MORE RESTRICTIVE ALTERNATIVES*

MICHAEL COENEN**

Courts often fault governments for pursuing their regulatory interests in an unnecessarily restrictive manner. Indeed, and as is well appreciated by courts, litigants, and scholars alike, the availability of a "less restrictive alternative" will often spell the doom of a constitutionally suspect law. Sometimes, however, this logic gets flipped on its head, with courts faulting governments for failing to utilize alternatives that are more restrictive rather than less. This Article collects examples of what it calls "more restrictive means" analysis in U.S. constitutional law and attempts to make sense of its analytical underpinnings. Specifically, the Article suggests that courts invoke "more restrictive alternatives" for at least one of two purposes: (a) to undercut the government's claim that a regulatory interest requires it to discriminate in a constitutionally problematic manner (highlighting what is described as an "equality-based" defect in the law under review); and/or (b) to cast doubt on the government's commitment to a claimed regulatory interest (highlighting what is described as a "sincerity-based" defect in the law under review). The Article also analyzes the various types of defenses the government might raise on behalf of its decision to regulate less restrictively, such as the claim that a more restrictive alternative would fail to produce additional regulatory benefits, the claim that it would increase administrative costs, and the claim that it would undermine important "lenience-related" interests that the less restrictive law is better capable of promoting. Additionally, the Article considers the relationship between the constitutional import of a more restrictive alternative and the constitutional validity of the alternative itself, suggesting somewhat counterintuitively that more restrictive alternatives of questionable constitutionality can sometimes support invalidation of the laws with which they are compared. The upshot of this analysis is a novel and systematic framework for

** Associate Professor of Law, LSU Paul M. Hebert Law Center. For helpful thoughts, comments, and criticisms, I am grateful to Anna Arkin-Gallagher, Dan Coenen, Seth Davis, Brannon Denning, Dan Epps, Andrea Freeman, Jeremy Golubcow-Teglasi, Ashley Lott, Alan Madry, Dina Mishra, Chad Oldfather, Christopher Sherman, Nelson Tebbe, Susannah Barton Tobin, Mark Tushnet, and workshop participants at Brooklyn Law School, Marquette University Law School, and Tulane University Law School.

thinking about more restrictive alternatives and their place within U.S. constitutional law.

INTRODUCTION

In constitutional law, it is not always true that the ends justify the means. Although a law's validity will often depend on the strength of the government interests said to justify it, courts must also attend to the question of *how* the law pursues the interests it purports to achieve. Constitutional difficulties do not disappear just because a law happens to connect with a governmental interest that is "legitimate," "important," or even "compelling"; to withstand attack, the law must

also advance that interest in an appropriate *manner*. Justifying a law's ends amounts to only half of the battle; even where the ends pass muster, so too must the means.[1]

How do courts evaluate the means by which a government pursues a given regulatory interest? One familiar technique, utilized across a variety of substantive domains, involves so-called "less restrictive means" analysis.[2] The underlying insight is straightforward: if a challenged law advances a government interest while imposing constitutional costs on regulated parties, and if an alternative law could achieve that same interest without imposing those costs, then the challenged law must go. The existence of a "less restrictive alternative," in other words, undercuts the case for upholding the "more restrictive" approach under review. Even if the relevant government interest might sometimes justify a sacrifice in the way of liberty interests, equality interests, structural safeguards, or some other constitutionally salient value, courts should not countenance such a sacrifice when a less restrictive alternative stands waiting in the wings.

To take a simple example, imagine a First Amendment challenge to a city ordinance that prohibits the holding of outdoor political rallies within municipal boundaries. Imagine also that city officials defend the law by reference to a government interest in avoiding noise and disorder on city streets. Because the ban is a "content-based" regulation of speech (insofar as it takes aim at only *political* rallies), a court is likely to subject this law to strict scrutiny.[3] Applying strict scrutiny, the court is likely to identify several less restrictive laws that might still allow the city to achieve its peace-promoting goals. The city might, for instance, prohibit the holding of political

1. Carey v. Brown, 447 U.S. 455, 464–65 (1980) ("For even the most legitimate goal may not be advanced in a constitutionally impermissible manner.").

2. For descriptions of the logic underlying "less restrictive means" analysis, see, for example, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 (2007); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 465–66 (2014); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) [hereinafter Volokh, *Freedom of Speech*]; Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework*, 56 UCLA L. Rev. 1443, 1465 (2009) [hereinafter Volokh, *Right To Keep and Bear Arms*]. Less restrictive means analysis enjoys a strong foothold in other jurisdictions as well, where courts have incorporated it as a discrete component of "proportionality"-based rights review. *See, e.g.*, Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 836–37 (2007); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3099 (2015); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 802–03 (2011).

3. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988).

rallies in residential neighborhoods, prohibit political rallies during weeknights, prohibit political rallies with 100 or more participants, prohibit only those rallies that are "disorderly," and so forth. At least some of these alternatives would achieve tolerable levels of peace and tranquility for city residents, and all would do so in a manner that lessens the burden on would-be rally-goers' free-speech rights. Given the existence of these less restrictive means, a court would have good reason to conclude that the city has pursued its interests in an impermissible way.

Now consider an alternative possibility. Suppose that the city demonstrates that none of the less restrictive alternatives identified would achieve a comparable level of peace and quiet on its streets. Should the city then prevail? Not necessarily. Even with the less restrictive alternatives disqualified, there remain *other* sorts of alternatives that might still compel the law's invalidation. Specifically, rather than curtail the restriction imposed by the existing law, the city might instead expand the restriction, so as to bring even more expressive conduct within its regulatory reach. One possibility would entail a ban on political rallies in addition to some other types of rallies, such as religious rallies and sports-related rallies. Another possibility would entail a ban on political rallies that occur *both* indoors and outdoors. An even broader possibility might involve a categorical ban on *all* types of rallies—be they centered on politics, religion, motorcycles, sports, or any other subject about which large groups of people come together in support of some cause. Yet another possibility might be a wholesale ban on assembling in public areas, regardless of whether the assembling is intended to serve expressive or non-expressive purposes. Would-be political rally-ers, to be sure, would fare no better under any of these alternative laws; rather, the only change would be a worsening of the situation faced by other individuals who are currently unburdened by the status quo regime. And yet, at least some of these more restrictive alternatives might provide a valid reason for invalidating the less restrictive law under review.

Scholars and practitioners of constitutional law are by no means unfamiliar with the proposition that expanding a law's regulatory burdens (or contracting a law's regulatory benefits) can sometimes ameliorate its constitutional defects. Most familiarly, it has long been recognized that governments may remediate equal protection problems by "leveling down" a law's treatment of a currently advantaged group to align with its treatment of a currently disadvantaged group. If, after all, discrimination is the relevant

concern, then a law that treats everyone poorly might prove less constitutionally problematic than a law that treats some people well.[4] This rule has carried force outside the equal protection context as well. Other doctrines enshrine nondiscrimination principles of their own, and these principles often support claims that a more restrictive law poses fewer constitutional problems than its less restrictive counterpart. Thus, for instance, we might find a dormant Commerce Clause violation in a law that taxes resident income at ten percent and nonresident income at fifteen percent, whereas we would not find such a violation in a law that taxes both resident and nonresident income at fifteen percent.[5] We might find a Free Exercise Clause violation in a law that prohibits only worshipers from ingesting peyote, whereas we would not find such a violation in a state that prohibits both worshipers and non-worshipers from ingesting peyote.[6] And we might find a First Amendment violation in a content-based law that singles out certain types of speech for adverse treatment but not in a content-neutral law that subjects all forms of that speech to the same adverse treatment.[7] What is true in the equal protection context thus turns out to be true in other constitutional contexts as well. "More restrictive" does not always equate to "more unconstitutional": sometimes governments can eliminate

4. *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1806 (2015) (noting that it "is simply a truism about every case under the dormant Commerce Clause (not to mention the Equal Protection Clause)" that "[w]henever government impermissibly treats like cases differently, it can cure the violation by . . . 'leveling down'"); Orr v. Orr, 440 U.S. 268, 272 (1979) ("In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties (e.g., by repealing the statute as a whole)."); Palmer v. Thompson, 403 U.S. 217, 218–19 (1971) (holding that Jackson, Mississippi did not violate the Equal Protection Clause when it decided to shut down its racially segregated public swimming pools rather than open those pools to everyone). For scholarly treatments of the subject, see, for example, Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004); Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1185 (1986); Jean Marie Doherty, Note, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S. CAL. L. REV. 1017, 1020 (2008).

