STUDENTS AND WORKERS AND PRISONERS—OH, MY! A CAUTIONARY NOTE ABOUT EXCESSIVE INSTITUTIONAL TAILORING OF FIRST AMENDMENT DOCTRINE

Scott A. Moss*

First Amendment free speech doctrine has been called "institutionally oblivious" for ignoring how different institutions present different legal questions. This Article analyzes a little-discussed phenomenon in the growing literature about institutional context in constitutional law. With certain institutions, the situation is not institutional obliviousness but the opposite: extreme institutional tailoring of speech doctrine. The burden of proof ordinarily is on the government to justify speech restrictions, but in three institutions—public schools, workplaces, and prisons—courts allow heavy speech restrictions and defer to government officials. Even if these institutions need to restrict speech unusually often, why do we need different doctrine—institutionally tailored government-deferential standards—rather than standard heightened scrutiny? Courts have given no real answer.

This Article serves three purposes. First, it attempts a descriptive analysis of why courts might perceive a need to tailor doctrine to these institutions. The two main arguments are waiver and risk. The waiver argument is straightforward. Individuals in certain institutions made a free, ex ante choice to enter a setting with restrictive rules. The risk argument is somewhat more involved. Heightened scrutiny, by declaring speech restrictions presumptively invalid, risks erroneously allowing dangerous speech in institutions in which there is both high error cost and high error probability. Error cost is high if a court erroneously allows disruptive speech in, for example, a prison prone to riots. Error probability is high because in these complex institutions, information costs are high for courts (so courts should defer to institutional judgments) and speech restrictions are warranted more often (so even a modest rate of error can yield a high number of errors). This risk analysis suggests that economics can help analyze constitutional issues involving risk and error cost and probability.

Second, this Article undertakes a critical analysis of the above arguments for institutional tailoring, finding several flawed or overstated. The waiver argument

* Associate Professor of Law, University of Colorado Law School (scott.moss@colorado.edu); J.D., Harvard Law School; M.A., B.A., Stanford University. I wish to thank the following: for their helpful suggestions and edits, Evan Criddle, Melissa Hart, Marianna Moss, Jessica Price, Peter Rofes, Paul Secunda, and Andrew Siegel; for their diligent and resourceful efforts, my research assistants Eric Lengell, Teresa Mambu, and William Nickol; and for their feedback on presentations of this Article, the attendees of the Marquette University Law School Faculty Workshop Series and this UCLA *Law Review* Symposium, "*Constitutional Niches*": *The Role of Institutional Context in Constitutional Law*.

contravenes precedent (and so cannot be courts' actual reason) and is based on exaggerated premises of free choice and foreseeable consequences. The error cost point is exaggerated because the government can often guard against harmful speech with monitoring rather than a ban. The error probability argument assumes high information costs of courts evaluating these institutions, yet courts regularly handle cases in more complex institutions. The waiver and risk arguments are exaggerated but not wholly unfounded. Both are stronger for prisons; and the waiver argument is stronger for workplaces than schools. This Article offers a typology of the strength of the waiver and risk arguments in each institution.

Third, this Article proposes that speech law, like equal protection law, apply heightened scrutiny in all institutions, though with modest tailoring. Considering institutional context is good in moderation, bad in excess. By dividing speech rights so starkly by institution, courts have not recognized, but rather overstated, the uniqueness of schools, workplaces, and prisons—and allowed more speech restriction than is justified. This risk of exaggerating uniqueness is inherent to tailoring and should give courts pause before tailoring constitutional law. This Article concludes with a pragmatic proposal to scale back the tailoring of speech doctrine: Courts should apply intermediate scrutiny to speech claims in these institutions.

INTRODUCTION

Any law as general as the freedom of speech clause of the First Amendment must be subdivided into categories. It must make distinctions between what speech is and is not protected, whether by subject matter (such as commercial versus noncommercial;[1] obscenity or pornography[2]), by medium (broadcast or print[3]), by institutional context,[4] or by some other criteria.[5] Yet, courts have not given much of a coherent account of whether, and to what extent, speech rights should vary by the institutional context of the speech. Frederick Schauer has noted and criticized an apparent

1. *Compare, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing for less protection for commercial speech because it is unrelated to self-governance), *with* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (arguing to the contrary because commercial speech is informational).

2. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) ("[P]ornography can be banned only if obscene . . . ."); Roth v. United States, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press."). Many criticize the denial of constitutional protection to sexual or hateful speech. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1507 (1996) ("[T]here is no way to draw a principled distinction between 'art' and 'pornography,' or 'art' and 'hate speech' . . . .").

3. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.6.2.4 (3d ed. 2006) ("Can the government require that the media make newspaper space or broadcast time available to respond to personal attacks? . . . Right to reply laws are allowed as to broadcast media, but not the print media.").

4. *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

5. *See generally id.* at 1256–64 (discussing the range of possible breakdowns of speech protections).

"general presumption that First Amendment rights do not vary substantially with institutional setting"[6]:

> [H]aving created the test for obscenity in the context of sales of printed materials by mail, the [U.S. Supreme] Court . . . appl[ies] the same line between the impermissibly obscene and the permissibly sexually explicit to outdoor theaters, to dial-a-porn telephone services, to cable and satellite television, and to the Internet . . . .[7]

That the Court is "institutionally oblivious,"[8] Schauer argues, has "distorted doctrine and underprotect[ed]"[9] speech, because by failing to account for institutional context, the Court has "overlooked important . . . differences"[10]:

> A Court that believes it must apply the same . . . grounds of offensive content to both broadcast television and Bob's XXX Adult Bookstore and Peepshow is, in reality, much more likely to allow less for Bob than it is to permit virtually everything for CBS during prime time . . . .[11]

Schauer has been the most persistent critic of "institutionally oblivious" constitutional doctrine, but others similarly have criticized courts' failure to admit that they scrutinize state programs more closely than federal ones ("vertical" tailoring)[12] and failure to recognize particular needs to protect "First Amendment institutions" like libraries, universities, religious associations, and the press.[13]

The main institutions Schauer discusses are media types (such as blogs versus newspapers), means of communication (Internet, broadcast, and print), and governmental institutions' own speech activities (administering

6. *Id.* at 1263.

7. *Id.* at 1261–62 ("[B]roadcasting and . . . zoning of adult establishments [are] the only significant exceptions." (footnotes omitted)); *see also id.* at 1262 ("[T]he Court conceptualized the library as . . . a *purchaser* of books . . . the same conceptual hopper as the government providers of health care . . . government employers . . . [and] government funders of art . . . ." (emphasis added) (footnotes omitted)).

8. *Id.* at 1264.

9. *Id.* at 1273.

10. *Id.* at 1271.

11. *Id.* at 1272.

12. *See* Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1961 (2007).

13. Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007) [hereinafter Horwitz, *Universities as First Amendment Institutions*]; Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 589 (2005) [hereinafter Horwitz, Grutter's *First Amendment*].

libraries, arts grants, and political debates).[14] Yet in other institutional contexts, the situation is the opposite of institutional obliviousness: Courts allow plaintiffs' speech within certain institutions—public schools, workplaces, and prisons—to be heavily restricted *because it occurs within that institution*. Whereas Schauer fears underprotection from too little institutional tailoring, in these three contexts, it is courts' extreme institutional tailoring that yields underprotection.

This Article does not quarrel with Schauer's and others' arguments for more tailoring as to certain unique institutions, such as government entities that engage in or fund speech themselves. Rather, it argues that courts tailor too much as to certain other institutions. Courts thus manage the difficult feat of succumbing to both Scylla and Charybdis—occasionally veering too far in one direction; occasionally veering too far in the other—and thereby experience the worst of two opposite paths by not setting a consistent course.

In student, worker, and prisoner core speech claims—challenges to normally forbidden restrictions on controversial speech, email, or expressions of grievances—courts do not apply any heightened scrutiny. Unlike in most speech cases, the burden of proof is not on the government to justify its restrictions of even core speech activities; rather, courts defer substantially to school and prison officials' judgments, and they protect public employee speech with a mere balancing test that denies any protection to speech that is too job-related or insufficiently a matter of public concern. Part I documents this substantial institutional tailoring by the Court.

Certainly, whereas the government rarely has good reason for substantially restricting core speech in public places, it more often will have good reason to do so to maintain discipline, mission focus, and order in institutions like schools, workplaces, and prisons. But why do courts need different speech doctrine—government-deferential tests that are institutionally tailored rather than heightened scrutiny—to so acknowledge? While courts regularly note the greater need for speech restrictions in such institutions, they have not given a coherent account of why institutionally tailored doctrine is necessary.

Part II attempts to discern two reasons that courts might perceive a need to tailor doctrine to these institutions. The first is waiver: By entering public schools, workplaces, or prisons, individuals waive any objection to speech restrictions those institutions impose. The second is that in

14. Schauer, *supra* note 4, at 1271–72; Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) [hereinafter Schauer, *Principles, Institutions, and the First Amendment*].

institutions requiring more speech restrictions, heightened scrutiny is ill-advised, because of the high cost of judicial error (courts disallowing a necessary restriction on dangerous prisoners' speech, for example) and the high probability of judicial error when courts impose a high burden of proof on institutions like schools and prisons whose management involves specialized knowledge that is difficult to elaborate clearly in court. The latter rationale is an economic risk analysis of error cost and probability. If the risk (probability times cost of error) of erroneously allowing harmful speech is especially high in certain institutions, then heightened scrutiny may be inappropriate. This analysis illustrates how economic theory can help analyze constitutional issues that entail analysis of risk.

Following the above descriptive analysis, Part II undertakes a critical analysis, arguing that many of the above reasons for tailoring are based on faulty assumptions or are inconsistent with key constitutional principles. Even if speech restrictions are warranted more often in certain institutions, that alone does not justify departing from heightened scrutiny. Absent any other rationales for institution-specific leniency for speech restrictions (that is, waiver, information cost, or error cost), the mere fact that the government more often should prevail simply means that school, workplace, or prison speech restrictions more often will satisfy heightened scrutiny. While many aspects of these arguments for tailoring are flawed, some are partly valid as to certain institutions. The waiver and risk arguments are strongest for prisons; the waiver argument is stronger for workplaces than schools. Part II closes with a typology of the strength of each argument in each of the three institutions discussed.

Finally, Part III discusses how speech law could, like equal protection law, apply heightened scrutiny to all institutions, with some minimal institutional tailoring. A primary objection to rejecting tailoring is that without dividing speech law by institution, courts cannot account for different effects of speech in different institutions; disruptive speech, for example, is especially harmful in schools, workplaces, and prisons. But like many things in life, considering institutional context is good in moderation, bad in excess. By dividing speech rights so starkly by institutional context, courts have not just recognized, but in fact overstated, the uniqueness of schools, workplaces, and prisons. Consequently, courts are allowing more speech restriction than actually is justified by the nature of those institutions. This risk of exaggerating institutional uniqueness is inherent to institutional tailoring and therefore should give courts pause before they tailor legal doctrines to particular institutions. Part III concludes with a pragmatic

proposal for a small degree of institutional tailoring. Because the arguments in favor of tailoring are overstated but not wholly frivolous, courts should apply intermediate, not strict, scrutiny to school, workplace, and prison speech claims.

I. EXTREME INSTITUTIONAL TAILORING: SCHOOLS, WORKPLACES, AND PRISONS

To illustrate the difference that institutional context makes, this Article focuses on core speech activities, such as speaking or writing on controversial issues or government actions, or exchanging written materials such as mail or books. Such activities are largely free from government interference when individuals undertake them on private or public property. Even on public property, the government lacks the right of a property owner: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[15] With few exceptions, the government can impose only reasonable "time, place, and manner" restrictions that are content neutral, serve a significant interest, and "leave open ample alternative channels" for speech;[16] the government cannot bar speech from a public space simply on the theory "that it may be exercised in some other place."[17]

In contrast, when the speaker is a public school student, a government employee, or a prisoner, core speech activities may be restricted to a degree clearly not permitted for other types of speakers.

