votes. The Announce Clause addresses this risk by aiming to preserve the impartiality and the appearance of impartiality of the state judiciary while maintaining the institution of judicial elections.⁹⁴ Understood in this broader context of constitutional accommodation of speech regulations in elections, judicial speech codes

'guarantee[s] to every State in this Union a Republican Form of Government.'" (quoting U.S. CONST. art. IV, § 4)).

⁸⁸ See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), discussed in *Baker v. Carr*, 369 U.S. 186 (1962).

⁸⁹ Indeed, the ready tendency to impeach state deviations from the federal model simply because they deviate from the federal system may be particularly misplaced here, for state courts may well play a different role in state governments than federal courts play in the federal government. See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. XX (2005) (hypothesizing that unlike their federal counterparts, state courts use state constitutions in manner that invites both legislative and popular responses, that this is a good thing, and that this is possible because state constitutions are far more easy to amend than the federal Constitution and because judges are democratically accountable through elections).

⁹⁰ See generally Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

⁹¹ Schauer & Pildes, *supra* note 79, at 1816.

⁹² I look more closely at several of these cases *infra* starting at ***.

⁹³ See generally Briffault, *supra* note 40, at 209-33.

⁹⁴ See *Republican Party of Minnesota v. White*, 536 U.S. 765, 817-18 (Ginsburg, J., dissenting).

simply are not the sort of regulation that in all likelihood is illegitimate and therefore subject to strict scrutiny's strong presumption of unconstitutionality.

Yet another substantive dimension of the Announce Clause suggests that it is not the sort of regulation that should be subject to strict scrutiny on account of its high likelihood of illegitimacy. How a person evaluates the merits of judicial speech codes likely turns on her conception of the judicial role. She is more likely to favor speech codes if she believes that there is a strong distinction between politics and law and that judges "are not political actors" but simply "must strive to do what is legally right . . ." ⁹⁵ After all, what is the harm of disallowing judicial candidates from announcing personal views that, on this view of the judicial role, are irrelevant to judging? Call this the "Judging as Law" approach. On the other hand, a person is inclined to be normatively skeptical of judicial speech codes to the extent she thinks that judges "possess the power to 'make' common law" as well as "the immense power to shape the States' constitutions as well." ⁹⁶ Call this second view, which rejects the "complete separation of the judiciary from the enterprise of representative government," ⁹⁷ the "Judging as Politics" approach. If Judging as Politics is a more accurate understanding of judging, then limitations on the speech of judicial candidates deprives the public of information highly relevant to making an informed judgment of a judicial candidate's qualifications. ⁹⁸

That a person's normative evaluation of judicial speech codes is a function of one's antecedent conception of the judicial role, along with the fact that there are several plausible competing conceptions of the judicial role, together counsel in favor of a modest standard of federal judicial review regarding state legislation that is premised on one of these competing conceptions. Stated differently, judicial speech codes implicate policies about which reasonable people disagree more than they implicate policies that properly are subject to strict scrutiny's strong presumption of unconstitutionality.

⁹⁵ *Id.* at 805-06 (Ginsburg, J., dissenting); *see also id.* at 798 (Stevens, J. dissenting) ("In a democracy, issues of policy are properly decided by majority vote" and "every good judge is fully aware of the distinction between the law and a person point of view").

⁹⁶ *Id.* at 784 (majority opinion).

⁹⁷ *Id.* at 784 (rejecting the view that there is a "complete separation of the judiciary from the enterprise of representative government").

⁹⁸ The majority and dissenting Justices in *White* held very different conceptions of the judicial function: Justice Scalia's opinion for the majority embraced (surprisingly) the "Judging as Politics" approach, *see id.* at 784, whereas Justice Ginsburg reflected the "Judging as Law" approach, *see id.* at 806 (Ginsburg, J., dissenting). Notwithstanding these differences, each Justice hegemonically asserted that her conception of the judiciary was self-evidently correct. Justice Stevens, it should be pointed out, adopted a more modest form of the "Judging as Law" approach than did Justice Ginsburg. *See id.* at 784 n.12.

Deeply entrenched federalism commitments provide yet another reason why strict scrutiny is inappropriate in relation to judicial speech codes. The level of judicial review chosen should encourage rather than obstruct states' different approaches with regard to issues as to which there can be good faith disagreement. Deferential federal judicial review is particularly appropriate when such good faith disagreement manifests itself in different methods for structuring state government⁹⁹ (*i.e.*, whether to have judicial elections, and if so how such elections should be regulated), and when the state choice itself (*i.e.*, judicial speech codes) is "relatively new to judicial elections," as the majority opinion acknowledged.¹⁰⁰

D. Revisiting Some Election Law Precedents

To reiterate, the discussion here is not intended to establish that the Announce Clause was constitutional, but only to challenge the widely held but unargued assumption that such speech regulations appropriately were subject to strict scrutiny. Tailoring makes clear that the unique institutional context of judicial elections *potentially* could give rise to the conclusion that the governmental regulations that define that context properly are subject to a different level of judicial review than regulations outside that context. Once one's eyes are opened to this possibility, some earlier decided case law begins to look different: it becomes evident that the Court already has Tailored constitutional principles in the elections context, thereby strengthening this Essay's argument that Tailoring can occur in the context of judicial elections, as well.

