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Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts

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I. INTRODUCTION

A popular myth in American constitutional law is that the "strict scrutiny" standard of review applied to enforce rights such as free speech and equal protection is "'strict' in theory and fatal in fact."[1]

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

This phrase, coined by the late legal scholar Gerald Gunther in 1972, has been called "one of the most famous epithets in American constitutional law"[2] and has effectively defined the strict scrutiny standard in the minds of lawyers for two generations. Born of Gunther's observation, supported by the iconic decisions of the Warren Court, and reinforced in constitutional law teaching and scholarship, the myth teaches that strict scrutiny is an "inflexible"[3] rule that invalidates every (or nearly every) law to which it applies.[4]

In recent years, however, this traditional understanding of strict scrutiny's inevitable deadliness has been challenged, most notably by Justice Sandra Day O'Connor. In *Adarand Constructors v. Pena*, O'Connor's majority opinion expressed the "wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[5] The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying" that standard.[6] In *Grutter v. Bollinger*, O'Connor's opinion for the Court turned wish into action and upheld an affirmative action policy under strict scrutiny.[7] Rather than create insurmountable hurdles that indiscriminately invalidate laws, O'Connor argued, the "fundamental purpose" of strict scrutiny is to "take relevant differences into account."[8] In short, when applying strict scrutiny, "[c]ontext matters."[9]

This Article contributes to this debate by offering a systematic empirical study of strict scrutiny in the federal courts. Reporting the results of a census of every strict scrutiny decision published by the district, circuit, and Supreme courts between 1990 and 2003, this study shows that strict scrutiny is far from the inevitably deadly test imagined by the Gunther myth and more closely resembles the context-sensitive tool described by O'Connor. Courts routinely uphold laws when applying strict scrutiny, and they do so in every major area

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2. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 4 (2000).

3. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

4. *See* Richard Fallon, *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 79 (1997) ("'strict in theory' will routinely prove 'fatal in fact'").

5. 515 U.S. 200, 237 (1995).

6. *Id.* at 230.

7. 539 U.S. 306, 326–28 (2003).

8. *Id.* at 327 (quotations omitted).

9. *Id.*

of law in which they use the test. Overall, 30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld. Rather than "fatal in fact," strict scrutiny is survivable in fact.

This Article begins, in Part II, by defining the strict scrutiny standard and tracing its theoretical underpinnings. Both the standard's formal terms and its underlying justifications leave ample room for laws to be upheld—hence, Gunther's premise of "strict in theory." Yet, in the Warren Court, the standard appeared to be "fatal in fact" as rigorous review was employed to invalidate laws at seemingly every turn. Coming on the heels of the Warren Court, Gunther's quotable phrase crystallized the notion that strict scrutiny was always (or nearly always) deadly. This view of strict scrutiny is common, although as Justice O'Connor's statements suggest, it has recently been subject to challenge. In addition to Justice O'Connor, a number of academics have argued that the traditionally rigid tiers of scrutiny so popular in American constitutionalism are softening.

Part III lays out the methodology of the empirical study and reports the general results. A key assumption underlying the decision to study all federal court decisions applying strict scrutiny is that constitutional law cannot be fully understood by looking only at the Supreme Court and its decisions. American constitutional law scholarship focuses almost exclusively on the Supreme Court, with little attention to the lower federal courts. While the Supreme Court sets the ground rules for judicial review, the lower courts are where those rules are most often applied to specific facts and particular laws. Thus, between 1990 and 2003, the Supreme Court only applied strict scrutiny 12 times, upholding only a single law prior to 2002. During that same period, the lower federal courts applied strict scrutiny in a conclusive, final ruling 447 times. If one wants to comprehend how strict scrutiny works, the lower federal court decisions must be incorporated into the analysis.

Part IV addresses why some laws survive strict scrutiny while others fail. If, as Justice O'Connor so powerfully argues, context matters so much to strict scrutiny analysis, what exactly are the contexts or differences that courts deem relevant? Examining the strict scrutiny cases at the macro level, this Part isolates a number of variables that appear to make a law more or less likely to survive strict scrutiny review generally. One difference found to be relevant is doctrinal: strict scrutiny does not operate with uniform "strictness" across constitutional law. While it is more or less equally rigorous in most areas of law—with a mean survival rate of 24 percent—in religious liberty cases the standard is remarkably lenient. Here, strict

scrutiny results in nearly 60 percent of challenged laws being upheld. Another relevant difference is the governmental institution behind the law. Courts tend to uphold federal judicial orders, federal legislation, and prison policies alleged to infringe on core constitutional rights, whereas state laws, local laws, and policies adopted by educational institutions are more likely to be invalidated. Federalism is an especially influential type of "relevant difference," as courts uphold nearly half of federal laws subjected to strict scrutiny while rejecting most state (and nearly all local) laws. This Part concludes by estimating the parameters of several regression models of strict scrutiny survival.

Part V takes a closer look at how contextual strict scrutiny works within each of the five areas of law in which that standard is found: suspect class discrimination, free speech, fundamental rights, freedom of association, and religious liberty. The objectives of this Part, which offers a micro-level analysis to accompany the earlier macro-level analysis, are threefold. First, the strict scrutiny cases are mapped out to identify what types of laws tend to survive and fail within particular doctrines. In religious liberty cases, for instance, generally applicable laws that substantially burden religious practices are routinely upheld but laws intentionally discriminating against religions are invariably overturned. In free speech cases, courts often uphold restrictions on the right of access to judicial proceedings but almost always overturn restrictions on access to public forums. Second, this Part explores how the variables found to be significant predictors of strict scrutiny survival by the estimated regression models work within discrete doctrines. The results can be surprising. For example, federalism is strongly correlated with strict scrutiny survival in free speech cases, yet there is virtually no current debate in constitutional law about whether federalism should be relevant to judicial review under the Free Speech Clause. Third, this Part explores unusual patterns that emerge in individual doctrines but that are washed out in the aggregated, macro-level data. The political ideology of the deciding judge, for example, does not appear to impact strict scrutiny decisions generally. Nevertheless, in race cases political ideology is closely linked with judges' votes to uphold or invalidate laws under strict scrutiny.

Contrary to the Gunther myth, laws can (and do) survive strict scrutiny with considerable frequency. While it remains true that the majority of laws subjected to strict scrutiny fall and that the government typically faces an onerous task defending laws under this standard, strict scrutiny is not nearly as deadly as generations of lawyers have been taught. As Justice O'Connor has repeatedly tried

to remind us, strict scrutiny responds to differences in context and is capable of being overcome. Strict scrutiny is fatal only in Gunther's theory and really just strict in fact.

II. "'STRICT' IN THEORY AND FATAL IN FACT"

A. What is Strict Scrutiny?

As a mode of judicial review in constitutional law cases,[10] the strict scrutiny standard was first suggested by implication in the famous footnote four of *United States v. Carolene Products*.[11] Decided in 1938, *Carolene Products* upheld a federal law banning the interstate shipment of "filled" milk.[12] More importantly, *Carolene Products* was one of the three cases[13] that overturned *Lochner v. New York*[14] and put an end to the controversial judicial practice of stringently limiting the ability of states and Congress to enact progressive economic legislation. In the "most celebrated footnote in constitutional law,"[15] Justice Harlan Fiske Stone wrote:

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10. As a judicial standard, "strict scrutiny" did not originate with twentieth-century constitutional controversies. In the 1800s, courts employed that terminology in equity cases of debtors who attempted to protect property from creditors by transferring it in suspicious circumstances, such as a sale to another family member. When, for example, a man conveyed a parcel of land to his wife ten days prior to the entrance of a judgment against him in favor of a creditor, the Georgia Supreme Court wrote in 1876 that "[c]ontracts between [relatives] which retain in the family property that would otherwise go to satisfy bonest creditors are to be subjected to *strict scrutiny*—a vigilant judicial police." Booher v. Worrill, 57 Ga. 235, 238 (1876) (emphasis added). According to the court, strict scrutiny meant that only "slight evidence" of fraud brought to the court's attention will "change the *onus*," shifting the burden of proof to "the conjugal pair" to show "the genuineness and good faith of the transaction." *Id.* (emphasis added). As the Nebraska Supreme Court explained in 1894, "conveyances by and transactions between a failing debtor and his relatives are always suspicious and to be regarded with strict scrutiny, and such transactions are badges of fraud, unless clearly explained." Altschuler v. Coburn, 38 Neb. 881, 889 (1894); *see also* Greer v. Altoona Warehouse Co, 20 So. 2d 513, 514–15 (Ala. 1945) ("After the complainant proved the existence of its debt, antedating the conveyance of Greer to his wife, the defendants had the burden of proving the bona fides of tbe consideration and that it was not greatly disproportionate to the value of the property conveyed, and the evidence offered is subject to strict scrutiny because of the family relations."); Paddock v. Pulsifer, 23 P. 1049, 1051 (Kan. 1890) ("[W]here a parent, through extreme age and infirmity, has become childish, and depends upon her son for advice in all her affairs, contracts made by her in his favor are subject to the same strict scrutiny given to contracts of children in favor of their parents."); Gish v. Unruhan, 165 P.2d 417, 418 (Kan. 1946) ("Another rule, here pertinent, is that on an issue of this sort conveyances between members of a family are properly subjected to strict scrutiny.").

11. 304 U.S. 144, 152 n.4 (1938).

12. *Id.* at 145.

13. The other cases were *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Nat'l Labor Relations Bd. v. Jones & Laughlin*, 301 U.S. 1 (1937).

14. 198 U.S. 45 (1905).

15. Lewis F. Powell Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly *more searching judicial inquiry*.[16]

In the wake of *Carolene Products*,[17] economic legislation would thereafter be judged by a standard of "rational basis": so long as the law is a "rational" way of furthering any "legitimate" governmental purpose, it is valid.[18] This standard is famously lenient, and, according to widespread belief, nearly every law judged by it is upheld.[19] The leniency of the standard is essentially the judiciary's way of implementing deference. In matters such as economic regulation the courts believe they are ill-suited to play a vigorous oversight role and thus allow the coordinate branches of government wide latitude to determine the law.[20]

For laws touching upon fundamental rights or discriminating against racial minorities, *Carolene Products* suggested the possibility of a more vigorous judicial role—a "more searching judicial scrutiny." The Supreme Court first used the precise term "strict scrutiny" in 1942's *Skinner v. Oklahoma*, where the Court invalidated an unusually harsh, early version of a "three strikes" law.[21] The Oklahoma law at issue permitted the sterilization of persons convicted of three crimes of moral turpitude but exempted those convicted of other crimes.[22] After calling procreation "one of the basic civil rights of man"[23] and detailing the inequality of Oklahoma's selective sterilization, Justice William O. Douglas's majority opinion explained

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16. *Carolene Prods.*, 304 U.S. at 152–53, n.4 (emphasis added).

17. In some ways, *Carolene Products* was less an introduction of the notion of exacting constitutional scrutiny and more a change in focus in how such review would be applied. The judiciary had long reviewed legislation by examining the asserted government purposes and the reasonableness of the chosen means. During the *Lochner* era itself the Supreme Court employed something akin to "exacting" scrutiny of economic legislation. The *Lochner* era Court required a "reasonable relationship" between economic legislation and "some purpose within the competency of the state"—language similar to today's rational basis test—while insisting upon an acutely narrow view of what counted as a legitimate purpose. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 309 (1997). As a result, the Court invalidated many economic laws adopted by Congress or the states. *Id.*

18. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (applying rational basis to an economic classification).

19. *See* Gunther, *supra* note 1, at 8 (stating that rational basis review is "virtually none in fact").

20. *See Ry. Express Agency*, 336 U.S. at 110.

21. 316 U.S. 535, 541 (1942).

22. *Id.* at 536–37.

23. *Id.* at 541.

that "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[24] Justice Douglas may have suspected that Oklahoma's discrimination was anything but well intentioned; in the early twentieth century, the "moral turpitude" label was often used to compound the stigma of crimes disproportionately committed by racial minorities and the poor.[25]

The esteemed state court jurist Hans Linde, who clerked for Justice Douglas,[26] appropriately recognized that terms like "strict scrutiny" "were not systematically selected for clarity or logic," but "first appeared in the opinions of judges who used them in the ordinary course of making a point, not in order to frame a formal rule."[27] Nevertheless, in the development of constitutional doctrine in the decades after *Skinner*, Justice Douglas's phrase caught on and eventually became increasingly formalized into a two "prong" test now referred to as "strict scrutiny" or "compelling interest" analysis. Courts first determine if the underlying governmental ends, or objectives, are "compelling." According to Linde, "the Court uses compelling in the vernacular to describe [the] societal importance" of the government's reasons for enacting the challenged law.[28] Because the government is impinging upon someone's core constitutional rights, only the most pressing circumstances can justify the government action.[29] If the governmental ends are compelling, the courts then ask if the law is a narrowly tailored means of furthering those governmental interests. Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the "least restrictive alternative" available to pursue

24. *Id.*

25. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985) (invalidating an Alabama constitutional provision disenfranchising individuals convicted of misdemeanors of "moral turpitude" because of a racially invidious motive).

26. *See* Heather Davis, *Dedication to Justice Hans A. Linde*, 64 ALB. L. REV. 1139, 1139 n.1 (2001).

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

28. *Id.* at 221.

29. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (arguing that constitutional rights are not absolutes and tbat "[p]ressing public necessity" may warrant interference).

those ends.[30] This inquiry into "fit" between the ends and the means enables courts to test the sincerity of the government's claimed objective.[31]

In the years following *Skinner*, the strict scrutiny standard developed in the doctrines of free speech[32] and equal protection.[33] The Supreme Court, in the 1943 case *Murdock v. Pennsylvania*, held that the First Amendment's guarantee of free speech required that invasive laws be "narrowly drawn."[34] A year after that, in *Korematsu v. United States*, the Court held that racial classifications were "immediately suspect" under the Equal Protection Clause.[35] After a period of dormancy,[36] strict scrutiny as a unique, identifiable test was picked up in the late 1950s by the Warren Court, which expanded it into new areas of law and rekindled it in the old. In *NAACP v. Alabama*, the Court held that the government must have a compelling interest to justify limitations on the freedom of association,[37] and in *Sherbert v. Verner*, the Court held that strict scrutiny applied to laws burdening the free exercise of religion.[38] The Warren Court also reaffirmed *Skinner*'s principle of strict scrutiny for invasions of fundamental rights in two 1969 decisions, *Kramer v. Union Free School District* (right to vote)[39] and *Shapiro v. Thomson* (right to travel).[40]

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30. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

31. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996) ("A law's underinclusiveness—its failure to reach all speech that implicates the interest—may be evidence that an interest is not compelling, because it suggests that the government itself doesn't see the interest as compelling enough to justify a broader statute.").

32. *See generally* Stephen A. Siegel, The Origin of the Compelling State Interest Test and Strict Scrutiny (2005) (unpublisbed manuscript, on file with author) (arguing that strict scrutiny arose primarily in free speech cases).

33. *See generally* Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29 (2005) (tracing the equal protection roots of strict scrutiny).

34. 319 U.S. 105, 116–17 (1943).

35. 323 U.S. 214, 216 (1944).

36. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991) (noting that it took years for the entire Court to adopt a presumptive rule against racial classifications).

37. 357 U.S. 449, 463–64 (1958).

38. 374 U.S. 398, 406–07 (1963).

39. 395 U.S. 621, 626–27 (1969).

40. 394 U.S. 618, 634 (1969).

B. Theories of Strict Scrutiny

The "more searching" scrutiny proposed in *Carolene Products* invoked an unusual starting presumption for courts to take in a limited set of controversies. Whereas separation of powers and federalism concerns ordinarily lead courts to presume that legislatures act within their powers and that legislation is constitutionally valid, footnote four implied an alternative course in core rights and discrimination cases. With laws encroaching upon these rights, the "ordinary political processes" could not be trusted to reach constitutionally legitimate results.[41] Thus, courts should reverse their usual starting point by presuming such laws to be unconstitutional and require the government to bear the burden of defending the law.[42]

Skinner pointed to one reason courts might mistrust the political branches: legislation may be motivated by improper or invidious purposes.[43] The notion that courts should police the political process for improperly motivated legislation has become a prominent justification for judicial application of heightened review. Constitutional theorist John Hart Ely, in his landmark book, *Democracy and Distrust*, argued that "special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation."[44] Cass Sunstein agrees, arguing that strict scrutiny is designed to "ensure[] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work."[45] The motive theory of strict scrutiny has its most profound impact in equality cases, as exemplified by Justice Sandra Day O'Connor's race discrimination opinions. "The reasons for strict scrutiny are familiar," she wrote in *Johnson v. California*.[46] "Racial classifications raise special fears that they are motivated by an invidious purpose."[47] Strict scrutiny is designed "to

41. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938).

42. *Id.*

43. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

44. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980).

45. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 78 (1996). Elizabeth Anderson recently described strict scrutiny under the equal protection guarantees as "the Court's way of operationalizing 'skepticism' about the state's purposes. It offers a way of telling whether the state's purported legitimate purpose in using a racial classification is a pretext for an invidious purpose." Elizabeth Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1230 (2002).

46. 543 U.S. 499, 505 (2005).

47. *Id.*

'smoke out' illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[48] The hunt for improper motives has also animated strict scrutiny in the First Amendment[49] and the fundamental rights strand of equal protection.[50]

An alternative justification of strict scrutiny invokes heightened review as a means of providing vigorous judicial protection for core rights while nevertheless pragmatically allowing "a safety valve in the event of a 'hard case,' where the governmental and societal reasons for infringing upon an individual right are particularly strong (or in the language of the doctrine, 'compelling')."[51] Under this approach, the court weighs the costs of a law in terms of its impact on individual rights against the law's benefits to society as a whole.[52] But this is a weighted balancing, with a heavy thumb on the scale in favor of the individual rights claimant, and the government is unlikely to win absent especially pressing circumstances. The Supreme Court referred to this weighted balancing approach to strict scrutiny in a recent free speech case. According to the Court, "the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems."[53] To insure that government's reasons are truly of sufficient magnitude to warrant invasion of rights, the courts use narrow tailoring to police against means that are overinclusive or underinclusive. A law with poor fit—one that does not capture all like threats—suggests that the government itself does not really believe the underlying ends are so compelling.[54]

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48. *Id.* at 506 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

49. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211–14 (1992) (Kennedy, J., concurring) (arguing to uphold a geographical electioneering ban under strict scrutiny because the speech restriction was not the result of illegitimate legislative motivation).

50. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 540–42 (1942) (suggesting that improper legislative motives were likely behind a law requiring sterilization for people convicted of crimes of moral turpitude).

51. Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 970 (1998).

52. *See* Siegel, *supra* note 32, at 82–84 (discussing the weighted cost-benefit theory of strict scrutiny).

53. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (describing this tradition after a long list of citations to landmark speech cases).

54. *See* Volokh, *supra* note 31, at 2420.

The weighted balancing approach to strict scrutiny reflects a compromise between two views of constitutional interpretation, represented by Justices Hugo Black and Felix Frankfurter respectively. Black argued that constitutional rights should be read as categorical rules that bar government from certain kinds of activity.[55] Black famously insisted that the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" meant "no law," "without any ifs, buts, or whereases."[56] Frankfurter, by contrast, believed that categorical absolutes unwisely invited conflict between the judiciary and the elected branches. He preferred instead a straightforward, even-handed balancing of the interests.[57] But if Black's absolutist approach gave rights too much protection, simple bimodal balancing offered too little.[58] Heightened scrutiny was a compromise. Courts would not balance the relative interests on equal terms nor categorically deny government the power to touch core rights; certain laws would be presumed unconstitutional and the government could only overcome that presumption by showing that the laws were absolutely necessary given the circumstances.

In each of these two theories of strict scrutiny,[59] the standard envisioned is strict but not inevitably fatal. Under the "smoke out" theory of strict scrutiny, laws that are *not* based on improper purposes

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55. *See* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 559 (1962) (quoting Justice Black). For other notable articulations of his absolutism, see Bridges v. California, 314 U.S. 252, 263–71 (1941) (opinion by Black, J.); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

56. Cahn, *supra* note 55, at 553, 559.

57. *See* Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring). For fuller accounts of the Black/Frankfurter debate, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84–89 (1962). *See generally* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISIONMAKING (1984).