(1) *Public Schools*. The Court has allowed content-based restrictions on students' speech (at least since the 1980s[18]), including censoring student newspaper articles on pregnancy and divorce[19] and punishing a high school student for a speech with (fairly tame) sexual innuendo.[20] Most recently, the Court allowed punishment of a student for displaying a banner bearing the

15. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (rejecting the argument that the government can restrict speech as the "owner" of public property).

16. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

17. Schneider v. New Jersey, 308 U.S. 146, 163 (1939).

18. The Court in the 1960s and 1970s recognized students' rights to antiwar and antipolice expression. *See* Papish v. Bd. of Curators, 410 U.S. 667 (1973) (antipolice cartoon); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (antiwar armbands).

19. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

20. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

message "BONG HiTS 4 JESUS,"[21] which the Court admitted was "cryptic"[22] but nevertheless said was punishable because school officials "reasonably viewed [it] as promoting illegal drug use"[23]—a standard that departs markedly from the Court's general First Amendment rule that encouragement of lawlessness is punishable only if it intends to, and is likely to, incite lawless action that is imminent.[24]

(2) *Public Employment.* "A government entity has broader discretion to restrict speech when it acts in its role as employer" in that courts analyze public employers' restrictions on employee speech not with heightened scrutiny but with a mere balancing test—or, when the speech is work-related or not of public concern, no protection at all.[25] Accordingly, an assistant district attorney's complaint about serious prosecutorial misconduct, for example, was entirely unprotected against retaliation by his public employer.[26]

(3) *Prisons.* "Most regulations of prisoner speech have been upheld"[27] because courts do not require prison speech restrictions to be necessary to compelling or significant interests, just "reasonably related to legitimate penological interests."[28] The Court has upheld substantial restrictions on prisoners' rights to send mail to other prisoners,[29] to order books,[30] and even to have any newspapers, magazines, or photographs.[31]

---

21. Morse v. Frederick, No. 06–278, slip op. at 2 (U.S. June 25, 2007).

22. *Id.* at 6.

23. *Id.* at 8.

24. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy . . . of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

25. Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006). *See generally* Sonja Bice, *Tough Talk From the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick's *Unworkable Employee/Citizen Speech Partition* (Marquette Univ. L. Sch., Research Paper No. 06-37, 2006), *available at* http://ssrn.com/abstract=942684.

26. *Garcetti*, 126 S. Ct. 1951.

27. CHEMERINSKY, *supra* note 3, § 11.4.4 (collecting cases).

28. Beard v. Banks, 126 S. Ct. 2572, 2578 (2006) (quoting Turner v. Safley, 482 U.S. 78, 87 (1987)).

29. *See Turner*, 482 U.S. 78 (upholding the rule against prisoners mailing letters to prisoners elsewhere).

30. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (upholding rule against prisoners receiving hardcover books other than from publishers or bookstores).

31. *See Beard*, 126 S. Ct. 2572 (upholding the rule disallowing newspapers, magazines, or photographs to prisoners housed in unit for those who committed misconduct while incarcerated).

Such schisms do not exist in all constitutional fields. For example, in equal protection doctrine, the same "tiers of scrutiny" analysis applies to all matters,[32] and the Court has declared strict scrutiny applicable even to claims brought by public school students,[33] public employees,[34] and prisoners.[35]

II. WAIVER AND RISK: TWO ARGUMENTS FOR TAILORING AND THEIR LIMITS

This Part serves two purposes. First, it attempts to explain why courts might perceive a need to tailor doctrine to the above-mentioned institutions. Fundamentally, the problem of evaluating speech restrictions is one of competing entitlements: the individual's right to speak versus the government's right (even duty) to perform public functions like operating public schools, workplaces, and prisons.[36] Even where an individual's entitlements merit strong protection, they still can be restricted in certain settings on the two main rationales of waiver and risk.

(1) *Waiver*.[37] Speech rights are waivable; we can choose, and even bind ourselves legally, not to speak. Individuals in certain institutions make a free, ex ante choice to enter a setting with restrictive rules. Public school students' parents exercise a choice among school districts and other options (private school or home schooling); public employees accept jobs that

32. *See generally* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342 (2006) ("[T]he modern three-tiered approach to equal protection review has become more and more embedded into the sinews of the law over the last quarter century.").

33. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Brown v. Bd. of Educ., 347 U.S. 483 (1954). For further analysis of the applicability of strict scrutiny in this context, see *infra* Part III.B.

34. The Supreme Court has not heard a case specifically involving race discrimination against a public employee, in part because many public employment cases are cast as statutory rather than constitutional discrimination claims. *See, e.g.*, Taxman v. Bd. of Educ., 91 F.3d 1547, 1552 (3d Cir. 1996). Still, it is well established that "employment practices which discriminate on the basis of race are subjected to strict scrutiny" under the Equal Protection Clause. Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 788 (1997) (collecting cases); *see also* Patrolmen's Benevolent Ass'n of N.Y. v. City of New York, 310 F.3d 43, 52 (2d Cir. 2002); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998).

35. *See* Johnson v. California, 543 U.S. 499 (2005). For further analysis of the applicability of strict scrutiny in this context, see *infra* Part III.A.

36. Guido Calabresi and A. Douglas Melamed's classic article noted how all asserted entitlements compete with a contrary entitlement. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

37. See Part II.A for a full elaboration of the waiver argument.

require them to obey employer-imposed restrictions; and prisoners, by committing crimes, force society to house them in prisons that require security restrictions.

(2) *Risk of Erroneously Allowing Dangerous Speech.*[38] In settings requiring more speech restrictions, it may make sense not to apply heightened scrutiny to the government. In some settings
   (a) *the cost of error is high*—if a court erroneously allows dangerous speech by a prisoner, for example, deaths or riots could result; and
   (b) *the probability of error is high* with heightened scrutiny because
      (i) *information costs are high* for courts analyzing complex, specialized institutions like schools or prisons, so courts should defer to the institutions' judgments; and
      (ii) *speech restrictions should be allowed more often* in certain institutions, so even a modest *rate* of judicial error can yield a high *number* of errors of allowing dangerous speech.

As to the risk analysis, if the risk (probability times cost of error) of erroneously allowing harmful speech that warrants restriction is especially higher in certain institutions, then it might make sense to relax the heightened scrutiny ordinarily applicable to speech restrictions.

Second, this Part engages in not only the above descriptive analysis of how courts might justify institutional tailoring, but also a critical analysis finding that many of the reasons for varying speech rights by institution are based on faulty assumptions or are inconsistent with key constitutional principles.

- The waiver argument is contrary to much case law (and therefore cannot be courts' actual reason) and, more importantly, is based on exaggerated premises of free choice and foreseeable implied waiver.[39]
- The high error cost point is exaggerated because even if useful speech restrictions were disallowed, the government could guard against harmful speech by spending more on monitoring (inspecting rather than banning mail, for example). While preventing serious harm justifies restricting speech, avoiding administrative costs rarely does.[40]

38. See Part II.B.1 for a full elaboration of the risk argument.
39. *See infra* Part II.A.
40. *See infra* Part II.B.2.a.

- The argument for deference based on probability of error assumes that there are high information costs of courts evaluating complex institutions like schools, workplaces, and prisons. Yet these institutions are not unusually resistant to outside analysis; courts regularly evaluate facts, set legal rules, and pass judgment in cases involving far more complex contexts.[41]

Despite the flaws in the waiver and risk arguments, it probably is true that speech restrictions are warranted more often in certain institutions. But absent any other rationales for institution-specific leniency for speech restrictions, the mere fact that the government more often should prevail does not justify a departure from heightened scrutiny; it simply means that speech restrictions in schools, workplaces, or prisons more often will satisfy heightened scrutiny.

Ultimately, the waiver and risk arguments are more persuasive in some contexts than in others. For example, waiver and risk arguments are stronger for prisons than schools or workplaces; the waiver argument is stronger for workplaces than schools. Subpart C offers a typology of the strength of each of the two arguments in each of the three contexts this Article discusses.

A. Waiver

Public schools, employment, and prisons each, to varying extents, might be institutional contexts in which individuals, by entering those places, waive their speech rights. This argument varies in persuasive power in each of these three contexts. This Subpart discusses each in turn.

1. Public Schools: Choice and Federalism

The waiver argument seems most persuasive for institutions in which speech is restricted as a result of the speaker's choices. Thus, the argument seems stronger for prisons (restrictions on autonomy seem necessary to the imprisonment that follows a choice to commit a crime) and for workplaces (restrictions on autonomy are part of the employment terms an employee accepts by taking and keeping a job) than in schools. Yet even the school context features an element of choice. Parents of schoolchildren can opt out of the public school system entirely, as many do in choosing private

41. *See infra* Part II.B.2.b.

schools or home schooling.[42] Even the vast majority who remain in the public school system exercise a choice as well: They choose the school district in which they live; essentially, parents choose which local government they prefer.

The waiver argument in the school context thus is essentially a federalism argument—that in a system of state sovereignty and local control within each state, local governments like school districts should have more leeway than the federal government to adopt their own viewpoints and select permissible speech. In this vein, some scholars have argued that speech rights[43] and other constitutional rights[44] should apply less strictly to state and local governments than to the federal government, in part because Americans can more effectively lobby or, by moving, opt out of a state or local government restricting their rights than a federal government doing so.

The argument that state or local governments can restrict rights more than the federal government, however, has been rejected by the Court,[45] except as to some of the more technical procedural guarantees in

42. *See generally* LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW 78–85 (2002).

43. *See, e.g.*, Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223, 246, 249 (2005) ("Permitting localities to regulate such things as pornography would have led to a broader array of political communities . . . insofar as there would have been polities that regulated pornography and others that did not. . . . [L]ower levels of government might be given greater leeway to regulate the content of speech . . . ."). A state-federal distinction has been defended as comporting with the original intent of the framers of the U.S. Constitution, who saw the First Amendment's free speech guarantee as a limit on federal power that did not infringe upon state sovereignty. *See, e.g.*, William T. Mayton, *From a Legacy of Suppression to the "Metaphor of the Fourth Estate,"* 39 STAN. L. REV. 139, 144 (1986) ("[I]n the allocation of powers upon which the Constitution was built . . . injurious speech was to be addressed by the states in the exercise of their residual police power. And that allocation, as James Madison explained, 'account[ed] for the policy of binding the hands of the federal government.'").

44. *See, e.g.*, Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624 (2006) (arguing that the Takings Clause should apply differently to local governments than to higher levels of government because local governments are more responsive to property owners and more risk averse about avoiding constitutional litigation).

45. *See* Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985) (stating that under the Establishment Clause of the First Amendment, it is a "firmly embedded" principle that "States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress"). Justice Thomas has argued that the Establishment Clause should apply less strictly to state and local government, *see* Zelman v. Simmons-Harris, 536 U.S. 639, 677 (2002) (Thomas, J., concurring), but thus far to no avail; no other Justice, for example, joined his *Zelman* concurrence.

the Bill of Rights.[46] In the past fifty years, only three Justices have argued that speech rights should be lesser at the state and local level: Justices Harlan and Jackson in the 1950s,[47] and Justice Rehnquist in the 1970s,[48] all three in opinions that were not joined by any other Justices.[49] When it comes to individual rights, there is good reason not to defer more to state and local

46. The Court has relaxed constitutional requirements for state and local governments only to the extent that it deems certain rights in the first eight amendments not to be "incorporated" into the Fourteenth Amendment's restrictions on states, on the ground that certain rights are insufficiently "fundamental" or "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937) (stating criteria for applying the Bill of Rights guarantees to states). Rights in the first eight amendments that apply less or not at all to states typically are not core rights like free speech but more technical, procedural rights, the key ones being the right to grand jury indictment in criminal cases, *see* Hurtado v. California, 110 U.S. 516 (1884), the right to a jury in civil cases, *see* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916), and the right to a unanimous twelve-member criminal jury, *see* Burch v. Louisiana, 441 U.S. 130 (1979) (disallowing nonunanimous juries of six, but only after precedents allowing unanimous juries of six or nonunanimous juries of twelve).