To begin, the Court has explicitly Tailored at least one constitutional principle across different governmental institutions in the context of elections. Although the guarantee of equal protection prohibits both the federal government and the states from conditioning a citizen's right to vote on property ownership, the Court held in *Ball v. James*¹⁰¹ that there are types of local government that are not barred from utilizing property-based franchise¹⁰² despite the fact that they are subject to the Fourteenth Amendment's equal protection clause.¹⁰³ The Tailoring occurs as between "general" state and federal governments, on the one hand, and "special-purpose unit[s] of

⁹⁹ See *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

¹⁰⁰ See *White*, 536 U.S. at 786.

¹⁰¹ 451 U.S. 355 (1981). This was not the first time the Court had so held. See *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

¹⁰² See *Ball*, 451 U.S. at 371.

¹⁰³ See, e.g., *Ball v. James*, 451 U.S. 355, 362-63 (1981) (water reclamation district); *Lane v. Town of Oyster Bay*, 603 N.Y.S.2d 53, 54 (N.Y. App. Div. 1993) (sanitation collection districts).

government” (such as water reclamation districts), on the other.¹⁰⁴ The Court has justified Tailoring on the basis of a functional analysis that takes account of the institutional differences between general and “special-purpose” governments: because special-purpose units of government “affect[] definable groups of constituents more than other constituents,” the Court permitted voting schemes that allow only those primarily affected to vote.¹⁰⁵

Awareness of the possibility of Tailoring sheds light on other cases that are relevant to the judicial speech codes at issue in *White*. In *Burson v. Freeman*,¹⁰⁶ the Court upheld content-based but viewpoint neutral speech restrictions that prohibited the solicitation of votes within one hundred feet of the entrance to polling places on election day. Though the plurality opinion in *Burson* purported to apply strict scrutiny,¹⁰⁷ it is more plausible to characterize the opinion as having applied less exacting scrutiny. As Justice Stevens persuasively argued in a dissent that was joined by Justices O’Connor and Souter, the 100-foot ban at issue in *Burson* was not narrowly tailored. Tennessee’s ban extended to more than 30,000 square feet, whereas other states were able to maintain order with solicitation bans that encompassed less than 8,000 square feet.¹⁰⁸ “Moreover, Tennessee’s statute does not merely regulate conduct that might inhibit voting; it bars the simple display of campaign posters, signs, or other campaign materials. Bumper stickers on parked cars and lapel buttons on pedestrians are taboo too. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.”¹⁰⁹ The dissenters in *Burson* also cast doubt on whether Tennessee had demonstrated a compelling interest in its broad ban on vote solicitation. The solicitation ban had been introduced a century earlier¹¹⁰ “as part of a broader package of elector reforms” including the secret ballot and regulation inside the polling

¹⁰⁴ See *Ball*, 451 U.S. at 362-63. More specifically, while the equal protection clause subjects general governments’ voter regulations to heightened scrutiny (which encompasses the requirement of one-person, one-vote), see *Hill v. Stone*, 421 U.S. 289, 297 (1975), voter requirements for special-purpose units are subject to the far more deferential “reasonable relationship” requirement (which does not include the one-person, one-vote requirement). See *Ball*, 451 U.S. at 371.

¹⁰⁵ *Ball*, 451 U.S. at 363.

¹⁰⁶ 504 U.S. 191 (1992).

¹⁰⁷ See *id.* at 198 (“As a facially content-based restriction on political speech in a public forum, [the regulation] must be subjected to exacting scrutiny: The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” (quoting *Perry Ed. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45(1983))).

¹⁰⁸ See *id.* at 218 (Stevens, J., dissenting).

¹⁰⁹ *Id.* at 218-19 (Stevens, J., dissenting).

¹¹⁰ See *id.* at 222 (Stevens, J., dissenting).

place, but there was no evidence that the solicitation ban was necessary *today* in view of the success of the other components of electoral forum.¹¹¹

The plurality's holding in *Burson* accordingly is best construed as resting on a standard of review more deferential than strict scrutiny. Reconceptualizing *Burson* in this matter would not render it a wholly *sui generis* free speech decision, for the Court elsewhere has subjected content-based restrictions to less than strict scrutiny.¹¹² Tailoring's focus on the appropriate level of scrutiny makes clear that the *Burson* case – which in fact was referenced in the course of the majority's opinion in *White*¹¹³ – could have supported the proposition that Minnesota's judicial code should have been subject to some lower level of scrutiny. Quite clearly, the *Burson* Court gave far more deference to Tennessee's solicitation ban than the *White* majority gave to Minnesota's judicial codes.¹¹⁴

E. Implications

The preceding analysis suggests that some alternative to strict scrutiny – most likely intermediate scrutiny or a balancing test¹¹⁵ – would have been more appropriate in *White*. The Announce Clause analyzed in *Minnesota v. White* still may have failed on even this lower level scrutiny for the reasons ably provided by Professor Briffault.¹¹⁶ But such lower level scrutiny would not have endangered other, more confined judicial codes regulating speech such as Pledge or Promise clauses and Commit or Appear to Commit clauses, both of which have been jeopardized under the Court's reasoning in *White*.¹¹⁷

¹¹¹ *Id.* at 220 (Stevens, J., dissenting).

¹¹² See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (applying a balancing test and upholding ban on government employees' receipt of honoraria for speaking engagements); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act's ban on political activities by public employees, using a level of scrutiny lower than strict that subsequently has been described by the Court as a balancing test, see *Nat'l Treasury Employees*, 513 U.S. at 467).

¹¹³ See *Republican Party of Minnesota v. White*, 536 U.S. at 786.

¹¹⁴ Compare *White*'s exacting application of strict scrutiny (discussed *supra* note 40) with the far more deferential approach that the dissenting opinions in *Burson* persuasively demonstrate was taken by the majority in that case.