58. Some of the classic works on balancing versus categorical rules include T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912–16 (1963).

59. Social choice offers another justification for strict scrutiny, according to which the courts police against legislation that would tend to reduce social welfare. My colleague Lynn Stout explains that "statutes burdening rights courts describe as 'fundamental' tend to reduce average welfare because legislative voting fails to account for the intense preference of those whose rights are invaded, while statutes employing classifications deemed 'suspect' under the Equal Protection Clause frequently serve redistributive rent-seeking. An independent judiciary that strictly scrutinizes these statutes can protect against the welfare losses that flow from legislative failure." Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1789–90 (1992). The social choice approach "implies that no right can be absolute. When the public interest is great enough, a utilitarian calculus permits the state to intervene in even the most private decisions." *Id.* at 1810.

are supposed to survive review even if they burden core constitutional rights.[60] A strict scrutiny that is always fatal cannot serve to smoke out improper motives; such a rule effectively sets fire to the laws themselves, invalidating them regardless of motive. Under the weighted balancing theory, the premise of heightened review is that, sometimes, laws infringing on individual rights may be legitimate due to unusually important countervailing interests.[61] In such cases, strict scrutiny exists precisely to permit regulation where ordinarily none is allowed.

C. The Rise of the Strict Scrutiny Myth

When Gunther penned his famous remark in 1972, only the theory of strict scrutiny seemed strict. In the hands of the Warren Court, heightened review certainly appeared to be outcome determinative and always fatal. In a line of landmark decisions, including *Loving v. Virginia*,[62] *Sherbert v. Verner*,[63] *Kramer v. Union Free School District*,[64] and *Shapiro v. Thompson*,[65] strict scrutiny was used by the Warren Court to strike down a range of laws and expand constitutional protections for individual rights. Although one pre-Warren Court case had upheld a law under heightened review—*Korematsu v. United States*,[66] upholding the exclusion of Japanese residents from areas of the West Coast during World War II—that case was easily categorized as an outlier occasioned by the war (or worse, a terrible judicial error).[67]

The 1971 term had marked a moment of transformation for the Supreme Court as President Richard Nixon's two newest appointments (Justice William Rehnquist and Justice Lewis Powell Jr.) had just replaced Justices Black and John Marshall Harlan, joining two earlier Nixon appointees (Chief Justice Warren Burger and Justice Harry Blackmun). The bevy of Nixon appointees promised

60. *See* Johnson v. California, 543 U.S. 499, 515 (2005) (noting that properly motivated laws are capable of surviving strict scrutiny).

61. *See* Volokh, *supra* note 31, at 2427 (noting that limitations on free speech, for example, may be acceptable when a government has extremely compelling interests in imposing such restrictions).

62. 388 U.S. 1, 11–12 (1967) (invalidating state ban on miscegenation).

63. 374 U.S. 398, 406–07 (1963) (invalidating a state law hurdening the free exercise of religion).

64. 395 U.S. 621, 622 (1969) (invalidating a state law restricting the right to vote in school district elections).

65. 394 U.S. 618, 634 (1969) (invalidating a state law restricting the right to travel).

66. 323 U.S. 214 (1944).

67. *See* Klarman, *supra* note 36, at 232 n.83 (explaining *Korematsu* as a reflection of deference to the military).

a significant change in direction for the Court, as the liberal and expansionist Warren Court turned to the potentially much more conservative and restrained Burger Court.[68] One hallmark of the Warren Court, according to Gunther, was its "embrace[]" of a "rigid two-tier attitude" in equal protection cases.[69] "Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact."[70] In the early Burger Court equal protection cases, Gunther discerned the beginnings of a "new trend": a continuation of interventionist equal protection review, but one without resort to strict scrutiny.[71] This "newer equal protection" would cease to examine critically the asserted government ends, "concern[ing] itself solely with means."[72] Moreover, means that significantly furthered whatever government purpose was alleged, but fell short of strict scrutiny's requirement of narrow tailoring, would be permissible.[73] The rise of "intermediate" and other forms of relaxed scrutiny in the ensuing years of the Burger Court proved the accuracy of Gunther's prediction of a newer equal protection.

Yet it was Gunther's characterization of strict scrutiny as "fatal in fact" that gained wide popularity. The phrase became "one of the most quoted lines in legal literature,"[74] and hundreds of law journal articles and judicial opinions have repeated the quote. The Supreme Court has cited Gunther approvingly, writing that "[o]nly rarely are statutes sustained in the face of strict scrutiny. . . . [S]trict-scrutiny review is 'strict' in theory but usually 'fatal' in fact."[75]

Gunther's line is not just frequently quoted, it is widely accepted by many as an accurate description of strict scrutiny. Constitutional scholar Paul Kahn has written that "equal protection law has essentially identified 'exacting' judicial scrutiny with judicial invalidation."[76] As one recent constitutional law treatise teaches,

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68. Gunther, *supra* note 1, at 5.

69. *Id.* at 8.

70. *Id.* (footnote omitted).

71. *Id.* at 12.

72. *Id.* at 21.

73. *Id.*

74. Kathleen M. Sullivan, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002).

75. Bernal v. Fainter, 467 U.S. 216, 220 n.6 (1984); *see also* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (defining "conventional 'strict scrutiny'" as "scrutiny that is strict in theory, but fatal in fact").

76. Paul Kahn, *The Court, The Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 6 (1987).

strict scrutiny "create[s] virtually insurmountable hurdles for the government seeking to defend its classifications."[77] Jed Rubenfeld agrees: "[W]hen a law burdens [a fundamental] right, it . . . triggers strict scrutiny—which, as everyone knows, is almost always fatal."[78] Strict scrutiny, it is said, is a "death knell"[79]: an "outcome determinative"[80] standard of review "virtually impossible for a law to survive."[81] According to another scholar, "[t]he subsequent evolution of strict scrutiny confirmed the accuracy of the Gunther assessment"[82] of the standard as inevitably fatal. "[O]nce the Court sorts the case into one or another constitutional bin [strict scrutiny or rational basis], the outcome is virtually foreordained."[83] Others insist "strict scrutiny is essentially invoked, not employed. Despite its name—strict 'scrutiny'—it ordinarily amounts to a finding of invalidity, not a tool of analysis."[84] Except in the extremely rare case, "the actual application" of the standard is "a rhetorical and mechanical afterthought."[85]

Although Gunther's observation was based on his view of equal protection doctrine, the "strict in theory, fatal in fact" label has often been used to describe strict scrutiny in other areas of law, including free speech doctrine[86] and fundamental rights doctrine.[87] Strict scrutiny is widely perceived to be equally fatal in these areas of law. According to Laurence Tribe, for example, "there are very few cases

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77. 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 25.02, at 8 (2d ed. 1997).

78. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1160 (2002); *see also* Fallon, *supra* note 4, at 76 ("[T]he classification of legislation as either 'suspect' or 'nonsuspect' is nearly always outcome-dispositive.").

79. CAROL M. SWAIN, THE NEW WHITE NATIONALISM IN AMERICA 269 (2002).

80. Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of* Nixon v. Shrink Missouri Government PAC, 66 MO. L. REV. 141, 160 (2001).

81. EVAN GERTSMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 14 (2004); *see also* JACK N. RAKOVE, THE UNFINISHED ELECTION OF 2000, at 172 (2003) (challenged law invalidated "virtually every time").

82. K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 404 (1997).

83. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 55 (1997).

84. Rubin, *supra* note 2, at 4.

85. Wells, *supra* note 80, at 160.

86. *See* Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children From Indecent Speech*, 11 WM & MARY BILL RTS. J. 671, 673 (2003); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 983 (2003); James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 321 (2002).

87. *See* Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1452 (2d ed. 1988).

which strictly scrutinize and yet uphold instances of impaired fundamental rights."[88]

D. Recent Challenges to the Myth

There have been several recent challenges to the widely held belief that strict scrutiny is an outcome determinative, always (or nearly always) fatal test. Justice O'Connor's opinions in *Adarand* and *Grutter* are perhaps the most recognizable arguments against Gunther's view. In a more recent case, *Johnson v. California*, Justice O'Connor once again argued that "[t]he fact that strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny."[89]

O'Connor's challenge is not alone. A handful of legal scholars have recently argued that, at least in equal protection doctrine, the tiers of scrutiny are collapsing.[90] Some have commented that the traditional outcome-determinative alternatives of rational basis review and strict scrutiny are becoming less extreme, as reflected in a number of high-profile Supreme Court decisions. According to Sunstein, "[t]he hard edges" of tiered review "have softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests."[91] Ashutosh Bhagwat agrees, and argues that the softening of the traditionally extreme tiers of scrutiny is due to a newfound willingness by the courts to undertake a genuine scrutiny of governmental purposes.[92]

The evidence of this softening comes from both sides of the traditional tiers of scrutiny. On the strict scrutiny side, the evidence for softening includes *Adarand Constructors*' claim that the test is not necessarily fatal[93] and *Grutter*'s subsequent implementation of less-than-fatal strict scrutiny to law school affirmative action policies. On the rational basis side, decisions such as *Cleburne v. Cleburne Living Center*,[94] *Romer v. Evans*,[95] and *Lawrence v. Texas*[96] apply an

88. TRIBE, *supra* note 87, at 1452.

89. 543 U.S. 499, 515 (2005) (quotations omitted).

90. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Law*, 85 CAL. L. REV. 297, 323–24 (1997); Robert E. Levy, *In* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 418 n.385 (1995).

91. Sunstein, *supra* note 45, at 77.

92. *See* Bhagwat, *supra* note 90, at 299–304, 315.

93. *Id.* at 315.

94. 473 U.S. 432, 450 (1985) (invalidating, under rational basis review, the application of a zoning law to prevent the operation of a group home for the mentally disabled).

uncharacteristically vigorous and skeptical version of that standard of review—one that has been termed "rational basis with bite."[97]

There is one area of law in which strict scrutiny has been widely recognized to be less than fatal in practice: free exercise cases. After the Supreme Court first applied strict scrutiny in the 1960s to require the government to grant exemptions from generally applicable laws to religious adherents, the Burger and Rehnquist Courts turned away most claims for religious exemptions. In 1992, James Ryan published an empirical study of free exercise cases decided by the federal appellate and Supreme courts between 1980 and 1990.[98] Ryan found that exemption claims were denied in 87 percent of the cases (85 of 97),[99] confirming the view expressed by other scholars that strict scrutiny in free exercise cases was easily satisfied.[100] Ryan's study was limited to free exercise cases, but the high rate at which laws survived strict scrutiny in those cases raises the question of how strict this test is in other areas of law.

III. METHODOLOGY AND BASIC RESULTS

A. Methodology

The study consists of a comprehensive data set of reported federal court opinions applying strict scrutiny from January 1990

95. 517 U.S. 620, 635 (1996) (invalidating, under rational basis review, a Colorado constitutional provision that barred the enactment of laws protecting those discriminated against on the basis of sexual orientation).

96. 539 U.S. 558, 578 (2003) (invalidating a Texas law that criminalized same-sex sodomy because it served no "legitimate" governmental interest).

97. *See generally* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987); *see also* Gunther, *supra* note 1, at 18–19 (arguing that several "minimal scrutiny" cases applied a standard with "bite"). *Cf. Lawrence*, 539 U.S. at 580 (2003) (O'Connor, J., concurring) (arguing that the Court has applied a "more searching" form of rational basis review when adjudicating laws burdening personal relationships). Lending empirical support to the thesis that the traditional tiers are softening is Robert Farrell's study of Supreme Court rational basis decisions between 1973 and May 1996, which found that 10% of the applications of that test resulted in the law being invalidated. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 417–18 App. (1999).

98. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

99. *Id.* at 1417.

100. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 55 (1995); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110, 1127 (1990); Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 246 (Stephen E. Gottlieb ed., 1993).

through 2003. To identify all the strict scrutiny appliers, an initial list of over 4,000 cases was compiled using Westlaw searches of published federal courts decisions that mentioned "strict scrutiny," "exacting scrutiny," or other potential formulations of the standard.[101] Each opinion identified was read to determine if it applied strict scrutiny. For the vast majority of opinions, this was a simple matter of reading the case and seeing whether the court wrote that it was applying "strict scrutiny" or judging a law to determine whether it was "narrowly tailored to further a compelling governmental interest." In a few cases, the courts expressed uncertainty about the applicable standard of review and held, as an alternative basis for the decision, that the law survived or failed review under strict scrutiny. These alternate holdings, though arguably dicta, were counted as strict scrutiny appliers in order to gain the most comprehensive picture of judicial practice.

The corpus of strict scrutiny decisions came from five basic doctrines: freedom of speech, religious liberty, suspect class discrimination, fundamental rights/substantive due process, and freedom of association. Other areas of law that borrow from the strict scrutiny standard but depart from it in some way were excluded. For example, in dormant commerce clause cases, courts sometimes claim to apply the "strictest scrutiny" but define that test as explicitly mandating only "legitimate" (but not "compelling") government interests.[102] Only decisions that purported to apply the traditional compelling interest/narrowly tailored version of strict scrutiny were included.

The period of 1990 through 2003 was chosen for theoretical and practical reasons. Limited resources and the large number of decisions that had to be read necessitated some line drawing, but this particular period was chosen because it provided a sufficiently large group of decisions from each circuit and in each area of doctrine from which reliable inferences could be drawn. A shorter period would limit the number of observations, and a much longer period of study—say, going back to the origins of strict scrutiny in mid-century—would present the dilemma of how to code decisions that are ambiguous

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101. Westlaw query for "da(1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003) & "strict scrutiny" "strictest scrutiny" "exacting scrutiny" ((compelling /2 interest) /s (narrow! "least restrictive"))" in the All Federal Cases database, conducted on September 24, 2004.

102. *See, e.g.*, Cooper v. McBeath, 11 F.3d 547, 553 (5th Cir. 1994) (applying the "strictest scrutiny" but requiring a "legitimate" interest in the dormant commerce clause context). Although I did not collect data on dormant commerce clause decisions, many were encountered while conducting the research for this Article and few (if any) survivors were found. Not all scrutiny has to be "strict" to be vigorous.

about the standard they apply. In the 1960s and '70s, many opinions that are now widely thought to use strict scrutiny did not employ that precise terminology nor even refer to the two prongs in any kind of systematic way.[103] By 1990, however, the norm of identifying with specificity the applicable standard and applying it in a more or less straightforward, structured fashion was well established. Moreover, the time period examined is relatively recent, offering a perspective on how strict scrutiny is currently applied in the federal courts as a matter of practice—rather than how strict scrutiny was applied historically.

The data set includes all published[104] federal court decisions applying strict scrutiny in a final ruling on the merits. Preliminary injunction cases and decisions that were subsequently reversed or affirmed on appeal in a published opinion were collected but, unless otherwise specified, were excluded from the reported results. The total number of strict scrutiny applications in final, published rulings on the merits was 459.

The data set was compiled with the flexibility to analyze strict scrutiny applications at two levels: the application level and the judge level. The application level data treats each judicial decision applying strict scrutiny as a single observation, regardless of the number of judges on the panel. Where a court adjudicated more than one provision under strict scrutiny in the same case, each application of strict scrutiny was treated as a distinct observation. This is the level of analysis that supports most of the empirical results in this Article. The judge level data, which is only used here in tests of potential correlations between political ideology and strict scrutiny, reports each judicial vote on a strict scrutiny application as a single observation.[105] Thus, for that same hypothetical circuit court decision

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103. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (applying what is now widely recognized as strict scrutiny even though the Court only required a "permissihle"—rather than "compelling"—governmental interest); Oyama v. California, 332 U.S. 633, 640, 646 (1948) (invalidating racially discriminatory state law under a partial strict scrutiny analysis that looked to the compelling importance of the governmental ends but without any formal analysis of means fit).

104. Some applications of strict scrutiny necessarily evaded the data set by the decision to focus only on published opinions. Courts that applied strict scrutiny without authoring an opinion and/or triggering an appeal that would result in an opinion were not captured by my research. This may skew the data and undercount strict scrutiny survivors. Assuming that a court is more likely to publish an opinion when it overturns a law than when it upholds one, we would expect the universe of unpublished strict scrutiny applications to be disproportionately survivors. In turn, the universe of published applications will be disproportionately fatalities.

105. Each judicial vote on a discrete legal issue requiring strict scrutiny analysis was treated individually. In some cases, there were multiple, distinct legal issues voted upon in a decision and each vote was counted as a separate observation.

referenced above, each of the three judges would be treated as a separate observation. In addition, where judicial votes are being studied, the data set allows the inclusion of published lower court strict scrutiny decisions that were later the subject of subsequent published rulings on the same law, although these non-final decisions are excluded from the application-level data. Unless otherwise specified, the results reported are based on the application-level data and include only final rulings on the merits.

A final point of clarification is in order. The purpose of this study is to examine how courts and judges apply strict scrutiny; it is not to determine how strict scrutiny might affect litigants, legislators, or others. Determining how strict scrutiny impacts the decision of lawmakers to adopt laws or encourages or discourages litigants to bring, settle, or appeal lawsuits is not the goal. The exclusive focus here is on how courts and judges apply strict scrutiny and the variables associated with strict scrutiny survival.

B. The O'Connor Hypothesis: Strict Scrutiny is not Fatal in Fact

The first hypothesis subjected to empirical verification is that strict scrutiny is not really fatal in fact. Because of the free exercise cases studied by Ryan and a few other high-profile decisions such as *Grutter* and *Korematsu*, it is already apparent that some decisions uphold laws while applying strict scrutiny. Therefore, we could determine that, as a purely descriptive matter, strict scrutiny is not *always* fatal without looking further. But the more interesting question is whether the free exercise cases, *Grutter*, and *Korematsu* are merely outliers and that, elsewhere in constitutional adjudication, strict scrutiny is fatal in all (or nearly all) cases. If the courts invalidate nearly every law under strict scrutiny save for these outliers, then one might still conclude that strict scrutiny is effectively fatal in fact. On this basis, a null hypothesis can be proposed: if only a small percentage of laws survive strict scrutiny, then strict scrutiny is as Gunther characterized it. The precise percentage cutoff is somewhat arbitrary, but a fair number might be a single digit survival rate: If less than 10 percent of applications result in the law being upheld, then strict scrutiny is practically speaking fatal.

To determine if strict scrutiny is fatal in fact, a simple descriptive statistic of the number of survivors and fatalities was employed. For this statistic, the application-level observations were used. There were 459 applications of strict scrutiny in published final rulings on the merits during the covered period. Of those 459 applications, there were 322 applications that resulted in invalidation

and 137 applications that upheld the challenged laws. This amounts to a survival rate of 30 percent. This rate is high enough to conclude that in the aggregate strict scrutiny is not inevitably, or even in the overwhelming number of cases, fatal in fact. Almost one in three applications of strict scrutiny upheld the challenged law.

The aggregate data, however, include strict scrutiny applications across five basic doctrines: freedom of speech, freedom of association, religious liberty, fundamental rights, and suspect class discrimination. Based on the Ryan study of religious liberty decisions in the 1980s, one may suspect that strict scrutiny survival rates may vary by doctrine. Moreover, it is conceivable that the 30 percent survival rate is propelled primarily by religious liberty cases. If the religious liberty cases are removed and the strict scrutiny survival rate drops to below 10 percent, then perhaps strict scrutiny really is fatal in fact everywhere but in religious liberty cases. Removing all of the religious liberty cases, however, results in a drop in the strict scrutiny survival rate to only 24 percent.[106] Strict scrutiny is stricter outside of religious liberty cases, but it is still far from fatal in fact. Across constitutional law, strict scrutiny is survivable.

Based on the high survival rate of strict scrutiny, both with and without the religious liberty cases factored in, it appears that *Grutter* and *Korematsu* are not outliers. Instead, they are the tips of an iceberg, the most visible signs of a larger body of strict scrutiny decisions that uphold laws under even this most rigorous and exacting standard of review.