47. *See* Roth v. United States, 354 U.S. 476, 503, 506 (1957) (Harlan, J., concurring in part and dissenting in part) ("I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment 'incorporates' the First in any literal sense . . . . [N]o overwhelming danger to our freedom . . . is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books." (citing Beauharnais v. Illinois, 343 U.S. 250, 294–95 (1952) (Jackson, J., dissenting) (asserting, as to the level of constitutional protection for speech, "[t]he inappropriateness of a single standard for restricting State and Nation . . . . I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power"))).

48. Buckley v. Valeo, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part) ("For the reasons stated in the dissenting opinion of Mr. Justice Jackson in *Beauharnais v. Illinois*, and by Mr. Justice Harlan in his dissenting opinion in *Roth v. United States*, I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the 'general principle' of free speech that the latter incorporates." (citations omitted)).

49. More recently, Justice Stevens has expressed a similar view, opining that local libraries can install Internet filters even though the U.S. Congress could not require such filters. United States v. Am. Library Ass'n, 539 U.S. 194, 220–23 (2003) (Stevens, J., dissenting) ("[L]ibraries that decided to use such software on *all* of their Internet terminals . . . did not act unlawfully. Whether it is constitutional for the Congress of the United States to impose that requirement . . . however, raises a vastly different question . . . . [L]ocal decisions tailored to local circumstances are more appropriate than a [federal] mandate . . . ." (internal citations omitted)). This is a less clear adoption of the Harlan-Jackson view (which Stevens did not cite) than Justice Rehnquist's for two reasons. First, Justice Stevens was not ruling directly on a local speech restriction, just opining that it would be better than the federal restriction actually at issue in the case. Second, libraries are a somewhat unique type of local government, one that necessarily makes its own speech choices in deciding which books to buy, and that arguably has its own speech rights, so it is far from clear that Justice Stevens would allow other kinds of local governments (such as school districts limiting student speech) to restrict speech more than the federal government. *See generally* Horwitz, *Universities as First Amendment Institutions*, *supra* note 13.

governments than to the federal government. Whereas local government may be quite responsive to property owner interests,[50] it is unlikely to be responsive to the interests of minority groups, whether racial, religious, or political—as illustrated by the many cases in which the Court has disallowed state and local government crackdowns on those with disfavored beliefs or practices.[51] And where responsiveness cannot be assumed, the only remaining argument for deferring more to local governments is citizen choice—which is the waiver argument, that by choosing to remain in a locality, one waives any objection to its rules.

The "choice" to remain in a locality, however, often is a purely formalistic choice; many have no meaningful option to move. Moving one's residence not only entails economic costs that some cannot afford (transportation and a means to transport all one's belongings), but also often means sacrifice to one's career, social network, and family ties; moving school-age children entails additional practical difficulty.

Given the substantial transaction costs[52] of moving one's residence, we cannot assume that when a town restricts a group's rights, the restriction must be socially efficient because the group did not depart en masse. The presence of substantial transaction costs means that rational choices may not lead to the socially efficient allocation of human or other capital.[53] Still, there is at least a formal choice to remain in a state or locality that restricts one's rights, so courts' rejection of the idea that states and localities have more power to restrict rights is an implicit rejection of the idea that unrealistic, formal choice is a basis for allowing restrictions of fundamental rights. The rest of this Subpart proceeds on this principle: that for any waiver argument to hold water, it must be based on a realistic conception of choice, not a merely formal one.

50. *See* Serkin, *supra* note 44.

51. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (overturning a city ordinance against only those fighting words with certain discriminatory content); Texas v. Johnson, 491 U.S. 397 (1989) (overturning a state law against flag burning); City of Houston v. Hill, 482 U.S. 451, 462 (1987) (overturning a city ordinance that "prohibits speech that in any manner . . . interrupt[s] an officer"); Cohen v. California, 403 U.S. 15 (1971) (overturning a state prosecution for profanity in the courthouse).

52. "Transaction costs" is a term that, sometimes confusingly, incorporates a variety of different costs. The present analysis focuses on costs that inhibit bargaining and free choice, which makes appropriate the broadest possible definition of transaction costs, "all obstacles to bargaining." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 91–94 (4th ed. 2004).

53. *See id.* at 88–90; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 55–56 (6th ed. 2003).

2. Public Employment: Agreeing to Employer Conditions

Until the mid-twentieth century, the waiver doctrine was the express reason that public employees had no First Amendment speech rights against their government employers:

> [T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted . . . constitutional rights. The classic formulation of this position was that of Justice Holmes' . . . on the Supreme Judicial Court of Massachusetts . . . : "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[54]

The Court clearly relied upon the waiver rationale up to and including in its 1952 decision in *Adler v. Board of Education of New York*.[55] *Adler* allowed a state law that barred from civil service jobs any individuals who had advocated the overthrow of the government by force:

> It is clear that such persons have the right . . . to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State . . . on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities . . . . *If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.*[56]

Adler was abrogated in just a few years, the Court later explaining that "constitutional doctrine which has emerged since that decision has rejected its major premise . . . that public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[57]

Yet the waiver rationale has survived the death of *Adler*. It exists alongside the external costs argument as a reason the Court does provide—or at least could provide—less speech protection in public employment than in other contexts. Even after *Adler* was invalidated, lower courts ruling against public employee speech rights continued to cite the old *Adler* theory: "'If they do not choose to work on such terms, they are at liberty

54. Connick v. Myers, 461 U.S. 138, 143–44 (1983) (alteration in original) (quoting McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (Mass. 1892)).

55. 342 U.S. 485 (1952).

56. *Id.* at 492 (emphasis added) (citations omitted).

57. Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (invalidating a policy similar to that upheld in *Adler*).

to retain their beliefs and associations and go elsewhere.'"[58] Considering its discredited origins, the waiver argument has proven remarkably resilient. It appeared in the 2006 Supreme Court decision substantially narrowing public employee speech rights, *Garcetti v. Ceballos*[59]: "When a citizen enters government service, the citizen by necessity must *accept certain limitations* on his or her freedom."[60] The earliest post-*Garcetti* decisions began to echo the old Holmes-through-*Adler* logic about having "no constitutional right to be a policeman"—for example, by explaining *Garcetti* as holding that a public employee "has no free speech interest in performing the duties of his job."[61]

Setting aside its roots in the case law and turning to the merits of the waiver argument, the argument stands on shaky ground. An employee's decision to work for a public employer may sometimes be a free choice when she is deciding whether to accept a job, but not always, given the high unemployment rates in certain major municipalities and state capitals that employ large numbers of public employees.[62] Additionally, once employees already have been on the job, they have less realistic choice to leave the job if they object to a workplace rule.

Leaving a job entails costs and risks. Job searches impose information costs, and interviewing and moving to a new workplace impose transaction costs, including substantial amounts of time. Quitting before knowing what job one might find is obviously risky because the next job could be

58. Cook v. Hudson, 365 F. Supp. 855, 859 (D. Miss. 1973) (quoting *Adler*, 342 U.S. at 492) (allowing a public school policy barring public school teachers from enrolling their children in a racially discriminatory private school).

59. 126 S. Ct. 1951 (2006).

60. *Id.* at 1958 (emphasis added).

61. Donnell v. City of Cedar Rapids, 437 F. Supp. 2d 904, 929 n.13 (N.D. Iowa 2006) (one of the first cases to cite and apply *Garcetti*); *see also* Ruotolo v. City of New York, No. 03 Civ. 5045 (SHS), 2006 WL 2033662, at *4 (S.D.N.Y. July 19, 2006) ("When a public employee goes 'to work and perform[s] the tasks he [i]s paid to perform,' that employee acts as a governmental employee and his speech is not protected by [the] First Amendment." (alterations in original) (quoting *Garcetti*, 126 S. Ct. at 1960)); Logan v. Dep't of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 WL 1750583, at *1 (S.D. Ind. June 26, 2006) ("If the speech giving rise to Defendant's punitive action against the speaker/employee occurred as part of the employee's job, then the government agency does not infringe any private liberties because the speech 'owes its existence to a public employee's professional responsibilities.'" (quoting *Garcetti*, 126 S. Ct. at 1960)). For further discussion of these decisions, which appear to be the first three federal cases dismissing claims on the newly announced *Garcetti* doctrine, see Bice, *supra* note 25, at 18–20.

62. As of December 2006, for example, various cities and states had unemployment rates significantly higher than the federal rate of 4.5 percent: Detroit (71 percent higher); Mississippi (67 percent higher); Michigan (58 percent higher); District of Columbia (40 percent higher). Bureau of Labor Statistics, Civilian Labor Force and Unemployment by State and Selected Area, Seasonally Adjusted, *available at* http://www.bls.gov/news.release/laus.t03.htm (last visited Jan. 24, 2007).

inferior in any number of ways that are hard to foresee, or simply could be hard or impossible to find. Even if one does not leave a job until the next job is lined up, there still is risk: One never knows in advance what the new job will really be like.[63]

Once an employee already has been on the job for a period of time, moreover, there are additional costs to leaving. These costs often include a loss of benefits, as a new job may not offer health benefits or retirement plan participation for the first few months or year,[64] and leaving a job often entails losing not yet vested deferred compensation[65] or retirement benefits.[66] More subjectively, an employee who holds a job for a long time may come to feel an emotional attachment to it (assuming he or she actually likes the job), as indicated by social science findings on the "endowment effect" (valuing something more when one has it for a longer time).[67] Finally, leaving a

63. Most risks that a new job will be worse than anticipated are not legally actionable. Only in certain jurisdictions can employees sue new employers for fraudulent misrepresentation, and even there only for certain types of clear misrepresentations. *See generally* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At-Will*, 67 U. PITT. L. REV. 295 (2005).

64. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 291 (3d ed. 2000) ("A [pension] plan is permitted to exclude employees who have not completed one year of service." (citing IRC § 410(a)(1)(A) (2000), and ERISA § 202(a)(1)(A) (codified at 29 U.S.C. § 1052(a)(1)(A) (2000)))); Elizabeth Hubbard, *Age Discrimination: Coping With Ambiguity, Court Decisions and Clients Thoughts From the Plaintiff's Side*, in LITIGATION, at 630–31 (PLI Litig. & Admin. Practice, Course Handbook Series No. 571, 1997) ("[I]f you have a pre-existing condition, the insurance carrier for a later employer may choose not to cover this condition for a period of time (typically, one year)."). More broadly, it is common for employers to provide new employees health insurance only after three months of employment—a norm sufficiently widespread to have become part of even broad legislative proposals to mandate employer-provided health care. *See, e.g.*, Jennifer Bender, *The Impact of ERISA on California Health Care Law Following the United States Supreme Court's Pro-Preemption Interpretation*, 26 WHITTIER L. REV. 1169, 1184 (2005) (recounting how even under a broad California bill to mandate employer-provided health insurance, "[t]o qualify for health coverage, an employee was required to work as least 100 hours per month for the same employer for at least three months").

65. When salespeople paid on commission leave their jobs, they often lose any right to commissions on sales they made for which their employer has not yet received full payment. *See, e.g.*, Dwyer v. Burlington Broadcasters, Inc., 295 A.D.2d 745 (N.Y. 2002) (denying plaintiff's claim for her sales commissions under such circumstances).

66. Congress noted the risk of losing accrued benefits in enacting statutory protection for employees at risk of being terminated just before they reach the point at which their benefits vest or at which they become entitled to a payout of pension benefits, for example. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 4.27, at 602 (3d ed. 2004) ("[ERISA's] legislative history contains stories of employees who were fired after many years of faithful service, just before they were to become eligible for a pension or other employment benefit.").