¹¹⁵ The Court used what is best described as intermediate scrutiny in the *Burson* case and has used balancing tests to analyze some other content-based regulations. See *supra* note 112. For present purposes I seek to establish only that there were good reasons for the Court to apply less than strict scrutiny, leaving for another day the determination of what specific test would have been appropriate. In fact, selecting the appropriate legal test is a complex process that typically receives inadequate attention from both the Court and commentators. For some scholars who have made this very important point, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 47-52 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 92-97 (2004).

¹¹⁶ Briffault, *supra* note 42, at 203-209.

¹¹⁷ *Id.* at 209-33.

III. ANTI-PORNOGRAPHY ORDINANCES: A CRITIQUE OF *AMERICAN BOOKSELLERS ASSOCIATION V. HUDNUT*

In the well known decision of *American Booksellers Association v. Hudnut*,¹¹⁸ the Seventh Circuit (per Judge Easterbrook) struck down an Indianapolis ordinance that, *inter alia*, prohibited the trafficking of “pornography,” which the ordinance defined as “the graphic sexually explicit subordination of women . . .”¹¹⁹ The court found the ordinance unconstitutional because it “discriminate[d] on the ground of the content of the speech.” Explained the court, “[t]he state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.”¹²⁰

This final section of this Essay critiques the *Hudnut* opinion from the vantage of Tailoring, showing that the court’s analysis problematically did not take account of what level of government was regulating. To be candid, the analysis that follows is the hardest case for Tailoring of the three doctrines explored in this Essay. This is because similar arguments were advanced by Justice Jackson and Justice Harlan¹²¹ but never adopted by the Court. Furthermore, the argument that follows is the most normatively controversial, for the ordinance at issue in *Hudnut* was a content-based speech restriction that was not viewpoint neutral.

My intention here is not to argue that the Indianapolis ordinance was constitutional, but to identify the problems that result from an analysis that ignores what level of government has sought to regulate. It turns out that foundational free speech concerns are implicated differently depending upon whether a regulation has come from the federal government or a city. This section catalogs the competing value judgments that properly inform the decision of whether free speech doctrine concerning content-based regulations should be Tailored. Determining how to reconcile these competing value judgments is considerably more complex than the *Hudnut* court’s One-Size-Fits-All analysis suggests. By laying bare the (what is best called) political judgments that necessarily inform the decision of whether these free speech principles should be Tailored, Tailoring exposes a very difficult question that must be answered along the way: what societal institutions properly play a role in determining whether free speech principles are to be Tailored? Space

¹¹⁸ 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

¹¹⁹ *Id.* at 324.

¹²⁰ *Id.* at 325.

¹²¹ See Rosen, *supra* note 5, at 1558-60.

limitations permit this Essay to identify, but not to seek to answer, this very hard question.

A. Critique

The *Hudnut* court's central argument was premised on an unstated and undefended One-Size-Fits-All assumption. The Seventh Circuit stated as follows:

Racial bigotry, anti-semitism, violence on television, reporters' biases – these and many more influence the culture and shape our socialization Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and directors of which thoughts are good for us.¹²²

Such governmental control, the Seventh Circuit wrote, raises the specter of totalitarianism:

Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.¹²³

The Seventh Circuit accordingly held that the Indianapolis ordinance flatly violated the commonly identified notion that free speech doctrine aims at resisting a governmentally-created ideological orthodoxy.¹²⁴

¹²² *Hudnut* at 330.

¹²³ *See id.* at 328.

¹²⁴ *See id.* An important statement of this “anti-orthodoxy” view appears in Justice Jackson’s well known opinion in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943): “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . .”. Justice Jackson’s poetic words have helped generate a first amendment ideology of “no-orthodoxy.” *See generally* Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 628-34 (2003) (noting and critiquing this); *see also* MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 6 (2001) (concluding that “governmental paternalism in the regulation of expression is inherently inconsistent with the fundamental democratic notions of individual dignity and societal self-rule.”)(footnote omitted); Julian N. Eule and Jonathan Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes A Curse*, 45 UCLA L. REV. 1537, 1542 (1998) (describing the “core” of free speech the “proscription against government imposed orthodoxy”).

The *Hudnut* court's concerns are very real if the federal government is the regulator,¹²⁵ for federal regulation typically imposes nation-wide rules, and nation-wide speech regulations intended to shape citizens' values clearly raise the specter of government-created orthodoxy. But such concern of a government created orthodoxy is misplaced if only some lower levels of government regulate. In fact, rather than leading to the single-minded, totalitarian society that the *Hudnut* Court feared Indianapolis' ordinance could create, permitting small polities to regulate such matters may well have led to a more diverse society.

How so? Permitting localities to regulate such things as pornography would have led to a broader array of political communities than exists in the post-*Hudnut* world insofar as there would have been polities that regulated pornography and others that did not. Such diversity among polities may facilitate a broader array of citizen perspective and in that way advance free speech values. Whether political diversity leads to more diverse citizen perspectives ultimately turns on empirical considerations, including perhaps most importantly the nature of human beings' character development. The most sophisticated justifications for pornography regulation are premised on the assumptions that people are significantly socialized by their social environment and that society's laws are an important contributor to and definer of the socializing environment. In the view of such "political perfectionists,"¹²⁶ government regulation is a component of the environment that is necessary to produce fully developed human beings.¹²⁷ Conversely, governmental inaction (for instance, permitting the distribution of pornographic materials) may prevent the generation of fully formed citizens.