5. *Cf., e.g.*, *Wynne*, 135 S. Ct. at 1822 (Ginsburg, J., dissenting) (noting that, on the logic of the majority opinion, "Maryland could eliminate the [constitutional violation] by terminating the special nonresident tax—a measure that would not help the Wynnes at all").

6. *See* Emp't Div. v. Smith, 494 U.S. 872, 882 (1990).

7. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 205 (1983) (noting that the First Amendment's content discrimination principle "may invite government to 'equalize,' not by permitting more speech, but by adopting even more 'suppressive' content-neutral restrictions").

constitutional problems simply by increasing, rather than decreasing, the scope of a law's regulatory burdens.[8]

But the question posed by the "no political rallies" hypothetical is not simply whether the government could cure a constitutionally defective (and less restrictive) law by adopting a more restrictive alternative in its stead. Rather, the relevant question is whether, and if so when, the *availability* of such an alternative should count as a reason for invalidating the less restrictive law under review. Indeed, the *remedial* question of whether the government may ratchet up restrictiveness in response to an adverse merits-based ruling is distinct from the *substantive* question of whether a hypothetically available more restrictive alternative should produce such an adverse ruling in the first place.[9] It is one thing to highlight a more restrictive alternative as a permissible substitute for a law whose

8. This point relates to Professor Matthew Adler's important observation that U.S. constitutional rights tend to operate as "rule-centered" rather than "act-shielding" restrictions on government action. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 1–173 (1998). As Adler points out, "[t]o say that sanctioning *X* pursuant to a particular rule violates her constitutional rights does not entail that the particular action at stake . . . is constitutionally protected from being sanctioned pursuant to all other rules." *Id.* at 14. Rather, the statement signifies only that "a reviewing court should at *X*'s instance invalidate, in some measure, a particular rule." *Id.* It is for this reason, for instance, that the government can permissibly prosecute an act of flag burning pursuant to a statute that criminalizes arson but not pursuant to a statute that criminalizes flag burning as such. *Id.* at 4–5. If U.S. constitutional law were truly "act-shielding" in its focus, then governments could never remediate unconstitutional action by increasing the scope of a law's burdens (and thus leaving the constitutionally protected act just as unshielded as was previously the case). But as the foregoing examples demonstrate, the doctrine often permits governments to do just that. The doctrine's willingness to permit remediation via restrictiveness-related *increases* (in addition to restrictiveness-related *decreases*) thus provides strong support for Professor Adler's descriptive claim about the rule dependent nature of constitutional rights.

The point also resonates with Professor John Fee's recent exploration of "greater-or-nothing" rules in constitutional law—rules that, as Professor Fee explains, stem from the proposition that "[t]he power to do A plus B does not necessarily include the power to do A alone." *See* John Fee, *Greater-or-Nothing Constitutional Rules*, 64 CASE W. RES. L. REV. 101, 102 (2013). As Professor Fee himself notes, some—though by no means all—such rules stem from the same sorts of doctrinal structures in which more restrictive means analysis is most likely to be employed. *See id.* at 109–13. As I explain further below, my focus here is not on the entire universe of doctrinal rules that permit the government to do "A plus B" but not "A alone." Rather, it is on the narrower range of circumstances in which the government's *failure* to do "A plus B" provides a reason to reject its justification for doing "A alone." In this sense, I believe that the analysis I provide here usefully complements Professor Fee's important and wide-ranging analysis of "greater or lesser" problems throughout constitutional law, by providing a more focused and in-depth treatment of one of several ways in which constitutional law might come to allow the imposition of a "greater" while keeping the "lesser" off limits.

9. *See infra* Part V.

unconstitutionality has already been shown, but it is another thing to leverage such an alternative for the purpose of demonstrating that a constitutional violation has in fact occurred. If the interests underlying a law could be equally or better served by worsening the lot of some regulated parties while improving the lot of *no* regulated parties, when (and how) should that fact count as a strike against the law that the government has chosen to adopt? That, in a nutshell, is the question that this Article confronts.

The question is worth confronting because more restrictive means analysis does in fact occur within U.S. constitutional law, as both the Supreme Court and lower courts have shown receptiveness to the (sometimes) counterintuitive proposition that the government can violate the Constitution because it has not regulated restrictively enough.[10] But in so doing, these courts have yet to develop a systematic framework for understanding (a) the mechanisms by which a more restrictive alternative might cast doubt on the validity of a less restrictive law, and (b) the justifications the government might offer on behalf of its decision *not* to regulate more restrictively. These analytical shortcomings in the case law, in turn, have generated spotty and inconsistent outcomes across cases, whose precedential implications thus remain vexing and unclear.[11] A sustained treatment of more restrictive means analysis in U.S. constitutional law thus might help us to make better sense of the existing case law, while also yielding prescriptive insights for the application of more restrictive means analysis in future cases.

The descriptive components of this task are carried out in the first two Parts of the paper. Part I offers definitional details, relating the notion of constitutional "restrictiveness" to other concepts and ideas that more often find expression in constitutional doctrine. Part II goes on to survey existing approaches to more restrictive means analysis within different areas of the law, demonstrating both (a) the

10. *See infra* Part II.

11. To be sure, several scholars have addressed aspects of more restrictive means analysis, although typically in the context of specific areas of substantive doctrine. *See, e.g.*, Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After* Williams-Yulee, 48 ARIZ. ST. L.J. 525, 528 (2016); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 868 (2001) (considering the problem within the free-exercise context); William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637, 637 (1993) (considering various applications of "more restrictive means" analysis within the free-speech context); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347–48 (1949) (considering aspects of the problem within the equal protection context). This Article, by contrast, represents an attempt to develop a broader, trans-substantive account of the phenomenon.

wide variety of contexts in which the Court has engaged in more restrictive means analysis of some form and (b) the absence of a coherent approach to the question of when more restrictive alternatives should in fact carry doctrinal weight.

That sets the stage for the analytical part of the inquiry. Part III begins by disaggregating and describing two different mechanisms by which a more restrictive alternative can highlight constitutional defects in a less restrictive law.[12] First, the more restrictive alternative might help to highlight *equality*-related defects in the law under review. Where a law employs a form of discriminatory treatment that the doctrine disfavors, a court has reason to invalidate the law if it can determine that the discriminatory treatment is not necessary to the achievement of the government's ends, and a more restrictive alternative can often help to demonstrate that this is the case. The hypothetical "no political rallies" law, for instance, draws a content-based distinction between political and non-political rallies. But there exist several more restrictive alternatives to that law that could just as effectively further the relevant government interests (i.e., peace and tranquility for city residents) without discriminating between rallies on the basis of their subject matter (e.g., "no rallies, period"; "no gathering on the streets"). And because the First Amendment disfavors content discrimination as such, a court might well conclude that the city went about pursuing its interests in a manner that is unnecessarily discriminatory and therefore constitutionally impermissible. More restrictive alternatives, in other words, can often function as *nondiscriminatory* alternatives, undercutting the government's claim that a particular regulatory interest requires it to discriminate in a constitutionally problematic fashion.

12. Other commentators have alluded to this basic distinction, especially as it arises in the free-speech context. *See, e.g.*, Volokh, *Freedom of Speech*, *supra* note 2, at 2423 (noting, in the free speech context, that a law's underinclusiveness may demonstrate "that the interest isn't very important, or that the government's real interest wasn't the stated one but was rather just a desire to favor one form of speech over another, or to suppress offensive or otherwise disfavored speech," and that underinclusiveness may also demonstrate that "the presence of content discrimination beyond that justified by the compelling interest"); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 51–52 (1994) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978)) (noting that underinclusiveness might reveal the existence of an impermissible "attempt to give one side of a debatable public question an advantage in expressing its views to the people," or instead might "diminish the credibility of the government's rationale for restricting speech in the first place"); ARTHUR D. HELLMAN, WILLIAM D. ARAIZA & THOMAS E. BAKER, FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION & FREEDOM OF RELIGION 407–08 (2nd ed. 2011) (describing the two different accounts of underinclusiveness offered by the Court in *City of Ladue*).

