## Notes

#### This is a federalism answers supplement for affirmatives that read Hazelwood. Debaters should still use answers in the original Federalism DA for uniqueness and impact answers — these are merely some link supplements.

## Hazelwood — Federalism Answers Supplement

### Non-unique – Federal Control of Free Speech Now

#### Federal action critical to free speech – most state and local regulations already struck down

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

Ever since the Supreme Court first held that the First Amendment's guarantee of free speech was incorporated to apply to the states, the Court has maintained that there is no formal distinction between laws burdening speech adopted at the federal, state, or local level. Regardless of their place in the federal system, all levels of government are formally treated to the same standards of review in speech doctrine.1 A content-based speech restriction, such as a campaign-finance law or a measure restricting indecent speech, is adjudicated under strict scrutiny regardless of whether it was enacted at the federal, state, or local level.2 A content-neutral speech restriction, such as a limitation on the time, place, or manner of speech, is adjudicated under a form of intermediate scrutiny no matter the governmental source.3 According to Fred Schauer, First Amendment doctrine is thus marked by "institutional blindness,' 4 with "the government" usually envisioned as a single, monolithic entity.5 The identity of the governmental institution behind a law restricting free speech rights may nonetheless be a significant, if hidden, factor in free speech cases. In this Article, I report the results of an empirical study of free speech decisions in the federal courts and reveal the ways in which the level of government behind a speech law-federal, state, or local-affects the degree of constitutional protection. This study shows that speech restrictions adopted by the federal government are far more likely to be upheld than speech restrictions adopted by other levels of government. Between 1990 and 2003, federal speech restrictions were upheld in 56% of federal court rulings, while only 24% of state speech restrictions were upheld. Even more striking is the fate of speech restrictions adopted by local governments; these were invalidated in almost every case, with only 3% surviving judicial review. In short, the level of government is a very good predictor of whether a speech restriction is likely to be upheld by the federal courts. This Article details these findings and considers potential explanations for, and implications of, this "free speech federalism."

#### Federal court regulation upheld now – several reasons:

#### a) Federal carrots and sticks – judicial promotion, backlash, Court stripping

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

Regardless of the doctrinal equivalence between federal, state, and local speech restrictions, there are numerous reasons to suspect that the identity of the government actor could shape judicial outcomes in free speech cases and potentially other areas of individual rights. But many of these reasons point in the opposite direction from that suggested by Justice Harlan and his occasional brethren: federal laws should survive more often than state and local laws. First, federal courts might defer to federal lawmakers relative to state and local lawmakers. A growing literature in political science and law argues that judges often act strategically when exercising judicial review.' 9 In deciding cases, judges often anticipate the potential reaction of other governmental actors and shape their decisions in ways designed to minimize backlash-what has been termed a "separation of powers" game.'° In the federal government, Congress and the Executive have both carrots and sticks to encourage judicial compliance with their policies. Among the carrots are judicial promotion; numerous scholarly studies suggest that federal judges may shape their behavior to enhance their chances of being elevated to a higher court. 2 ‘Among the sticks are constitutional amendment, 22 intentional reshaping of the judiciary through a politicized nomination process, 23' court packing24 (or unpacking 25), impeachment,26 and budget 27 and 281 salary reduction. Congress can also adopt laws stripping the courts of jurisdiction over particular matters, as happened during Reconstruction 2 and has been threatened repeatedly since the Warren Court days. 3 According to William Eskridge and Philip Frickey, "there is a growing body of empirical evidence indicating that the Court bends its decisions to avoid overrides or other political discipline."'" In contrast to Congress and the Executive, state and local governments have relatively little ability to discipline federal courts for overly aggressive judicial review. Prior to the adoption of the Seventeenth Amendment, state officials had "institutional weapons" that "could be used to influence outcomes at the Supreme Court and other federal courts if those courts threatened the institutional interests of state legislatures."" For example, state legislators could appoint Senators who might threaten to vote against judicial nominees thought to be hostile to state interests. But once Senators were popularly elected rather than accountable to state legislatures, courts were "free to hold state laws unconstitutional without significant fear [of] ... retaliation."'33 Local lawmakers have even less ability than state lawmakers to discipline federal judges, with little more than the power to complain about judicial rulings. State interests are still presumably represented, at least in part, by popularly elected senators-even though the direct interests of the state legislature no longer impinge on the confirmation process. Local lawmakers don't even have that small remnant of influence on federal judicial nominees. William Landes and Richard Posner have recognized that federal courts tend to be reluctant to invalidate federal laws, yet such hesitation diminishes "as we move from regulation that is less local to regulation that is more local.' 34