67. *See* Scott A. Moss & Peter H. Huang, Judges' "Behavior" Problems: What Behavioral Economics and Happiness Research Say Employment Law Gets Wrong (unpublished manuscript, on file with authors). *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

job for a new one often requires moving, which for many people is a costly or entirely unrealistic option, as discussed above.[68]

3. Prisons: "If You Can't Do the Time, Don't Do the Crime"

The waiver argument seems strongest as to prisoners. The cliché "if you can't do the time, don't do the crime" reflects this waiver argument—choosing to commit a crime is a choice to risk incarceration, which inherently involves a loss of personal autonomy. In the past, courts did so hold:

> A convicted felon . . . is in a state of penal servitude to the State. He has, as a consequence of his crime, *not only forfeited his liberty, but all his personal rights* except those which the law in its humanity accords to him. He is for the time being the slave of the State. . . . The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead.[69]

The modern state of the law, however, is to the contrary. A prisoner is not a "slave of the State" who is deemed to have "forfeited . . . all his personal rights." The Supreme Court has so held:

> Prison walls do not form a barrier separating prison inmates from the protections of the constitution. . . . [P]risoners retain the constitutional right to petition the government for the redress of grievances; they are protected against invidious racial discrimination by the equal protection clause . . . and they enjoy the protections of due process.[70]

Based on this principle, it is well established that criminal sentences cannot violate constitutional rights.[71] Setting aside how the Supreme Court has ruled, waiver of *all* rights does not logically follow from commission of a crime. To the contrary, the only waiver that seems to logically follow from a crime is a waiver of the rights that must be abridged for the criminal's prison to be operated.

---

68. *See supra* Part II.A.1 (discussing the waiver argument in context of "choosing" public schools).

69. Ruffin v. Commonwealth, 21 Gratt. 790, 1871 WL 4928, at *4 (Va. 1871) (emphasis added). *Contra* State v. Dignan, 171 S.E. 527, 528 (W. Va. 1933) ("The principles of the Ruffin Case are not the law in this state. Here, all men are entitled to the protection of the Constitution, and this protection is not forfeited by even a convict except to the extent reasonably necessary to expiate the offense already committed.").

70. Turner v. Safley, 482 U.S. 78, 84 (1987) (citations omitted).

71. *E.g.*, Owens v. Kelley, 681 F.2d 1362, 1364 (11th Cir. 1982) ("The probation requirements imposed . . . did not merely consist of perfunctory reports; instead, the conditions were obviously fashioned for the purpose of making probation a meaningful rehabilitative experience . . . . Nevertheless, all such efforts must . . . not violate the constitutional rights of the probationer.").

Many seem to find emotional appeal in the idea that prisoners, who came to be in prison by virtue of making bad choices, do not deserve the same rights as other citizens. Yet restrictions on prisoners' rights, however justified, seem best justified not on waiver principles, but on the argument that social need justifies infringing rights—an argument discussed below in Part II.B.

4. Conclusion

The arguments for waiver of speech in the contexts of public schools, workplaces, and prisons are weaker than they first seem. Fundamental rights can be deemed waived if either

(1) the rights holder actually waived them, or
(2) the rights holder freely chose to take some voluntary action that fairly could be deemed a waiver of the right.

As discussed above, neither of these kinds of waiver exists in the three relevant contexts. There could also be a third argument for waiver. We could deem an individual's rights waived if

(3) waiver is necessary for society, even though the rights holder made no actual choice to waive those rights.

This third argument could be viewed as a waiver argument in the following way: Behind the "veil of ignorance,"[72] when we do not know if we will be the speaker or a person harmed by the speech (a person, for example, who needs government services that are disrupted by the speech), we would agree that the speech should not be allowed, because it may harm others far more than it benefits the speaker.

Yet, it would be a pure legal fiction to call this third argument a waiver argument. In reality, it is an argument that social necessity justifies restricting the rights of someone who really did *not* want to waive those rights and never did anything that could be fairly deemed to amount to a waiver. Thus, although there may be times when we allow restrictions of rights based on social necessity, that is not a waiver argument, but instead an argument for basic constitutional rights analysis—a sufficient governmental interest exists to justify restricting a constitutional right.

This sort of necessity analysis for restricting a fundamental right like freedom of speech typically would be a basic strict scrutiny analysis; but, as discussed above,[73] that is not the standard that courts actually apply in

72. JOHN RAWLS, A THEORY OF JUSTICE *passim* (1999).
73. *See supra* Part I.

these contexts. This Article proceeds to examine why courts use a lower standard than strict scrutiny to protect speech rights in the three contexts at issue.

B. The Risk of Court Error: Invalidating Worthy Restrictions on Harmful Speech

The discussion above rejected the idea that waiver justifies varying First Amendment protections by institutional context. The risk argument follows with two somewhat contradictory goals. The first Subpart below attempts, with the aid of economic theory, to establish risk as a rationale for the doctrinal variation that could not be explained fully with waiver. After this attempt to elaborate the best case possible for applying less speech-protective rules in certain contexts, the second Subpart reverses course, criticizing the risk rationales.

Thus, this discussion is likely to generate disagreement among a wide range of readers. Some will find the risk rationales persuasive as a justification for existing doctrine, and therefore disagree with the criticisms of those justifications; some will agree so deeply with the criticisms that they might deem the apology for the status quo entirely unpersuasive; and, of course, some may disagree with both, perhaps suspecting that the first Subpart sets up a straw man as an easy target for the second Subpart. As the dissonance between the two Subparts shows, and as Part III argues later, my own view is somewhere in between those who (like most Justices, presumably) would defend the status quo entirely, and those who would not admit that any logic underlies the Court's variations of speech rights by institutional context.

I apply here an economic analysis of risk, examining whether speech restrictions are more justified in certain contexts by a high cost or high probability of court decisions wrongly allowing dangerous speech. While economics has been applied to constitutional law less than to other fields, it has helped analyze certain constitutional problems;[74] more specifically, economics and speech law (which has been modeled, at least in one famous theory, as a "marketplace" of ideas[75]) feature similar debates: individual

74. *See generally* POSNER, *supra* note 53, at 649–716 (analyzing various constitutional issues); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135 (2005).

75. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing for "free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment"). "That the *Abrams* dissent plays a central role in First Amendment case law and scholarship is not disputed . . . . [It] now carr[ies] the weight of

autonomy[76] versus reasons for society to restrict that autonomy. Moreover, economics is useful in assessing which legal rules optimally combine (1) allowing people to exercise their rights; and (2) restricting harmful activity[77]—exactly the question in deciding the legal standard for analyzing speech restrictions.

1. The Argument for Applying Less Speech-protective Rules in Certain Contexts

In settings requiring more speech restrictions than the proverbial town square, the risk of an erroneous ruling in favor of speech plaintiffs may be unusually high. To the extent that there is a heightened risk of allowing too much dangerous speech, the burden of proof on the government perhaps should not be the usual heightened scrutiny of speech restrictions. In a variation on the old economics-minded Learned Hand formula for assessing tort risk,[78] this risk can be reflected in the product pL, in which p and L represent the probability and cost, respectively, of a judicial error of allowing dangerous speech that should be restricted. In certain settings

(1) L, the *cost of an error*, is particularly high and is an externality—a cost imposed upon third parties; and
(2) p, the *probability of an error*, is particularly high, because
    (a) *information costs are high* for courts analyzing complex, specialized institutions like schools or prisons, so courts should apply deference to the institutions' judgments; and

---

precedent . . . ." David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 886, 892 (1986). The marketplace theory has drawn substantial criticism. *See, e.g.*, Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1352 (1998) ("Holmes's marketplace metaphor is unpersuasive as an account of the search for social and political truth . . . . The outcome of the process . . . would not be an objective truth but merely an aggregate . . . [of] the interests and views of a majority."). Yet such criticism does not at all diminish the overlap between speech theory and economic theory, because criticisms of the marketplace theory of speech—for example, that it "conceives of individuals in an overly private way," *id.*—parallel the criticisms of free-market economics.

76. This is why so many traditional economic analysts of law have a libertarian orientation. *See, e.g.*, POSNER, *supra* note 53, at 161–64 (characterizing various laws regulating consensual sexual behavior as "unjustifiable interferences with freedom of contract" unless the activities they ban "impose significant costs on third parties"); *id.* at 244 ("The economic arguments for criminalization of the drug trade are rather unimpressive.").

77. *E.g.*, ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 125–57 (2003) (discussing how liberal pleading rules maximize autonomy but risk more harmful litigation, whereas strict pleading rules do the opposite).

78. *See* POSNER, *supra* note 53, at 167–71.

(b) speech restrictions more often are warranted in cases involving certain institutions (such as prisons), so even a modest *rate* of judicial error can yield a high *number* of judicial errors of ruling for plaintiffs engaged in dangerous speech that warrants restriction.

The Hand formula has its origins in tort law but has, at times, been applied to speech restrictions, including by Judge Hand himself: "In each case [judges] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[79] The combination of gravity (L) and probability (p) justified prosecution, Hand and later the Supreme Court held, of individuals for "conspiring to organize the Communist Party of the United States as a group to 'teach and advocate the overthrow and destruction' of the government 'by force and violence.'"[80]

Many have criticized the Hand formula for implying that a high potential harm (L) justifies restricting speech despite a low probability of that harm (p) and despite the high cost to society of reining in speech, a cost that offsets the benefit of eliminating the pL risk.[81] Yet, as illustrated below, a more nuanced version of the Hand rule—that is, one scrutinizing high L claims closely,[82] and breaking down high p claims into the factors that influence the probability of a bad outcome[83]—can avoid the pitfalls of the court decisions allowing dubious prosecutions of disfavored speech. Further, the Hand rule is used in this Article less to analyze the risk of *speech* than to analyze the risk of *judicial error*, a common subject of economic risk analysis.[84]

a. High Cost of Judicial Error: Externalities of Speech in Certain Contexts

In settings such as prisons, the cost (L) of a judicial error allowing speech that should be restricted is particularly high, because speech risks

79. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).
80. *Id.* at 205 (quoting indictment).
81. *See, e.g.*, POSNER, *supra* note 53, at 694–96 (noting and analyzing such criticisms).
82. *See infra* Part II.B.1.a.
83. *See infra* Part II.B.1.b.
84. *See, e.g.*, BONE, *supra* note 77, at 131 (analyzing alternative pleading rules by each rule's "expected error cost . . . the probability of an error *multiplied by* the social cost of the error if it materializes"); POSNER, *supra* note 53, at 563–64 ("In Hand Formula terms, due process is denied when $B<PL$, where B is the cost of the procedural safeguard, P is the probability of error if the safeguard is denied, and L is the magnitude of the loss if the error materializes.").

imposing serious harms and costs upon others—negative externalities, in the economic parlance.[85] For example, the Court upheld a ban on prisoners receiving hardcover books other than directly from publishers or bookstores, on the theory that hardcover books might contain dangerous contraband.[86] It also upheld a ban on prisoner communications with other prisons' inmates because "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts."[87]

While the prison context is the most obvious one for finding serious negative externalities, the Court also has noted the potential for serious harm from speech in public workplaces.[88] It similarly has stressed the importance of the mission of public education in noting how certain speech in public schools can be restricted if it risks harming that mission.[89]

b. High Probability of Judicial Error

A second component of the argument for less restrictive rules in certain contexts is that the probability of error is high. The first reason this is so is that the cost to courts of obtaining information about the institutions is too high. The second is that speech restrictions may be warranted more often in these institutions, which would make judicial errors frequent under strict scrutiny.

---

85. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 621–22 (5th ed. 2001) (noting that a "negative externality" occurs when a party "has no incentive to account for the external costs that it imposes" and therefore "produces too much output" in the sense of undertaking the activity even when the costs exceed the benefits, because the party ignores the costs it imposes on others).

86. Bell v. Wolfish, 441 U.S. 520 (1979).

87. Turner v. Safley, 482 U.S. 78, 91 (1987).

88. *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006) (noting that if public employers did not have "a significant degree of control over their employees' words and actions . . . there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions" (citations omitted)); Connick v. Myers, 461 U.S. 138, 151 (1983) ("'[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation . . . with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale . . . and ultimately impair the efficiency of an office or agency.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part))).

89. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986) ("One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."); *id.* at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").