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106. One interesting question, although beyond the scope of this study, is why we do not find something closer to a 50% rate, as might be expected in light of the famous Priest-Klein "selection effect" hypothesis. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984) (arguing that because only "close" cases will ordinarily be pursued through final adjudication, with otbers controversies settling prior to trial or never being brought, plaintiffs should win approximately 50% of litigated cases regardless of the substantive standard or legal rule). Althougb there has been considerable research on the Priest-Klein hypothesis, most of it looks at private rather than constitutional litigation. For exemplary studies, see Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility?*, 79 WASH. U. L.Q. 569 (2001); Robert E. Thomas, *The Trial Selection Hypothesis Without the 50 Percent Rule: Some Experimental Evidence*, 24 J. LEGAL STUD. 209 (1995). The selection effect in strict scrutiny cases is examined more thoroughly in Craig Countryman & Adam Winkler, Fundamental Rights and the Selection Effect (2006) (unpublished manuscript, on file with the author).

IV. CONTEXTUAL STRICT SCRUTINY

In *Grutter*, Justice O'Connor's majority opinion insisted that, even where strict scrutiny applies, "[c]ontext matters."[107] Strict scrutiny, she wrote, "must take relevant differences into account. . . . [S]trict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker . . . in that particular context."[108] This Part offers a macro-level examination of the strict scrutiny data to consider a series of questions related to the extent to which context matters in strict scrutiny review. How does strict scrutiny vary among the different areas of law in which that standard is found? Is the type of governmental actor behind a challenged law a relevant difference? Do courts treat educational institutions differently than other institutions or treat federal laws to more or less deferential review than state laws? Does a law's likelihood of being upheld depend at all on the level of court called upon to decide the issue? These and other factors are considered. This Part concludes by estimating the parameters of a regression model designed to account for which variables are significantly tied to strict scrutiny outcomes.

A. The Identity of the Right

Strict scrutiny is regularly overcome in each of the five constitutional rights in which the standard is used. This Section considers if all rights trigger an equally protective version of strict scrutiny. The discussion so far has already revealed that one area of law, religious liberty, has a particularly weak version of strict scrutiny under which the majority of challenged laws are upheld. Is there any discernible variation in strict scrutiny's "strictness" in other areas of law?

Table 1 reports the strict scrutiny survival rate by right, along with the results of a statistical test designed to measure whether the variation in the survival rate is significant.

107. 539 U.S. 306, 327 (2002).

108. *Id.* (internal quotations omitted).

Table 1. Strict Scrutiny Survival by Right

Right	*Survival Rate*	*Applications* (N)
Religious Liberty	59%	73
Freedom of Association	33%	33
Suspect Class Discrimination	27%	85
Fundamental Rights	24%	46
Freedom of Speech	22%	222
Total	30%	459
$F = 9.988$, $DF = 4$, $p < .000$		

Strict scrutiny survival is correlated with doctrine at a statistically significant rate ($p < .000$). In other words, the doctrine in which a case arises impacts the likelihood that the underlying law will be upheld. Strict scrutiny is clearly survivable in religious liberty cases, where 59 percent of applications result in the law being upheld. This is consistent with the received wisdom of religious liberty scrutiny being relatively easy to satisfy. Thirty-three (33) percent of applications to laws alleged to infringe upon the freedom of association were survivors. In suspect class discrimination cases, strict scrutiny was satisfied in 27 percent, while in fundamental rights cases the survival rate was 24 percent. Strict scrutiny was most fatal in free speech cases, where only 22 percent of challenged laws survived. None of the constitutional rights triggers a truly fatal-in-fact form of strict scrutiny, and the survival rate in every right is in excess of 20 percent. These figures are consistent with a form of review that is difficult, but not impossible, to overcome.

Although each right has its own survival rate, further examination suggests that the significant variation is limited to religious liberty decisions, as compared to all others. Outside of religious liberty, the rate at which laws survive strict scrutiny review is more or less consistent—all within the range of 22-33 percent. If the religious liberty cases are removed from the analysis, no statistically significant variation in survival rates among the doctrines remains ($p = .494$). Strict scrutiny is equally "strict" in free speech, association, fundamental rights/due process, and suspect class discrimination cases. The identity of the constitutional right, therefore, appears to make a difference in the likelihood a law will survive strict scrutiny only as it compares religious liberty to all other constitutional rights. The scrutiny applied to religious liberty

infringements resembles some form of intermediate (or more deferential) scrutiny.

Part V will return to the question of how strict scrutiny varies among doctrines and detail the types of laws that survive or fail in each area of law. For now, it is enough to recognize an apparently important variation in strict scrutiny's deadliness between religious liberty cases, on the one hand, and all other rights on the other.

B. Enacting Institution

Another potentially useful way to examine strict scrutiny in practice is to consider whether judges evaluate laws adopted by different governmental actors with the same degree of skepticism. Courts are asked to consider the constitutionality of policies and laws adopted by a host of governmental institutions, from Congress and state legislatures to executive agencies and local government officials. Some cases involve policies adopted by prisons, others by educational institutions, and still others by federal judges themselves. Is each of these governmental institutions subject to the same degree of suspicion, or are federal judges prone to defer to some and to more strictly scrutinize the actions of others?

In a series of articles, Frederick Schauer has argued that our understanding of free speech would be enhanced by focusing on the institutional context in which the speech arises.[109] Rather than treating all speakers as the "same," First Amendment doctrine might better serve the underlying rationales of the free speech guarantee if courts paid attention to "lines of institutional differentiation."[110] According to Schauer, "[i]nstitutional specificity and institutional differentiation are a reality of modern life, and this reality is reflected, as elsewhere, in the institutions relevant to free speech adjudication."[111] "[W]e might also trust [courts] to recognize the difference between the institutional press and the lone pamphleteer, between the Internet and an adult theater, between libraries and medical clinics, and between the National Endowment for the Arts and the National Institutes of Health."[112] Schauer's suggestion for the

109. *See generally* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) [hereinafter *Institutions*]; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter *Institutional First Amendmcnt*].

110. Schauer, *Institutional First Amendment*, *supra* note 109, at 1260.

111. Schauer, *Institutions*, *supra* note 109, at 113–14.

112. Schauer, *Institutional First Amendment*, *supra* note 109, at 1260.

First Amendment also has potential salience for how one might view other areas of constitutional doctrine. Indeed, it may be that courts are already silently attuned to institutional context when they apply a test such as strict scrutiny, even if the test itself is ostensibly blind to the identity of the governmental actor.

1. Survival Rate by Institution

To see whether courts treat different governmental actors with differing levels of skepticism, all of the strict scrutiny applications were coded for the governmental institution that enacted the law at issue. The variables chosen were much broader than those suggested by Schauer as this test was not designed to substantiate Schauer's particular claims but rather to build on his notion of institutional specificity more generally. Table 2 reports the strict scrutiny survival rate by governmental actor that adopted the challenged policy or law

Table 2. Strict Scrutiny Survival by Governmental Institution

Enacting Institution	*Survival Rate*	*Applications* (N)
Penal Institutions[113]	74%	27
Judiciary[114]	58%	38
Congress	49%	43
Federal Agency[115]	45%	29
State Legislature/Constitution[116]	23%	145
State Agency[117]	14%	14
Educational Institution[118]	20%	35
Local Government[119]	15%	118
Other[120]	10%	10
Total	30%	459
$F = 10.227$, $DF = 8$, $p < .000$		

Strict scrutiny survival rates vary significantly by enacting governmental institution ($p < .000$). Penal institution policies subjected to strict scrutiny survive in a remarkably high percentage of applications, 74 percent. Judicial orders alleged to violate core rights have a survival rate of 58 percent. Laws adopted by Congress (49%) and federal administrative agency regulations (45%) survive nearly half the time. State legislative enactments and constitutional provisions survive much less frequently than federal laws, at 23 percent. Strict scrutiny as applied to educational institutions, such as universities, public schools, and libraries is fatal in all but 20 percent

113. Penal Institutions includes both federal and state prisons and related institutions.

114. Judiciary includes court orders, injunctions, and consent decrees put in place by courts.

115. Federal Agency includes all federal executive branch agencies, except prisons.

116. State Legislature/Constitution includes state legislative enactments and constitutional provisions.

117. State Administrative Agency includes all state executive agencies, except prisons and educational institutions.

118. Educational Institutions includes public schools, colleges, universities, and libraries. Library cases were too few in number (3 total, all fatalities) to warrant treatment as a unique variable.

119. Local Government includes municipal and county governmental actors, excluding educational institutions.

120. Other included private entities that were deemed to be state actors (such as unions), and state bars.

of observed applications. State administrative agencies (14%), local governmental entities (15%), and other governmental actors (10%) fare even worse. These last types of governmental institutions face a scrutiny that is nearly always fatal.

Courts seem to be extremely deferential to penal institutions, upholding state and federal prison polices in 3 of every 4 applications. What explains this high survival rate? First, the prison cases are overwhelmingly religious liberty cases, where strict scrutiny is the least fatal (59%). Moreover, as will be shown in the later discussion of religious liberty, the prison cases involve free exercise exemption claims where strict scrutiny is especially weak. To the extent that penal institutions, as such, impact strict scrutiny analysis—and the regression models estimated later show that penal institutions are statistically correlated with strict scrutiny survival even controlling for their origin in religious liberty cases—one part of the explanation may be creeping deference. Courts are famously unwilling to oversee prison policies with too demanding an eye for fear of interfering with the security of inmates and prison personnel. Under the doctrine articulated by the Supreme Court in *Turner v. Safley*, courts usually apply an extremely low level of scrutiny to prison policies that infringe on inmates' constitutional rights, requiring merely that the policies be "reasonably related to legitimate penological interests."[121] As *Turner* explained, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[122] *Turner*'s standard does not formally apply to the laws captured by this data set; the prison decisions here all apply strict scrutiny. But even where courts apply this supposedly rigorous standard of review, the underlying rationale of *Turner* may still exert some gravitational pull on judicial decisionmaking toward deference.

The federal judiciary also tends to be relatively deferential to other judicial actors, upholding judicial orders under strict scrutiny at a rate of 58 percent. (All but one of the judicial orders in the data set were adopted by federal courts.) That judges would be more respectful of court rulings in general makes perfect sense. To the extent that strict scrutiny is designed to ferret out improper purposes and overreaching laws, one might presume that federal judges would trust other federal judges more than other governmental actors. One would

121. 482 U.S. 78, 89 (1987).

122. *Id.*

expect judges to permit other judges greater discretion based on their presumed expertise and commonality of interests.

Educational institutions are among those one might expect courts to approach with a measure of deference. As Schauer posits, colleges and universities can be thought of as "appropriate areas for highly (externally) unregulated inquiry" because "special immunity" here "would in the large serve important purposes of inquiry and knowledge acquisition."[123] Indeed, in several decisions, the federal courts have argued that educators have expertise that warrants at least some hesitancy on the part of courts to second-guess educational policies, even where strict scrutiny formally applies. In *Hunter v. Regents of the University of California*, the Ninth Circuit Court of Appeals upheld the partially race-based admissions policy of an innovative public laboratory school (run by the author's home institution, UCLA) under strict scrutiny.[124] The school considered race in admissions to create a sample population with similar demographics as the typical urban public school in California.[125] "[C]ourts should defer to researchers' decisions about what they need for their research," the Ninth Circuit explained, citing to the Supreme Court's statement that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment."[126] A similar approach was taken in *Grutter v. Bollinger*,[127] where the Supreme Court explained that educational institutions "occupy a special niche in our constitutional tradition" and enjoy "educational autonomy" to make their "own judgments" about which students will help in the "fulfillment of [their] mission."[128] Therefore, a law school's "educational judgment that . . . diversity is essential to its educational mission is one to which we defer."[129] Both *Hunter* and *Grutter* were nevertheless explicit that they were applying "strict scrutiny." These opinions were examples of "strict scrutiny schizophrenia": they pledge adherence to both deference and skeptical scrutiny.

Hunter and *Grutter* are unusual, however, in that they actually defer to educators. Under strict scrutiny, courts are relatively

123. Schauer, *Institutional First Amendment*, *supra* note 109, at 1274–75.

124. 190 F.3d 1061 (9th Cir. 1999).

125. *Id.* at 1066.

126. *Id.* (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990)).

127. 539 U.S. 306 (2003).

128. *Id.* at 330 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978)).

129. *Id.* at 328; *see also* Lackland H. Bloom, Jr., Grutter *and* Gratz*: A Critical Analysis*, 41 HOUS. L. REV. 459, 470 (2004) ("Four paragraphs into the analytical section of the opinion, the continuous drumbeat of deference, deference, deference rings out loud and clear.").

unlikely to uphold a challenged educational institution rule or policy. The survival rate for educational institutions under strict scrutiny is only 20 percent—not fatal, but still lower than most other types of institutions whose acts were adjudicated under the same standard. If the educational institution variable is broken down, policies adopted by public elementary and high schools survive at a slightly lower rate (17%), and university policies survive at a level (29%) slightly higher than the aggregate survival rate of all strict scrutiny cases. From these data, it appears that courts do not show any unusual deference to educational institutions when applying strict scrutiny.

2. The Importance of Federalism

In a recent article, Mark Rosen argues that courts should not apply constitutional principles "identically to all levels of government."[130] Rather, courts should "tailor" constitutional principles to "apply differently to different levels of government."[131] According to Rosen, "[s]ensitivity to what level of government is acting . . . is critical because the different levels of government are sufficiently dissimilar that a particular limitation as applied to one may have very different repercussions when applied to another."[132] The type of "tailoring" most commonly recognized is when the courts apply different standards of review to different governmental actors, such as strict scrutiny for laws enacted by the federal government and intermediate or rational basis scrutiny for state laws.[133] But tailoring can also occur when the courts apply the same standard of review. As shown earlier, the same strict scrutiny test varies in its strictness depending upon the governmental actor behind the law.

One of the most striking and powerful patterns in the strict scrutiny data is how federal governmental actors fare compared to state and local governmental actors. Federal actors, such as Congress, the federal judiciary, and federal agencies are much more likely to have their laws upheld than state and local governmental actors. Table 3 collapses the enacting institution variables into three larger ones to represent all federal laws, all state laws, and all local laws.

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130. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

131. *Id.*

132. *Id.* at 1520.

133. *See id.* at 1526, 1536–37. Rosen also describes tailoring that occurs through the development of doctrine after the choice of standard has been made, what he terms a "Rulified Standard." *Id.* at 1526.

Table 3. Federalism and Strict Scrutiny Survival

Level of Government	*Survival Rate*	*Applications* (N)
Federal[134]	50%	112
State[135]	29%	191
Local[136]	17%	156
Total	30%	459
$F = 18.886$, $DF = 2$, $p < .000$		

It appears that federal judges are relatively deferential to federal laws and relatively skeptical of state and, to an even greater extent, local actors ($p < .000$).[137] Strict scrutiny is much more fatal to local laws (17% survival rate) than it is to state laws (29% survival rate), which in turn are much less likely to survive review than federal laws (50%). This remarkable difference occurs despite the fact that no current debate exists about the role of federalism in strict scrutiny analysis.

Perhaps the linear descent in survival rates as one moves from the national to the local level is a reflection of Madison's theory of faction. As Madison wrote, "The smaller the society, the fewer probably will be the distinct parties and interests composing it . . . [and] the more easily will they concert and execute their plans of oppression."[138] In a larger polity, such as the federal government, "a greater variety of parties and interests . . . make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[139] If faction is to be feared on the state and local level, but not as much on the federal level, courts might approach

134. Federal included acts of Congress, federal administrative agency regulations (including federal penal institutions), and orders of federal courts.

135. State included all state legislation, state constitutions, state court orders, and state agency action. Note that, unlike in Table 2, State here includes state penal institutions.

136. Local included all laws or government actions taken by governments at the county level and smaller. Note that, unlike in Table 2, Local here includes educational institutions.

137. "Tailoring" might be understood in two different ways, only one of which is suggested by the strict scrutiny cases. One form of tailoring would be for the courts to uphold law x enacted by the federal government and reject the same law if enacted by a state. A second, more subtle form of tailoring is the implementation of an extra degree of deference to the federal government vis-à-vis the states.

138. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

139. *Id.* For an insightful argument that courts to apply relative deference to federal laws as compared to state laws on the basis of Madison's theory of faction, see Norman Williams, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963 (1994).

state and local laws with relatively greater skepticism and distrust. Moreover, even with equal degrees of skepticism, the relative susceptibility of different governmental entities to faction's influence means that local governments are more likely to adopt laws that are unconstitutional. The federal government, under this view, is less likely to be motivated by impermissible motives that need to be "smoked out," even if the underlying right remains protected by a formal strict scrutiny standard.

In any event, federal laws clearly survive more frequently than state and, especially local, laws. If strict scrutiny is designed to take relevant differences into account, one difference that appears to matter considerably to federal judges is federalism, understood broadly to refer to all the different levels of government, including local governments.

C. Time Trend

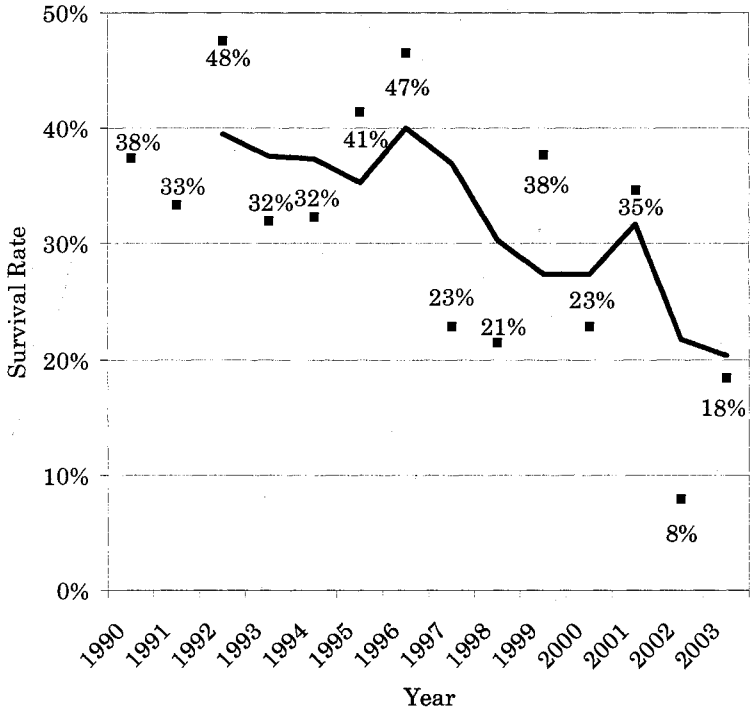
As noted earlier, several scholars have recently challenged the myth of strict scrutiny's deadliness, opining that the traditionally rigid tiers of scrutiny have been softening. In recognition of the finding that strict scrutiny is satisfied in 30 percent of applications, one may be tempted to conclude that these scholars are correct. Moreover, the Supreme Court's insistence in 1995's *Adarand Constructors v. Pena* that strict scrutiny is not inevitably fatal to challenged laws[140] may have influenced courts to apply strict scrutiny less strictly in the years subsequent to that decision.

For these reasons, one might pose two related hypotheses. First, strict scrutiny is becoming less fatal, or easier to satisfy, over time. Second, the coordinating force of the Supreme Court has led courts to apply strict scrutiny in a less deadly way after 1995, when *Adarand* was decided. To test these two hypotheses, one can calculate the strict scrutiny survival rate by year over the fourteen years covered by the data set. If the survival rate increases, one can surmise that strict scrutiny is becoming easier to satisfy and that at least this tier's traditional rigidity is softening. For the second hypothesis, one should find that strict scrutiny survival rate rose after 1995.

Figure 1 plots the strict scrutiny survival rate for every year between 1990 and 2003. The trend line charts a three-year moving average—that is, the mean survival rate over the previous three years.

140. 515 U.S. 200, 237 (1995).

Figure 1. Strict Scrutiny Survival Rate by Year (With 3-Year Moving Average), 1990 - 2003



The judicial practice of applying strict scrutiny contradicts both hypotheses. Strict scrutiny is not becoming easier to satisfy; rather it

is apparently becoming *more fatal*. Between 1990 and 1992, the mean survival rate by year was just over 40 percent. Between 2001 and 2003, by contrast, the mean survival rate had been cut in half, to 20 percent. The difference is especially stark if one compares 1992, where the survival rate was 48 percent,[141] to 2002, where the survival rate was 8 percent.[142] Strict scrutiny appears to be more difficult to overcome currently than it was over a decade ago.