But more restrictive alternatives do not operate solely in connection with an established legal presumption against discriminatory treatment: claimants might also invoke a more restrictive means to support a *sincerity*-based attack on a constitutionally suspect law. More specifically, where a challenged law furthers a claimed government interest with only some effectiveness, and where a more restrictive law would serve that government interest with greater effectiveness, the government's failure to regulate more restrictively may support an inference that the regulatory object of a law is something other than the interest that the government has identified. Our hypothetical "no political rallies" law might suffer from this constitutional defect as well. If it turned out that sports-related rallies caused more chaos and disruption within the city than did political rallies, the city's failure to include sports-related rallies within the scope of its anti-rallying ordinance would complicate its efforts to justify the law as a peace- and tranquility-promoting measure. That the city has chosen to regulate less restrictively might indicate that it is actually seeking to suppress undesirable political speech, pursuing an aim that the First Amendment flatly condemns. The more restrictive alternative thus helps to reveal that the government has done less than what a true commitment to a legitimate interest would require, and that revelation, in turn, provides a ground for supposing that some other, illegitimate interest actually underlies the less restrictive law under review.

The equality- and sincerity-based rationales for more restrictive means analysis thus help to answer the question of *why* courts should sometimes treat a law's relative lenience as a constitutional liability. But with that question answered, a second analytical challenge arises: if more restrictive alternatives should sometimes carry force, then we must next explain why they sometimes should not. At first glance, the underlying logic of both the equality- and sincerity-related arguments might seem to enjoy a nearly limitless range of successful application, pushing toward the bizarre conclusion that the only constitutionally acceptable regime is one in which no one is ever allowed to do anything anywhere. Common sense and everyday practice indicate that this is clearly not the case, but some additional analytical work is needed to explain why that is so. Thus, the remainder of the Article, set forth in Parts IV and V, attempts to identify, taxonomize, and evaluate the various types of arguments that government actors might offer in response to the claim that they have regulated with insufficient restrictiveness. These Parts thus lay out the sorts of

considerations that function to cabin the scope of the equality- and sincerity-based arguments, and they also highlight the various ways in which government actors might appeal to these considerations in rebutting a claim of insufficient restrictiveness.

The first set of considerations, canvassed in Part IV, concerns issues of regulatory viability. Both the equality- and sincerity-based applications of more restrictive means analysis require some investigation of the extent to which a more restrictive alternative would serve the government interests invoked on behalf of a challenged law. That investigation, in turn, creates an opening for the government to argue that the posited alternative is not in fact an adequate regulatory substitute. The government might pursue this claim in four different ways, arguing that a more restrictive alternative would (1) yield little in the way of additional regulatory benefits, (2) prove too costly to administer, (3) actively undermine the regulatory interests that a challenged law directly pursues, and/or (4) undermine other government interests associated with the lenient aspects of the status quo regime. Some of these claims are more persuasive than others, and their persuasiveness will often depend on whether the claimant is advancing an equality- or sincerity-based attack. But by separating out these claims and evaluating each on its own terms, we can help to lay the groundwork for a more coherent and principled judicial assessment of the comparative regulatory merits of more restrictive alternatives and their less restrictive counterparts.

A second set of considerations, canvassed in Part V, centers on the issue of *constitutional viability*. Simply put, the government might sometimes defend its failure to adopt a more restrictive alternative by contending that the alternative itself would create constitutional problems. Perhaps, for instance, an expanded prohibition on all rallying would itself violate the First Amendment, in which case the government could point to the likely unconstitutionality of the more restrictive alternative as helping to justify its enactment of a less restrictive law. This sort of "constitutional viability" defense gives rise to a question that is both theoretically interesting and practically important: to what extent must a posited more restrictive alternative itself avoid constitutional difficulties in order to carry doctrinal weight? That question may seem easy to answer. Obviously, one might say, a more restrictive means must itself qualify as unambiguously valid in order to support a constitutional attack on a less restrictive law. But in fact, the answer is not as straightforward as it may appear. The general, if somewhat counterintuitive, conclusion

is that, while an unconstitutional more restrictive alternative can never support an equality-based attack on a less restrictive law, it can sometimes support a sincerity-based attack on the same.

Before we proceed further, two methodological clarifications are in order. First, as this Introduction reveals, the ensuing analysis treats more restrictive means analysis as a trans-substantive problem of constitutional law, according only limited significance to the traditional boundaries that divide up constitutional doctrine. Some limits, however, necessarily constrain the Article's scope. Most importantly, the Article considers only those areas of doctrine that require a judicial assessment of the *fit* between a challenged law and the government interests it is said to serve; where no such "means/ends" assessment is required, more restrictive alternatives will prove irrelevant to the cases being decided. What is more, the Article focuses primarily on doctrines that call for heightened means/ends scrutiny of constitutionally suspect laws, taking it largely for granted that the presence or absence of more restrictive alternatives will not often influence the court's application of rational basis review.[13] Put another way, the domain of the Article includes all areas of doctrine where courts (a) must assess the means by which a challenged law furthers a stated government interest, and (b) must do so according to a level of scrutiny that is at least somewhat more exacting than standard-form rational basis analysis.[14]

Second, with respect to the evaluative and prescriptive components of the inquiry, the Article attempts to steer a middle course between the twin extremes of rigid doctrinal fidelity and freewheeling doctrinal reform. This analysis does not go so far as to take *all* features of the doctrine as established and unchangeable (in which case evaluation and prescription would be impossible), but it also does not treat every feature of the doctrine as flexible and up for grabs (in which case evaluation and prescription would be of little

13. This point finds support in the Court's oft-quoted suggestion that—as far as rational basis analysis is concerned—the government is free to confront a regulatory problem "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955). So long as that proposition remains true, claimants will have difficulty convincing courts that a law that confronts one "phase" of a problem but not another should be invalidated in light of more restrictive alternatives that would confront more phases of the problem at the same time.

14. I do discuss a few cases that, while purporting to apply standard rational basis review, in fact depart substantially from its traditionally deferential mood. *See, e.g.*, *infra* Section II.C (discussing the Court's implementation of "rational basis with bite" review in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985)).

practical use). Here, in particular, the study focuses on the particular phenomenon of more restrictive means analysis, while leaving largely unquestioned the broader constitutional frameworks within which that analysis operates. Thus, for instance, the Article does not consider whether means/ends analysis should itself play a significant role in guiding the application of many different constitutional guarantees, whether different types of governmental regulation should trigger meaningfully different levels of means/ends scrutiny (e.g., strict scrutiny, intermediate scrutiny, rational basis), whether facially discriminatory laws should face tougher constitutionally scrutiny than do facially neutral laws with discriminatory effects, and so forth. In taking these propositions as a given, I do not mean to suggest that they are immune from criticism. Rather, my concern in this Article is the narrower question of what those propositions imply when it comes to asking whether the government has regulated with insufficient restrictiveness. To be sure, these insights may yield some troubling or untoward results, which may require a rethinking of the overall wisdom of more restrictive means analysis and the premises that give it force. But before that rethinking occurs, we need first to understand where the analysis comes from and how it relates to broader features of the doctrine writ large. That is what this Article attempts to do.