#### b) Courts trust federal lawmakers with rights

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

Even if federal judges do not fear discipline, they might still defer to federal lawmakers because they trust them more than state and local lawmakers when it comes to matters of fundamental rights. 3 The Supreme Court has given voice to a certain prejudice against state and local governments before. In West Virginia Board of Education v. Barnette, the famous flag salute case, the Court wrote that "small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity ,,36 may be less vigilant in calling it to account. In terms of individual rights, the state and local governments earned a reputation for being untrustworthy in the most important high-profile constitutional controversy of the twentieth century: the struggle for civil rights for racial minorities. Localism in particular has suffered from its association with an ideology of racial segregation. According to David Barron, there is a "deep-seated intuition that local governments are islands of private parochialism which are likely to frustrate the effective enforcement of federal constitutional rights.",3s By contrast, the modem constitutional tradition "asserts that rights-protecting institutions like the Court or the federal government are required to constrain local exercises of power that oppress minorities."' 9

#### c) Federal laws are higher quality – more publicized factions, resources

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

Another reason federal laws might survive more often than state or local laws stems from the supply side of constitutional adjudication: federal laws may be of higher quality than state laws, and state laws may be of higher quality than local laws. "Quality," as I use the term here, refers to the expected fit between the law and existing constitutional doctrine. A high quality law is one that, ex ante, would be predicted to have a strong likelihood of surviving judicial review because it corresponds to controlling precedent. A poor-quality law, by contrast, is one that a reasonable lawyer would predict will be invalidated based on the case law. To understand why the level of government might affect the constitutional quality of a law, we can return to our original and greatest constitutional theorist: James Madison. Madison in Federalist 10 focused on the problem of "faction"-groups of citizens united by a "common impulse of passion . . . adverse to the rights of other citizens' 40 who threatened core rights, such as speech.4 1 Although Madison believed that "the causes of faction cannot be removed,"42 he reasoned that the national government would better protect against their tyranny than state and local governments. According to Madison, "[tlhe smaller the society, the fewer probably will be the distinct parties and interests composing it," the more risk of "local prejudices and schemes of injustice," and "the more easily will they concert and execute their plans of oppression."43 In contrast, the national government would be sufficiently large that no faction could easily achieve dominance. 4 "Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ....” Modem public-choice theory largely concurs with Madison's assessment. Lawmaking is often the product of bargains between politically influential interest groups and government officials. But because of differences in interest group pressures-akin to Madison's "factions" 46--one would expect, in the words of Jonathan Macey, federal law to be a "higher quality product than state law.' 47 Owing to the relatively large number of interests represented by both elected officials and lobbying groups, federal lawmaking tends to require compromise and moderation, 48 diluting the likelihood of any piece of legislation catering to a specific, potentially oppressive interest. 49 Such bargaining is especially hard for an interest that is out of the mainstream, as it must co-opt mainstream elements in order to be successful. At the state (and even more so, the local) level, by contrast, the range of represented interests tends to be smaller and the constituencies more homogenous 0 As a result, oppressive legislation is easier to achieve in a single state or municipality than at the national level.5 This is especially true for groups out of the national mainstream that nevertheless fit comfortably within the culture or demographics of a single state or locality. Moreover, where constituents are relatively homogenous, legislators can gain political capital by pursuing policies that run directly counter to prevailing national norms, even constitutional ones." That the federal courts are likely to overturn a law that mandates, say, prayer in school, may provide an additional reason for some local politicians to enact it. Their constituents may like that they are "standing up" to the federal courts and the erroneous decisions of the Supreme Court. Additionally, as one moves down the federalist hierarchy, we might expect more speech burdens to be adopted without the attention of the press and organized national interest groups. When a local public library considers denying access to one of its meeting rooms to a religious group, no organized interests are likely to even know about it much less lobby to stop it. The ACLU may not notice the local public library's decision, but it will know about every proposed federal law or federal agency regulation that burdens speech. There are also differences in the resources available to lawmakers at the different levels of government, which enhance the possibility of constitutionally unsound laws being adopted as we descend from the federal to the local. The federal government has comparatively greater resources behind its legislative processes to devote to ensuring the durability of its laws than do state and local governments. Federal lawmakers have large staffs, both individually and in committees, that vet legislation and that are often made up of skilled lawyers. Moreover, the wealthier, larger interest groups competing on the national stage can devote more resources to examining legislation and uncovering its flaws. State legislative staffs are smaller, less well funded, and have fewer skilled lawyers.53 At the local level the problem is even worse; city councils, policymakers in school boards and libraries, and other municipal-level officials often have little or no legal staffing whatsoever. 54