(1) High Information Costs as a Basis for Deference

In contexts such as schools or prisons, courts may lack the expertise to second-guess professional judgments as to the need to restrict speech activities. A ruling in favor of a free speech plaintiff replaces the judgment of institutional experts with that of a nonexpert judge, entailing high information costs to courts and litigants analyzing complex institutions, and creating a serious risk of error costs.

In institutions involving specialized knowledge, such as schools and prisons,[90] the information costs of adjudication may be especially high. Litigants must expend more time and expense explaining the case to the court, and the court must expend more time and effort learning the information necessary to make a good ruling. When information costs (or any other transaction costs) are high, then error costs will be high as well, because with the courts likely having less information when making their rulings, the odds of erroneous rulings are greater.

Arguments for heightened deference to defendants' decisions, and thus for less protection for individual rights, appear explicitly in various lines of case law.

> *Schools, Public and Private.* Parallel arguments for deference to school defendants appear in various kinds of cases—not just First Amendment cases against public schools,[91] but also constitutional challenges to affirmative action at public universities[92] and discrimination cases against higher education institutions.[93]

90. There is a deference argument for public employment cases as well, as detailed below, but it is not based on public workplaces being institutions that involve the sort of specialized knowledge it takes to understand prison or school management.

91. *See Fraser*, 478 U.S. at 683 ("[D]etermination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.").

92. In upholding affirmative action in law school admissions, the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), applied an interesting mix of strict scrutiny of and deference to the law school's race-conscious admissions process:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which *we defer*. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is *in keeping with our tradition of giving a degree of deference to a university's academic decisions*, within constitutionally prescribed limits.

Id. at 328 (emphases added) (citations omitted).

93. *See generally* Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1 (2006) (collecting cases and critiquing doctrine based on its inconsistency with other doctrine and based on social norms and economic theory).

> *Public Employment.* The Court has noted in the context of a free speech case that certain government jobs require "close working relationships with . . . superiors," and in such jobs, "a *wide degree of deference* to the employer's judgment is appropriate."[94] Moreover, courts analyze employee First Amendment claims with the same pleading and proof rules as in all kinds of employment claims, in which deference is the corollary of the employment-at-will rule: "Courts must act with a certain restraint when examining an employer's personnel decisions."[95]
>
> *Prisons.* In prisoner speech cases, courts grant "'substantial deference to the professional judgment of prison administrators'"[96]—a deference that is "wide-ranging . . . [b]ecause the realities of running a penal institution are complex and difficult . . . ."[97] This deference not only lightens the government's burden of justifying a speech restriction, but actually shifts the burden back to the speech plaintiff, and makes it a burden of "conclusive" proof. "It is enough," the Court holds, when prisons officials "have not conclusively been shown to be wrong" in deeming speech restriction warranted.[98]

Thus, the deference argument is one with deep and broad roots. First Amendment speech law is merely one of the areas of law among many in which courts defer to defendants' judgments; and public schools, public workplaces, and prisons are merely three of the contexts in which courts defer.

(2) Speech Restrictions Are More Frequently Warranted

Should untrammeled speech usually be allowed? The answer is yes for society in general. Even controversial speech occurs on public property and

---

94. Connick v. Myers, 461 U.S. 138, 151–52 (1983) (emphasis added) (discussing the lower court's decision in rejecting the public employee's speech claim).

95. Kearney v. Town of Wareham, 316 F.3d 18, 25 (1st Cir. 2002) ("'Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions.'" (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991))).

96. Beard v. Banks, 126 S. Ct. 2572, 2575–76 (2006) (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)) (upholding a policy that "denies newspapers, magazines, and photographs to a group of specially dangerous and recalcitrant inmates" (internal quotation marks omitted)).

97. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 (1977); *see also* Turner v. Safley, 482 U.S. 78, 84–85 (1987) ("'[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform' . . . [and should] accord deference to the appropriate prison authorities." (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974))).

98. *Jones*, 433 U.S. at 132 (upholding prison officials' barring of unions because "prison officials concluded that . . . a prisoners' labor union would be detrimental to order and security in the prisons. It is enough to say that they have not been conclusively shown to be wrong in this view").

in the media with little threat of serious social harm[99] and little concern that courts cannot analyze the matter properly.[100] It is appropriate, therefore, to presume speech restrictions invalid by applying heightened scrutiny to government efforts to restrict speech.

In certain institutions, however, we cannot as easily presume that most speech restrictions are invalid. As discussed above, speech is more likely to cause negative externalities in institutions in which discipline is critical and in which people coexist in a tight-knit setting such as a school, a workplace, or a prison[101]—in contrast to the society in general, where people usually can avoid each other as they see fit.

Further, whereas few sue frivolously for the right to speak on public property, meritless speech lawsuits may be common in certain institutions. There are many meritless prisoner lawsuits, in part because litigation does not impose much cost or risk on prisoners (who have plenty of time on their hands and little of the fear of employer or community disdain that most citizens might have from litigating a controversial case),[102] but also in part because prisoners can be mischievous, as some of the stranger prisoner lawsuits, such as the following, illustrate:

> Rather than . . . any particular theology . . . the Church of the New Song . . . encourage[s] a relatively non-structured, free-form, do-as-you-please philosophy, the sole purpose of which is to cause or encourage disruption of established prison discipline . . . [which] is not the *result* of this so-called religion; it is rather the underlying *purpose* . . . . [T]he "Church's" one attempt at a paschal type feast produced a tongue-in-cheek request for prison authorities to supply steak and wine. . . . [T]he services . . . at the Atlanta penitentiary were nothing more than "gripe sessions" . . . to gain advantages over other inmates not belonging to the "group" and were totally lacking in anything approaching religious content.[103]

Weak employee lawsuits also are common, though for a different reason. The employment-at-will rule makes most terminations lawful, even

---

99. *See supra* Part II.A.1.

100. *See supra* Part II.A.

101. *See, e.g.*, *supra* notes 94–95 and accompanying text.

102. Prisoners do suffer one nontrivial consequence of filing frivolous claims: Under the Prison Litigation Reform Act of 1996, if a prisoner files three federal lawsuits or appeals that are dismissed for failure to state a claim upon which relief may be granted, that prisoner is barred from filing any further lawsuits or appeals "unless the prisoner is under imminent danger or serious physical injury." 28 U.S.C. § 1915(g) (2000); *see* Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002) (applying and upholding § 1915(g) against constitutional challenge). This is a limited sanction, however, and it still leaves prisoners able to file at least two frivolous lawsuits.

103. Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975).

if they are unfair enough to motivate an employee to sue out of ignorance or spite.[104] The fact that the employment-at-will rule is so well entrenched but so little known to workers[105] may help explain why employment discrimination cases account for a substantial portion of the federal docket (about 10 percent), but "generally fare worse than most other kinds of civil [suits] . . . . [P]laintiffs have long suffered success rates that fall below other civil plaintiffs."[106] Even workers and lawyers aware of the employment-at-will doctrine may well file lawsuits when they strongly believe employees have been treated unfairly but have only a weak claim of retaliation against speech activities or discrimination.

Thus, speech claims cannot as easily be presumed valid in certain institutions, like workplaces and prisons,[107] as in the public property speech context. If the government should prevail more often in cases involving those institutions, then even a modest rate of judicial error can yield a high number of judicial errors (rulings for plaintiffs whose dangerous speech warrants restriction).

This point—that the choice of legal rule should be based in part on a judgment as to the proportion of lawsuits that are and are not meritorious—parallels Robert Bone's economic analysis of "strict pleading" versus "notice pleading" rules.[108] Strict pleading increases the odds that courts will erroneously dismiss meritorious suits; notice pleading increases the odds that courts will erroneously permit nonmeritorious suits to proceed. If most lawsuits are frivolous, that fact militates in favor of the prodefendant standard, strict pleading, because the population of cases subject to the error that strict pleading yields (meritorious cases facing a risk of erroneous dismissal) is smaller than the population of cases subject to the error that notice pleading yields (nonmeritorious cases erroneously allowed to proceed). If most lawsuits are meritorious, then the reverse is true: The proplaintiff standard, notice pleading, would minimize the greater risk of error. This may explain why, even though the general rule for federal litigation is

104. See *Kearney v. Town of Wareham*, 316 F.3d 18, 25 (1st Cir. 2002), for an illustration of courts' application of the employment-at-will rule. *See generally* Moss, *supra* note 63.

105. *See* Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002).

106. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001).

107. I omit mention of schools here because while there is evidence that most employee and prisoner claims ultimately lose, there is less such evidence as to student speech claims.

108. BONE, *supra* note 77.

notice pleading,[109] heightened pleading standards apply to categories of cases about which more skepticism may be warranted, such as securities fraud class actions.[110]

The analogy to Bone's analysis here is that in settings such as workplaces and especially prisons where free speech claims are less likely to be meritorious, it may be appropriate to depart from the usual proplaintiff rule of heightened scrutiny for speech restrictions. Deferring more to governmental speech restrictions risks erroneous rejections of meritorious plaintiffs' claims—but if there are relatively fewer meritorious claims in workplaces and prisons, that error risk is lower, and heightening plaintiffs' burden minimizes the countervailing risk of erroneously allowing speech that should be restricted.

c. Summary: The Case for a Lower Burden on Government Entities Defending Speech Restrictions

The above discussion illustrates that in certain contexts, speech restrictions may be especially warranted because of both the higher harm that dangerous speech can cause and the higher likelihood that courts would erroneously rule in favor of a plaintiff seeking the right to undertake such dangerous speech activities.

In contrast, a speaker on common public property does not typically create such social costs or risks, even if he is harshly criticizing the government. He or she does not risk harming the internal discipline of a necessarily tightly controlled institution like a public school, workplace, or prison; unlike schoolchildren or prisoners, he is not presumptively a risk to society who merits a special degree of control; and there is little reason to think that judges lack competence to decide upon speech claims not involving complex institutions.

The fact that the government should win more often in speech cases involving certain institutional contexts may justify a lesser burden of proof for the government. High litigation costs and error costs can result when courts apply a high burden of proof, such as strict scrutiny, to a party that frequently will have valid reasons for its actions. That is, when the party that should win faces a high burden of proof, it may get sued more than it should (litigation costs) and may lose more than it should (error costs). As to the latter problem, the government may be unsuccessful in defending

109. *See* FED. R. CIV. P. 8.

110. *See* Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

worthy speech restrictions, simply because courts do make mistakes, and under a heightened burden, the government more often will be unable to marshal its evidence and present its case sufficiently to convince the factfinder that it has met its high burden.

2. The Argument Against Applying Less Speech-protective Rules in Certain Contexts

The analysis above is not critical but descriptive. Amidst case law that is not always clear as to why speech rights should vary by institutional context, it attempts to discern and justify that variation in speech rights. Some readers may find the above defense of the status quo compelling and reject the critical analysis of this Subpart, which finds the rationales for tailoring to be underwhelming when examined closely.

This Subpart expresses skepticism about some, though not all, of the above arguments for tailoring. It expresses some skepticism about the merits of the first argument: that speech threatens high externalities (L) to an unusual degree in certain institutions. It expresses even deeper skepticism about the second argument: that an unusual degree of deference is proper when reviewing certain institutions' speech restrictions.

This Subpart does not challenge, but rather accepts, the third argument: that speech restrictions are warranted more often in certain institutions. Yet the third argument alone, even if supported by a moderate version of the first argument (externalities), does not go that far toward justifying a different test or level of scrutiny for speech rights.

a. High Cost of Judicial Error: An Exaggerated Argument; Spending Can Obviate Certain Risks

While many speech restrictions are justified by describing the harms that unrestricted speech could cause, some speech restrictions would be unnecessary if the governmental entity simply would spend more to monitor the disputed speech. A pair of Supreme Court decisions on prison speech restrictions is instructive: *Bell v. Wolfish*,[111] which allowed a ban on prisoners receiving hardcover books in the mail other than directly from publishers or bookstores; and *Turner v. Safley*,[112] which allowed a ban on prisoners mailing letters to inmates in other prisons.