In terms of softening, the data here are limited because they only extend back to 1990, and one can only speculate what the survival rate was in earlier years. It could be that strict scrutiny in the 1970s and 1980s was very fatal until a spike in the survival rate in the early 1990s. Or it could be that strict scrutiny was never all that fatal in the federal courts, despite the appearance given by the Warren Court's strict scrutiny decisions. At least for the time period covered by my study, strict scrutiny is becoming more difficult for laws to satisfy.

The data are inconsistent with the hypothesis that courts were influenced to apply strict scrutiny in a less deadly fashion by the Supreme Court's announcement of strict scrutiny's survivability in *Adarand*. In fact, the data show no spike in strict scrutiny survival rates after 1995, but rather a steep decline in the likelihood of a law's being upheld. In 1995 and 1996, the survival rate was 41 percent[143] and 46 percent[144] respectively. By 1997 and 1998, however, the strict scrutiny survival rate dropped to 23 percent[145] and 21 percent[146] respectively. And, as noted, the survival rate has been dropping more or less consistently ever since. Although *Adarand* has received much attention for its rejection of the Gunther myth, the lower courts have not been inspired by that decision to water down their scrutiny. On the contrary, their scrutiny has surprisingly hardened.

D. Level of Court

Do district courts apply strict scrutiny more or less leniently than the circuit courts of appeal, and how does each compare with the Supreme Court? The Supreme Court receives the most attention from legal scholars, and so its application of strict scrutiny likely plays an inordinate role in shaping lawyers' understandings of strict scrutiny.

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141. N = 21.
142. N = 38.
143. N = 29.
144. N = 43.
145. N = 35.
146. N = 42.

Recall that when Gunther first referred to "fatal in fact," he was reflecting on the Warren Court's use of heightened scrutiny. In addition, recent scholarly challenges to the Gunther myth arguing that the tiers of scrutiny are softening may also be largely informed by Supreme Court opinions, such as *Adarand* and *Grutter*. Yet, the Supreme Court uses strict scrutiny infrequently; between 1990 and 2003, 12 Supreme Court decisions applied strict scrutiny. By contrast, in that same period, the federal district courts applied strict scrutiny 248 times in final rulings and the circuit courts of appeal used the standard 199 times.[147] The true survival rate of strict scrutiny in practice is determined by looking at the lower courts, rather than at just the more studied Supreme Court.

Table 4 reports the strict scrutiny survival rate by level of court.

Table 4. Strict Scrutiny Survival by Level of Court

Level of Court	*Survival Rate*	*Applications* (N)
Supreme Court	25%	12
Circuit Court	39%	199
District Court	23%	248
Total	30%	459
$F = 6.725$, $DF = 2$, $p = .001$		

Strict scrutiny survival rates do vary significantly by level of court ($p = .001$). Although the Supreme Court (25%) and the district courts (23%) uphold laws at similar rates, the circuit courts of appeal are much more likely to uphold a law (39%).

It is unclear what accounts for this difference, although one possibility is that the circuit courts hear more hard, or close, cases than the district courts. Such controversies are relatively likely to be pursued by litigants up through the appellate process because the outcome is unclear. Easier cases where the law more clearly favors one side or the other are more likely to end at the district court. The 25 percent survival rate at the Supreme Court, however, poses a challenge to this hypothesis, and one might otherwise expect the Court to hover closer to 50 percent if the Court primarily granted review to the relatively hardest cases. Yet, the number of

147. The number of district and circuit court applications reported here excludes non-final rulings, where the same legal question was analyzed under strict scrutiny by a higher court in a subsequent published opinion.

observations at the Supreme Court level is very small and only one or two decisions going the other way would raise the survival rate considerably. Thus, the figure for the survival rate at the Supreme Court is not especially robust.

One way to test if the identified variation might be due in part to the relative difficultly of the underlying legal question is to compare the strict scrutiny survival rate in final district court decisions with district court decisions that were subsequently ruled on by the appellate courts. This latter group of decisions obviously involves the exact same laws ruled on by the circuit courts in their final decisions. If the legal questions that are appealed are relatively hard, then one would expect the survival rate in those cases to be higher than in district court rulings that were not appealed. This is precisely the pattern of the data. The survival rate in the non-final district court rulings was 34 percent[148]—almost 50 percent greater than the survival rate in final district court rulings and much closer to the 39 percent survival rate witnessed in the circuit courts of appeal. Consequently, the evidence is consistent with the hypothesis that harder cases are more likely to be appealed. If so, then the variation may be attributable to the difficulty of the case rather than the level of court *per se*.

E. Other Variables Considered

A number of other variables were examined to see if they correlated with strict scrutiny outcomes, but the results were negative: (1) region of the country; (2) circuit; (3) whether the case involved minor children; (4) whether the law was election-related; and (5) whether the law was related to law enforcement needs. None of these factors revealed any apparent relationship to strict scrutiny survival.

One notable variable with little discernible impact on strict scrutiny is the political ideology of the deciding judge. In a recent empirical study, Cass Sunstein, David Schkade, and Lisa Micelle Ellman argue that a federal judge's political ideology—gauged by the proxy of the appointing president's party—is closely correlated with how she votes in many important areas of law, including environmental law, sexual harassment, affirmative action, campaign

148. $N = 117$ (40 survivors, 77 fatalities). Note that not all district court decisions that were subsequently adjudicated by the court of appeals were reported. The data here only include reported district court decisions. Moreover, the results of this comparison are generally consistent with the Priest-Klein selection effects hypothesis discussed *supra* note 106.

finance, and disability discrimination.[149] One might therefore surmise that political ideology would influence judicial voting in strict scrutiny cases, where our most fundamental (and often most contested) rights are at stake. Indeed, there is some overlap between the areas of law that receive strict scrutiny and those studied by Sunstein, et al. Yet, in the aggregate, there was no statistically significant difference in strict scrutiny voting by political ideology—that is, Republican appointed judges were no more likely to invalidate laws than judges appointed by Democrats. Moreover, there was no variation in survival rates along ideological lines in most of the discrete areas of law covered by strict scrutiny, including freedom of speech (both generally and in particular speech doctrines, such as campaign finance and indecency cases), religious liberty, and freedom of association. The areas of law with apparent ideological differences in survival rates were suspect class discrimination (which is almost entirely comprised of affirmative action cases) and fundamental rights cases (although here the correlation is too weak to support any strong inferences). These two areas in which political ideology may play a role in judicial decisionmaking are discussed further in the doctrine-by-doctrine analysis offered in Part V.

F. Modeling Strict Scrutiny

The discussion so far suggests a set of potential determinants of strict scrutiny survival: (1) the identity of the right, at least between religious liberty and all other rights; (2) the court in which the application takes place, with circuit courts applying potentially more lenient review; (3) the government institution that enacted the challenged law, with stark differences especially along federalism lines; and (4) the year in which the decision was rendered, with more recent courts applying a more fatal version of the test than courts did in the early 1990s.

To verify the relationship between these factors and strict scrutiny survival, the data were analyzed with multivariate logistic regression. Four models were estimated, each with the dependent

149. Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 319–22 (2004). For a classic work on how judicial attitudes impact voting, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). Significant challenges have been made to the attitudinal model in the political science literature. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997) (arguing for a strategic interaction model of judging that focuses on coalition-building and institutional dynamics affecting Supreme Court decisionmaking).

variable being the rate at which laws survive strict scrutiny review. Table 5 reports the results.

Table 5. Logistic Regression: Four Models of Strict Scrutiny Survival in the Federal Courts, 1990-2003

	I	*II*	*III*	*IV*
Right				
Religious Liberty	1.621*** (0.288)	1.495*** (0.300)	1.644*** (0.317)	1.354*** (0.413)
Freedom of Association	0.568 (0.403)	0.630 (0.415)	0.536 (0.430)	0.627 (0.438)
Fundamental Rights	0.104 (0.382)	-0.267 (0.404)	0.031 (0.407)	-0.013 (0.433)
Suspect Class Discrimination	0.270 (0.293)	0.236 (0.313)	0.162 (0.326)	0.015 (0.350)
Enacting Institution				
Federal Government		0.926*** (0.268)	0.934*** (0.276)	
Local Government		-0.754** (0.293)	-0.777** (0.303)	
Judiciary				1.563*** (0.427)
Congress				1.323*** (0.435)
Federal Agency				0.515 (0.504)
Penal Institution				1.418* (0.615)
Other				
Circuit Court			0.959*** (0.240)	1.050*** (0.250)
Supreme Court			0.312 (0.709)	0.522 (0.744)
Trend			-0.076* (0.031)	-0.064* (0.032)
Constant	-1.261*** (0.162)	-1.265*** (0.198)	-1.222*** (0.323)	-1.463*** (0.347)
Chi-Square	34.488	65.884	90.261	107.157
Nagelkerke R^2	.103	.190	.253	.296

*$p < .05$; **$p < .01$; ***$p < .001$

Dependent variable = strict scrutiny survival rate. Standard errors in parentheses. $N = 459$.

Constant: *Model I:* Free speech laws; *Model II*: Free speech laws and laws adopted by state governments; *Model III*: Free speech laws, laws adopted by state governments, district court decisions, and year 1990; *Model IV*: Free speech laws, state legislation/constitutional provisions, district court decisions, and year 1990.

Note: Model IV included variables for state agencies, educational institutions, local government, and other governmental actors. These coefficients were not significant and were omitted from the table for clarity.

1. Model I

Model I is a simple logistic regression of strict scrutiny survival by the underlying area of law that the case emerges in—that is, the right alleged to be infringed. The coefficients indicate the deviation in the strict scrutiny survival rate from the constant, which in this model represents the survival rate in freedom of speech cases. So, the fact that a case is a religious liberty controversy—which has a positive, highly significant coefficient (1.354; $p < .000$)—is a significant predictor of strict scrutiny survival compared to a free speech case.

None of the other rights (fundamental rights, freedom of association, and suspect class discrimination), by contrast, deviate significantly from freedom of speech cases. Thus, the fact that a law discriminates on the basis of race does not make it significantly more or less likely to survive strict scrutiny review.

This initial model confirms what the earlier difference in means statistic indicated about strict scrutiny's being equally strict across rights with the lone exception of religious liberty.

2. Model II

Model II estimates coefficients for the likelihood of surviving strict scrutiny, controlling for both the identity of the underlying right and federalism. The constant here represents free speech strict scrutiny decisions and decisions applying strict scrutiny to laws adopted by state governments.

Like Model I, Model II indicates that religious liberty is the only right in which strict scrutiny survival deviates significantly from free speech strict scrutiny. Indeed, this same finding holds in each of the models estimated in this section.

Model II offers a compelling indication of the importance of federalism to strict scrutiny analysis. The fact that a law was adopted by a federal governmental actor, as compared to a state governmental actor, is a significant predictor of strict scrutiny success (0.926, $p < .000$). That a law was enacted by a local governmental actor is also a significant predictor, but of strict scrutiny failure as compared to a state governmental actor (-0.754, $p = .010$). The data show a clear linear relationship between survival and the federal hierarchy of government. The further down the line from federal to state to local, the less likely a law is to overcome judicial review under strict scrutiny. This holds even if one controls, as Model II does, for the underlying substantive right involved.

The rise in both the Chi-square (from 34.488 to 65.884) and the Nagelkerke R^2 (from .103 to .190) indicates that Model II better fits the underlying patterns in the observed data. The addition of the federalism variable provides more traction in understanding the determinants of strict scrutiny survival than looking at the identity of the right alone.

3. Model III

Model III adds variables for level of court (Supreme, circuit, district) and trend (or timing) variables. The constant—the deviation from which is shown by the reported coefficients—represents free speech laws, state government laws, district court decisions, and decisions from the year 1990. All of the variables indicated earlier to be significant remain significant when we control for level of court and trend.

This model indicates that, in addition to federalism and religious liberty, the fact that a strict scrutiny application occurs in circuit court, as compared to district court, is a highly significant, positive predictor of strict scrutiny survival (0.959, $p < .000$). The circuit courts are far more likely to uphold a law under strict scrutiny than the district courts. The same does not hold for the Supreme Court, which does not depart significantly from district court practice. (0.312, $p = .660$). Note, however, that the Supreme Court coefficient is based on a very small number of observations (12) and the standard error is very high (0.709). More observations would be necessary to make any reliable inferences about strict scrutiny survival at the Supreme Court.

Trend is also a significant predictor of a law's likelihood of being upheld, with laws more likely to be invalidated in later years (-0.076, $p = .014$). Even accounting for the underlying substantive right, the court, and federalism, strict scrutiny has become harder to survive.

Model III fits the data better than the earlier models, as indicated by the increase in both the Chi-square (90.261) and the Nagelkerke R^2 (.253).

4. Model IV

Model IV breaks down the data with different enacting institution variables. The federalism variables employed in the other models only considered whether a law was adopted by a federal, state, or local governmental entity. That approach shows quite clearly the vertical dimensions of strict scrutiny review—that is, how outcomes

vary depending upon which level of government in the federal hierarchy is behind the law. Model IV complicates the picture somewhat by uncovering horizontal variation among coordinate branches and entities operating at the same level of government.

Each of the enacting institutions discussed in Part IV.B.1[150] was included in Model IV, although the table only reports the results for Congress, the federal judiciary, federal agencies, and penal institutions.[151] For this model, state legislation and constitutional provisions were incorporated into the constant. The variables for the underlying right, the level of the deciding court, and trend all remain significant. Once again, the fit of this model is better than each of the earlier ones (Chi-square = 107.157, Nagelkerke $R^2 = .296$).

The federalism story of the earlier models is made somewhat more opaque by Model IV. Congress is a strong positive predictor of strict scrutiny success (1.323, $p = .002$), and federal legislation is far more likely to be upheld than state legislation. When the institution behind a challenged law is the judiciary itself—as with a court order or a judicially approved consent decree, courts are even more likely to uphold the law under strict scrutiny (1.563, $p < .000$). As noted earlier, all but one of the judiciary cases were orders or decrees entered by federal courts. So far, the results conform to the earlier discovery of a vertical federalism effect.

Federal agencies, however, do not appear to receive especially lenient treatment as compared to ordinary state legislation (0.515, $p = .307$). Thus, the federalism effect is only partial, and the executive branch does not appear to benefit from it. Although federal agencies have a relatively high survival rate (45%), once controls are added for the other variables, the variation washes out. A closer look at the federal agency cases reveals why: there have been relatively few federal agency regulations (24) judged under the strict scrutiny standard in the courts between 1990 and 2003, and one-third of those were religious liberty cases (where strict scrutiny is already unusually lenient). The federal agency cases report a high survival rate, but this may be due to other overlapping factors. Courts, at least when they

150. *See supra* notes 109–139, and accompanying text.

151. The omitted coefficients, none of which were statistically significant, are state agencies (-0.921), local governments (-0.527), educational institutions (-0.527), and other governmental actors (-0.838). Of these, only local government was even close to significant ($p = .137$). The local government variable in Model IV is not equivalent to the local government variable used in the earlier models—due to the vertical breakdown of governmental institutions, many of the local governmental laws fell into other categories (notably educational institutions)—and thus the results for this variable have been omitted from the table to avoid confusion.

apply strict scrutiny, do not appear to defer to federal agencies quite as much as they do to other branches of the federal government.

Model IV's vertical breakdown also shows that penal institutions are a positive predictor of strict scrutiny survival (1.418, p = .021). The influence, however, is mild compared to the effect of Congress or the judiciary. Although penal institution policies survive at the greatest rate of any governmental actor (74%), the vast majority are religious liberty cases (24 of 26 applications). But penal institutions still appear to have a slight positive impact on the likelihood of strict scrutiny survival even when the underlying right and the other variables are accounted for.

Strict scrutiny thus operates differently on a number of dimensions. Not all rights are treated the same, with religious liberty strict scrutiny being far easier to overcome than strict scrutiny in other areas of law. Not all governmental actors are treated the same, either; Congress, the judiciary, and penal institutions receive relatively easy review. The circuit courts are more forgiving of governmental intrusions on rights than the district courts, which may be a measure of the relative difficulty of cases that are appealed. Time is also on the plaintiff's side, as courts are becoming increasingly unwilling to uphold governmental infringements on core rights. These are some of the "relevant differences"[152] that impact strict scrutiny in practice.

V. A DOCTRINE-BY-DOCTRINE EXAMINATION OF STRICT SCRUTINY

The findings described so far all come from a macro-level examination of the strict scrutiny case law. This Part looks at each constitutional right and its individual cases with the objectives of (1) identifying within discrete doctrines what types of laws survive or fail strict scrutiny, and (2) detecting discernible patterns within those cases that may help to explain how strict scrutiny operates, with special attention to the variables shown to be correlated with survival in the estimated models.

A. Suspect Class Discrimination

Between 1990 and 2003, the federal courts applied strict scrutiny 85 times in final rulings to questions of suspect class discrimination under the equal protection guarantees of the Fourteenth and Fifth Amendments. All but one observed application

152. Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (internal quotations omitted).

of strict scrutiny involved a racial classification of some sort.[153] (For convenience, therefore, I will refer to the entire group of suspect class discrimination cases as "race" cases.) The overwhelming majority of applications (85%) addressed the constitutionality of affirmative action policies. The remainder was comprised of race-conscious electoral districting plans (12%) and arguably invidious discrimination (3.5%, of which one of the three applications was a survivor).

The overall strict scrutiny survival rate in these cases was 27 percent, with 23 of 85 applications upholding the challenged use of race or other suspect criterion. In one sense, this number should not be all that surprising. Equal protection is an area of law in which the Supreme Court has repeatedly written that laws are capable of overcoming strict scrutiny. This Section reviews that case law, identifies the various sorts of suspect classifications that were subject to strict scrutiny during the period of my study, and isolates the types of classifications that were most likely to survive or fail review. This Section also considers the role of federalism, the enacting institution, and political ideology—each of which is associated with strict scrutiny survival in suspect class discrimination cases.

1. The Supreme Court, Race, and Strict Scrutiny

The Supreme Court paved the way for non-fatal applications of strict scrutiny in the context of equal protection in a series of Rehnquist Court decisions. The first Supreme Court decision arguably upholding a remedial race-based affirmative action policy under strict scrutiny was *Local 28 of Sheet Metal Workers' International Association v. EEOC* ("*Sheet Metal Workers*"), decided in 1986.[154] The underlying lawsuit determined that a labor union was guilty of unlawful discrimination in violation of Title VII.[155] The court ordered the union to remedy its own past discrimination by admitting specified numbers of African-Americans and Latinos, but the judicial order was challenged as racially discriminatory.[156] The Supreme Court upheld the remedial order, with only a partial majority opinion. The controlling plurality of four Justices expressed uncertainty about the applicable standard of review but then argued that "the relief ordered in this case passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying

153. The one non-race case was Wallace v. Calogero, 286 F. Supp. 2d 748, 763–64 (E.D. La. 2003) (invalidating a Louisiana law barring non-immigrant aliens from practicing law).

154. 478 U.S. 421, 480 (1986) (plurality opinion).

155. *Id.* at 426.

156. *Id.* at 440.

past discrimination."[157] Justice Lewis Powell Jr. did not join the plurality, but in his separate concurrence, he agreed that the plan survived strict scrutiny,[158] establishing a majority of Justices who would vote to uphold under that standard. A year later, in *United States v. Paradise*, the Court once again upheld a remedial affirmative action policy with no majority opinion.[159] The lead plurality echoed *Sheet Metal Workers* and contended that the policy in that case satisfied even strict scrutiny.[160]

Although the Court did not uphold race-based affirmative action under strict scrutiny in *City of Richmond v. J.A. Croson, Co.*[161] and *Adarand Constructors v. Pena*,[162] those cases set the parameters of strict scrutiny in race discrimination cases. In *Croson*, Justice Sandra Day O'Connor's opinion for the Court[163] confirmed the reasoning of *Sheet Metal Workers* and repeated several times that remedial uses of race may overcome strict scrutiny where they are designed to counter the past discriminatory practices of governmental entities.[164] Indeed, O'Connor suggested that remedying past discrimination was the only government objective that was compelling enough to satisfy strict scrutiny in the context of race discrimination.[165] In *Adarand Constructors*, decided in 1995, the Court, again per O'Connor, held that strict scrutiny applied to federal affirmative action policies (as compared to the state policy at issue in *Croson*).[166] At the same time, Justice O'Connor explicitly rejected what the myth of strict scrutiny has long taught: "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[167] Strict scrutiny can be overcome, she suggested, when race-based initiatives respond to the "unhappy persistence of both the practice

157. *Id.* at 480.