I. DEFINING "MORE RESTRICTIVE ALTERNATIVES"

A. Restrictiveness Defined

Under what circumstances does one law qualify as "more restrictive" than another?[15] For purposes of this Article, the following definition will apply:

15. I am aware of only a few instances in which the Court or one of its members has used the phrase "more restrictive" in the manner I describe. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 404 n.5 (1992) (White, J., concurring in the judgment) (attributing to the majority opinion the conclusion that a more restrictive alternative could adequately serve the compelling need identified by St. Paul lawmakers); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 649 (1985) ("We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations."); Clements v. Fashing, 457 U.S. 957, 989 (1982) (Brennan, J., dissenting) ("A provision directed only at Texas officeholders, that gave those officeholders a choice between resigning and serving out their current terms would serve all of the asserted state interests; yet Texas has inexplicably chosen this far more restrictive alternative."); Carey v. Brown, 447 U.S. 455, 475 (1980) (Rehnquist, J., dissenting) ("Under the Court's approach today, the State

> *Law A^+ is "more restrictive" than Law A when it is true that either: (a) at least one individual party regulated by Law A^+ is subject to a regulatory burden that is more severe than what that party experienced under Law A, and no regulated party is subject to a regulatory burden that is less severe than what that party experienced under Law A, or (b) at least one individual party regulated by Law A^+ receives a regulatory benefit that is less generous than what that party experienced under Law A, and no regulated party receives a regulatory benefit that is more generous than what that party experienced under Law A.*

More generally, if government actors modify a law so as to improve its treatment of nonregulated parties and to worsen its treatment of at least one regulated party, then the modified law qualifies as a more restrictive alternative to the unmodified law.[16]

A few features of this definition warrant emphasis. First and foremost, the definition proceeds in relative terms, meaning that a given law's status as a more restrictive alternative exists in relation to an established legal baseline. A law might qualify as a more restrictive alternative in comparison to one law but not in comparison to another—its status as such depends on the particular legal reference point against which it is being evaluated. The definition, in other words, does not attempt to posit some threshold level of restrictiveness that differentiates restrictive and nonrestrictive laws. Rather, it attempts only to furnish some means of determining whether one law counts as more or less restrictive in relation to another.

Second, in gauging relative levels of restrictiveness, the definition focuses on formal legal treatment of regulated parties. This condition thus deliberately omits the experiences of nonregulated parties, who sometimes may find themselves significantly less restricted on account of a formally more restrictive means.[17] Consider, for instance,

would fare better by adopting *more* restrictive means, a judicial incentive I had thought this Court would hesitate to afford.").

16. In this sense, a more restrictive alternative might be characterized as "Pareto inferior" to its less restrictive counterpart—at least where the relevant Pareto principle is "strong" rather than "weak" and the only costs and benefits being considered are the costs and benefits formally allocated by the law. *See generally* MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 53 (2012) (distinguishing between the "strong" Pareto principle, which deems x as superior to y if no one is worse off under x and at least some are better off under y, and the "weak" Pareto principle, which deems x as superior to y if everyone is better off under x and no one is worse off under x).

17. I should further emphasize that in distinguishing between regulated and nonregulated parties I do not mean to suggest as a normative matter that the interests of

legislative action that expands the reach of an antipollution statute. Under the definition adopted here, the expanded antipollution statute would qualify as more restrictive than the previous antipollution statute if it improved the lot of zero would-be polluters and worsened the lot of at least some would-be polluters. And that would remain so even if the law produced a significantly less restrictive environment for everyone else via improvements to public health and outdoor enjoyment. All laws produce winners and losers, and some increases in formal restrictiveness will nonetheless generate welfare- and liberty-promoting results for regulatory beneficiaries. But the definition offered here does not attempt to account for all of these consequences. Rather, it assumes the perspective of each party *regulated* by a law and asks, from that perspective, whether the law's formal treatment of the individual has become more burdensome (or less beneficial) than had previously been the case.

Third, and relatedly, the definition ignores the system-wide effects of the two laws subject to comparison.[18] Restrictiveness is gauged from an atomized and individualistic perspective, with the benefits and burdens imposed on one party viewed in isolation from the benefits and burdens imposed on other parties. Suppose, for instance, that Law A taxes in-state citizens at five percent and out-of-state citizens at ten percent, and suppose further that Law A^+ taxes both in-state and out-of-state citizens at ten percent.[19] Out-of-state citizens may plausibly claim that they fare better under Law A^+ than under Law A, for the simple reason that Law A, while leaving their tax rates unchanged, at least "eliminates the unfairness of being treated differently."[20] Valid as that consideration may be, however, it has no bearing on the relative restrictiveness of Law A, because "restrictiveness," as we have defined it, excludes cross-party comparisons in regulatory treatment. In other words, for the limited purpose of asking whether Law A^+ counts as more or less restrictive than Law A, we should ignore any positive effects that arise on

the former *should* in fact be greater cause for concern than the interests of the latter. *Cf.* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186–88 (1992) (suggesting that the distinction between "regulated objects" and "regulatory beneficiaries" "load[s] the dice" by falsely presupposing a natural, baseline state of affairs in which the endowments and entitlements of "regulated objects" exist entirely independent of the common law regime).

18. *See* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 (2009).

19. *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1823 (2015) (Ginsburg, J., dissenting) (providing an analogous illustration where "leveling up" or "leveling down" alleviates a discriminatory tax).

20. *Id.*

account of any one party's awareness of how the law treats similarly situated parties. This is not to say that such effects are unimportant. To the contrary, these effects go a long way towards explaining why more restrictive alternatives sometimes prove constitutionally preferable to their less restrictive counterparts. But for purposes of analytical clarity, "cross-party dynamics" of this sort are best left out of the threshold determination of whether one law qualifies as "more restrictive" than another.

None of these three conditions is intended to signal any normative or constitutional assumptions about the *desirability* of increasing (or decreasing) a law's restrictiveness. The conditions instead reflect a set of definitional choices, intended to establish a useful analytical framework for understanding a set of complex problems that courts routinely confront. I emphasize that I am claiming no essential truths here; to the extent that one would prefer to understand restrictiveness differently, alternative conceptual frameworks could certainly be developed. The important point is simply that the concept of a "more restrictive alternative" by no means equates with the concept of a "less constitutional alternative" (nor does it equate to the concept of a "less desirable alternative"). When and how those concepts should equate is an interesting question that will be taken up in due course.[21] For the time being, however, it suffices to say that by identifying Law A^+ as more restrictive than Law A, one need not embrace any evaluative conclusions about how those two laws should be dealt with by the courts.

B. Related Concepts

1. Nondiscriminatory Alternatives

A "nondiscriminatory alternative," as its name suggests, pursues an identified government interest in a manner that avoids a constitutionally suspect form of discriminatory treatment.[22] This concept arises with frequency in U.S. constitutional law.[23] In the equal protection context, for instance, courts sometimes ask whether there exists a "race-neutral" means of achieving the government interests

21. *See infra* Part V.

22. *See* Fee, *supra* note 8, at 109.

23. *See id.* at 109–13 (noting the emergence of "antidiscrimination rules" within several different areas of constitutional law).

underlying a non-race-neutral law,[24] or whether there exists a "gender-neutral" alternative to a "gender-based" law.[25] In the free speech context, courts often inquire into whether there exists a "content-neutral" means of achieving the government interests underlying a "content-based law."[26] And in the dormant Commerce Clause context, courts sometimes ask whether there exists a nondiscriminatory means of achieving the government's interests underlying a law that facially discriminates against interstate commerce.[27] A "nondiscriminatory alternative," in short, is any proposed alternative to a challenged law that steers clear of the constitutionally problematic form of discriminatory treatment that the challenged law employs.

How do nondiscriminatory alternatives relate to more restrictive alternatives? In many cases, a more restrictive alternative will turn out also to be a nondiscriminatory alternative, and vice versa.[28] But the categories are not in fact co-extensive. Nondiscriminatory alternatives can just as easily qualify as less restrictive (compare, for instance, a hypothetical twenty percent/ten percent tax to an across-the-board tax at ten percent), or as neither more nor less restrictive in an absolute sense (compare, again, the twenty percent/ten percent tax to an across-the-board tax at fifteen percent). This is another way of saying that governments can alleviate inequalities in different ways. They can "level down" a law's treatment of previously advantaged parties to match its treatment of previously disadvantaged parties; they can "level up" a law's treatment of previously disadvantaged parties to match its treatment of previously advantaged parties; or they can "level to the middle," by partially ameliorating a law's treatment of the previously disadvantaged parties and partially

24. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives . . . .").

25. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 283 (1979) ("Where, as here, the State's . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.").

26. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (noting that "existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of . . . a [content-based] statute") (citing Boos v. Berry, 485 U.S. 312, 329 (1988)).

27. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (noting that "facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives").

28. Compare, for instance, a rule that taxes *A* at twenty percent and *B* at ten percent with an alternative rule that taxes both *A* and *B* at twenty percent; the latter qualifies as both nondiscriminatory as between *A* and *B* and more restrictive than the original rule.

worsening its treatment of previously advantaged parties.[29] All three modifications are capable of producing nondiscriminatory alternatives, but only one of them is capable of producing a more restrictive alternative as well.

Thus, not all nondiscriminatory alternatives qualify as more restrictive alternatives. Nor, for that matter, do all more restrictive alternatives qualify as nondiscriminatory alternatives. For example, rather than tax *A* at ten percent and *B* at twenty percent, a government might instead tax *A* at ten percent and *B* at thirty percent. In no sense does the modified law alleviate discriminatory treatment of *A* and *B* (if anything, it exacerbates it), but the new law would still qualify as more restrictive than the law that it replaced. Further, some more restrictive alternatives might exist in relation to laws that are not even discriminatory in the first place. A law that prohibits everyone from purchasing guns, for instance, might not give rise to a discrimination-based constitutional claim. But we can still imagine alternatives to such a law that would qualify as unambiguously more restrictive than the status quo regime.[30] The category of more restrictive alternatives, in short, is neither coextensive with, nor subsumed by, the category of nondiscriminatory alternatives. A law can be more restrictive without being nondiscriminatory, just as it can be nondiscriminatory without being more restrictive.

2. Underinclusiveness

More restrictive means analysis also relates closely to the concept of "underinclusiveness." Generally speaking, courts and commentators use the term "underinclusive" to describe a law that applies less broadly than they would either expect or prefer to be the case.[31] Not surprisingly, more restrictive means analysis will often

29. *See* Brake, *supra* note 4, at 515 (questioning the "presumptive permissibility of leveling down" as a means of remediating violations of equality-based norms).

30. Consider, for example, a law that prevents everyone from purchasing guns and knives.

31. Tussman and tenBroek, for instance, define "underinclusiveness" by reference to the relationship between the "Trait" ("*T*") underlying a legal classification and the "Mischief" ("*M*") that the law attempts to mitigate. *See* Tussman & tenBroek, *supra* note 11, at 347. As they explain, an underinclusive statute is one for which "[a]ll *T*'s are *M*'s but some *M*'s are not *T*'s"—or, less abstractly, for which "[a]ll who are included in the class [defined by the Trait] are tainted with the mischief, but there are others also tainted whom the classification does not include." *Id.* at 347–48. The term can also mean other things in other contexts. *See, e.g.*, Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul*,* Rust v. Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 38 (1992) (suggesting that "content-based underinclusion" inheres

implicate this general idea. Suppose, for instance, that a state attempts to reduce the incidence of drunk driving by restricting alcohol purchases by males under the age of twenty-one and by females under the age of eighteen.[32] Suppose further that the state could more effectively achieve this interest by extending the ban to include females between the age of eighteen and twenty, thus expanding the pool of individuals subject to the restriction. Under these circumstances, the more restrictive alternative of a stricter, gender-neutral prohibition on purchasing alcohol would help to demonstrate the underinclusiveness of the less restrictive law under review. In other words, the law's underinclusiveness is a condition made manifest by the availability of a more restrictive alternative. The gender-based alcohol-purchasing requirement is underinclusive by virtue of the fact that a more restrictive (and gender-neutral) prohibition would achieve the state's interests more effectively than the less restrictive (and gender-based) prohibition being challenged.

Here too, however, the two concepts do not perfectly equate. For one thing, not every more restrictive alternative will suffice to demonstrate the underinclusive nature of a less restrictive law. It is always possible to imagine more restrictive alternatives to a constitutionally suspect law, but as Part III of this Article will show, not all such alternatives will achieve the relevant government interests as effectively as the "less restrictive" law under review. If, for instance, a forty percent tax on everyone serves the government's regulatory interests just as well as a fifty percent tax on everyone, then the fifty percent tax—while certainly more restrictive than the twenty percent tax—does not showcase any real underinclusiveness problems in the law being reviewed.

In addition, as it is conventionally used, the term underinclusive will sometimes end up pointing to the existence of an alternative that is less restrictive rather than more. Suppose, for instance, that a public scholarship program categorically withholds benefits from 1,000 individuals whose inclusion would help to further the purposes of the program itself. Intuitively, the program appears to be underinclusive: the scope of its coverage is narrower than what its underlying interests would appear to demand.[33] That conclusion, however, would

in "government action [that] is, in the ordinary sense, narrower than the action stipulated to be constitutional").

32. *See,* Craig v. Boren, 429 U.S. 190, 190 (1976) (providing a factually analogous illustration).

33. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (holding that a provision of the Social Security Act designed to support the dependents of a disabled individual was

stem from the availability of an alternative program that treats none of the existing scholarship recipients any worse and at least some existing non-recipients much better—i.e., a *less restrictive alternative*, as the term is defined here.[34] In this example, at least, the alignments have switched: more restrictive alternatives accompany overinclusiveness problems and less restrictive alternatives accompany underinclusiveness problems. Generalizing further, we might say that the connection between underinclusiveness and insufficient restrictiveness exists only in circumstances where expanding a law's coverage results in a worsening of its overall treatment of regulated parties; the connection does not exist when an expansion of coverage redounds to the benefit of newly covered parties.

In sum, a more restrictive alternative is a law that—compared to some pre-existing baseline—increases regulatory burdens (or reduces regulatory benefits) on some regulated parties, without also reducing regulatory burdens (or increasing regulatory benefits) on other regulated parties. A more restrictive alternative will sometimes but not always qualify as a nondiscriminatory alternative, just as a nondiscriminatory alternative will sometimes, but not always, qualify as a more restrictive alternative. Similarly, a more restrictive alternative will sometimes, but not always, highlight the existence of underinclusiveness problems, just as underinclusiveness problems will sometimes, but not always, imply the existence of a more restrictive alternative.

II. MORE RESTRICTIVE ALTERNATIVES IN U.S. CONSTITUTIONAL LAW

How have courts utilized more restrictive means analysis in constitutional cases? The answer to this question is not simple. As this Part demonstrates, courts have employed a variety of different

"'underinclusive' in that it conclusively excludes some illegitimate [children] . . . who are, in fact, dependent upon their disabled parent"); Henderson v. Stalder, 287 F.3d 374, 390 (5th Cir. 2002) ("A person or group *excluded from benefits* conveyed via an underinclusive statute has standing to challenge the statute on constitutional grounds.") (emphasis added); Wauchope v. U.S. Dep't of State, 985 F.2d 1407, 1418 (9th Cir. 1993) (noting that courts may sometimes "redress[] constitutionally underinclusive statutes by *extending their benefits* to a disfavored class" (emphasis added)).

34. By the same token, if the existing program extended benefits to more individuals than its regulatory interests demanded, we would characterize the program as "overinclusive": the scope of its coverage is broader than what its underlying interests would appear to demand. But that conclusion would imply the availability of an alternative program that treats at least some of its existing recipients worse and none of its existing non-recipients any better—i.e., a *more restrictive alternative*.

approaches to the problem, with no obvious pattern emerging from the cases as a whole. In some cases, courts willingly *accept* the presence of a more restrictive alternative as a reason to invalidate a challenged law. In other cases, courts expressly *reject*—on a number of different grounds—the claim that a law should fail because a more restrictive alternative would achieve its underlying interests. And in other cases, still, courts *avoid* the issue altogether. All three approaches are on display in different areas of constitutional doctrine, as the ensuing discussion reveals.