If perfectionist assumptions concerning human nature are correct, then the result of a constitutional regime that allows some localities (but not the federal government) to ban pornography will be a citizenry that, in the nationwide aggregate, has broader ideological diversity than would a constitutional doctrine that disallowed all polities from banning pornography. Diversity across polities accordingly can be said to further rather than undermine the First Amendment goal of guarding against the creation of a singular national orthodoxy.¹²⁸

¹²⁵ See *infra* p. 38, discussing Justice Harlan's dissent in *Roth v. United States*, 354 U.S. 476 (1957).

¹²⁶ For a more detailed consideration of the structure of "political perfectionist" thought, including its connection to Aristotelian political theory, see Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1064-71 (1998).

¹²⁷ See, e.g., CATHERINE MCKINNON, ONLY WORDS (1993).

¹²⁸ Cf. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823-31 (2004) (making similar argument in respect of religious freedom).

Indeed, constitutional doctrine that disallows differences across sub-federal polities, and thereby prevents political perfectionists from translating their political commitments into action, itself may threaten First Amendment values insofar as such doctrine may create a nation-wide ideological orthodoxy. If perfectionists' assumptions concerning human character development are correct, then constitutional doctrine that guaranteed that citizens across the country will be raised in non-perfectionist polities will create a national orthodoxy of incomplete human beings who have been raised in polities that do not undertake appropriate values-inculcation.

More generally, Tailoring constitutional doctrines to the different levels of government advances several of federalism's promises of enhancing liberty and facilitating experimentation.¹²⁹ Government regulations are a form of public good, and a constitutional doctrine that expands the range of polities (e.g., that gives room for both "perfectionist" and "non-perfectionist" polities) increases the range of options among which citizens can choose. Regulatory variations at the municipality level (rather than state or federal) create a situation where exit costs from one polity to another are relatively low,¹³⁰ increasing the extent to which citizens can be said to have real choices in selecting the polity that reflects their public good preferences.¹³¹ As Professor Robert Cooter recently has argued in his intriguing book "The Strategic Constitution,"

[i]n general, escaping jurisdiction by a less comprehensive government is easier than escaping jurisdiction by a more comprehensive government. Differences in the cost of exit from different levels of government justify different degrees of vigilance by courts in protecting individual liberties The 'exit principle' implies the 'federalism of individual rights,' by which I mean that courts should tolerate more interference with individual liberty when the effects are localized.¹³²

¹²⁹ For a nice statement of these values, see *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991).

¹³⁰ For an explanation as to why exit costs from smaller polities are smaller than exist costs from larger polities, see Rosen, *supra* note 5, at 1606-08.

¹³¹ For the classic statement of this position, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Although Tiebout's thesis has been subject to both empirical and normative critiques, Tiebout's central claims have been empirically verified. See Rosen, *supra* note 5, at 1608-12.

¹³² ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 323 (2002). For a brief discussion of some of the insufficiencies of Cooter's account, see Rosen, *supra* note 5, at 1611-12.

The Seventh Circuit's One-Size-Fits-All approach, by contrast, deprives political perfectionists of the liberty to live in polities that provide the public goods that they believe are necessary to create full human beings. Relatedly, the court's One-Size-Fits-All approach forecloses the chance of testing political perfectionists' empirical claims concerning character development.

B. Objections to Tailoring Constitutional Limits on Speech

This section identifies and responds to two powerful objections to the Tailoring contemplated in my analysis of *Hudnut*.

1. Costs to our Political Culture

The first objection is that content-based, non-viewpoint neutral regulations are categorically inconsistent with Americans' foundational political self-identity. The Court probably accurately captured contemporary American sensibilities when it stated in *Police Department v. Mosley* that "above else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas"¹³³ The fact that the United States apparently stands alone in this regard – that virtually every other liberal democracy permits the regulation of certain expression on account of its content¹³⁴ – is no response if, in fact, the First Amendment means "no message policing" for today's Americans.

Careful consideration may well lead to the conclusion that governmental policing of messages is categorically unacceptable and that free speech principles accordingly should not be Tailored across the different levels of government. Even so, the jurisprudence of Tailoring would have been useful. Tailoring exposes that One-Size-Fits-All is not axiomatic. This understanding underscores that normative commitments, rather than jurisprudential necessity, underwrite any conclusion that free speech principles should be treated in a One-Size-Fits-All manner in this circumstance. Such clarity is good, for it is important to be aware of the assumptions upon which one's position rests.

On the other hand, normative analysis may lead to the conclusion that Tailoring is desirable in this situation. The first step to understanding the plausibility of such a conclusion is the recognition that First Amendment doctrine presently is more nuanced in respect of governmental policing of

¹³³ 408 U.S. 92, 95 (1972).

¹³⁴ See generally Frederick Schauer, *The Exceptional First Amendment*, available at <http://ssrn.com/abstract=668543> (February 15, 2005).

messages than *Hudnut's* and *Mosley's* rhetoric suggest. Though the First Amendment “embodies our profound national commitment to the free exchange of ideas,” and while it is true that “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” the Supreme Court also has noted that “this principle, like other First Amendment principles, is not absolute.”¹³⁵

Indeed, free speech doctrine permits government to restrict a non-trivial quantum of expression on account of content. Not only may American governments regulate obscene materials¹³⁶ and fighting words,¹³⁷ but government may ban speech that constitutes espionage,¹³⁸ enact “content-based advertising restrictions” in relation to the sale of securities,¹³⁹ prohibit the advocacy of illegal activities,¹⁴⁰ enact “content-based [regulations] of [labor union] elections and election campaigns – including restrictions on accurate representations by employers about the future consequences of unionization,”¹⁴¹ and more.¹⁴² These doctrines are in tension with the Seventh Circuit’s suggestion that Americans have an “*absolute* right to propagate opinions that the government finds wrong or even hateful”¹⁴³ and to *Mosley's* flat assertion that “government has no power to restrict expression because of its message [or] its ideas”¹⁴⁴ More importantly for present purposes, the recognition that our free speech jurisprudence already tolerates some governmental policing of messages illuminates that the normative claim that local governments should be permitted to regulate pornography constitutes a plea for extending current doctrinal approaches rather than an argument for creating a completely *sui generis* and unique doctrinal exception.