111. 441 U.S. 520 (1979).
112. 482 U.S. 78 (1987).

Bell strikingly conflated the state interest in avoiding high dangers like prisoners with weapons (certainly compelling) and the state interest in avoiding expensive procedures for mail processing (certainly less compelling):

> [T]o make a "proper and thorough" inspection of such items, prison officials would have to remove the covers of hardback books and to leaf through every page . . . to ensure that drugs, money, weapons, or other contraband were not secreted in the material. "This search process would take a substantial and inordinate amount of available staff time."[113]

Turner then implicitly extended *Bell* by stressing that the prison in *Bell* could have prevented the feared contraband smuggling with not only time-consuming labor, but also certain technology, namely, machines to scan incoming packages.[114]

Thus, it often is possible to trade off error costs of allowing dangerous speech and administrative costs of monitoring and screening speech—because the monitoring and screening can avoid the harm threatened by some fraction of that speech (like some prisoner mail). Accordingly, the real government interest in many security risk cases is avoiding mere administrative costs, not avoiding dangerous speech—and the former is a far weaker basis for restricting speech than the latter.

Where speech threatens dangers that can be prevented with either a speech restriction or an expenditure of administrative costs, such as security staffing or equipment, the Court has held that the government must incur the costs rather than restrict the speech.[115] The government

---

113. *Bell*, 441 U.S. at 549 (quoting prison warden).

114. *Turner*, 482 U.S. at 88.

115. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 113–14 (1943) (striking down an ordinance requiring the purchase of a license to sell written materials: "It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution"); Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (striking down ordinances restricting distribution of handbills in public, noting the validity of the government interest in clean streets, but holding that "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press"); *cf.* Ad World, Inc. v. Doylestown, 672 F.2d 1136, 1141 (3d Cir. 1982) (disallowing an ordinance prohibiting door-to-door distribution of advertising material, which included community newspapers, and noting that "[t]he Supreme Court has tenaciously protected the right of a speaker to reach a potential listener and get the listener's attention. *It does not seem onerous to impose on the potential listener some of the costs of this important freedom*" (emphasis added) (citations omitted)); Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978) (disallowing an ordinance prohibiting disseminating materials that promote hatred based on heritage, and rejecting an argument that other important public policies, such as antidiscrimination goals, would be

can charge "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question,"[116] and prohibitively high costs might justify speech restrictions; however, most of the prison cases do not entail costs too high to bear or to charge as per-use fees. Most of those cases involve more extensive screening of incoming mail and visitors—an expense that is not trivial but is well below the substantial costs that courts force municipalities to incur for the necessary police staffing and equipment to ensure safety and order at public protests and rallies.[117]

The Court has so held not only in cases involving prisons, but also in cases involving schools, albeit as to a different constitutional right. In striking down excessively broad affirmative action programs, the Court held that the mere fact that a program infringing less on constitutional rights "might present administrative challenges does not render

---

undercut by allowing such speech: "The Village . . . argu[es] . . . that it has a policy of fair housing, which the dissemination of racially defamatory material could undercut. We reject this argument without extended discussion. That *the effective exercise of First Amendment rights may undercut a given government's policy on some issue* is, indeed, one of the purposes of those rights" (emphasis added)).

116. *Murdock*, 319 U.S. at 113–14 (disallowing a license fee but noting the more permissible "nominal fee" option); *see also* Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1249 (10th Cir. 2000) (reviewing regulations of fundraising organizations, and upholding a "$250 regulatory fee . . . [that] does no more than defray reasonable administration costs" of state antifraud efforts but disallowing the requirement that an organization must "provide proof that it is bonded or provide a letter of credit in the amount of at least $25,000 . . . [as] a sizeable price tag upon the enjoyment of a guaranteed freedom"); MacDonald v. Chi. Park Dist., 132 F.3d 355, 363 n.8 (7th Cir. 1997) (holding that park-use fees for speech activities are permissible "absent a threat that the allegedly excessive fees are likely to suppress protected speech"); Nat'l Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995) (citing *Murdock*).

117. *See, e.g.*, Church of Am. Knights of Ku Klux Klan v. City of Gary, 334 F.3d 676, 680–81 (7th Cir. 2003) (Posner, J.) (granting an injunction against restrictions and fees applicable to a proposed Ku Klux Klan rally, which would "require a heavy police presence, at some cost . . . in police overtime unless the police thin out coverage in other parts of the City . . . 'fencing and barricades that enforce separation of the Klan from other attendees, who, themselves, must be separated into separate enclosures for pro and con demonstrators and all three separated from the press, for its safety . . . [and] separate parking areas must be provided and guarded, and all attendees must be screened for weapons'"; holding that "a permit for a parade or other assembly . . . cannot be denied because the applicant's audience will riot . . . [and] a city cannot in lieu of denying the permit charge the applicant for the expense . . . of reining in the hecklers"); Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365, 367 (D.C. Cir. 1992) (upholding an order requiring the city to allow a "Ku Klux Klan parade[ ] from the Washington Monument down Constitution Avenue to Capitol Hill" even though "[a] violent counter-demonstration had been threatened, causing the full mobilization of the Metropolitan Police Department and the commitment of more than 3,500 police officers").

constitutional an otherwise problematic system."[118] Certainly, it is economically rational for institutions to reject costly individualized scrutiny or monitoring procedures in favor of cheap, across-the-board rules.[119] Accordingly, the argument that in certain institutional contexts speech restrictions are necessary to avoid high negative externalities does not hold up to close scrutiny, at least in situations in which spending more on monitoring (the prison mail cases) or individual scrutiny (the affirmative action cases) would obviate the need to restrict a fundamental right.

b. High Probability of Judicial Error: Too Little Argument for Institutional Uniqueness and Judicial Inability

The main problem with the deference argument is that it proves too much. It applies equally well to a wide variety of contexts and, therefore, at bottom, is little more than an argument that there almost always should be a limited scope to judicial review. As I have argued elsewhere, in criticizing the argument for deference to employers' decisions in discrimination cases, the argument for deference applies just as well to an extraordinarily wide range of fields: "The problem with this reasoning is that it would dissolve Title VII if followed to its logical conclusion and extended to other areas . . . . It would have courts defer to employers in a wide swath of labor markets, whenever judges feel insecure about their knowledge of the field."[120] Contrary to the premise that judges cannot handle cases in fields in which they lack expertise, judges always

118. Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (rejecting the argument "that '[t]he volume of applications and the presentation of applicant information make it impractical . . . to use the . . . system' upheld by the Court today in *Grutter*," which required individualized applicant scrutiny rather than the less individualized affirmative action "point system" (alterations in original) (quoting Brief for Respondent Bollinger at 6, n. 8)); *see also* Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 9 (2001) (suggesting methods of individualized admissions scrutiny, following *Grutter* and *Gratz*: "[A] direct measures program undoubtedly will be both expensive and time-consuming for admissions committees, which will have to evaluate the entire applicant file including the personal statement. To avoid constitutional difficulty however, applications should in no way be pre-screened based on the racial identity of the applicants").

119. *See generally* David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1224 (2001) (discussing law firms' use of cheap, easily visible "signals" to evaluate law students rather than complicated, expensive data such as references and analysis of coursework: "Grades and [School] Eliteness . . . [are] 'visible' and 'rankable' signals that make it easy . . . to make substantive distinctions among applicants. [R]ely[ing] heavily on these relatively inexpensive sorting criteria . . . narrow[s] the large pool of applicants . . . . References from Faculty and Relevance of Courses . . . are rarely scrutinized. Although arguably providing . . . more detailed[ ] information about a student's skill and interest level, both . . . are time consuming . . . .").

120. Moss, *supra* note 93, at 6.

adjudicate cases in fields alien to them, including "accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry."[121]

Indeed, for the main institutions that feature deference to speech regulations—public schools and prisons—judges would seem more capable of evaluating professional judgments than in many other contexts. There is little reason to think that judges can develop a quick expertise in various private-sector specialty fields such as securities, accounting, or engineering. Yet, courts regularly pass judgment as to whether challenged securities deals were fraudulent or whether challenged private-sector employment decisions involving technical work were pretextual.

In contrast, judges do have a fair bit of expertise in the criminal justice system, given both their extensive adjudication of prisoner filings and the background a great many federal judges have as prosecutors or otherwise as government officials in the executive or legislative branch.[122] Judges also all have college and graduate degrees, making academic deference less defensible than, say, securities or engineering deference, just to name two fields in which judges are much less likely to have any particular expertise. Finally, judges are public employers, so it is hard to see how public employment would be an area in which judges have little expertise.

Perhaps more significantly, deferential scrutiny of speech restrictions is inconsistent with the heightened scrutiny typically applicable to government restrictions of individual rights. A court applying heightened scrutiny places the burden of proof on the government to prove its restriction is justified; it does not defer to the defendant or simply ask for a merely rational justification.[123] A deference exception to a rule of heightened scrutiny thus would be a classic "exception that swallows the rule"; accordingly, arguments for deference are arguments against applying heightened scrutiny at all to fundamental rights claims. The fact that courts have chosen to apply heightened scrutiny to so many types of constitutional claims means that there is little solid reasoning behind applying deference to a few idiosyncratic institutional contexts.

Finally, even if certain institutions are harder for courts to analyze effectively, parties and courts are unlikely to accept erroneous rulings easily,

---

121. *Id.* at 6–7.

122. For example, the majority of judges in three of the most populous federal district courts—the U.S. District Courts for the Southern District of New York, the Eastern District of New York, and the Central District of California (which combine for over 160 federal district and magistrate judges, a sizeable fraction of the total population of federal judges)—worked as government officials or lawyers, with the largest share of them having served as state or federal prosecutors. *See* Fed. Judicial Ctr., Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Mar. 6, 2007).

123. *See infra* Part III.B (discussing the inconsistency between deference and heightened scrutiny).

but instead will spend more time and resources remedying the problem of imperfect information. As the law and economics literature has discussed at length, error costs can be traded off with transaction and information costs.[124] Specifically, a government defending a speech restriction is just like any other party in that it decides how much time and expense to invest in litigation; other things equal, the more it invests in litigation, the better and fuller the portrayal of its litigation position will be, and the lower the risk of an erroneous judicial ruling for the other party.[125] Thus, even where there is a modest degree of institutional uniqueness, that problem can be at least somewhat remedied with more spending on litigation, and, as discussed above, the mere desire to save administrative costs does not justify restricting fundamental rights.[126]

C. A Typology: Institutional Context and the Level of First Amendment Protection

Ultimately, every reader is bound to disagree with at least some portion of this Article. Some will find the risk rationales sufficiently compelling as a justification of the status quo that they reject the dismantling of those arguments, and vice versa. As is often the case, though, the truth may lie somewhere in between these two polar positions. As discussed above, there are varied arguments for applying less speech-protective doctrines in certain institutional contexts. These arguments, however, are not equally persuasive in all contexts.

For example, the argument that certain contexts feature more significant risk (high *pL*) seems stronger in prisons than schools, and stronger in schools than workplaces. All three contexts do share certain key characteristics: All are institutions requiring discipline whose members are in tight-knit, interdependent relationships, making each person vulnerable to others. Yet, among the three, prisons clearly feature the highest *pL*: the highest likelihood of serious misdeeds (high *L*), and the strongest claim for deference to specialized institutional knowledge (high *p* of error due to information costs), because judges may know little about prisons but have at least some understanding of education and employment (because all have been students and public employers). Compared to workplaces, schools present more need for discipline and more risk of misconduct (high *L*), given that minor students typically lack the maturity of

124. *See, e.g.*, BONE, *supra* note 77, at 147 (noting that "process costs," specifically more elaborate litigation efforts, trade off with "error cost[s]").

125. *See, e.g.*, *id.* at 203 (noting that parties spend litigation costs on discovery to remedy their lack of information).