What follows is by no means an exhaustive survey of cases in which courts have confronted (or not confronted) arguments about more restrictive alternatives. Rather, this Part focuses on six areas of law in which the issue has arisen: free speech doctrine, free exercise doctrine, equal protection doctrine, substantive due process doctrine, dormant commerce doctrine, and case law involving the newly-revitalized "equal sovereignty" principle. But these are not the only areas of law in which more restrictive means analysis either does or might come into play.[35] Nor, for that matter, is my discussion of any given area intended to be comprehensive within its own sphere. The goal here, in other words, is not to offer a complete catalogue of cases (or even clauses) that touch on the subject of this Article. It is, rather, simply to showcase the variety of approaches that the Court has taken to more restrictive means analysis, and to suggest that the Court lacks a systematic framework for working through the problems to which the analysis gives rise.

A. Free Speech

At least as far back as *Police Department of Chicago v. Mosley*,[36] the Supreme Court has drawn a critical doctrinal distinction between laws that regulate speech on the basis of its content and laws that regulate speech on the basis of some other "content-neutral" characteristic.[37] This distinction—which underlies the so-called "content discrimination" principle—finds expression in the

35. Consider, for example, questions concerning the scope of Congress's power to enforce the Reconstruction Amendments, which, as the Court has held, encompasses only "remedial measures" that are "congrue[nt] and proportional[]" in relation to the "injury to be prevented." City of Boerne v. Flores, 521 U.S. 507, 508, 530 (1997). As Evan Caminker has suggested, that test may incorporate its own sort of "means-ends" analysis, which in turn could provide a basis for invalidating a remedial statute on "underinclusiveness" grounds. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1153–54 (2001).

36. 408 U.S. 92 (1972).

37. *Id*. at 95.

differential levels of means/ends scrutiny accorded to content-based and content-neutral laws.[38] And the content-discrimination principle in turn has generated several cases in which the Court has faulted the government for its failure to regulate more restrictively.[39]

Consider *R.A.V. v. City of St. Paul*.[40] The city of St. Paul had criminalized certain forms of expression that "arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[41] The Minnesota Supreme Court had interpreted the law as a ban on "fighting words," a historically recognized category of unprotected speech.[42] The majority in *R.A.V.* did not question that conclusion, but it nevertheless proceeded to invalidate the law on First Amendment grounds.[43] The problem, in short, was one of insufficient breadth: St. Paul had chosen to target some "fighting words" but not others, and it had distinguished between prohibited and non-prohibited fighting words on the basis of their content.[44] This, the Court held, St. Paul could not do.[45] If St. Paul wished to pursue its government interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination," it needed to enact a law relating to fighting words that was "not limited to the favored topics."[46] Or, as Justice White put the point in a separate opinion, the majority in *R.A.V.* had invalidated the St. Paul ordinance on account of its determination that a "more restrictive alternative could adequately serve the compelling need identified by St. Paul lawmakers."[47]

Other free speech cases reveal a similar reliance on more restrictive means analysis. Recently, for instance, the Court struck down a content-discriminatory prohibition on the display of road

38. *See*, *e.g.*, Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235–36 (2012); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348–49 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981); Stone, *supra* note 7 at 205.

39. For an analysis of earlier cases, see Lee, *supra* note 11, at 637, 637 n.3.

40. 505 U.S. 377 (1992).

41. *Id.* at 380.

42. *Id.* at 381.

43. *Id.* at 382.

44. *Id.* at 391.

45. *Id.* The latter part of this conclusion was controversial, given that the ordinance drew its content-based distinction within a category of so-called "unprotected speech." *See id.* at 401 (White, J., concurring). Nevertheless, as the *R.A.V.* majority made clear, content-discriminatory laws remained constitutionally suspect even when applied to subsets of unprotected speech. *Id.* at 387 (majority opinion).

46. *Id.* at 395–96.

47. *Id.* at 404 n.5 (White, J., concurring).

signs, focusing its attention on the "hopelessly underinclusive" nature of the law's coverage.[48] The government had claimed, for instance, an interest in preserving aesthetics, but, as the majority opinion skeptically noted, it had simultaneously "allow[ed] [the] unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones."[49] Similarly, the government had claimed an interest in promoting traffic safety. But it had failed to offer any "reason to believe that directional signs pose a greater threat to safety than do ideological or political signs."[50] The government, to be sure, had identified plausible justifications for its limitations on the placement of road signs, but it had failed to limit such signage in a sufficiently restrictive way.[51] In that way, then, the more restrictive alternative of a stricter anti-sign ordinance contributed to the constitutional invalidity of the law under review.[52]

The availability of a more restrictive means, however, has not always spelled the doom of a speech-infringing law. In *Burson v. Freeman*,[53] the Court considered a content-based prohibition on political campaigning at polling places, said to be necessary in light of the state's interests in preventing voter intimidation and election fraud.[54] A plurality of Justices held that the law withstood strict scrutiny, even while appearing to acknowledge that the state could have just as easily achieved its interests by extending the ban to

48. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

49. *Id*.

50. *Id.* at 2232.

51. *Id.*

52. *R.A.V.* and *Gilbert* by no means exhaust the universe of free-speech cases in which the Court has approvingly cited to a more restrictive alternative as grounds for invalidating a less restrictive law. In *Carey v. Brown*, 447 U.S. 455 (1980), for instance, the Court struck down an Illinois anti-picketing ordinance that exempted certain forms of picketing related to a labor dispute. *Id.* at 457. Illinois defended the law by referencing a government interest in promoting residential privacy. *Id.* at 462. But this argument failed, the Court held, in light of the statute's failure to restrict labor-related picketing, which was "equally likely to intrude on the tranquility of the home." *Id.*; *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972) ("If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. 'Peaceful' nonlabor picketing, however the term 'peaceful' is defined, is obviously no more disruptive than 'peaceful' labor picketing. But Chicago's ordinance permits the latter and prohibits the former."). Dissenting from the Court's holding, then-Justice Rehnquist was quick to notice (and criticize) the Court's reliance on a "more restrictive means." *Carey*, 447 U.S. at 475 (Rehnquist, J., dissenting). As he put it, the Court's approach led to the strange and counterintuitive result that "the State would fare better by adopting *more* restrictive means, a judicial incentive I had thought this Court would hesitate to afford." *Id.* For additional examples of such cases, see generally Lee, *supra* note 11.

53. 504 U.S. 191 (1992).

54. *Id.* at 198–99.

encompass both political and nonpolitical solicitation at polling places.[55] According to the plurality, however, the law's "failure to regulate all speech" did not "render[] [it] fatally underinclusive," given the absence of "evidence that political candidates have used other forms of solicitation or exit polling to commit [] electoral abuses."[56] Thus, the state's failure to enact a more restrictive alternative was excused on the ground that "[t]he First Amendment does not require States to regulate for problems that do not exist."[57]

Similarly, in *Williams-Yulee v. Florida Bar*,[58] the Court again cast aside a proposed more restrictive alternative when it upheld a Florida prohibition on political fundraising by judicial candidates.[59] The state defended the law as necessary to preserve both the actuality and appearance of "judicial integrity" within the court system,[60] and the challenger responded by claiming, inter alia, that the law failed to pursue these interests in a sufficiently restrictive fashion.[61] Specifically, the challenger argued, the law lacked narrow tailoring on account of its failure to reach additional forms of integrity-impairing behavior: among other things, for instance, Florida did not prohibit third-party communications made *on behalf of* judicial candidates, even though those communications "arguably reduce[d] public confidence in the integrity of the judiciary just as much as a judge's personal solicitation."[62] But the Court waved the argument away. Reasoning that "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech," the Court went on to conclude that the law raised "no fatal underinclusivity concerns."[63] This was so, the Court explained, because "personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees," and "a State may conclude that they present markedly different appearances to the public."[64] And, quoting *Burson*, the Court reiterated that "[t]he

55. *Id.* at 207.
56. *Id.*
57. *Id.*
58. 135 S. Ct. 1656 (2015).
59. *Id.* at 1673.
60. *Id.* at 1666.
61. *Id.* at 1668.
62. *Id.*
63. *Id.*
64. *Id.* at 1669; *see also* Calvert, *supra* note 11, at 561 (noting that the "key" to the Court's "logic" in *Williams-Yulee* was "the alleged noncomparability between the regulated and unregulated varieties of speech").