Another indication that the prospect of governmental policing of messages is not flatly absurd – and, more specifically, that lower levels of government might be given greater leeway to regulate the content of speech – is that this

¹³⁵ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation omitted).

¹³⁶ *See Roth v. United States*, 354 U.S. 476, 484-85 (1957).

¹³⁷ *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹³⁸ *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919).

¹³⁹ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770 (2004).

¹⁴⁰ *See id.* at 1778-80.

¹⁴¹ *Id.* at 1782.

¹⁴² *See id.* at 1781-83 (discussing permissible speech regulations in the context of antitrust, copyright, trademark, and sexual harassment law).

¹⁴³ *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985). For what arguably is another counterexample, see *Virginia v. Black*, 538 U.S. 343, 362-63 (2003) (upholding Virginia's ban on cross burning with intent to intimidate).

¹⁴⁴ 408 U.S. 92, 95 (1972).

position has been advocated by several Supreme Court Justices. Justice Harlan argued in his dissent in *Roth v. United States*¹⁴⁵ as follows:

The danger is perhaps not great if the people of one State, through their legislature, decide that 'Lady Chatterley's Lover' goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.¹⁴⁶

In short, Justice Harlan concluded that the First Amendment could tolerate state regulation of expression on the basis of content (what is deemed to be "offensive"). Justice Jackson argued in his dissent in *Beauharnais v. Illinois* that states had greater leeway than the federal government to "protect the private right to enjoy integrity of reputation" by means content-based regulations known as libel laws,¹⁴⁷ and then-Justice Rehnquist similarly argued in his concurrence in *Buckley v. Valeo* that the First Amendment may impose greater restrictions on the federal government than on the States.¹⁴⁸ That several Justices have advocated that lower levels of government may police messages in ways that federal government cannot powerfully supports the proposition that the Tailoring of free speech principles to permit lower level polities to enact content-based regulations is not absurd.

History provides definitive support to the proposition that the policing of messages by lower levels of government is not flatly unthinkable to American constitutionalism. As recently as the early twentieth century, content-based,

¹⁴⁵ 354 U.S. 476, 506 (1957) (Harlan, J., concurring in part and dissenting in part).

¹⁴⁶ *Id.*

¹⁴⁷ See 343 U.S. 250, 294-95 (1952) (Jackson, J., dissenting). For a more complete discussion of Justice Harlan's and Justice Jackson's approaches to what I dub "Tailoring," see Rosen, *supra* note 5, at 1558-60.

¹⁴⁸ See *Buckley v. Valeo*, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part), *discussed in* Rosen, *supra* note 5, at 1561.

non-viewpoint neutral regulations designed to proscribe speech that had a “bad tendency” were deemed to be consistent with free speech principles.¹⁴⁹ For instance, writing for the Court before the First Amendment had been formally incorporated,¹⁵⁰ Justice Holmes in *Patterson v. Colorado* “assume[d] that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states”¹⁵¹ but nonetheless upheld a state court’s contempt order that had been issued against the publisher of an article and cartoon that were “intended to embarrass the court.”¹⁵² Holmes wrote that although “the main purpose of such constitutional provision is to prevent all such *previous restraints* upon publications,” they do not prevent “subsequent punishment of such as may be deemed contrary to the public welfare[,]” even where what was publicly stated had been true.¹⁵³

Consistent with *Patterson*, early twentieth century courts applied the so-called “bad tendency” approach to free speech to uphold state laws designed to prevent dissemination of information that the government deemed to be harmful to the public. In 1907, for instance, the Minnesota Supreme Court upheld a state law that barred newspapers from providing details of executions “beyond the statement of the fact that such convict was on the day in question duly executed according to law....”¹⁵⁴ The court acknowledged that the newspaper regulation had been adopted to “surround the execution of criminals with as much secrecy as possible, in order to avoid exciting an unwholesome effect on the public mind[,]” but nonetheless upheld the law against claims that it violated state constitutional protections of the press and speech.¹⁵⁵ The court held that “liberty of speech and of the press [] imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, *so long as it is not harmful in its character* . . .”¹⁵⁶ If material “naturally tends to excite the public mind and thus indirectly

¹⁴⁹ See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 132-46 (1997).

¹⁵⁰ There is some dispute among scholars as to when free speech was incorporated against the States, though the consensus is that it did not occur prior to 1925. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS* 18 & n.a (3d ed. 2001).

¹⁵¹ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

¹⁵² *Id.* at 459.

¹⁵³ *Id.* at 462 (emphasis in original, internal quotation omitted).

¹⁵⁴ *State v. Pioneer Press Co.*, 110 N.W. 867 (Minn. 1907). This intriguing case was brought to my attention in Daniel A. Farber, Book Review, 15 *CONST. COMMENT.* 571, 575 (1998) (reviewing DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997)).