158. *Id.* at 485 (Powell, J., concurring).

159. 480 U.S. 149, 185–86 (1987) (plurality opinion).

160. *Id.* at 166–67.

161. 488 U.S. 469, 511 (1989) (plurality opinion).

162. 515 U.S. 200, 204–05 (1995).

163. The opinion is partially a majority opinion and partially a plurality opinion. *See Croson*, 488 U.S. at 476.

164. *Id.* at 492, 493.

165. *See id.* at 493 ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see also* Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 64 (2004) ("In the Court's opinion, Justice O'Connor did say that affirmative action had to be limited to compensation for specifically identified past discrimination.").

166. 515 U.S. at 227.

167. *Id.* at 237.

and the lingering effects of racial discrimination against minority groups in this country."[168]

Commentators' readings of *Croson* and *Adarand Constructors* emphasized that, regardless of Justice O'Connor's announced "wish," affirmative action was destined to fail strict scrutiny. According to some, these decisions adopted a "crippling standard of review [that put] a stranglehold on the power of state and local governments[,]"[169] making it "improbable that a statute containing a race-based classification will remain valid."[170] Others wrote that the standard would be "nearly impossible . . . to meet."[171]

Yet, the lower courts have proven capable of using strict scrutiny to judge affirmative action plans in a more forgiving manner than predicted. *Stuart v. Roache*[172] exemplifies the facts and reasoning underlying many of the survivors in this area of law. In *Stuart*, the First Circuit upheld under strict scrutiny a race-conscious promotion program adopted by the Boston Police Department as part of a consent decree that settled a discrimination lawsuit brought by black officers.[173] The court held that the police department's prior invidious discrimination—detailed in the consent decree—established a compelling governmental interest in remediation,[174] and that the race-conscious promotions were narrowly tailored means that gave only limited consideration to race.[175] In other words, the Boston Police Department's policy fit comfortably within *Croson*'s framework. Rather than sounding a death knell for affirmative action, *Croson* was followed by federal courts upholding affirmative action plans under strict scrutiny in, among others, the Chicago Police Department,[176] the

168. *Id.*

169. K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 400 (1997).

170. Erica J. Rinas, *A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools*, 82 IOWA L. REV. 1501, 1515 (1997).

171. William L. Taylor & Susan M. Liss, *Affirmative Action in the 1990s: Staying the Course*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 30, 35 (1992).

172. 951 F.2d 446 (1st Cir. 1991).

173. *Id.* at 455; *see also* Cotter v. City of Boston, 323 F.3d 160, 164 (1st Cir. 2003) (upholding under strict scrutiny the promotion to sergeant of black applicants with lower exam scores than white applicants who were not promoted); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 14 (1st Cir. 1998) (upholding racial preferences for promotions to lieutenant in the Boston police department, which had engaged in past discrimination, under strict scrutiny).

174. *Stuart*, 951 F.2d at 452.

175. *Id.* at 454–55.

176. *See* Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (upholding race-based affirmative action plan to promote minority police officers); Reynolds v. City of Chicago, 296 F.3d 524, 521–30 (7th Cir. 2002) (upholding under strict scrutiny the Chicago Police Department's affirmative action plan that permitted the promotion of Hispanics over whites with higher test scores); Majeske v. City of Chicago, 218 F.3d 816, 818 (7th Cir. 2000) (upholding an affirmative

Chicago Fire Department,[177] the San Francisco Police Department,[178] Florida's Metropolitan Dade County Fire Department,[179] Alabama's Montgomery County Sheriff Department,[180] the New York City Police Department,[181] and the Cincinnati Police Department.[182] A similar plan required the City of Yonkers, New York, to take affirmative steps to integrate its public and subsidized housing.[183] None of this is to say that *Croson* and the other Supreme Court cases did not circumscribe race-based affirmative action, perhaps even a great deal. Nevertheless, those decisions still left open an avenue for lower courts to uphold some race-based affirmative action plans. Moreover, strict scrutiny has proven no more strict in the area of race discrimination than it is elsewhere, save for religious liberty.

2. Types of Race-Conscious Policies

There are five different types of race-conscious laws captured by the data set: (1) race-based affirmative action plans adopted in the context of public contracting, such as minority business, employment, and housing preferences;[184] (2) policies to integrate historically

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action plan for promotion of detectives in the Police Department under which applicants were ranked within their respective racial categories and which set target goals on the basis of estimated numbers of past minority promotions lost to discrimination).

177. *See* McNamara v. City of Chicago, 138 F.3d 1219, 1224 (7th Cir. 1998) (upholding the promotion of minority firemen to captain because there was evidence of past discrimination and the minority proportion of captains remained lower than the percentage of minorities in the city's population).

178. *See* Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726–27 (9th Cir. 1992) (applying strict scrutiny and upholding "banding" of test scores, according to which the San Francisco Police Department treats scores within a statistically determined range as equivalent in order to promote more minorities).

179. *See* Peightal v. Metro. Dade County, 26 F.3d 1545, 1548 (11th Cir. 1994) (upholding a remedial affirmative action plan for Hispanics in the county fire department).

180. *See* Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1487–88 (M.D. Ala. 1995) (upholding under strict scrutiny a settlement agreement reached in a discrimination suit that required county sheriff department to promote an equal number of black and white sergeants and lieutenants for one year).

181. *See* Paganucci v. City of New York, 785 F. Supp. 467, 476–78 (S.D.N.Y. 1992) (upholding consent decree requiring remedial racial preferences for municipal police department promotions).

182. *See* Vogel v. Cincinnati, 959 F.2d 594, 596 (6th Cir. 1992) (upholding the race-based affirmative action policy of the Cincinnati Police Department).

183. *See* United States v. Sec'y of HUD, 239 F.3d 211, 218–221 (2d Cir. 2001) (upholding a court order requiring Yonkers to integrate its housing with race-based policies to remedy past, intentional racial segregation).

184. *See, e.g.*, Sherbrooke Turf, Inc. v. Minn. Dept. of Transp., 345 F.3d 964, 969–73 (8th Cir. 2003) (upholding public contracting rules); Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 714–15 (6th Cir. 1997) (invalidating public contracting rules); Associated Gen. Contractors of

segregated law enforcement agencies, such as police departments, fire departments, and correctional institutions;[185] (3) diversity-enhancing affirmative action plans in educational institutions;[186] (4) race-based legislative districting;[187] and (5) miscellaneous other types of race-conscious policies and preferences (including small numbers of broadcasting license preferences,[188] judicial diversity programs,[189] and three arguably invidious classifications[190]).

The Supreme Court has held that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."[191] But do all different types of racial classifications fare equally under strict scrutiny review, or do courts tend to uphold some types of racial classifications and reject others? Table 6 reports the strict scrutiny survival rate by type of race-conscious policy.

Ohio, Inc. v. Drabik, 50 F. Supp. 2d 741, 771 (S.D. Ohio 1999) (invalidating public contracting rules).

185. *See supra* notes 174–183, and accompanying text.

186. *See, e.g.*, Podberesky v. Kirwan, 38 F.3d 147, 151 (4th Cir. 1994) (invalidating racial preferences in educational institution); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000) (invalidating racial preferences in educational institution); Shuford v. Ala. State Bd. of Educ., 846 F. Supp. 1511, 1512 (M.D. Ala. 1994) (upholding racial preferences in educational institution).

187. *See, e.g.*, Goosby v. Town Bd., 180 F.3d 476, 481 (2d Cir. 1999) (upholding race-based districting).

188. *See, e.g.*, MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 15–16 (D.C. Cir. 2001) (invalidating broadcasting licensing racial preferences).

189. *See, e.g.*, Back v. Bayh, 933 F. Supp. 738, 756–57 (N.D. Ind. 1996) (invalidating racial preferences used by state judicial nominating commission).

190. *See, e.g.*, Wallace v. Calogero, 286 F. Supp. 2d 748, 763–64 (E.D. La. 2003) (invalidating a Louisiana law barring non-immigrant aliens from practicing law).

191. Adarand Constructors v. Pena, 515 U.S. 200, 224 (1995).

Table 6. Strict Scrutiny Survival by Type of Racial Classification

Type of Racial Classification	*Survival Rate*	*Applications* (N)
Law Enforcement Affirmative Action[192]	48%	25
Education	27%	11
Districting	20%	10
Public Contracting[193]	13%	30
Other	22%	9
Total	27%	85
$F = 2.303$, $DF = 4$, $p = .065$		

Different types of racial classifications do survive at somewhat different rates and the variation is very close to statistical significance ($p = .065$).[194] There are certainly some discernible patterns in the case law. The use of race by law enforcement agencies, such as the remedial affirmative action policies discussed above,[195] survive nearly half the time (48%) with an ample number of observations (25). These laws are the racial classifications most likely to be upheld by the federal courts. Racial preferences used by educational institutions survive 27 percent of the time, exemplified most prominently by *Grutter v. Bollinger*. Race-based electoral districting policies are upheld in 20 percent of observed applications, and racial classifications falling within the default category survive in 22 percent of applications. Public contracting laws, which are the most common type of racial classification observed, fare the worst under strict scrutiny. Such laws survive only 13 percent of the time—results suggesting that strict scrutiny is nearly deadly enough to be considered fatal in fact.

One potential explanation for this pattern is that courts may be relatively inclined to uphold remedial affirmative action when the challenged plan redresses the identified discrimination of a particular government agency. In the law enforcement cases, for example, the

192. Law Enforcement includes fire department and police department hiring and promotion plans, along with a few racial classifications used by penal institutions.

193. Public Contracting includes minority business set-asides, public employment preferences (excluding law enforcement personnel and preference programs for Native Americans), and race-conscious public housing policies.

194. The standard threshold for statistical significance is $p < .005$. However, in ligbt of the low F, even a p value of .065 is arguably significant.

195. *See supra* notes 172–183, and accompanying text.

racial preferences usually remedy identified past discrimination by the very same institution now adopting the policy, such as a police or fire department. The Supreme Court has repeatedly said that in such instances, strict scrutiny is capable of being overcome.[196] Moreover, many of the law enforcement cases involved consent decrees issued by federal judges to settle race discrimination litigation. Courts may believe, as Judge Richard Posner has written, "law-enforcement and correctional settings [are] the very *clearest* examples of cases in which departures from racial neutrality are possible."[197] The effectiveness of law enforcement may depend upon adopting a measure of racial and ethnic representation to foster public respect and confidence in the police force and related agencies. One might therefore expect judges to be relatively more willing to uphold remedial affirmative action policies than racial classifications adopted by a legislature or administrative agency (as in public contracting) or justified by other governmental ends such as diversity (as in educational institutions).

One surprise from the data is that 20 percent of racial redistricting cases survive review. Under *Shaw v. Reno* and subsequent Supreme Court districting decisions, strict scrutiny only applies to districting when government officials draw election district boundaries based *predominantly* on race.[198] This contrasts with traditional equal protection doctrine, which subjects *any* intentional use of race to strict scrutiny.[199] Due to the predominance requirement, many (if not most) instances of race-influenced gerrymandering do not receive strict scrutiny; courts inclined to uphold a plan can determine that race played some role but did not predominate over other traditional districting principles (such as compactness, contiguity, or partisanship).[200] In light of this initial hurdle of predominance, scholars speculated that strict scrutiny in districting cases would become "a rule of automatic invalidation"[201] whenever race was found

196. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–99 (1989).

197. Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (emphasis in original).

198. Shaw v. Reno, 509 U.S. 630, 645 (1993); *see* Miller v. Johnson, 515 U.S. 900, 905 (1995); *see also* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1584 (2002).

199. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977); Karlan, *supra* note 198, at 1584.

200. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 257–58 (2001) (holding that a race-influenced districting plan was not predominantly motivated by race and thus strict scrutiny was inapplicable).

201. Rubin, *supra* note 2, at 89. Rubin posits another interpretation of *Shaw*, but even this second possibility, in his view, would lead to "invalidation of all race-conscious districts." *Id.* (emphasis in original).

to be the predominant factor behind a gerrymander. Yet strict scrutiny has not proven to be fatal in fact in these cases.

3. Federalism & Race

A recurrent theme in the affirmative action debate over the past thirty years has been whether the courts should accord more deference to the federal government's efforts to remedy the legacy of racial discrimination than to corresponding efforts by the states. The basis for this differentiation was the explicit power ceded to Congress in Section 5 of the Fourteenth Amendment, which set forth that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[202] While granting Congress the authority to enact legislation to fulfill the promise of equal protection, the Fourteenth Amendment conversely limited the ability of states to legislate in the area of race.

In the 1980s and early 1990s, the Supreme Court flirted with the idea of implementing this greater level of deference to Congress by applying intermediate scrutiny to race-conscious laws adopted by the federal government,[203] while applying strict scrutiny to state laws. In *Adarand Constructors v. Pena*, however, a majority of Justices held that strict scrutiny applied to the federal government's race classifications too.[204] The Court explained that the Constitution demanded "congruence between the standards applicable to federal and state racial classifications."[205] "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[206]

Although the courts have achieved a formal congruence by explicitly applying the same formal standard of "strict scrutiny" to all racial classifications, federalism continues to have a strong association with strict scrutiny survival. Table 7 reports the strict scrutiny survival rate in suspect class discrimination cases broken down by federal laws, on the one hand, and state and local laws on the other.

202. U.S. CONST. amend. XIV, § 5.

203. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

204. Adarand Constructors v. Pena, 515 U.S. 200, 222 (1995).

205. *Id.* at 226.

206. *Id.* at 227.

Table 7. Strict Scrutiny Survival by Level of Government in Suspect Class Discrimination Cases

Level of Government	*Survival Rate*	*Applications* (N)
Federal[207]	52%	25
State & Local[208]	17%	60
Total	27%	85
$F = 12.548$, $DF = 1$, $p = .001$		

There is a considerable difference in the survival rates of strict scrutiny as applied to the federal government's uses of race, which are upheld over half the time (52%), and state and local laws employing race (17%). The variation is highly significant ($p = .001$). Indeed, race-conscious laws adopted by the federal government are three times more likely to survive than those adopted by the state and local governments.

That federalism has such an apparently strong association with strict scrutiny survival in race cases is consistent with the larger pattern in the strict scrutiny case law. What is unusual here is that in race cases the Supreme Court has so vigorously insisted upon "congruence" and "consistency" in judicial treatment of federal and state uses of race. In spite of the Court, judges in the lower courts may be allowing their decisionmaking to be influenced by a relative mistrust of state and local governments as compared to the federal government. Deference to the federal government may now be implemented through relatively deferential application of strict scrutiny rather than through an explicitly more lenient standard of review.

4. Political Ideology and Race-Conscious Policies

In the aggregated strict scrutiny data, the political ideology of the judge—as determined by the imperfect proxy of the party of the nominating president—had no statistically significant impact on whether a judge voted to uphold or invalidate a law. But few issues have been as politically divisive in recent years as race-based affirmative action, raising the specter that ideology may have a role to

207. Federal Actors includes Congress, federal administrative agencies, and federal judicial orders.

208. State & Local includes all other enacting institutions.

play in this specific context even if ideology washes out in the larger data set. Moreover, the contending sides in the debate over whether affirmative action is an appropriate tool to redress centuries of racial segregation closely parallel the primary ideological dividing line in American politics. The Democratic Party is typically viewed to be pro-affirmative action, and the Republican Party is commonly understood to oppose it. Democrat judges might well be expected to vote to uphold racial preferences with greater frequency than Republican judges.

Table 8 reports judicial votes in race cases by the political ideology of the casting judge. For this test, the relevant data are judicial votes rather than applications; each vote on a panel of judges is counted as a single observation.

Table 8. Strict Scrutiny Survival and Political Ideology in Race Cases

Party of Appointing President	*Survival Rate*	*Votes* (N)
Democrat	48%	69
Republican	26%	138
Total	33%	207
$F = 10.169$, $DF = 1$, $p = .002$		

Political ideology does appear to be associated with the likelihood of a judge's vote to uphold or reject racial classifications.[209] Judges appointed by Democratic presidents vote to uphold racial classifications about half the time under strict scrutiny (48%), while judges appointed by Republicans vote to uphold only about one in four (26%). Republican-appointed judges vote on racial classifications at a rate consistent with strict scrutiny more generally, but Democratic-appointed judges treat racial classifications much more deferentially than the average law subjected to strict scrutiny. In fact, Democratic appointees are almost twice as likely to vote to uphold a racial classification as Republican appointees. Moreover, this difference is highly significant ($p = .002$). When it comes to racial classifications, political ideology is closely tied to judicial voting behavior.

209. The pattern is similar to that found by Sunstein, Schkade & Ellman, *supra* note 149, at 319, in tbeir study of federal appellate court decisions on affirmative action between 1978 and 2002.

B. Free Speech

Free speech law is the area of law in which the most strict scrutiny cases arise (222 of 459), comprising 48 percent of all strict scrutiny applications in the federal courts during the covered period.[210] Where government regulates protected speech on the basis of the substance of what is expressed, such regulation is considered content-based and is usually subject to strict scrutiny.[211] Although Gunther's famous adage arose in the context of equal protection, strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right.

The free speech cases can be broken down by the type of law adjudicated. Within the large body of speech restrictions subjected to strict scrutiny, there are a number of identifiable clusters of similar laws—the differences between which are associated with variation in the rate of survival. As with racial classifications, some types of speech laws are more likely than others to overcome strict scrutiny. Also like the race cases, in free speech cases federalism is strongly associated with the likelihood of survival, although that variable is not one traditionally associated with judicial review in the speech area.[212]

1. Types of Speech Restrictions & Sub-Doctrinal Variation in Speech Cases

There is considerable variation in the types of laws found within the body of speech cases considered by the federal courts under the strict scrutiny standard. One can break down the laws into seven categories: (1) campaign speech regulations, including campaign finance laws and electioneering restrictions; (2) limits on the right of access to court proceedings and records; (3) indecency laws; (4) viewpoint discriminatory rules on access to public forums; (5) sign ordinances; (6) charity solicitation laws; and (7) miscellaneous other

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210. Included in this category are 8 observed applications of strict scrutiny to speech restrictions arising under the fundamental rights strand of the Equal Protection Clause. These cases apply the doctrine of the First Amendment, even though they are formally brought under the Fourteenth Amendment (and not just for reasons of incorporation).

211. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (explaining that strict scrutiny applies to content-based speech restrictions).

212. This area of constitutional law showed no statistically significant difference in survival votes between Democrat and Republican appointed judges. Democratic appointees are slightly less likely than Republican appointees to uphold a speech restriction (22% to 27%, with $N = 164$ and 318 respectively), but this difference was not statistically significant ($p = .224$). This finding even held in the campaign finance area. Democrat appointees voted to uphold 29% of the time in campaign finance controversies ($N = 48$), compared to 30% by Republican appointees ($N = 128$), with no statistical significance ($p = .947$).

speech restrictions. Table 9 reports the survival rate for each of these types of speech restrictions.

Table 9. Strict Scrutiny Survival Rates by Type of Speech Law

Type of Speech Law	*Survival Rate*	*Applications* (N)
Right of Access to Courts	50%	26
Charity Solicitation	50%	12
Indecency	33%	15
Campaign Speech	24%	82
Public Forum Viewpoint Discrimination	4%	28
Sign Ordinances	0%	18
Other	10%	41
Total	22%	222
$F = 6.230$, $DF = 6$, $p < .000$		

Each of these subgroups deserves some individualized attention. Notice, however, the range of variation in survival rates: from 0 percent in sign ordinance cases and 4 percent in public forum cases, to 50 percent in charity solicitation cases and access-to-court cases. Clearly, not all types of speech laws are equally likely to be invalidated under strict scrutiny—and some types are as likely to pass strict scrutiny as fail. The variation is highly significant ($p < .000$).

a. Campaign Speech Restrictions

The largest group involves campaign speech regulation, which includes campaign finance laws, judicial campaign speech codes, and other laws regulating the speech of candidates for office or their supporters. There were 82 strict scrutiny applications arising from campaign speech restrictions in the covered period, of which 20 were survivors, for a survival rate of 24 percent.