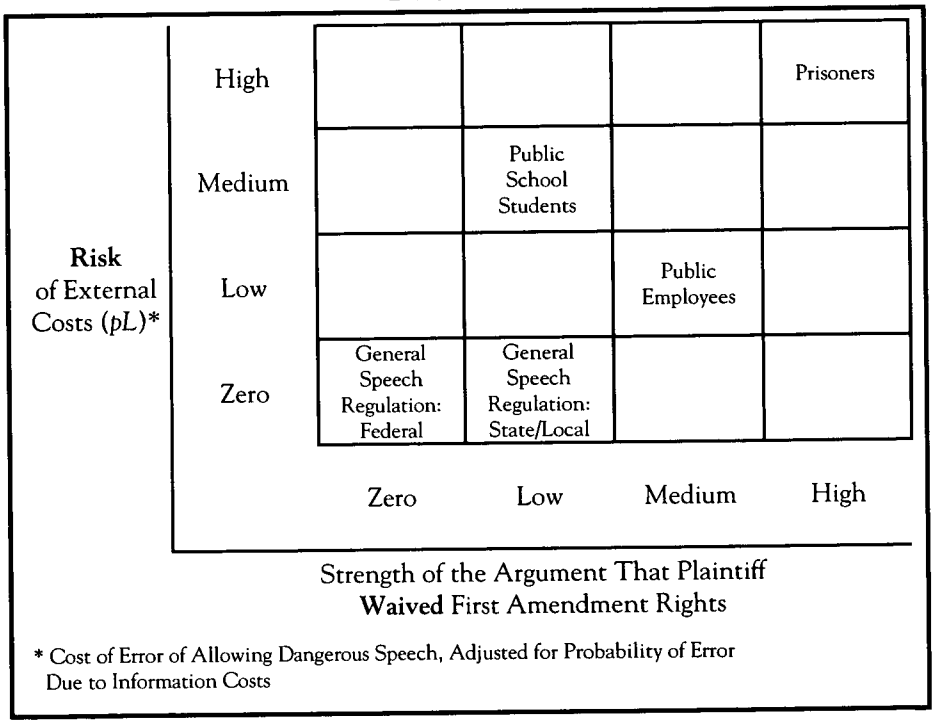
126. *See supra* notes 115–119 and accompanying text.

gainfully employed adults, and schools have more interest in controlling student behavior than a workplace does in controlling employee behavior. Deference also seems more appropriate for schools (due to high p) than workplaces; administration of schools seems harder to understand from the outside than administration of a workplace.

Similarly, the waiver argument, though somewhat questionable in all contexts, seems most plausible in prisons. Prisoners, in choosing to commit crimes, exercised at least some autonomous choice that carried a known risk of losing some degree of freedom, even if the loss of speech rights in particular was not a freedom that imprisonment would foreseeably restrict. And while some employees are entirely tied to their jobs, it is on average more feasible to switch jobs than to switch schools; the latter requires either moving one's residence, paying for private school, or becoming a home schooling parent—all options far more burdensome than the average job hunt.

Given that reasonable minds may differ about the persuasive power of the waiver and externalities arguments, it seems helpful to chart the strength of each argument in each context along a two-dimensional grid.

DIAGRAM A



In short, because the arguments for tailoring are twofold—waiver and risk—any analysis of whether an institution merits tailoring must consider whether either argument is persuasive as to that institution. As Diagram A illustrates, the case for tailoring in public schools may be stronger or weaker than the case for tailoring in public employment, depending on whether the waiver argument or the risk argument carries more weight, because the waiver argument is stronger for public employment, while the risk argument is stronger for public schools.

Diagram A also helps compare the arguments for tailoring in different institutional contexts. Notably, for example, the waiver argument is about the same for speech restrictions by public schools and by any other local governments. If one waives a right to object to a school's speech restrictions by staying in that public school district, then logically one waives a right to object to a town's speech restrictions by staying in that city. To the extent that courts and scholars have rejected the argument that "you remained in that locality and therefore waived any objection to its speech restrictions,"[127] the waiver argument is unsupportable as applied to public schools—and, accordingly, tailoring for schools must be based on risk arguments rather than waiver arguments.

III. A CAUTIONARY NOTE ABOUT EXAGGERATING INSTITUTIONAL UNIQUENESS AND A PROPOSAL FOR INTERMEDIATE SCRUTINY AS MODEST TAILORING

A. Avoiding the Exaggeration of Institutional Uniqueness in Tailoring

This Article argues that heightened scrutiny should apply to speech restrictions regardless of institutional context. I will refrain from wading into the turbulent sea of literature, dating back to Karl Llewellyn and Oliver Wendell Holmes, about whether legal rules should be general or subject specific.[128] Rather, the specific question this Article addresses is this: Is more uniformity across institutions feasible for speech claims, or would more uniformity be unable to account for the particularities of certain institutions, like public schools, workplaces, and prisons, which differ in meaningful ways from society at large?

127. *See supra* Part II.A.1.

128. Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 14, at 107–13, 118–19 (discussing range of views).

Schauer suggests that speech law generally takes too little account of institutional context, resulting in "too often treat[ing] settings, institutions, and contexts similarly when . . . they are substantially and relevantly different."[129] This Article does not take issue with Schauer's arguments as to the main institutions he analyzes: media types, means of communication, and governmental speech activities. Rather, this Article argues that as to certain institutions within which speech rights commonly are curtailed—public schools, workplaces, and prisons—a more uniform, less institution-specific speech doctrine could take appropriate account of institutional difference without exaggerating those differences, as the current doctrine does.

First, in splintering First Amendment doctrine into "a doctrine for every institution," the Court has not simply accounted for institutional uniqueness; rather, it has to a large degree *exaggerated* institutional uniqueness. This was the main point of Part II of this Article. The arguments that certain institutions face such a greater threat of negative externalities from speech, or are so much less comprehensible to courts reviewing their speech restrictions, do not hold up under close examination. Thus, if the question is whether more unified doctrine would have too little recognition of institutional weakness, then one answer is, "compared to what?"—because the status quo of institution-specific doctrine yields *too much* recognition of institutional uniqueness.

Second, the Court has, in its equal protection jurisprudence, shifted from context-specific doctrine to more unified doctrine with little loss of ability to account for nuanced contextual differences. One such case specifically involved prisons. In *Johnson v. California*,[130] the Court declared that strict scrutiny, not deferential rational basis scrutiny, applied to temporary racial segregation of incoming prisoners. Though the prisons asserted a context-specific security interest for the segregation—"to prevent violence caused by racial gangs"[131]—the Court rejected for equal protection exactly the sort of context-based rulemaking it applies in First Amendment cases.

---

129. Schauer, *supra* note 4, at 1270.

130. 543 U.S. 499 (2005).

131. *Id.* at 502. To elaborate further:

> [Defendant] cites numerous incidents of racial violence . . . and identifies five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. The CDC [California Department of Corrections] also notes that prison-gang culture is violent and murderous. [I]f race were not considered in making initial housing assignments, [it] is certain there would be racial conflict . . . . The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger . . . .

Id. at 502–03.

The Court rejected the argument that for equal protection claims in the prison context, the usual strict scrutiny should be replaced with mere rational basis scrutiny, as *Turner v. Safley*[132] provided for speech claims in the prison context:

> [W]e have applied *Turner's* reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." . . . The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system.[133]

The *Johnson* Court's distinction between speech rights and equality rights seems conclusory. Could it not equally be said that "compliance with the [First] Amendment's ban on [speech restrictions] is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system"? Further, exactly why is it the case that racial equality, taken to the far extent of forbidding (as in *Johnson*) even temporary segregation of prisoners based on plausible security concerns, "is not a right that need necessarily be compromised for the sake of proper prison administration"—whereas speech rights "need necessarily be compromised"? In short, by failing to explain persuasively why the strict scrutiny that works for equal protection claims would not work for speech claims, the *Johnson* Court left ample reason to believe that heightened scrutiny would work just as well for prisoners' speech claims.

Johnson expressly asserted one point helpful to this Article's advocacy of heightened scrutiny for First Amendment claims in all contexts: that strict scrutiny "is designed to take relevant differences into account," including "special circumstances" presented by "dangerous places" such as prisons:

> The [California Department of Corrections] protests that strict scrutiny will handcuff prison administrators . . . . Not so. Strict scrutiny is not "strict in theory, but fatal in fact." [It] does not preclude the ability of prison officials to address the compelling interest in prison safety. [They] will have to demonstrate that any race-based policies are narrowly tailored to that end.
>
> . . .

132. 482 U.S. 78 (1987).
133. *Johnson*, 543 U.S. at 510–11.

> The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law . . . ." Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.[134]

In a different area of equal protection law—affirmative action—the Court has illustrated more fully how strict scrutiny can take account of institutional context. For decades, the Court left affirmative action an exception to its rule of strict scrutiny for racial classifications,[135] but *Adarand Constructors v. Pena*[136] declared strict scrutiny applicable to racial affirmative action. Justice O'Connor pointedly sought in *Adarand* "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[137] Nevertheless, many remained skeptical that strict scrutiny analyses could account for context sufficiently to recognize that while racial classifications rarely pass muster, modest affirmative action plans might.[138]

Ultimately, the Court in the two University of Michigan affirmative action cases, which invalidated the more sweeping affirmative action plan[139] but allowed the more modest one,[140] illustrated how strict scrutiny can apply across the board, even in contexts in which it may be appropriate both to allow exceptions to the presumption of invalidity and to allow "a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[141]

Thus, the Court's equal protection jurisprudence illustrates how applying a consistent constitutional test to all contexts, rather than the sort of context-specific rules featured in the First Amendment, would not necessarily destroy the ability of the Court to consider institutional context.

---

134. *Id.* at 514–15 (citations omitted).

135. *See* CHEMERINSKY, *supra* note 3, § 9.3.5.1 (noting splintered Court decisions as to the appropriate level of scrutiny for racial affirmative action).

136. 515 U.S. 200 (1995).

137. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

138. *See, e.g.*, Emanuel Margolis, *Affirmative Action: Deja Vu All Over Again?*, 27 SW. U. L. REV. 1, 39 (1997) (noting that the Court declined to review three appellate cases striking down affirmative action in college admissions, scholarships, and public employment; "a 'cert. denied' pattern . . . that can only be described as discouraging" for supporters of affirmative action, "certainly in light of *Adarand* [*Constructors, Inc. v. Pena*] decided in the following year"). Of course, not all commentators saw *Adarand* as the end of affirmative action. *See, e.g.*, Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 606–07 (2002) (noting indications that Justice O'Connor might uphold some affirmative action programs under strict scrutiny).

139. Gratz v. Bollinger, 539 U.S. 244 (2003).

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

141. *Id.* at 328. See *supra* notes 143–144 and accompanying text for more of this portion of *Grutter*.

Such a move toward greater First Amendment consistency therefore would be feasible and, as discussed above, advisable as a reform of this confused area of constitutional law.

B. Intermediate Scrutiny as Modest Tailoring That Keeps a Presumption Against Rights Restrictions

Ultimately, however, this Article concedes that a modest amount of institutional tailoring may be appropriate for a simple reason: It is unclear whether strict scrutiny is really as capable of taking institutional difference into account as claimed by Justice O'Connor, the author of both *Johnson v. California* and *Grutter v. Bollinger*,[142] the two main cases in which the Court upheld a racial classification it analyzed with strict scrutiny. Various commentators sympathetic to the idea of at least some degree of affirmative action have criticized *Grutter* for not featuring true strict scrutiny, on two main grounds. First, *Grutter*'s notion of strict scrutiny with "a degree of deference"[143] is oxymoronic. Strict scrutiny entails not deferring to the governmental entity being challenged[144] and not assuming (as the Court did) good faith on the part of that entity.[145] Second, having accepted diversity as a compelling interest, *Grutter* did not truly undertake the second part of the strict scrutiny analysis—whether

142. 539 U.S. 306.

143. *Id.* at 328.