¹⁵⁵ *Pioneer Press*, 110 N.W. at 868.

¹⁵⁶ *Id.* (emphasis supplied)

affect the public good” or otherwise is “detrimental to public morals,” however, then government can regulate its publication.¹⁵⁷

There is no question that our country’s early history with constitutional principles of free speech is very different from the way speech regulations are doctrinally handled today.¹⁵⁸ The question is what to make of the Court’s doctrinal voyage from the “bad tendency” test to *Mosley*’s averment that “above else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas”¹⁵⁹ Two general approaches to this doctrinal change can be identified. The first is to view the contemporary approach as unquestionably superior to what preceded. The battle has been fought and won; the earlier era’s First Amendment jurisprudence was mistakenly thin, and its eclipse is a good thing.¹⁶⁰ The second approach is to situate our country’s severe doctrinal shift from “bad tendency” to *Mosley* in historical context. As is suggested by the Seventh Circuit’s analysis in *Hudnut*, which linked the anti-pornography ordinance to totalitarian governments’ “suppression of billions and spreading dogma that may enslave others[,]”¹⁶¹ contemporary free speech doctrine’s (apparent) wholesale rejection of governmental efforts to socialize its citizens may be a reaction to the twentieth century totalitarian regimes against which our nation as a political culture defined itself.¹⁶² The fact that those regimes largely have fallen away suggests two related things: we as a society perhaps can modulate our rejection of all they stood for and look to see if there may be merit in any aspects of their political systems.

In short, free speech principles have not always been metonymic with government disability to police messages. Our country’s past tolerance of content-based regulations, as well as its current non-zero tolerance for such regulations, together counsel that the question of whether government should have the power to regulate the dissemination of information is more normatively complex than *Hudnut*’s and *Mosley*’s absolutist sloganeering suggests.¹⁶³ This brief Essay does not purport to make out the full case for

¹⁵⁷ *Id.* at 868-69.

¹⁵⁸ The person most responsible for uncovering this aspect of our country’s constitutional history is David Rabban. See RABBAN, *supra* note 149.

¹⁵⁹ 408 U.S. 92, 95 (1972).

¹⁶⁰ For such an approach, see RABBAN, *supra* note 149.

¹⁶¹ *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985).

¹⁶² This is not to deny that certain court decisions during the McCarthy era threatened what today are deemed to be core free speech principles, see generally MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE SPEECH IN THE MCCARTHY ERA* (2005). Nevertheless, the Court’s free speech jurisprudence as a whole during the second part of the twentieth century created a doctrinal regime that for the most part is intolerant of governmental policing of messages.

¹⁶³ See also Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in*

governmental power to regulate content, but is content to make two points: the case for permitting some such regulations is not trivial, and a conclusion that municipalities can regulate content does not invariably lead to the conclusion that higher levels of government can so regulate.¹⁶⁴ Importantly, these two propositions are interrelated insofar as the latter point (Tailoring's insight) may well affect how people think about the former (normative) question.

2. *The Oddity of "Interactive" Constitutional Doctrine*

One of the main reasons provided above for Tailoring free speech principles as between the federal government and sub-federal polities is that federal regulations have nation-wide effects whereas one sub-federal polity's regulation leaves other sub-federal polities free to "make [their] own choice" and decide not to ban *Lady Chatterley's Lover* (for example).¹⁶⁵ But what if all sub-federal polities decided to ban such a book? Even if such an eventuality is unlikely, is the possibility of such an outcome fatal to any proposal to Tailor free speech principles?

Recognizing such a possibility makes clear that free speech principles can be Tailored only if it is possible to ensure that constitutionally-protected materials are reasonably accessible to people who wish to obtain them. This final section of the Essay explores how this condition can be satisfied.

For present purposes I will assume, *pace* Justice Harlan, that free speech principles would be violated if offensive materials could be proscribed on a state-wide basis. In my view, states are too large, and the exit costs associated with either traveling or altogether moving out-of-state are too great, to support a "federalism of individual rights"¹⁶⁶ with regard to speech regulations of this kind at the state level. Rather, the patchwork of varying speech regulations would be constitutionally permissible only if (1) any such regulations were the products of sub-state polities (most likely municipalities), and if (2) the regulations were not adopted by large numbers of contiguous sub-state polities.

Let us focus on the second condition that bans not be adopted by numerous contiguous sub-state polities. Without such a limitation, it would be possible for there to be a vast expanse of territory within which certain materials

First Amendment Jurisprudence, 10 WM & MARY BILL RTS J. 647 (2002).

¹⁶⁴ And indeed, for the reasons suggested above, there are principled reasons for treating local governments as different institutional contexts than the federal government for purposes of speech regulation.

¹⁶⁵ *Roth v. United States*, 354 U.S. 476, 506 (Harlan, J., dissenting).

¹⁶⁶ See COOTER, *supra* note 132, at 323.

simply could not be obtained. This second condition implies that the constitutional permissibility of City A's speech regulation may be a function of the speech regulations of its neighboring polity City B. Let us dub doctrine of this sort – in which what one polity's powers are a function of another polity's regulations – “interactive” constitutional doctrine.