The Supreme Court first suggested the survivability of campaign speech restrictions in the landmark campaign finance decision, *Buckley v. Valeo*.[213] In *Buckley*, the Court applied what it termed the "closest scrutiny"[214] to judge provisions of the Federal

213. 424 U.S. 1 (1976).

214. *Id.* at 25 (citation omitted).

Election Campaign Act limiting expenditures by candidates and contributions to candidates. The Court wrote that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"[215] and that the laws in question intentionally "suppress[] communication"[216] by "impos[ing] direct quantity restrictions on political communication."[217] As a result, the Court rejected the traditionally more deferential tests used for content-neutral laws and insisted that the expenditure and contribution limits be judged instead under a "rigorous standard of review."[218] Applying this standard, the Court invalidated the expenditure limits[219] but upheld the contribution limits, which were justified by the compelling government interests in combating *quid pro quo* corruption between candidates and contributors and in preventing the appearance of such corruption.[220]

Although the Supreme Court eventually scrapped strict scrutiny in the context of contribution limits,[221] the Court continues to insist that strict scrutiny applies to other types of campaign finance laws. Thus, in *Federal Election Commission v. National Right to Work Committee* ("*NRWC*"), the Court upheld federal restrictions on who could be solicited to contribute to corporate political action committees under what the Court termed to be "the closest scrutiny."[222] In *Austin v. Michigan Chamber of Commerce*,[223] the Supreme Court held that states have a "compelling" reason to bar corporations from using general treasury funds to support candidates, namely preventing the "use [of] resources amassed in the economic marketplace to obtain an

215. *Id.* at 15 (citation omitted).

216. *Id.* at 17.

217. *Id.* at 18.

218. *Id.* at 29.

219. *Id.* at 45–48.

220. *Id.* at 24–28.

221. In *Nixon v. Shrink Mo. Gov't PAC*, the Court officially revised the test for contribution limits and held that something less than strict scrutiny applied to these specific types of campaign finance regulations: a form of intermediate scrutiny that required "close" tailoring to further a sufficiently "important" end. 528 U.S. 377, 387–88 (2000). Measured by the language of the lower court opinions in contribution ban cases, it appears that judges *thought* they were applying strict scrutiny in the pre-*Nixon* years—or, at least, that is what they said in justifying their decisions. According to Christina Wells, prior to *Nixon* the courts "consistently . . . interpreted *Buckley* as requiring strict scrutiny review for contribution limitations." Wells, *supra* note 80, at 150 n.67. For purposes of my study, I have labeled decisions in contribution limits cases occurring between 1990 and 2000 (the year *Nixon* was handed down) as strict scrutiny cases, unless the court referred to the applicable standard as something other than strict scrutiny.

222. 459 U.S. 197, 207 (1982) [hereinafter NRWC] (citation omitted).

223. 494 U.S. 652 (1990).

unfair advantage in the political marketplace."[224] The Court explicitly stated that the applicable standard was strict scrutiny.[225] More recently, in *McConnell v. F.E.C.*, the Court extended the *Austin* rationale to apply to labor unions and upheld under strict scrutiny provisions of the Bipartisan Campaign Reform Act that barred corporations and unions from using general treasury funds to pay for electioneering advertisements close to Election Day.[226]

Since 1990, the lower federal courts have followed the Supreme Court's lead and upheld a wide variety of campaign speech laws under strict scrutiny. As in *Buckley*, *NRWC*, *Austin*, and *McConnell*, the lower courts often find that electoral speech restrictions are justified by government's need to preserve the integrity of the electoral process from various types of corrupting influences. Indeed, the Court's frequent rulings in this area and occasional insistence that the only compelling governmental end is protecting the integrity of the electoral process by combating corruption or its appearance has had the effect of coordinating arguments about the first prong of strict scrutiny analysis. In the majority of campaign speech case (72%), the government argues that the speech restriction is necessitated by the compelling governmental ends of combating corruption and preserving the integrity of the electoral process. As a result, the meat of strict scrutiny in this area of law is on the narrow tailoring prong. Laws survive or fail primarily based on the court's determination whether there are less restrictive alternatives to achieving those ends.[227]

Which campaign speech laws are most likely to survive strict scrutiny and which most likely to be invalidated? Courts uphold disclosure requirements at a relatively high rate (41%)[228] and show an inclination to uphold restrictions on corporate expenditures (50%, although there were very few cases)[229] and laws burdening speech in the context of judicial elections (28%).[230] Alternately, courts

224. *Id.* at 659 (citation omitted).

225. *See id.* at 657 ("[W]e must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.").

226. 540 U.S. 93, 205 (2003). *McConnell* did not explicitly refer to "strict scrutiny" but relied directly on *Austin*, which did unambiguously use strict scrutiny, and required that the electioneering finance restrictions be justified by a "compelling governmental interest." *See id.* As a result, I have coded *McConnell*'s adjudication of the electioneering finance restrictions as an application of strict scrutiny.

227. Of the 62 campaign speech fatalities, 57 contain a sufficient analysis of strict scrutiny to determine what prong of the test was found to be unsatisfied. Of those 57, 47 (or 82%) ruled that the ends were compelling and the constitutionality of the law turned on the fit.

228. N = 17.

229. N = 4.

230. N = 7.

consistently invalidate petition circulator restrictions (6% survival rate)[231] and expenditure limits (0%).[232]

One particularly surprising finding arises from the courts' treatment of contribution limits. For many years after *Buckley*, commentators suggested that the Supreme Court did not really apply strict scrutiny to contribution limits.[233] In part, this sentiment was due to the ambiguity of the *Buckley* opinion, which was hastily written and less than crystal clear about its standards of review. But the sentiment was also likely a product of the Gunther myth itself: how could a law survive strict scrutiny if the test was fatal in fact? Moreover, the *Buckley* Court seemed to accept a relatively loose fit between the particular contribution limits chosen by Congress and the governmental end of combating corruption. Presumably, some candidates could be "bought" for less than $1,000—the ceiling imposed by the federal law—and some could not be "bought" for much greater sums. According to *Buckley*, "Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . [A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind."[234] Ordinarily strict scrutiny would be expected to invalidate the use of means that further their underlying ends with such imprecision. The notion that *Buckley*'s approach to contribution limits was not "real" strict scrutiny was only magnified by the Court's decision in 2000 to formally adopt an intermediate level of scrutiny for contribution limits.[235]

Based on the common view that contribution limits were not really judged under strict scrutiny—even though the lower courts consistently wrote that they were applying strict scrutiny before 2000[236]—one might suppose that the standard applied to contribution limits was easier to satisfy than strict scrutiny more generally. To test this hypothesis, one can compare the survival rate of strict scrutiny in contribution limits cases to the 30 percent survival rate for the aggregate strict scrutiny data set (or, alternatively, to the 24

231. N = 16.

232. N = 4.

233. *See, e.g.*, Marlene Arnold Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Conditions Doctrine*, 10 HASTINGS CONST. L.Q. 601, 607 (1983) (recognizing the lack of clarity in *Buckley* and observing that "the Court seemed to scrutinize some of the limitations more closely than others, giving credence to the interpretation that the level of scrutiny was subject to a sliding scale").

234. Buckley v. Valeo, 424 U.S. 1, 30 (1976) (citation omitted).

235. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387–88 (2000) (requiring that contribution limits have "close" tailoring to further a sufficiently "important" end).

236. *See* Wells, *supra* note 80, at 150 n.67.

percent survival rate in areas other than religious liberty). There were 18 applications of strict scrutiny to contribution limits in final rulings between 1990 and 2000, yet only 4 of those applications upheld the challenged law. This amounts to a survival rate of 22 percent—well below the aggregate survival rate and slightly lower than the strict scrutiny rate in areas of law other than religious liberty. Strict scrutiny, as the lower courts applied it, appears to have been no less rigorous in contribution limits cases than in strict scrutiny cases generally.

b. Right of Access to Judicial Proceedings

A second distinguishable subset of strict scrutiny free speech decisions addresses the First Amendment right of access to judicial proceedings and records. The Supreme Court has never explicitly held that this right is governed by strict scrutiny. Yet in *Press-Enterprise v. Superior Court of California*, the Court held that judges may order the closure of courts—usually from the media—if "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[237] A valid argument can be made that these cases ought to be treated as their own separate First Amendment doctrine rather than as true free speech cases. Laws and court orders sealing judicial records do not technically limit speech or communication. They limit *access* to records prepared for judicial purposes, but the media can publish this same information if obtained some other way. Nevertheless, the courts consistently claim to be applying freedom of speech principles, and lower courts have read *Press-Enterprise* to hold that "strict scrutiny is the correct standard."[238]

Encouraged perhaps by *Press-Enterprise*, however, the federal courts apply an relatively lenient form of strict scrutiny to laws burdening the right of access to court proceedings and records. Fifty percent of strict scrutiny applications in right-of-access cases uphold the challenged laws (13 of 26). Breaking down the right-of-access decisions, one finds that courts tend to uphold restrictions on media access to grand jury or other traditionally closed proceedings (100%);[239] access limitations designed to protect minors (100%);[240] and

237. 464 U.S. 501, 510 (1984).

238. Kamasinski v. Judicial Review Council, 44 F.3d 106, 109 (2d Cir. 1994). I thank Eugene Volokh for reminding me that such cases do not technically limit speech. If all of the right-of-access decisions are removed from the free speech category, the survival rate of speech laws declines to 18 percent—still far from inevitably fatal.

239. N = 4.

240. N = 4.

restrictions adopted in terrorism cases (67%).[241] By contrast, courts seem relatively hostile to denials of access to ordinary criminal proceedings and records (16%).[242] In the two cases dealing with court-imposed restrictions on the ability of attorneys to communicate post-trial with jurors, the courts ruled against the court orders.

Courts may be sympathetic to right-of-access restrictions because the governmental action underlying the claim is either an order by another federal court trying to control its proceedings or a law with the same objective. In strict scrutiny decisions more generally, courts tend to uphold orders of other federal courts that happen to infringe on rights. Moreover, one might expect that courts would be relatively open-minded about the need to limit on access to court records and proceedings designed to protect the integrity of the judicial process. No one is more invested in this ideal than other federal judges, and one would expect them to understand the importance of such efforts.

c. Viewpoint Discrimination in Access to Public Forums

Between 1990 and 2003, there were 28 published final rulings on the merits in the federal courts concerning the constitutionality of viewpoint discrimination in granting access to public forums. The typical viewpoint discriminatory public forum restriction bars a political or religious group from using a school or library's public rooms,[243] speaking at city council or other governmental meetings,[244] displaying art in government buildings or spaces,[245] or taking out advertisements on buses or "adopt-a-highway" programs.[246] This is a

241. N = 3.

242. N = 16.

243. *See, e.g.*, Good News/Good Sports Club v. Sch. Dist., 28 F.3d 1501, 1502 (8th Cir. 1994) (invalidating denial of access to puhlic school's facilities); Khademi v. S. Orange County Cmty. Coll. Dist., 194 F. Supp. 2d 1011, 1036 (C.D. Cal. 2002) (invalidating law requiring advance approval for postings at a community college); Pfeifer v. City of W. Allis, 91 F. Supp. 2d 1253, 1267–68 (E.D. Wis. 2000) (invalidating denial of access to public library's meeting room).

244. *See, e.g.*, Zapach v. Dismuke, 134 F. Supp. 2d 682, 698 (E.D. Pa. 2001) (invalidating denial of access to public comment period of a government meeting); Pesek v. City of Brunswick, 794 F. Supp. 768, 801 (N.D. Ohio 1992) (invalidating city council's prohibition of a firefighter speaking at council meetings).

245. *See, e.g.*, Hopper v. City of Pasco, 241 F.3d 1067, 1069–70 (9th Cir. 2001) (invalidating municipality's refusal to display controversial art in City Hall); Doe v. Small, 964 F.2d 611, 612 (7th Cir. 1992) (invalidating ban on religious displays in public parks).

246. *See, e.g.*, Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 148 F.3d 242, 244 (3d Cir. 1998) (invalidating refusal to allow anti-abortion advertisements in public buses); Knights of Ku Klux Klan v. Ark. State Highway and Transp. Dept., 807 F. Supp. 1427, 1438–39 (W.D. Ark. 1992) (invalidating exclusion of the Ku Klux Klan from adopt-a-highway program).

sub-group of free speech law where strict scrutiny has been truly fatal in fact. Of the 28 applications of strict scrutiny, all but one[247] resulted in the viewpoint discriminatory rule being invalidated, establishing a survival rate of 4 percent.

In a substantial percentage of the public forum cases (39%), the challenged laws or policies were adopted in a purported effort to comply with the Constitution itself. Laws denying religious organizations access to public forums are usually defended on the ground that the discriminatory treatment is itself required by the First Amendment's Establishment Clause. Yet the courts reject the "compellingness" of this end in every case,[248] generally explaining that discrimination against religion is not required by the Clause. As a result, the ends fail to satisfy the first prong of strict scrutiny.[249]

Moreover, this type of law is overwhelmingly adopted by local governmental entities (79%). As with strict scrutiny more generally, local governmental laws that restrict rights fare especially poorly. It may be that federal courts are especially distrustful of local governments and thus little heed to the constitutional interpretations of local officials. Alternatively, local governmental officials may be particularly willing to adopt laws that stray far from extant constitutional standards. In either case, public forum restrictions are not well received in the federal courts.

d. Sign Ordinances

Signs posted in yards or along public roads have become a common sight in suburban America, and local governments have attempted to limit this type of speech through permit requirements, temporal limits on yard signs, prohibitions on placing signs that mention anything other than that property's particular use, and illumination restrictions. Most of these laws imposed special burdens on political signs and thus might have been included in the campaign speech category. Yet, the sign ordinance cases are not justified by election-related goals such as preserving the integrity of the electoral process. Rather, the ends behind sign ordinance laws tend to be

247. *See* Mood For A Day, Inc. v. Salt Lake County, 953 F. Supp. 1252, 1271–72 (D. Utah 1995) (upholding a county's refusal to allow a pro-marijuana group alleged to be advocating violation of the criminal laws to operate a booth at a family-themed county fair).

248. N = 10.

249. *See, e.g.*, Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1281 (10th Cir. 1996) (rejecting end of compliance with the Establishment Clause in the context of a city policy banning religious instruction and worship in city-owned senior centers); Good News/Good Sports Club v. Sch. Dist., 28 F.3d 1501, 1502 (8th Cir. 1994) (rejecting compliance end asserted to justify school district's denial of religious organization's access to district property).

quality of life concerns such as maintaining a visually pleasing aesthetic in neighborhoods and traffic control.[250] The sign ordinance laws are also somewhat unique because they are treated to a very severe scrutiny. Eighteen published final rulings on the merits of the constitutionality of sign ordinances were handed down by the federal courts between 1990 and 2003 under strict scrutiny, and not a single court upheld such an ordinance. Here one sees the most fatal strict scrutiny possible: no laws survive it.

These are relatively easy free speech cases under the strict scrutiny standard. The quality of life interest is hardly a "compelling" interest—one that government absolutely must promote—and the courts consistently held that sign ordinances failed the first prong of strict scrutiny.[251] Moreover, even to the extent there is a worthwhile traffic safety component to the avoidance of visual clutter, the laws are usually woefully under-inclusive. By targeting political signs in particular, and failing to cover "for sale" signs and other commercial signs, the laws do not further even the potentially valid ends with sufficient precision.[252]

e. Charitable Solicitation Restrictions

If viewpoint discrimination in public forums and sign ordinances receive hostile reception in the federal courts, charity solicitation laws receive a relatively warm welcome. Of the 12 applications of strict scrutiny to restrictions on charitable solicitations, half survived review. Among the types of restrictions likely to survive were disclosure requirements imposed on solicitors (75%)[253] and restrictions on solicitation by law enforcement personnel (66%).[254] It is not surprising to find the former in the survivor camp as the disclosure requirements tend to be straightforwardly designed to prevent fraud and protect consumers. Courts consistently accept the sincerity of this legislative motivation; all but one found the

250. *See, e.g.*, Whitton v. City of Gladstone, 54 F.3d 1400, 1403 (8th Cir. 1995) (regulating placement of political signs for aesthetic and traffic safety reasons); King Enters., Inc. v. Thomas Twp., 215 F. Supp. 2d 891, 896 (E.D. Mich. 2002) (regulating exterior signs for the purposes of "public safety, aesthetics and economic development").

251. The ends prong was not satisfied in 14 of the 18 sign ordinance applications.

252. *See, e.g.*, *Whitton*, 54 F.3d at 1410–11 (invalidating sign law targeting political speech as underinclusive); Sugarman v. Village of Chester, 192 F. Supp. 2d 282, 302–03 (S.D. N.Y. 2002) (invalidating sign law targeting political speech as underinclusive).

253. N = 4.

254. N = 3.

underlying governmental interests compelling.[255] The law enforcement solicitation cases are much more surprising in light of the fact that courts are upholding special restrictions on solicitation by police officers raising money to benefit public servants and their families. Yet courts appear willing to recognize the highly contextualized nature of police officers' speech, which in the instance of solicitation may be perceived as coercive.[256] By contrast, courts have invalidated curfews imposed on solicitors (2 applications, both fatalities)[257] and a handful of various other types of restrictions.

f. Indecency Regulation

Another cluster of free speech cases is comprised of challenges to laws that regulate indecent speech—i.e., sexually explicit speech short of obscenity (which is not formally protected by the First Amendment[258]). The interest asserted in nearly all of the indecency cases is the obviously compelling governmental interest of protecting minors from harms thought to stem from access to sexually explicit materials. The Supreme Court has clearly held that "protecting the physical and psychological well-being of minors" by "shielding [them] from the influence of literature that is not obscene by adult standards" is compelling.[259] In light of the perceived importance of the underlying goal, one might expect the courts to be relatively deferential to legislative efforts in this area.

In fact, however, strict scrutiny in indecency cases is close to the mean survival rate for all strict scrutiny applications. Of the 15 applications of strict scrutiny to indecency regulations, only 5 (33%) survived review. The number of observations is relatively small, but the evidence does suggest that courts are not especially forgiving of

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255. For examples of courts upholding disclosure laws, see Special Programs, Inc. v. Courter, 923 F. Supp. 851, 860–61 (E.D. Va. 1996) (upholding disclosure requirement); Lucas v. Curran, 856 F. Supp. 260, 273 (D. Md. 1994) (upholding disclosure requirement); Am. Ass'n of State Troopers, Inc. v. Preate, 825 F. Supp. 1228, 1238 (M.D. Pa. 1993) (upholding disclosure requirement).

256. *See, e.g.*, Auburn Police Union v. Carpenter, 8 F.3d 886, 889 (1st Cir. 1993) (upholding ban on charity solicitations by law enforcement personnel); Tex. State Troopers Ass'n, Inc. v. Morales, 10 F. Supp. 2d 628 (N.D. Tx. 1998) (upholding ban on charity solicitations by law enforcement personnel).

257. *See, e.g.*, Ohio Citizen Action v. City of Mentor-On-The-Lake, 272 F. Supp. 2d 671, 674–75 (N.D. Ohio 2003) (invalidating curfew); *Tex. State Troopers Ass'n, Inc.*, 10 F. Supp. at 637 (invalidating curfew).

258. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

259. Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747, 756–57 (1982); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968).

indecency legislation. Courts were consistently intolerant of indecency regulations imposed on Internet communications (0%),[260] but willing to accept the legitimacy of dial-a-porn restrictions (66%)[261] and television/radio broadcast limits (50%).[262] In all but one indecency case, the governmental end of protecting minors was accepted as compelling. But courts usually held that less restrictive alternatives were available that posed fewer hurdles for adults' constitutionally protected access to indecent material.[263]

g. Other Speech Restrictions

The types of speech laws discussed so far do not exhaust the field. Some types of free speech restrictions were subject to too few strict scrutiny applications during the covered period to warrant individualized treatment. These include bans on making false accusations against public officials[264] (0% survival rate)[265] and parade permitting and restrictions[266] (which survive in 11% of applications).[267] There is also a host of odd cases that would provide several years worth of fun and interesting Constitutional Law exam questions: a law that prohibits midwives from advising mothers in labor;[269] bans on fortunetelling and astrology;[270] a refusal to allow a

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260. N = 5.