### Impact Turn – States oppressive

#### States cannot protect fundamental rights – federal regulatory authority key

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

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

#### Devolution of speech rights causes oppression – small, homogenous groups more likely to institute oppression

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

Perhaps the most significant constitutional trend of the past two decades has been the so-called "federalism revolution." After half a century of centralizing constitutional authority in the federal government-and correspondingly diminishing the power of state and local governments-the Rehnquist Court and a cadre of legal scholars argued for reversing course. This states' rights revolution has centered primarily on Congress's power to regulate commerce and state immunity from federally imposed mandates."' 33 But it has also begun to touch questions of constitutional rights. Justice Clarence Thomas, for example, has called for reinterpreting the First Amendment's Establishment Clause to impose limits on only the federal government and not the states. 3 4 Several notable scholars have similarly called for greater state or local authority to regulate in matters of religious liberty.'35 Others have argued for devolution in matters of constitutional rights more generally. 116 The federalism effect in free speech cases casts in bold relief some dangers of devolution, especially in matters of fundamental rights. To the extent that federal speech laws are a higher quality product than state and local speech laws, we ought to be wary of giving state and local governments more leeway to burden fundamental rights. The justifications for devolution emphasize three arguments. First, devolution is thought to enhance democratic self-governance by making elected officials more responsive to the voters.'37 By placing authority in the hands of government officials closer to local communities-rather than in a distant Washington, D.C.-those communities are better able to effectuate policies and control their destinies. 13 Yet, in light of the poor track record of state and local governments in the area of free speech, one might reasonably question whether enhancing governmental responsiveness to relatively small, geographically compact communities is such a good thing. As Madison warned, in smaller jurisdictions there are fewer interests competing against one another and local prejudices can more easily dictate legal outcomes. 3 9 When small, cohesive groups in the electorate control lawmaking, oppression of outsiders and minorities becomes easier. At the federal level, the pressures of competing interest groups make such oppression more difficult to achieve. Modem-day public-choice theory tells us that elected officials are not simply public spirited; they respond to incentives. 40 Owing to structural features of the national government, these lawmakers are less likely than state and local officials to adopt poorly formed laws that exceed constitutional limits. Democratic self-government loses much of its appeal when it is employed to deny fundamental rights, such as the freedom of speech, to minority interests. One might even conclude that only by vigorous protection of speech rights-an essential element of self-government--can governmental processes be sufficiently worthy of our respect.14 1

### Impact Turn – States Hurt Free Speech

#### Decentralized power risks free speech – state will be rolled back

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

A second and related justification for devolution focuses on the "checking" effect of state and local governmental authority. Under this view, a major threat to individual liberty is concentrated governmental power in the federal government. 42 There is a "danger of irresponsible power at the federal level in the interplay between federal bureaucracies, congressional committees, and interest groups.' 43 While the fear of concentrated power is legitimate, the free speech cases suggest there ought to be equal or greater concern for decentralized power. Because of structural features of lawmaking at the federal level, the legal output of the national government is the result of a process in which multiple groups exercise their voice. Consequently, that output tends to be moderate rather than radical, constitutionally strong rather than constitutionally weak. As we descend to the state and local level, governmental power is more easily exercised to injure the freedom of speech. If the First Amendment exists to keep open the channels of communication, especially for minorities, then the free speech cases suggest that state and local regulation often needs the correcting force of federal judicial review. Indeed, the history of individual rights in the twentieth century, especially the battle against race discrimination, indicates that state and local authority may be "the problem, not the solution."'" If anything, the free speech data suggest that the federal government-in the guise of the judiciary-is checking the excesses of state and local governments. One might nevertheless defend the qualitatively poor output of state and local governments if it is part of an effort to change existing doctrine. If they object to current doctrinal rules, one of the few ways they have of attempting to change them is to enact contradictory laws and try to defend them successfully in court. While I am skeptical that most, if any, of the poor quality free speech laws found in this study are conscientious efforts to change constitutional doctrine, if they were, then we might say that lawmakers are using their legislative authority to check the federal courts. Unfortunately for them, the federal courts have the last say.

#### Decentralization undermines the marketplace of ideas – lack of uniformity hurts fundamental rights

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

The third argument for devolution is that it creates choice in the marketplace for governmental services and organizations.14 ' Here, devolution is valued for reasons akin to those used by Justice Harlan to justify relatively lenient judicial treatment of state obscenity laws: federal regulation homogenizes the law by requiring uniformity throughout the nation. To the extent our pluralistic society wishes more diversity, diminished federal power and augmented state and local authority may serve to create variation in legal regimes. People can then choose to move to the area that most resembles their preferences. 46 In one sense, the free speech cases support the premises of this argument: at lower levels of government, there is a range of unusual speech regimes that mobile citizens could choose from. People opposed to campaign-finance reform or to speech about violence can find jurisdictions with laws that match their desires. The problem is that choice and diversity are not necessarily values that should be encouraged when it comes to fundamental rights. 47 The right to free speech is supposed to be enjoyed equally by all citizens, regardless of their place of residence. In the traditional understanding of the First Amendment, the citizen choice that is valued is that which comes from unfettered debate in the marketplace of ideas. If state and local governments can restrict speech, the channels of dialogue are restricted and choice diminished, not enhanced.