Is the fact that Tailoring free speech principles would require the creation of interactive constitutional doctrine fatal to any proposal to Tailor free speech? I think not. Interactive constitutional doctrine is neither as conceptually nor doctrinally novel as it may first appear. Any need to create interacting constitutional doctrine entailed by Tailoring free speech principles accordingly does not mean that Tailoring free speech is *per se* unthinkable or unconstitutional.¹⁶⁷

To begin, interactive constitutional doctrine is susceptible of being characterized as being no different from the ordinary doctrine that regulates the powers of a single polity. This is because it is well established that sub-state polities (such as counties and municipalities) do not have independent legal status, but instead are creatures of state law that accordingly have only those powers that are granted by the state.¹⁶⁸ Consequently, interactive constitutional doctrine can be conceptualized as a limitation on the powers that the state can delegate to its sub-state polities; it is a federal constitutional limitation that disallows a state from granting all its municipalities the power to ban offensive materials, but instead allows a state to delegate such regulatory powers only to a subset of its sub-state polities.¹⁶⁹ In this sense, what I have dubbed “interactive constitutional doctrine” is nothing more than a limitation on the power of states.

Moreover, interactive constitutional doctrine is not as novel as it may at first seem because variations of regulatory powers across sub-state polities in a single state is not particularly unusual. Such variations frequently are realized through the creation of so-called “special districts,” that is, sub-state polities created under authorizing state statutes that are granted special powers and responsibilities.¹⁷⁰ School districts and water reclamation districts are two

¹⁶⁷ The analysis that follows does not address the normative question of whether the creation of such doctrine is worth the effort – what is ultimately a pragmatic question that would have to take full account of the potential benefits Tailoring free speech principles. See Rosen, *supra* note 5, at 1630-34 (noting that the downsides of Tailoring constitute pragmatic considerations rather than categorical requirements).

¹⁶⁸ The classic statement of this can be found in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). For a sophisticated dissenting perspective, see David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).

¹⁶⁹ State constitutional limitations, such as proscriptions on special legislation, may limit the ways states can accomplish this. In the next paragraph in text I provide a suggested approach that likely would not run afoul of such constitutional limits.

¹⁷⁰ See generally Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L.

examples. Each type of special district has regulatory powers that differ both from the regulatory powers of other types of special districts and from municipalities. It is conceivable that a state statute could authorize the creation of a limited number of “anti-pornography” or “perfectionist” special districts that enjoyed augmented regulatory powers in relation to speech (e.g., the power to ban offensive materials).

Variations in regulatory powers also can be found across municipalities. A review of one prominent instance of such variations provides an additional suggestion as to how regulatory variations across sub-state politics can be implemented. Although the *Mount Laurel* decision famously held that the New Jersey state constitution required that every “municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing . . . at least to the extent of the municipality fair share of the present and prospective regional need therefore,”¹⁷¹ state law permitted municipalities to sell a portion of their constitutional “fair share” obligations to other municipalities.¹⁷²

Three lessons emerge from the *Mount Laurel*. First, *Mount Laurel* is an example of regulatory authority varying across municipalities; those politics that sold allowable amounts of their fair share obligations had greater leeway to zone in a manner that made it infeasible for low income people to afford to live in their municipality than did the municipalities that purchased such fair share obligations. Second, the allocation of regulatory authority was undertaken by means of the market. There are several market mechanisms that similarly could be utilized to allocate municipal regulatory powers to ban offensive materials.¹⁷³ Third, state law provided a baseline requirement that ensured that a certain number of low income homes would be available. Analogously, federal constitutional requirements would determine the minimum extent to which offensive materials would have to be available.

Alternatively, interactive constitutional doctrine can be conceptualized as an analog to zoning. What is parceled out by the state government is not a private actor’s license to build certain structures in certain locations, but sub-state politics’ powers to regulate. Such “zoning” of regulatory powers in

REV. 346, 375-78 (1990).

¹⁷¹ *S. Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 336 A.2d 713, 724 (N.J. 1975).

¹⁷² *See Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (describing and upholding New Jersey’s Fair Housing Act of 1985).

¹⁷³ For example, the state itself could either sell or auction “perfectionist” regulatory rights. Alternatively, the state could grant all municipalities the entitlement to regulate in perfectionist ways subject to a background requirement that offensive materials be available within a specified distance and then permit the municipalities to negotiate for the rights among themselves.

relation to constitutional rights is unusual but not unprecedented. In *City of Renton v. Playtime Theatres, Inc.*,¹⁷⁴ the Supreme Court upheld regulations that had the effect of permitting adult motion picture theaters to be located in only a small area (approximately five percent) of a city.¹⁷⁵ Thus although the Court held that adult theaters showing “offensive” but not obscene materials could not be wholly banned, it was constitutionally permissible for a city to ban them in most of its geographical space.

Interactive constitutional doctrine builds on and reworks *City of Renton*’s analytics. *City of Renton* suggests that materials that the Constitution does not permit government to altogether ban may be proscribed throughout most of a polity so long as the materials are available somewhere. Interactive constitutional doctrine likewise envisions a circumstance where materials may be barred in one geographical zone only if they may be obtained in another. Interactive constitutional doctrine diverges from *City of Renton*, however, insofar as *City of Renton* ruled that the municipality is the relevant polity within which an adult theater must be able to be found. Interactive constitutional doctrine presupposes that some sub-state polity larger than the municipality is the appropriate geographical space within which materials that cannot constitutionally be altogether banned must be available.

The *City of Renton* Court did not explain why the municipality, rather than some larger sub-federal polity (such as the county), should be the relevant polity within which the material must be accessible. The normative considerations that weigh in favor of decentralizing political power counsel in favor of defining the relevant locus of accessibility to offensive materials at a polity larger than the city: doing so expands the range of political communities that are available in the United States (thereby augmenting the extent to which federalism can achieve its twin benefits of giving citizens wide and real choices among political communities and allowing experiments in radically different social policies) and increases the extent to which citizens can exercise self-governance (particularly in relation to issues about which they’re likely to feel very strongly, which in turn is likely to intensify citizen participation).¹⁷⁶

¹⁷⁴ 475 U.S. 41 (1986).