261. N = 3.

262. N = 4.

263. *See, e.g.*, ACLU v. Johnson, 194 F.3d 1149, 1160 (10th Cir. 1999) (state law criminalizing computer dissemination of material harmful to minors held to be overinclusive); Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990) (alternatives available to state restrictions on access to sexually explicit phone service).

264. *See, e.g.*, Eakins v. Nevada, 219 F. Supp. 2d 1113, 1121 (D. Nev. 2002) (holding statute that criminalized the filing of false allegations of misconduct against a police officer violated the First Amendment); Hamilton v. City of San Bernardino, 107 F. Supp. 2d 1239, 1248 (C.D. Cal. 2000) (holding state law making it a misdemeanor to knowingly file a false misconduct allegation against a police officer violates the First Amendment).

265. N = 4.

266. *See, e.g.*, Kirkeby v. Furness, 92 F.3d 655, 658 (8th Cir. 1996) (invalidating restriction of abortion protestors to specific areas around abortion clinics); Trewhella v. City of Lake Geneva, 249 F. Supp. 2d 1057, 1076–77 (E.D. Wis. 2003) (invalidating selective permitting requirement for parades and protests); Mahoney v. Babbitt, 105 F.3d 1452, 1459–60 (D.C. Cir. 1997) (invalidating the revocation of a permit to protest at the President's inauguration).

267. N = 9.

269. Dickerson v. Stuart, 877 F. Supp. 1556, 1561 (M.D. Fla. 1995) (upholding the midwife speech restriction).

270. Trimble v. City of New Iberia, 73 F. Supp. 2d 659, 668–69 (W.D. La. 1999) (invalidating fortunetelling ban); Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1041–42 (E.D. Wis. 1997) (invalidating astrology and fortunetelling ban).

state university's fraternity to host an "ugly woman" contest;[271] a law banning the wearing of masks in public (to target the Ku Klux Klan);[272] restrictions on the rental of violent video games;[273] and a ban on trading cards depicting heinous criminals.[274] All of these miscellaneous cases are grouped together in the "Other" category. This is nevertheless a substantial group of strict scrutiny decisions and makes up the second largest group of free speech cases (behind campaign speech restrictions). As a group, however, they fared poorly in the courts during the covered period with a 10 percent (4 of 41) survival rate.

2. Free Speech and Federalism

The earlier analysis of the data indicated that federalism had a considerable impact on the likelihood of strict scrutiny survival in both the aggregate body of applications and in suspect class discrimination cases. The same dynamic we identified earlier—courts' greater tendency to uphold a federal law than a state or local measure—also plays out in the free speech cases.

Table 10 reports the results of the survival rate of speech restrictions by level of government.

Table 10. Strict Scrutiny Survival by Level of Government in Free Speech Cases

Level of Government	*Survival Rate*	*Applications* (N)
Federal	59%	37
State	21%	114
Local	4%	70
Total	22%	222
$F = 9.560$, $DF = 6$, $p < .000$		

271. IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (invalidating the contest ban).

272. Am. Knights of Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 836 (N.D. Ind. 1999) (invalidating the anti-mask law).

273. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003) (invalidating rental restrictions); Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687 (8th Cir. 1992) (same).

274. Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 64 (2d Cir. 1997) (invalidating the trading card ban).

The federalism effect is apparently very strong in free speech cases ($p < .000$). When applying strict scrutiny to speech restrictions, the federal courts are far more likely to uphold a federal law (59%) than a state law (21%). Laws enacted at the local level—by city councils, school districts, libraries, counties, and alike—are especially unlikely to survive review. Strict scrutiny was fatal to all but 4 percent of local laws considered by the federal courts between 1990 and 2003. The linear descent in the survival rate from the federal level to the local level is striking.

It is also quite surprising. In contrast to race discrimination, free speech is an area of constitutional law in which there has not been a vibrant debate about whether courts should scrutinize federal laws differently than state or local laws. In fact, there is almost no contemporary scholarship on how federalism concerns ought to shape judicial review in the context of freedom of speech.[275] In the 1950s and 60s, the second Justice John Harlan argued in a series of concurring and dissenting opinions in obscenity cases that the Constitution mandated distinct judicial treatment of federal compared to state impairments on speech.[276] He argued, however, that "the dangers of federal censorship in this field are far greater than anything the states may do," and called for stricter limits on *federal* speech laws.[277] Yet, looking at judicial practice in recent years, federalism operates exactly the opposite of Harlan's proposal, at least in free speech laws governed by strict scrutiny.

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275. One notable counter-example is Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Speech Codes, and Anti-Pornography Ordinances*, 21 J. L. & POL. 233, 244-47 (2005). Contrary to the pattern I uncovered, Rosen argues for courts to give local governments more leeway than the states or the federal government in regulating speech. *Id.*

276. *See* Roth v. United States, 354 U.S. 476, 496–508 (1957) (Harlan, J., dissenting in part, concurring in part) (arguing for separate standard for federal impediments on obscenity); *see also* Ginzburg v. United States, 383 U.S. 463, 493–97 (1966) (Harlan, J., dissenting) (same); Jacobellis v. Ohio, 378 U.S. 184, 203–04 (1964) (Harlan, J., dissenting) (same). Early in his service, (then) Justice William Rehnquist, who occupied the seat on the Court vacated by Harlan, continued the call for stricter review of federal speech laws. *See* Buckley v. Valeo, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part) (arguing for more stringent standards for federal impairments on free speech). Of course, studies of Justice Harlan's judicial philosophy have recognized Harlan's preference for favoring state over federal speech laws. *See* Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 262–63 (1969) ("In his view the broad responsibility of states for public welfare under the police power grants them more leeway to regulate free expression."); Daniel A. Farber & John Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 432 (1985) ("Harlan was willing to allow the states broad leeway in regulation of obscenity. In his view, however, the legitimate sphere of federal regulation was narrowly circumscribed.").

277. *Roth*, 354 U.S. at 505.

What remains uncertain is the explanation behind this federalism effect. Is it because courts defer to the federal government's efforts to restrict speech? Perhaps the federal government is more likely than states to adopt types of speech laws that, regardless of federalism, are capable of overcoming strict scrutiny. There is some noticeable difference in the types of speech laws adopted by the federal government as compared to state and local governments. Federal actors tend to adopt laws restricting the right of access to courts and indecency laws, which are relatively likely to survive review. Local governments, by contrast, enact laws such as sign ordinances and viewpoint discriminatory rules of access to public forums,[279] which are almost always invalidated.

Yet federalism has the same effect across types of speech restrictions, suggesting that federalism as such is playing a role. While most of the right of access to court restrictions are federal in origin (77%), state laws regulating such access are much less likely to survive (17% for states compared to 60% for the federal government[281]). In campaign speech cases, where the survival rate was only 24 percent, all of the federal campaign speech laws adjudicated under strict scrutiny were upheld and only a minority of state laws survived. In indecency cases, the courts upheld federal laws 50 percent of the time[282] and state laws 25 percent,[283] while invalidating all of the indecency measures adopted by local governmental entities. Federalism clearly deserves more attention by scholars as a factor in free speech law.[284]

C. Religious Liberty

In the period covered by this study, there were 73 applications of strict scrutiny in published final rulings pertaining to religious liberty. As noted earlier, the religious liberty category had the highest survival rate of any area of law in which strict scrutiny applies: 59

279. All 18 of the sign ordinance laws and 19 of 28 instances of public forum discrimination were adopted by local governmental actors. There was only one instance of a federal law restricting access to a public forum, and it was invalidated.

281. N = 6 and N = 20, respectively.

282. N = 8.

283. N = 4.

284. For my own effort to explain the federalism effect in free speech cases, see Adam Winkler, Free Speech Federalism (2006) (unpuhlished manuscript, on file with author).

percent, more than double the mean of the other doctrinal categories. What accounts for this unusually high survival rate and what types of religious liberty cases survive strict scrutiny? This Section considers several potentially influential variables. First, the cases will be examined to determine if the high survival rate is tied to the fact that most of the religious liberty cases apply statutory—rather than constitutional—strict scrutiny. Second, this Section will determine if the survival rate is tied to the substantive nature of the religious liberty claims rather than the legal origin of the standard.[285]

1. Statutory Versus Constitutional Strict Scrutiny

To begin, one can distinguish two groups of cases within the religious liberty set: (1) constitutional applications arising from the Free Exercise Clause,[286] and (2) statutory applications arising from federal legislation, such as the Religious Freedom Restoration Act ("RFRA")[287] and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[288] The religious liberty doctrine is the only one in the data set that includes decisions that apply strict scrutiny due to a statutory mandate. While the formal origin of this strict scrutiny is unusual, the test remains strict scrutiny; the statutory language requires that challenged laws be narrowly tailored means of furthering compelling governmental interests.[289]

A bit of background is in order. Strict scrutiny has had a troubled history in the area of religious liberty. The Court first held that strict scrutiny applied in constitutional free exercise cases in 1963's *Sherbert v. Verner*, where the Court declared unconstitutional the denial of unemployment benefits to a woman fired for her unwillingness to work on the Saturday Sabbath.[290] In the 1970s and 1980s, however, the courts granted very few religion-based exemptions to generally applicable laws despite applying strict scrutiny in many

285. A statistical test using the ideology proxy found no significant difference between Republican and Democratic appointees' votes to uphold/reject religious liberty infringements.

286. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (invalidating requirement that police officers shave their beards); United States v. Hammer, 121 F. Supp. 2d 794, 801 (M.D. Pa. 2000) (invalidating mandatory autopsy policy).

287. *See, e.g.*, United States v. Lundquist, 932 F. Supp. 1237, 1244 (D. Or. 1996) (upholding provisions of the Bald & Golden Eagle Protection Act from RFRA challenge).

288. *See, e.g.*, Charles v. Verhagen, 220 F. Supp. 2d 937, 947, 952 (W.D. Wis. 2002) (invalidating prison ban on inmate's use of prayer oil and upholding prison's limits on the number of religious feasts inmates can attend under the RLUIPA).

289. 42 U.S.C. § 2000cc (2006).

290. *See* 374 U.S. 398, 406–10 (1963) (finding that there must be a compelling state interest to justify an infringement of the Free Exercise Clause).

decisions. The Supreme Court, for instance, upheld against free exercise challenges the uniform application of minimum wage laws,[291] social security laws,[292] and sales taxes[293]—providing lower courts ample room to refuse exemptions to other laws under strict scrutiny. As James Ryan found, under this regime the federal appellate courts turned away a remarkably high percentage of free exercise challenges between 1980 and 1990: 87 percent.[294] In these free exercise decisions, strict scrutiny was, in the memorable words of Christopher Eisgruber and Larry Sager, "strict in theory but feeble in fact."[295]

In 1990, the Supreme Court in *Employment Division v. Smith* ruled that strict scrutiny no longer applied to most free exercise claims.[296] Although the weakness of *Sherbert*'s strict scrutiny led to the characterization of *Smith* as a "mercy killing,"[297] Congress responded to *Smith* by enacting the RFRA, which created a statutory cause of action for free exercise claimants to seek exemptions from generally applicable laws.[298] The law provided that courts were to apply strict scrutiny to laws substantially burdening religious practices.[299] The Supreme Court did not take well to Congress's encroachment on its standard-setting turf, and in *City of Boerne v. Flores*, the Court invalidated the RFRA to the extent it required strict scrutiny for judicial review of state laws.[300]

Nevertheless, strict scrutiny still applies to a number of different types of religious liberty claims. First, strict scrutiny still applies under the RFRA to *federal* laws substantially burdening the exercise of religion; *City of Boerne* only invalidated the RFRA as applied to *state* laws. Second, the *Smith* Court only discarded strict scrutiny to the extent religious adherents challenged generally applicable state laws. Where laws intentionally target religions for discriminatory treatment, the Free Exercise Clause still requires

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291. Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985).

292. United States v. Lee, 455 U.S. 252, 261 (1982).

293. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–90 (1990).

294. *See* Ryan, *supra* note 98, at 1416–17.

295. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). For additional recognition of the survivability of the standard used in free exercise cases, see Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 459–60 (1996); Joshua R. Geller, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y, 561, 564 (2003).

296. 494 U.S. 872, 882–85 (1990).

297. Sullivan, *supra* note 87, at 300.

298. 42 U.S.C. § 2000bb-1 (2006).

299. *Id.*

300. 521 U.S. 507, 532–36 (1997).

strict scrutiny.[301] Third, the RLUIPA, passed in 2000, requires strict scrutiny to be applied to state and federal laws that substantially burden the religious practices of prisoners and the land use plans of religious institutions.[302]

The data set includes religious liberty strict scrutiny applications from these three remaining sources, in addition to federal court decisions applying the RFRA to state laws before 1997 (when *City of Boerne* was decided). Of the 73 strict scrutiny applications in final religious liberty rulings, 54 (74%) were statutory in origin and the remaining 19 (26%) were based on the Free Exercise Clause.

The statutory decisions were far more likely than the constitutionally-based strict scrutiny decisions to result in the challenged law being upheld. Under the RFRA and the RLUIPA, the federal courts upheld 72 percent of the challenged laws, while under the Constitution-based strict scrutiny the survival rate was 21 percent—the latter in line with most other constitutional doctrines. Nevertheless, this variation is not a product of statutory strict scrutiny being different in kind from constitutional strict scrutiny. Ryan's study of free exercise cases in the 1980s found an 87 percent survival rate, and all of the cases included there were constitutional cases.[303] Thus, it is not the statutory origin as such that accounts for the higher survival rate of some religious liberty cases. Something else must be at work.

2. Free Exercise Exemptions Versus Discriminatory Treatment

An alternate explanation is that, regardless of whether strict scrutiny stems from statute or the Constitution, the nature of the underlying religious liberty claim accounts for the variation in survival rates. There are two substantive types of religious liberty strict scrutiny cases: (1) claims for exemptions from generally applicable laws, and (2) claims that laws intentionally target religious practices with discriminatory motive. An example of the former is a religious adherent's lawsuit to permit him to refuse to pay taxes or participate in the social security program.[304] An example of the latter

301. *See* Church of the Lukumi Bahalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (applying strict scrutiny under the Free Exercise Clause); Simpson v. Chesterfield County Bd. of Supervisors, 292 F. Supp. 2d 805, 810–11 (E.D. Va. 2003) (applying strict scrutiny under the Establishment Clause); Rader v. Johnston, 924 F. Supp. 1540, 1550–51 (D. Neb. 1996) (applying strict scrutiny under the Free Exercise Clause).

302. 42 U.S.C.A. § 2000cc-1(a) (2006).

303. Ryan, *supra* note 98, at 1416–17.

304. *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) (refusing to grant a religious exemption to social security participation).

is a religious adherent's lawsuit to invalidate a law that bars members of her religion from practicing a traditional ritual, such as animal sacrifice, when other people are allowed to slaughter animals.[305]

This substantive difference closely matches up with the statutory/constitutional division. Under *Smith*, constitutional claims for exemptions from generally applicable laws do not receive strict scrutiny, thus exemption cases are now brought under the RFRA and the RLUIPA.[306] Religious discrimination claims, by contrast, still receive strict scrutiny under the Free Exercise Clause. The match is not perfect, however, as the data set includes a small number (4) of constitutional exemption decisions handed down in the early months of 1990, before *Smith* was decided. Most importantly, all four of these observed applications of strict scrutiny upheld the government's refusal to grant an exemption.[307] Perhaps, then, it is the type of religious liberty claim rather than the legal source of strict scrutiny that accounts for the variation.

The data are consistent with this hypothesis. Table 11 reports the survival rate of strict scrutiny in exemption cases and discrimination cases.

Table 11. Strict Scrutiny Survival by Type of Religious Liberty Claim

Type of Claim	*Survival Rate*	*Applications* (N)
Exemption Claim	74%	58
Discrimination Claim	0%	15
Total	59%	73
$F = 41.822$, $DF = 1$, $p < .000$		

Evidently, there is a major difference between strict scrutiny's deadliness as applied in exemption cases compared to discrimination cases ($p < .000$). The survival rate in exemption cases is high, 74 percent of 58 applications—hardly surprising in light of Ryan's earlier study of exemption decisions. In religious discrimination cases, by

305. *Church of the Lukumi Babalu*, 508 U.S. at 524–26.

306. 494 U.S. 872, 884–86 (1990).

307. *See, e.g.*, S. Ridge Baptist Church v. Indus. Comm'n, 911 F.2d 1203, 1208–11 (6th Cir. 1990) (refusing free exercise exemption for church from worker's compensation program); United States v. Bd. of Educ., 911 F.2d 882, 893 (3d Cir. 1990) (refusing to exempt school teacher from dress code requirement).

contrast, strict scrutiny is truly fatal in fact; there are no survivors in the 15 applications.

Why is strict scrutiny so easy to overcome in exemption cases? Perhaps the courts are justifiably worried that they will be overwhelmed by litigants demanding religious exemptions to every law that might inadvertently interfere with the great diversity of Americans' religious practices.[308] As Ira Lupu writes: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[309] My colleague Eugene Volokh argues: "When people are asking for freedom not just to speak, or to be treated equally without regard to race, but to act, the law must often intrude on that freedom."[310] Thus, "even when the courts claimed to apply strict scrutiny, they didn't and couldn't apply strict scrutiny as it has become familiar in free speech law, race discrimination law, and other areas."[311] The numbers strongly support these arguments.

In the discrimination cases, however, the courts confront laws or other government actions that explicitly single out religious organizations or practices for disadvantageous treatment—for example, a police department's ban on facial hair that permits medical but not religious exceptions.[312] That scrutiny in such cases is particularly deadly ought to be expected. As the Supreme Court wrote in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, "a law targeting religious beliefs as such is never permissible."[313] Yet, to warrant strict scrutiny under the Free Exercise Clause in the first place, the law has to subject religions to exactly such discriminatory treatment. In other words, strict scrutiny only applies to laws that are by their very nature already unconstitutional.

D. Fundamental Rights

Courts also use strict scrutiny to judge the constitutional validity of legislation infringing on fundamental rights under the

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308. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1481 (7th ed. 2004) (granting exemptions "would make compliance with the law optional for every person").

309. Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

310. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1500 (1999).

311. *Id.* at 1498.

312. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (invalidating requirement that police officers shave their beards).

313. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments.[314] Overall, the strict scrutiny survival rate in fundamental rights cases is 24 percent, with 11 of 46 applications upholding the challenged laws.

One can break down the fundamental rights cases into several identifiable groups: (1) substantive due process; (2) right to travel; and (3) right to vote or to run for office.[315] Each of the three groups survives strict scrutiny at a different rate, as indicated by Table 12.