First Amendment does not require States to regulate for problems that do not exist."[65]

Other free speech cases have left the problem of more restrictive alternatives largely unexplored. Consider, for instance, *Holder v. Humanitarian Law Project*,[66] in which the Court upheld against First Amendment attack a federal statute making it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[67] This statute, the Court held, was content-based in that its coverage both (a) encompassed verbal communications with terrorist groups, and (b) depended on what those communications expressed.[68] Even so, the statute withstood heightened scrutiny,[69] with the Court concluding that the burdens imposed on materially supportive speech were sufficiently well tailored to a compelling governmental interest in "combating terrorism," and that there existed no less restrictive means of achieving those interests in a comparably effective way.[70] Left unanalyzed, however, was the question whether Congress might have pursued this interest by simply prohibiting all communications directed at foreign terrorist organizations, regardless of their content. Such a more restrictive means would have mitigated (if not eliminated) the content-discriminatory features of the statute, without in any obvious manner frustrating the government's pursuit of the "terrorism prevention" interest that was said to necessitate the content-based ban. Even on

65. *Williams-Yulee*, 135 S. Ct. at 1670 (quoting Burson v. Freeman, 504 U.S. 191 207 (1992)); *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2532 (2014) (rejecting the claim that Massachusetts should have dealt with the problem of protests at abortion clinics via the more restrictive alternative of a "buffer zone" requirement that covered "'every building in the State that hosts any activity that might occasion protest or comment,' not just abortion clinics" (citing Brief for Petitioner at 24, McCullen v. Coakley, 134 S. Ct. 2518 (2014) (No. 12-1168), 2013 WL 4829340, at *24)).

66. 561 U.S. 1 (2010).

67. *Id.* at 8 (quoting 18 U.S.C. § 2339B (2006)).

68. *Id.* at 27. The statute would apply, for instance, if a speaker provided instruction regarding a "specific skill" or communicated "specialized knowledge," but it would not apply if the speaker imparted "only general or unspecialized knowledge." *Id.*

69. *Id.* at 28. As Professor Volokh has noted, it is not altogether clear whether the Court in *Humanitarian Law Project* understood itself to be applying "strict scrutiny" or a somewhat more lenient standard. Eugene Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny*, VOLOKH CONSPIRACY (June 21, 2010), http://volokh.com/2010/06/21/speech-that-aids-foreign-terrorist-organizations-and-strict-scrutiny [https://perma.cc/9GNA-XL9M].

70. *Humanitarian Law Project*, 561 U.S. at 28–32. Specifically, the Court rejected the claim that Congress might have prohibited only those forms of material support that aided the "peaceable, lawful conduct" of foreign terrorist groups. *Id.* at 32; *see also id.* at 46 (Breyer, J., dissenting) (disagreeing with the majority that the statute reflected the "least restrictive means" of achieving the government's terrorism-prevention interests).

the premises accepted by the majority in *Humanitarian Law Project*, there seemed to exist a potentially relevant more restrictive (and content-neutral) means of serving the government's interest. Nevertheless, in an arguable departure from the approach taken in *R.A.V.*, *Reed*, and *Burson*, the Court in *Humanitarian Law Project* did not consider the doctrinal implications of that fact, let alone acknowledge its existence.

B. Free Exercise

In *Employment Division v. Smith*,[71] the Court significantly narrowed the reach of the Free Exercise Clause, holding that the First Amendment permitted the government to "impose an 'incidental effect'" on religious practices through the enactment and enforcement of "neutral law[s] of general applicability."[72] *Smith* thus transitioned the law out of an old regime in which the Court closely reviewed all laws that burdened religious practices and into a new regime in which the Court closely reviewed only those laws that *targeted* religion.[73] The practical implications of the decision were clear: governments could insulate religion-burdening laws against free exercise attack by broadening rather than narrowing their applicability. That, in turn, created opportunities for the Court to invoke the availability of a more restrictive alternative as a ground for invalidating a religion-targeting law.

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah[74] illustrates the point. Adherents to the Santeria faith challenged a set of rules regarding the ritualized killing of animals, claiming discrimination on the basis of their religious beliefs.[75] The Supreme Court agreed with the challengers, concluding that the animal sacrifice laws were not in fact neutral or generally applicable with respect to religion. Why? Largely due to the availability of more restrictive alternatives that could have just as easily served the interests associated with the less restrictive enactments. Specifically, the City had argued that its ordinance helped to "protect[] the public

71. 494 U.S. 872 (1990).

72. *Id.* at 879, 882 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

73. *Id.* at 882. The Court in *Smith* did recognize certain exceptions to this rule, noting, for instance, that heightened scrutiny might remain when a generally applicable law simultaneously implicated the free-exercise right and some other right, *id.* at 881–82 (citing, inter alia, Wisconsin v. Yoder, 406 U.S. 205 (1972)), or when a generally applicable law "lent itself to individualized governmental assessment" of particular forms of conduct, *id.* at 883–84 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

74. 508 U.S. 520 (1993).

75. *Id.* at 528.

health" and "prevent[] cruelty to animals."[76] Both interests, however, could have been furthered by laws that applied to a wider range of nonreligious practices. As to the "animal cruelty" interest, the City's argument failed because its law did not forbid (and indeed sometimes explicitly authorized) several nonreligious animal-killing practices—practices such as "fishing," "euthanasia of stray, neglected, abandoned, or unwanted animals," "the infliction of pain or suffering in the interest of medical science," and the "hunt[ing] [of] wild hogs."[77]

Likewise, as to the "public health" interest, the City had again pursued the goal too narrowly, failing to regulate, say, "hunters[] bringing their kill to their houses," or "restaurants" that "improper[ly] dispos[ed] of garbage."[78] Had the City criminalized a wider range of animal-harming practices (including, but not limited to, the ritual slaughter of animals), its law would have qualified as more "generally applicable" and thus less constitutionally problematic. But because the City had not pursued its interests by way of a more restrictive means, its ordinances ran afoul of the Free Exercise Clause.[79] Or, as Justice Blackmun stated in a separate opinion, "[i]f the State's goal is important enough to prohibit religiously motivated activity, it will not and must not stop at religiously motivated activity."[80]

As in the free speech context, however, the Court has not always treated the availability of a more restrictive alternative as fatal to the constitutionality of a religion-related law. In *Locke v. Davey*,[81] decided some eleven years after *Lukumi*, the Court upheld a Washington scholarship program that specifically excluded students of devotional theology.[82] Invoking *Smith*, the Court held the program

76. *Id.* at 543.

77. *Id.* at 543–44.

78. *Id.* at 544.

79. *Id.* at 567–77.

80. *Id.* at 578–79 (Blackmun, J., concurring). Lower courts, too, have embraced similar reasoning in the Free Exercise context, faulting the government for its failure to pursue a regulatory objective in a sufficiently restrictive manner. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (noting that a police department's willingness to grant medical exemptions from a policy prohibiting officers from wearing beards undercut its justifications for refusing to grant religious exemptions from the policy). For a helpful overview of such cases, see generally Duncan, *supra* note 11, at 868–83 (noting that *Lukumi* made "underinclusion" an "earmark[] of laws which, although facially neutral with respect to religion, nonetheless fail to satisfy the general applicability requirement").

81. 540 U.S. 712 (2003).