144. *See, e.g.*, Lackland H. Bloom, Jr., Grutter *and* Gratz*: A Critical Analysis*, 41 HOUS. L. REV. 459, 468–69 (2004) (criticizing *Grutter*'s deference argument: "Was the Court stating that diversity is a compelling state interest because the Michigan Law School says it is? Surely not. If so, then the Court has effectively dropped the standard of review from strict scrutiny to rational basis review"; also criticizing the Court's reliance on amici briefs, noting that "deferring to the conclusions of amici wholly untested by the adversarial process seems even more troublesome than deferring to the conclusions of a party to the litigation"); Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1621–22 (2007) (criticizing *Grutter* for saying it was "'giving a degree of deference to a university's academic decisions' . . . . Nowhere in its prior decisions had the Court delegated responsibility for deciding the weight of a governmental interest to some other governmental entity" (quoting *Grutter*, 539 U.S. at 328)).

145. Karlan, *supra* note 144, at 1622 (criticizing Grutter's "presumption of good faith": "[A] central idea underpinning strict scrutiny was the Court's belief that race was a sufficiently problematic criterion that its use cannot be 'presumed' to reflect 'good faith'" . . . . What is striking here is not that the Court thinks racial diversity . . . can be a compelling government purpose, but rather that it declares that racial diversity is compelling because schools think it is" (quoting *Grutter*, 539 U.S. at 329)).

the race-based admissions policy was necessary to assure diversity, or whether race-neutral alternatives might have sufficed.[146]

Other equal protection cases similarly resort to a somewhat schizophrenic invocation of deference in their strict scrutiny decisions to uphold race-based classifications by trusted institutions,[147] including at times "strict scrutiny" review that upholds race-based classifications based on surprisingly slim evidence offered to justify the need to take race into account.[148]

In short, to take proper account of institutional context, courts have to alter the nature of strict scrutiny substantially, from a test that was every bit as "fatal in fact" as Gerald Gunther suggested to one that, in Justice O'Connor's hands, has "less than strict [scrutiny],"[149] with the Court assuming the defendant's good faith, granting it deference, and not taking a terribly close look at less discriminatory alternatives. This is analogous to how the Court, in its early 1970s sex discrimination jurisprudence[150] and its recent sexual orientation jurisprudence,[151] has invalidated laws "while purporting to apply a traditional 'rationality' standard." In such cases, the

146. *See, e.g.*, Bloom, *supra* note 144 ("[T]he Court could have offered a more persuasive explanation for the result it reached but probably felt precluded by precedent from doing so." *Id.* at 460. "The Court was probably correct in concluding that none of the race neutral alternatives were workable . . . but it certainly could have done a better job of explaining why." *Id.* at 486.); David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in* Gratz *and* Grutter *of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483 (2004) (opining that "the narrow tailoring requirement [is] the 'Rodney Dangerfield' of the strict scrutiny approach, because it 'don't get no respect,'" *id.* at 516, and that in *Grutter* and *Gratz*, "[the] Court's analysis of narrow tailoring . . . is weak and unpersuasive," *id.* at 485, because the Court seemed to disallow "point" systems in Grutter, but "fixed points used in more reasonable ratios," *id.* at 535, would be more narrowly tailored than an "open-discretion" system of the sort permitted in Grutter," *id.* at 528–29).

147. *See* Winkler, *supra* note 12, at 1941–43 (questioning granting "deference" to race-based decisions).

148. Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) (upholding a federal consent decree featuring race-based affirmative action despite offering no analysis of narrow tailoring and even though the only cited evidence of past discrimination was that the percentage of minority police officers was lower than the percentage in the applicant pool and labor force, which typically is insufficient to justify state and local affirmative action); Pagnucci v. City of New York, 785 F. Supp. 467 (S.D.N.Y. 1992) (upholding a federal consent decree featuring race-based affirmative action, with little analysis and no requirement of evidence beyond deferentially citing, and taking at face value, the view of the federal judge who had adopted the decree that it was narrowly tailored and was justified by past discrimination).

149. Jack M. Balkin, Plessy, Brown, *and* Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1727 (2005).

150. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971).

151. *E.g.*, Romer v. Evans, 517 U.S. 620 (1996).

Court's critical look at governmental motive[152] and at the government's chosen means of achieving legitimate cost savings[153] "necessarily import[s] some suspicion of . . . [such] laws," as Kathleen Sullivan and Gerald Gunther noted of the early sex discrimination jurisprudence.[154]

In the sex discrimination and sexual orientation jurisprudence, the Court purported to retain traditional rational basis scrutiny but, seeing a need to strike some laws, in reality applied a heightened level of scrutiny,[155] which eventually (in the sex discrimination context) took shape as intermediate scrutiny.[156] The problem of institutional tailoring in equal protection jurisprudence is essentially the reverse: The Court purports to retain traditional strict scrutiny but, seeing a need to uphold some laws, in reality applies a lesser level of scrutiny.

Just as intermediate scrutiny proved to be a workable, stable solution to the problem of the creeping heightening of rational basis review, so could intermediate scrutiny work as a solution to the "creeping lowering" of strict scrutiny review that occurs when the Court faces a challenge to which strict scrutiny ordinarily would be applicable but sees a need to defer somewhat to certain institutions. The Court in *Johnson v. California* portrayed a dichotomous choice between the extreme "rationality review" tailoring of *Turner v. Safley*[157] and the entirely nontailored, traditional strict scrutiny,[158] but intermediate scrutiny is a not bad approximation of what the Court actually did in *Johnson* and *Grutter*: Retain heightened scrutiny but apply some deference to the government's policy choices. In those equal protection challenges to universities and to prisons, the Court undertook a genuinely searching analysis of the racial classifications at issue, found sufficiently weighty state interests at stake, and—in a nod to the need for tailoring—appeared to examine possible race-neutral alternatives in a somewhat limited fashion based on notions of deference.

Intermediate scrutiny similarly could serve as the appropriate way to undertake modest tailoring in speech cases involving institutions such as

152. *See id.* at 634 ("'[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

153. A preference for men over women in appointing estate administrators intended "to accomplish the elimination of hearings on the merits . . . [is] arbitrary legislative choice." KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 772–73 (15th ed. 2004).

154. *Id.*

155. *See, e.g.*, Balkin, *supra* note 149, at 1727 ("[T]he rational basis test has become stricter to protect groups like the mentally retarded, the children of illegal immigrants, and homosexuals.").

156. Craig v. Boren, 429 U.S. 190 (1976).

157. 482 U.S. 78 (1987).

158. Johnson v. California, 543 U.S. 499, 509–12 (2005).

public schools, workplaces, and prisons. Like strict scrutiny, intermediate scrutiny remains a form of heightened scrutiny in that it places the burden of proof on the defendant—the governmental entity seeking to defend its speech restriction.[159] Also like strict scrutiny, intermediate scrutiny is capable of discerning when a weighty asserted government interest like security is not really at stake because it could be served by means other than the speech restriction at issue.[160] As the Court once put it, intermediate scrutiny requires the government to prove that the challenged policy was "determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions."[161] Yet intermediate scrutiny is not nearly as "fatal in fact" as strict scrutiny, allowing restrictions of rights upon a sufficient governmental showing far more frequently than does strict scrutiny,[162] in part by relaxing strict scrutiny's requirement that the government choose the means least restrictive of individual rights.[163] Thus, intermediate scrutiny strikes a balance between the two imperatives courts face: assuring that speech rights not be restricted unwarrantedly (as they often are under the deferential rationality standards currently applied); and assuring that courts not be

159. *See generally* CHEMERINSKY, *supra* note 3, § 6.5 (collecting and discussing cases).

160. Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995) (reversing a restriction on beer labels, under intermediate scrutiny applicable to commercial speech restrictions, and finding that the law at issue was "more extensive than necessary" toward the government's asserted goals, in light of "several alternatives" less restrictive of speech).

161. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982).

162. The Court on numerous occasions has upheld gender discrimination under intermediate scrutiny. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding an Immigration and Naturalization Service (INS) rule favoring mothers over fathers); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a requirement that men but not women register for the draft); *cf.* Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding gender-specific statutory rape laws; the plurality applied a form of heightened rationality scrutiny, but Justice Blackmun's concurrence, providing the fifth vote to uphold, was an application of intermediate scrutiny). The Court also has upheld a number of regulations of commercial speech under intermediate scrutiny. *See, e.g.*, Bd. of Trs. v. Fox, 492 U.S. 469 (1989) (upholding a bar on commercial speech in the public university's student dormitories).

163. While the equal protection cases have not discussed expressly the extent to which "least restrictive means" is a requirement of intermediate scrutiny, the Court has discussed the matter extensively in cases addressing the regulation of commercial speech, which faces intermediate scrutiny as well; there, the Court expressly cited deference as a reason not to invalidate any law that is not the "least restrictive means" possible. *See, e.g.*, *Fox*, 492 U.S. at 478 ("We uphold such restrictions so long as they are 'narrowly tailored' to serve a significant governmental interest, a standard that we have not interpreted to require elimination of all less restrictive alternatives. . . . [W]e have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary' . . . . And we have been loath to second-guess the Government's judgment to that effect." (citations omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))).

too quick to reject critical governmental interests that should justify certain speech restrictions (a risk under strict scrutiny).

Accordingly, intermediate scrutiny seems the best way to assure that courts take appropriate, but not excessive, account of institutional needs that might justify speech restrictions. To be sure, intermediate scrutiny's ability to balance competing values is not only a strength but also a weakness. It draws criticism as a "malleable test that permits judges' subjective preferences to come into play"[164] and as a test that "treats an evil as though it were a mere inconvenience."[165] More broadly, the Court's recent tinkerings with scrutiny tiers may, as Jack Balkin has noted, "suggest[ ] that . . . the model of scrutiny rules has been stretched to the breaking point, and that the model has outlived its usefulness."[166] Yet, while relying on the existing middle tier of the scrutiny model—intermediate scrutiny—may not be a perfect option, it is superior to the apparent alternatives. As a way for courts to analyze institutions, it is superior to strict scrutiny; as a way to protect against unneeded speech restrictions, it is superior to the deferential forms of scrutiny that prevail under current doctrine.

CONCLUSION

Like religion and drinking, tailoring doctrine to institutions is good in moderation but bad in excess. On the one hand, Holmes makes a valid point in mocking the (probably apocryphal) "justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."[167] On the other hand, Schauer makes a valid point in arguing that "Holmes was wrong" to so mock the possibility of

164. George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 (1993).

165. Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 821 (2002) ("Taken at face value, intermediate scrutiny intimates that treating women as less than equals is bad, but not very bad. Accordingly, if we have reasonably good reasons for failing to live up to the requirements of equal regard, we should let the chips of gender injustice fall where they may.").

166. Balkin, *supra* note 149, at 1726.

167. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1006 (1997) (reprinting 1897 Holmes address).

arranging laws by subject, because differences among institutions sometimes justify different legal rules.[168]

This Article responds with a note of caution and skepticism to the increasing amount of scholarship echoing Schauer's call for more institutional tailoring in, among other fields, First Amendment law. To be sure, some kinds of tailoring may be prudent in First Amendment law where the identities of "speakers" vary greatly in relevant ways. For example, protestors are very different speakers than libraries making choices among books or government arts boards deciding which art to fund; attempting to apply the same rules to all such speakers would be difficult, if not futile. But in other areas, tailoring by institution entails great risk of, and in fact has produced, exaggerations of institutional uniqueness that are dangerous because they have curtailed speech massively in institutions that each govern millions of Americans—schools, public workplaces, and prisons. In deciding speech restrictions not based on a institution-less "law of dangerous speech" but instead on a "law of schools' needs," for example, courts have focused on schools' institutional concerns and thereby accorded schools a deference that is out of conformity with how courts traditionally, and should, closely scrutinize assertions of institutional need to restrict fundamental rights. Intermediate scrutiny of speech restrictions in public schools, workplaces, and prisons—and perhaps in other institutions unique enough to warrant individualized treatment—seems a prudent compromise between recognizing that tailoring can yield relevant insights into institutional difference and recognizing that too much tailoring can yield unjustifiedly excessive deference to institutions seeking to restrict fundamental rights.

168. Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 14, at 118.

***