¹⁷⁵ See *id.* at 53-54 (upholding zoning regulation that permitted such business to be located only in 520 acres of the entire city).

¹⁷⁶ For a more complete consideration of these benefits, see generally Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 886-91 (2002) (considering federalism’s benefits regarding diversity of political communities); GERALD E. FRUG, RICHARD T. FORD, & DAVID J. BARRON, *LOCAL GOVERNMENT LAW* 866-905 (3d ed. 2001) (considering the benefits of citizen participation in politics at the local level).

It might be objected that extending the *Renton* rule to some super-city level (such as the county) would not bring any of these benefits to citizens because political diversity would be quashed at the county level. Any such critique, however, is bottomed on an empirical claim regarding the interchangeability of cities and counties that likely is mistaken. It seems probable that citizens identify more strongly with the municipality in which they live than their county. Even if offensive materials constitutionally must be available somewhere within Cook County, Evanstonians are likely to view the question of whether the city of Evanston should ban offensive materials as politically significant and accordingly are likely to participate when the city considers such an ordinance. Likewise, a city-wide ban may hold out the prospect of creating a sufficiently large space within which perfectionists can comfortably live and have an opportunity to put their social visions into (what for the rest of society may be an experimental) practice. At the same time, Tailoring constitutional doctrine so that offensive materials must be available somewhere in the county gives expression to foundational free speech principles and arguably does not unduly interfere with the marketplace of ideas insofar as the materials banned in Evanston still can be obtained without too great an inconvenience should a person really so desire.

I do not pretend to suggest that determining whether free speech principles should be Tailored is a simple decision. At the end of the day, whether Tailoring in this context is desirable would appear to turn on contestable political commitments: does our country's commitment to free speech mandate that *no* polity across the nation be permitted to ban offensive materials? The major point here is that deciding that the First Amendment bars Congress from enacting bans on offensive materials does not ineluctably lead to the conclusion that sub-federal polities are similarly constrained. Whether or not free speech principles should be Tailored is a hard question that implicates substantive political commitments, and the question of whether First Amendment principles should be Tailored ought to be forthrightly debated in such terms.

IV. CONCLUSION

Tailoring rejects the common tendency to presume that multi-institutional constitutional principles apply identically to the various governmental institutions to which they apply. The failure to Tailor sometimes is flatly illogical. Tailoring's institutionally sensitive constitutional analysis always holds out the prospect of securing benefits of federalism and of separation of

powers that can be lost if constitutional principles are willy-nilly applied in a One-Size-Fits-All manner. Tailoring also facilitates recognition of instructive lines of case law that can be easily overlooked.

By illuminating that case law decided in one institutional context may not seamlessly transfer to a different governmental context, Tailoring spotlights points where precedent gives out and choices must be made among options that One-Size-Fits-All ignores. To be sure, the doctrinal possibilities uncovered by Tailoring raise difficult questions. Determining whether a particular constitutional provision should be Tailored demands careful thought about the institutional characteristics of the different levels and branches of government. Frequently, Tailoring's ultimate desirability will turn not only on such institutional-sensitive analysis, but also on contested normative commitments. This insight naturally raises the question of what governmental institutions properly play a role in answering the normative questions that underlie the decision of whether or not to Tailor. One-Size-Fits-All jurisprudence avoids these complex questions, but at the cost of unreflectively answering them in a manner that hides the fact that decisions had to be made.

This Essay showcases these insights of Tailoring through careful analysis of three constitutional doctrines. The *Thornton* decision's One-Size-Fits-All approach to Arkansas' term limits was illogical. Tailoring makes clear that the provision nonetheless was properly stricken, but illuminates why state-imposed term limits are not *per se* unconstitutional. The Essay then identified, but did not seek to answer, the difficult normative questions that are raised by state-imposed term limits.

Next, the Essay showed that the majority and dissenting decisions in the *White* case, along with one particularly perspicuous commentator, problematically neglected to critically consider what standard of review should be applied to Minnesota's "Announce Clause." The strict scrutiny precedent that was relied upon by all these legalists concerned speech regulations enacted by legislatures in respect of elections for legislative and executive officials. Yet there are solid functional reasons to conclude that regulations drafted by courts in relation to judicial elections should be subject to less than strict scrutiny. Moreover, Tailoring's forthright inquiry concerning the appropriate level of review reveals that some case law supports the adoption of less than strict scrutiny in this context. The Announce Clause may still have been unconstitutional under less than strict scrutiny, but a lower level of scrutiny would not have endangered the many other regulations of judicial elections that *White* has jeopardized.

Finally, the Essay showed that the Seventh Circuit's analysis in *Hudnut* problematically failed to take account of the fact that the anti-pornography regulation had been enacted by a municipality. Tailoring so as to permit sub-state polities (but not states or the federal government) to enact content-based regulations may advance rather than impede foundational free speech values. *Hudnut*'s unreflective adoption of One-Size-Fits-All in relation to free speech principles was unjustified on functional, precedential, and historical grounds. The court's unexamined One-Size-Fits-All approach also obscured the difficult normative questions that are raised by the question of whether free speech principles should be Tailored. If a One-Size-Fits-All approach to free speech doctrine is to be defended, it must be done by direct normative argumentation.