Table 12. Strict Scrutiny of Fundamental Rights by Type of Right

Type of Fundamental Right	*Survival Rate*	*Applications* (N)
Substantive Due Process	22%	27
Right to Travel	40%	10
Right to Vote/Run for Office	0%	8
Total	23%	45
$F = 2.524$, $DF = 3$, $p = .071$		

314. A group of federal court decisions handed down before the time period analyzed in this Article upheld infringements of bodily integrity of women seeking abortions past the point of fetal viability. The Supreme Court paved the way for these cases in none other than the landmark abortion rights decision of *Roe v. Wade*, 410 U.S. 113 (1973). *Roe*'s trimester framework, under which the right to cboose abortion varied dramatically depending upon where the woman was in her pregnancy, was built around strict scrutiny. Following this framework, the lower courts applied strict scrutiny and upheld a variety of late-term abortion restrictions. *See* Am. Coll. of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 289, 299–300 (3d Cir. 1984) (upholding a ban on abortions after viability), *aff'd on other grounds* 476 U.S. 747 (1986); Simopoulos v. Commonwealth, 277 S.E.2d 194, 199, 199 n.3 (Va. 1981) (upholding the validity of a statute proscribing the destruction of a viable fetus), *aff'd on other grounds* 462 U.S. 506 (1983); Wynn v. Scott, 449 F. Supp. 1302, 1320–22 (D. Ill. 1978) (upholding a law requiring persons inducing post-viability abortions to exercise professional skill to preserve the life and health of the fetus and forbidding experimentation on any viable aborted fetus), *appeal dismissed*, 439 U.S. 8 (1978), *aff'd on other grounds*, 599 F.2d 193 (7th Cir. 1979); Doe v. Deschamps, 461 F. Supp. 682, 684, 687–88 (D. Mont. 1976) (three-judge panel) (per curium) (upholding a law making it a crime to "caus[e] the death of a viable fetus delivered during an abortion" and requiring the concurrence of two additional physicians that the pregnant woman's life is in danger for any post-viability abortion); Wolfe v. Schroering, 388 F. Supp. 631, 637 (D. Ky. 1974) (three-judge panel) (upholding a Kentucky statute that outlawed (1) any abortion on a fetus which could "reasonably be expected" to be viable, and (2) "any experimentation" on a viable aborted fetus), *aff'd in part and rev'd in part on other grounds*, 541 F.2d 523 (6th Cir. 1976); Spencer v. Seikel, 742 P.2d 1126 (Okla. 1987) (upholding a ban on abortions after viability).

315. This excludes one case where the federal court assumed arguendo that the right to bear arms was a fundamental right protected by the Equal Protection Clause. *See* United States v. Miles, 238 F. Supp. 2d 297, 301 (D. Me. 2002) (upholding a gun control law under strict scrutiny). Another group of fundamental rights cases—equal protection challenges to discriminatory speech restrictions—is treated in this study as free speech cases rather than fundamental rights cases.

The variation between these cases is very close to statistical significance (p = .071). The right-to-vote/run-for-office cases betray a scrutiny that is fatal in fact; there are no survivors in 8 applications. These cases involve restrictions on the right to vote or run such as durational residency requirements,[316] disenfranchisement of people convicted of misdemeanors,[317] denial of the vote to the mentally ill,[318] and mandatory disclosure of one's Social Security number to register to vote.[319]

Substantive due process cases, which make up the majority of strict scrutiny applications in the fundamental rights area, survive at a rate (22%) consistent with strict scrutiny more generally. Most of the substantive due process cases involve infringements on the right to "bodily integrity," which encompasses denials of bail to aliens detained pending deportation,[320] forced civil commitment of sexual predators,[321] and compulsory medical treatment of criminal defendants.[322] The most prevalent of these were the alien deportation cases, where strict scrutiny has proven fatal; no final published decision of a court upheld the indefinite detention of aliens without bail under strict scrutiny.[323] The courts also tend to reject another type of substantive due process infringement: restrictions on parents' rights to control their children's upbringing (25%).[324] By contrast, the

316. *See generally* Robertson v. Bartels, 150 F. Supp. 2d 691 (D. N.J. 2001) (analyzing a statute that imposed a four-year residency requirement).

317. *See generally* McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995) (analyzing statute that prohibited individuals convicted of misdemeanors from voting).

318. *See* Doe v. Rowe, 156 F. Supp. 2d 35, 50–51 (D. Me. 2001) (finding a state constitutional provision unconstitutional because it denied the mentally ill the right to vote).

319. *See* Greidinger v. Davis, 988 F.2d 1344, 1345 (4th Cir. 1993) (analyzing a statute that required potential voters to supply their social security numbers for police inspection).

320. *See, e.g.*, Bonsol v. Perryman, 240 F. Supp. 2d 823, 826-27 (N.D. Ill. 2003) (invalidating legislative denial of bail for indefinitely detained aliens); Vang v. Ashcroft, 149 F. Supp. 2d 1027, 1037–38 (N.D. Ill. 2001) (same); Vo v. Greene, 63 F. Supp. 2d 1278, 1284-85 (D. Colo. 1999) (same).

321. *See, e.g.*, Johnson v. Nelson, 142 F. Supp. 2d 1215, 1229–30 (S.D. Cal. 2001) (upholding civil commitment of sexual predator).

322. *See, e.g.*, United States v. Deters, 143 F.3d 577, 582 (10th Cir. 1998) (upholding commitment for psychological evaluation).

323. N = 15.

324. N= 4. In *Troxel v. Granville*, 530 U.S. 57, 68 (2000), the Supreme Court invalidated a Washington state law that allowed any person, at any time, to petition for visitation rights to a child. A majority of the Court concurred with the plurality opinion's declaration that parents have a due process right "to make decisions concerning the care, custody, and control of their children." *Id.* at 66 (plurality opinion), 80 (Thomas, J., concurring), 77 (Souter, J., concurring).

Parental rights cases typically arise in state courts and *Troxel* has led to an avalanche of state court litigation over the constitutionality of child custody and visitation laws. In scores of decisions the state courts have upheld laws despite applying strict scrutiny. *See, e.g.*, *In re* L.B.S. v. L.M.S., 826 So. 2d 178, 187 (Ala. Civ. App. 2002) (upholding under strict scrutiny a

courts generally uphold other types of restrictions on bodily integrity (75%).[325]

Laws infringing on the right to travel are relatively more likely to withstand judicial review (40%). The laws challenged in the right-to-travel cases include juvenile curfew laws,[327] which are upheld in 66 percent of applications;[328] durational residency requirements for welfare,[329] which are invalidated in both observed instances; and restrictions on the ability of certain people to use national lands or other designated areas,[330] which survive 33 percent of the time.[331]

As with all of the other areas of law in which strict scrutiny applies (except suspect class discrimination), there is no traditional debate among scholars about the appropriate role of federalism in judicial review of laws invading fundamental rights. The standard assumption in constitutional law circles is that courts reviewing constitutional rights claims treat federal, state, and local laws more or less uniformly. As revealed by the strict scrutiny data, however, federalism usually plays a prominent role in accounting for why some laws survive and others fail review. Federalism may play a role in fundamental rights cases too. But judicial review here shows signs of

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grandparent visitation law); Jackson v. Tangreen, 18 P.3d 100, 104 (Ariz. Ct. App. 2000) (same); *In re* C.M., 74 P.3d 342, 345–46 (Colo. Ct. App. 2002) (same); Sightes v. Barker, 684 N.E.2d 224, 227–30 (Ind. Ct. App. 1997) (upholding under strict scrutiny a grandparent visitation law, although expressing uncertainty about the applicable standard); *In re* Guardianship of Blair, No. 01-1565, slip op. at 3–4 (Iowa Ct. App. Jan. 29, 2003) (upholding under strict scrutiny a grandparent visitation law); Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002) (same); Rideout v. Riendeau, 761 A.2d 291, 303 (Me. 2000) (same); Fausey v. Hiller, 851 A.2d 193, 199 (Pa. Super. Ct. 2004) (same); *see also In re* R.C., 745 N.E.2d 1233, 1242 (Ill. 2001) (upholding statute providing adoptive parents with the right to seek permanent custody over birth mother's objection when birth mother is mentally impaired); *In re* D.W., 799 N.E.2d 410, 425–27 (Ill. App. Ct. 2003) (upholding a statute creating a presumption of parental unfitness when a parent has been convicted of aggravated or heinous battery, or attempted murder of any child), *overruled by* 827 N.E.2d 466, 483–85 (Ill. 2005); *In re* O.R., 767 N.E.2d 872, 876–79 (Ill. App. Ct. 2002) (upholding a legal determination of parental unfitness when controlled substances are found in two of parent's children at birth).

325. N= 4.

327. *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 492–95 (5th Cir. 1993) (upholding juvenile curfew); Nunez v. City of San Diego, 114 F.3d 935, 952 (9th Cir. 1997) (invalidating juvenile curfew).

328. N = 3.

329. *See, e.g.*, Warrick v. Snider, 2 F. Supp. 2d 720, 729 (W.D. Pa. 1997) (invalidating durational residency requirement for eligibility for welfare benefits).

330. *See, e.g.*, Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 816 (D. Idaho 1993) (upholding travel restriction in national forest); Pottinger v. City of Miami, 810 F. Supp. 1551, 1553 (S.D. Fla. 1992) (invalidating policy of arresting homeless people for sleeping in public).

331. N = 3.

turning the federal/state hierarchy upside-down. In contrast with most of the other rights studied here, federal courts may treat fundamental rights-infringing federal laws *more strictly* than state and, especially, local laws. Between 1990 and 2003, the federal courts upheld federal laws at a rate of 19 percent,[332] state laws at a rate of 21 percent,[333] and local laws at a rate of 36 percent.[334] Although a statistical test does not report any significance to this variation (p = 0.551), the findings are nevertheless interesting if only for their inconsistency with the pattern uncovered in the larger data set. There is at least some suggestion in the data that fundamental rights strict scrutiny may actually disfavor federal and state laws as compared to local laws.

Political ideology may impact fundamental rights strict scrutiny decisions, although the evidence here, as with federalism, is weak. If one looks at all judicial votes in these cases broken down by the proxy of the party of the nominating president, one finds hints of a potential difference in how Republican-appointed judges approach fundamental rights cases compared to Democrat-appointed judges. Democratic appointees invalidate laws invading on fundamental rights more often than Republican appointees, with Democratic appointees voting to uphold in 23 percent of observed votes and Republican appointees voting to uphold in 40 percent. The variation is close to statistical significance (p = .110), although the total observations are relatively few and the p-value is sufficiently low to raise questions about the effect of political ideology in fundamental rights controversies. If there is a partisan difference here, it would not be a surprise in light of the relative views of the political parties on implied, unwritten rights. Republican presidents have argued strenuously for a philosophy of "strict construction" that is unwilling to recognize new, unwritten rights in the Constitution. As a result, Republicans may be more likely to vote to uphold a law alleged to infringe on such unwritten rights. Again, more study is needed before knowing if the ideological difference holds in fundamental rights cases.

332. N = 21.

333. N = 14.

334. N = 11.

E. Freedom of Association

The strict scrutiny survival rate in freedom of association cases is 33 percent, with 11 of 33 applications resulting in the challenged law being upheld. The association cases deal primarily with ballot access restrictions (20 applications), with the remainder comprised of disputes over laws infringing on other strands of the freedom of association right.[335]

Ballot access restrictions, according to the Supreme Court, implicate "two different, although overlapping, kinds of rights": the "right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters . . . to cast their votes effectively."[336] Whenever ballot access restrictions impose "severe" or "substantial" burdens on these rights, strict scrutiny is applied.[337] Despite being restricted to severe burdens, strict scrutiny in ballot access cases was originally portrayed by the Supreme Court as lenient. In *American Party of Texas v. White,*[338] the Court wrote that "any fixed percentage requirement [of support to gain access to the ballot] is necessarily arbitrary"[339] because any particular percentage cutoff is going to be over-inclusive and keep parties with slightly less support off the ballot even with no marginal risk of voter confusion. In a companion case, *Storer v. Brown,*[340] the Court noted that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under" the case law.[341] Such sentiments

335. One group of cases that is excluded from this category is campaign finance contribution limits cases, which *Buckley* held was protected by the freedom of association. *See* Buckley v. Valeo, 424 U.S. 1, 24–28 (1976). Contribution limits, like other forms of campaign finance laws, are usually considered speech limitations despite *Buckley* and thus have for purposes of this study been included in the free speech category.

336. Williams v. Rhodes, 393 U.S. 23, 30 (1968).

337. *See* Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983) (describing voting rights as fundamental but stating that not all regulations are "constitutionally-suspect burdens"); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

338. 415 U.S. 767 (1974). The Court upheld a ballot access law that required parties polling less than two percent of the vote in the preceding gubernatorial elections to nominate candidates through conventions and to show support among one percent of voters via petition signatures. The Court explained tbat requiring a modicum of voter support was a justifiable means of advancing the state's interest in electoral integrity and avoiding voter confusion—necessary components of an effective, meaningful vote. *Id.* at 783 n.14.

339. *Id.* at 783.

340. 415 U.S. 724 (1974). The Court upheld a state's denial of a ballot position to any candidate currently running as an "independent" who had been a registered member of a political party in the previous year, reasoning that the state's "compelling" interest in avoiding voter confusion was furthered by limits on the number of candidates on the ballot. *Id.* at 734–36. The Court was also clear that strict scrutiny was not necessarily fatal in fact: "The rule is not self-executing and is no substitute for the hard judgments that must be made." *Id.* at 730.

341. *Id.* at 730.

hardly evoke the demanding, skeptical review traditionally associated with strict scrutiny. Yet the standard has not proven to be unusually easy to satisfy. Thirty percent of ballot access restrictions survive strict scrutiny[342]—consistent with strict scrutiny generally.

The Supreme Court has also suggested that laws burdening other aspects of the freedom of association are capable of overcoming strict scrutiny. In *Roberts v. United States Jaycees*, the Court upheld the application of a state antidiscrimination law to the Jaycees, a non-profit membership organization that traditionally excluded women, under a strict scrutiny-like analysis.[343] Following the *Roberts* lead, the federal courts upheld 5 of 13 (38%) laws burdening the right of association outside of the ballot access context.[344] The courts consistently ruled against laws that restricted the associational rights of political parties (0% survival rate).[345] In contrast, they tended to uphold other types of burdens when the asserted justification for the laws was public safety or effective law enforcement (71%).[346]

The difference in survival rates between ballot access laws and other types of associational burdens is not significant.[347] Moreover,

342. *See, e.g.*, Swamp v. Kennedy, 950 F.2d 383, 386 (7th Cir. 1991) (upholding fusion ban); Libertarian Party of Kentucky v. Ehrler, 776 F. Supp. 1200, 1211 (E.D. Ky. 1991) (invalidating nominating petition signature requirement).

343. 468 U.S. 609, 623 (1984). The Court held that the Jaycees had expressive associational rights invaded by the antidiscrimination law, which "reflect[ed] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—ends the Court deemed to be "compelling state interests of the highest order." *Id.* at 622–24. *Roberts* did not explicitly identify the standard being applied, and some argue that the Court merely adopted a "balancing-of-interests" test instead of strict scrutiny. *See id.* at 632 (O'Connor, J., concurring) (describing the majority's test as a "balancing-of-interests" test). There is language in the opinion supportive of this view, too—a sign of the opacity of the majority opinion. *Id.* at 624. But several lower courts have agreed with the Third Circuit's statement that the "*Roberts* opinion teaches that strict scrutiny is to be applied to infringements on the freedom of [expressive] association." Salvation Army v. Dep't of Cmty. Affairs of New Jersey, 919 F.2d 183, 200 (3d Cir. 1990); *see also* Korenyi v. Dep't of Sanitation, 699 F. Supp. 388, 394 (E.D.N.Y. 1988) (arguing that the Supreme Court "has engaged in strict scrutiny" of laws restricting association); Bhagwat, *supra* note 51, at 971 (terming *Roberts* a strict scrutiny case).

344. *See, e.g.*, Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1500 (5th Cir. 1995) (invalidating application of anti-discrimination law to private club); McCabe v. Sharrett, 12 F.3d 1558, 1569–70 (11th Cir. 1994) (upholding reassignment of police chief's secretary after secretary married an officer).

345. N = 4. *See, e.g.*, Arizona Libertarian Party, Inc. v. Bayless, 351 F.3d 1277, 1281 (9th Cir. 2003) (invalidating state law imposing semiclosed primary on parties); Cool Moose Party v. Rhode Island, 6 F. Supp. 2d 116, 121–22 (D. R.I. 1998) (same).

346. N = 7. *See, e.g.*, Grider v. Abramson, 180 F.3d 739, 752–53 (6th Cir. 1999) (upholding city's requirement that participants in a KKK rally at a courthouse pass through metal detectors on public safety rationale); Déjà vu of Nashville, Inc., v. Metro. Gov't, 274 F.3d 377, 396 (6th Cir. 2001) (upholding nude dancing buffer zone because it deters crime).

347. $p = .627$.

variables such as enacting institution, federalism, and political ideology were not correlated with strict scrutiny survival in either group of association cases.

VI. CONCLUSION

Justice Harry Blackmun once wrote that if strict scrutiny is shorthand for "'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all."[348] This result, however, is precisely what the oft-repeated formulation of "strict in theory and fatal in fact" has taught generations of law students. Lawyers often believe that "the categorization of a law as subject to either strict or minimal scrutiny is outcome determinative, with the actual application of those standards a rhetorical and mechanical afterthought."[349] Kathleen Sullivan captures this widespread perception:

> The key move in litigation under a two-tier system is steering the case onto the preferred track. The genius of this tracking device is that outcomes can be determined at the threshold without the need for messy balancing. True, the standard formulations of these tests require a court to go through the motions of balancing a right against a legitimate or compelling interest. But this is not real balancing. If the standard is rationality, the government is supposed to win—and any lawyer who hires expert witnesses to dispute the empirical basis for legislation under this standard of review is wasting the client's money. If strict scrutiny is applied the challenged law is never supposed to survive—well, hardly ever, taking *Korematsu* into account. Hence Professor Gerald Gunther's pithy aphorism . . .[350]

In recent years, Justice O'Connor, among others, has challenged this traditional view of strict scrutiny. O'Connor has argued that when courts apply strict scrutiny, "[c]ontext matters."[351] Strict scrutiny is not fatal in fact, but rather "is designed to take relevant differences into account."[352]

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348. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

349. Wells, *supra* note 80, at 160; *see also* Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N.U. L. REV. 591, 595 (1989) ("If strict scrutiny virtually insures that a statute will fail judicial review, and if application of the classic rational basis test yields the opposite result, then it would seem as if the Court's only real 'decision' is about which standard to apply.").

350. Sullivan, *supra* note 87, at 296.

351. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

352. Johnson v. California, 543 U.S. 499, 515 (2005).

The federal practice strongly confirms Justice O'Connor's view. Strict scrutiny is not, generally speaking, fatal in fact, and there are clear patterns in the cases that show how context influences judicial review. Of the five rights protected by strict scrutiny, courts clearly apply a much more lenient version of strict scrutiny in religious liberty cases, in particular those involving claims for exemptions from generally applicable laws. In addition to doctrinal differences, the courts are acutely attuned to the identity of the governmental actor behind a law. Courts are far more likely to uphold federal laws than state and, especially, local laws. This federalism effect is particularly profound in suspect class discrimination and free speech cases—the latter an area of law where the prevailing scholarly literature ignores federalism as a factor in judicial review. Courts are also more likely to uphold judicial orders that burden constitutional rights than legislation or executive action, and tend to uphold prison policies but not those of educational institutions. Strict scrutiny review is institutionally sensitive.

Within discrete areas of law, strict scrutiny varies even more with the underlying context and courts have identifiable tendencies to uphold or reject particular types of laws. In suspect classification cases, courts are relatively likely to uphold law enforcement affirmative action policies and reject public contracting and redistricting laws—with Democrats being far more likely than Republicans to vote to uphold any use of race. In freedom of speech cases, strict scrutiny is relatively easy to overcome for laws or court orders limiting access to judicial proceedings or regulating charitable solicitation. By contrast, courts systematically invalidate sign ordinances, viewpoint discriminatory access denials to public forums, and a range of other speech limitations. Campaign speech restrictions are capable of surviving, but do not do so at an inordinately high rate and, surprisingly, strict scrutiny did not prove unusually lenient when applied to contribution limits. Strict scrutiny is always fatal to laws intentionally discriminating against religion and to limitations on the right to vote, but capable of being overcome in substantive due process, right to travel, and freedom of association cases.

This study only scratches the surface of the strict scrutiny case law, and many more questions remain to be answered. Which prong of strict scrutiny is more deadly, the ends analysis or the fit requirement? Are some ends more likely to be deemed compelling than others? Is tbere a functional difference between a fit analysis that emphasizes over- and under-inclusiveness on the one hand and less restrictive alternatives on the other? Does strict scrutiny work to "smoke out" illegitimate motives or is it just a tool to conduct a

straightforward cost-benefit analysis? What was strict scrutiny like before 1990, and how much more strict will it be in future years? All of these questions, however, are only worth asking if strict scrutiny is capable of being overcome. If nothing else, this study has conclusively shown that strict scrutiny is survivable in practice and not fatal in fact.

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