82. *Id.* at 725.

did not target religion in a problematic way. That was so, the Court explained, because Washington could justify the theology exclusion by reference to a valid state interest in avoiding the "establishment" or endorsement of religion over nonreligion.[83] This "historic and substantial" interest in avoiding an improper establishment of religion was sufficient to defeat the conclusion that state's scholarship program was "inherently constitutionally suspect" on Free Exercise grounds.[84]

The Court's reasoning in *Davey* highlighted the inadequacy of various less restrictive alternatives to the program under review: if the state were to afford more generous treatment to devotional theology students, the Court explained, its "antiestablishment" aims would necessarily be compromised.[85] But, as Justice Scalia pointed out in his dissent, the Court never explored the alternative possibility of a *more* restrictive approach to the problem—specifically, Washington might instead have avoided Establishment Clause difficulties by simply terminating the scholarship program in its entirety.[86] If the state were truly serious about disassociating itself from religious instruction, it could have exited the educational arena altogether—thus avoiding the provision of both direct support and indirect support of institutions that did in fact promote various religious beliefs.[87] Thus, much as the Court did in *Lukumi*, it might have done (but did not do) in *Davey*—fault the state for its failure to pursue its regulatory interests in a sufficiently restrictive manner.

C. Equal Protection

In contrast to its First Amendment decisions, the Court's equal protection decisions have only infrequently relied on more restrictive means analysis to strike down constitutionally suspect laws. But such analysis is not entirely absent from the case law. Consider, for instance, the majority opinion in *Cleburne v. Cleburne Living*

83. *Id.* at 724–25.

84. *Id.* at 725.

85. *Id.* at 721–22.

86. *Id.* at 728–29 (Scalia, J., dissenting) ("The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with such an incidental, indirect religious effect.").

87. *See* Antony Barone Kolenc, *"Mr. Scalia's Neighborhood": A Home for Minority Religions?*, 81 ST. JOHN'S L. REV. 819, 851 (2007) (noting that Justice Scalia's reasoning in *Davey* "could lead government officials to take actions that amount to less funding for religious programs across the board").

Center.[88] A municipal zoning ordinance required the issuance of a "special use permit" for the operation of group homes for individuals with mental disabilities.[89] Having been denied such a permit, the plaintiffs challenged the rule under the Equal Protection Clause, claiming that it unlawfully discriminated on the basis of disability.[90] Although the Court declined to treat the law's classification as "suspect" or "quasi-suspect,"[91] it nonetheless struck down the law, via the application of what commentators would later call "rational basis with bite" review.[92] In so doing, the Court made short shrift of a variety of proffered justifications for the City's permitting scheme, focusing first and foremost on the City's relatively more *lenient* treatment of other parties not before the Court.[93] For example, the City had claimed an interest in protecting group home residents from the risk of a flood; but this argument would not do, the Court held, because it could not support the law's "distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit."[94] Similarly, the City expressed a concern about "the legal responsibility for actions" that the home's residents might take.[95] But that argument failed, given the lack of permitting requirements demanded of boarding houses and fraternity houses.[96] Additionally, the City expressed concern about the size of the home and the large number of its residents. But that argument foundered on the complete absence of restrictions for "boarding house[s], nursing home[s], family dwelling[s], fraternity house[s], or dormitor[ies]."[97] Finally, the City defended its permit denial as "aimed at avoiding concentration of population and at lessening congestion of the streets."[98] But again, "[t]hese concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit."[99] In short,

88. 473 U.S. 432 (1985).
89. *Id.* at 435.
90. *Id.* at 437.
91. *Id.* at 442–47.
92. *Id.* at 447–50; *see also* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793–96 (1987).
93. *Cleburne*, 473 U.S. at 447.
94. *Id.* at 449.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 450.
99. *Id.*

virtually every time the City claimed an interest on behalf of its permitting decision, the Court responded by identifying a more restrictive alternative that the City had chosen not to pursue.[100]

Consider also the recent litigation concerning the constitutionality of same-sex marriage bans. The Court itself did not invoke more restrictive alternatives in holding that such bans violated the Constitution,[101] but some lower courts did do so while teeing the issue up for Supreme Court review. In striking down two such laws from Wisconsin and Indiana, for instance, the Seventh Circuit placed special emphasis on these states' failure to withhold marriage benefits from sterile, opposite-sex couples—a failure that undercut the states' attempt to characterize their marriage laws as devices designed to deal with the aftermath of "accidental" pregnancies.[102] In striking down a similar Virginia law, the Fourth Circuit pointed out that the state's continued willingness to recognize the marriages of infertile opposite-sex couples rendered its same-sex marriage restriction "woefully underinclusive."[103] Other courts have reached similar conclusions.[104] In sum, the pre-*Obergefell* cases often found fault in the states' refusal to extend their prohibitions on marriage as far as the stated justifications for those prohibitions would have demanded.

But more restrictive alternatives have not always paved the way to equal protection success. In *Michael M. v. Superior Court*,[105] for instance, the Court waved away a posited more restrictive alternative in a California law that made it a crime for underage males (but not underage females) to engage in non-marital sexual intercourse with

100. *Id.* at 448–50; *see also* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 955 (2004) (noting that "the Court implied that the extraordinarily underinclusive nature of the classification so poorly served the ostensible purposes of concern about the number of residents and the home's location on a flood plain that it freed the Court from reliance on such hypothetical purposes").

101. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597–605 (2015).

102. *See* Baskin v. Bogan, 766 F.3d 648, 661 (7th Cir. 2014) ("The state treats married homosexuals as would-be 'free riders' on heterosexual marriage, unreasonably reaping benefits intended by the state for fertile couples. But infertile couples are free riders too. Why are they allowed to reap the benefits accorded marriages of fertile couples, and homosexuals are not?").

103. Bostic v. Schaefer, 760 F.3d 352, 381 (4th Cir. 2014) ("If Virginia sought to ensure responsible procreation via the Virginia Marriage Laws, the laws are woefully underinclusive. Same-sex couples are not the only category of couples who cannot reproduce accidentally. For example, opposite-sex couples cannot procreate unintentionally if they include a post-menopausal woman or an individual with a medical condition that prevents unassisted conception.").

104. *See, e.g.*, Bishop v. Smith, 760 F.3d 1070, 1081 (10th Cir. 2014) ("And Oklahoma permits infertile opposite-sex couples to marry despite the fact that they, as much as same-sex couples, might raise non-biological children.").

105. 450 U.S. 464 (1981) (plurality opinion).

another underage party.[106] No one on the Court appeared to dispute the importance of the interest asserted on behalf of the law—namely, that of "preventing [out-of-wedlock teenage] pregnancies"—nor did the Justices disagree that the prohibition helped to achieve that interest to some extent.[107] What was disputed was whether the state could justifiably exempt underage females from the prohibition—whether, in other words, the state should be faulted for its failure to pursue the more restrictive alternative of a gender-neutral prohibition on underage sex.[108]

Justice Rehnquist's plurality opinion answered no, for two separate reasons. First, Justice Rehnquist credited the state's assertion that a male-only prohibition helped to "equalize" burdens across the sexes.[109] Since "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female," legally imposed (and male-exclusive) burdens of criminal punishment approximated some of the physically imposed (and female-exclusive) burdens of an unwanted pregnancy.[110] And second, Rehnquist accepted the state's contentions that a more restrictive means might prove less effective at deterring the prohibited behavior.[111] More specifically,

> [the State's] view is that a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.[112]

Thus, the plurality found itself "unable to accept petitioner's contention that the statute . . . must, in order to pass judicial scrutiny, be *broadened* so as to hold the female as criminally liable as the male."[113]

The Court was similarly dismissive of more restrictive alternatives when, in *Nguyen v. INS*,[114] it upheld a set of gender-based rules governing the citizenship claims of children born abroad to

106. *Id.* at 464.
107. *See id.* at 470; *id.* at 490–91 (Brennan, J., dissenting).
108. *Id.* at 490–91 (Brennan, J., dissenting).
109. *Id.* at 473 (plurality opinion).
110. *Id.* at 473.
111. *Id.* at 473–74.
112. *Id.* at 473–74 (internal footnotes omitted).
113. *Id.*
114. 533 U.S. 53 (2001).

unmarried couples of mixed citizenship.[115] The terms of the law varied depending on whether the "citizen-parent" of the child—i.e., the member of the couple with U.S. citizenship—was male or female, with children of citizen-fathers subject to more onerous procedural and evidentiary requirements than children of citizen-mothers.[116] The government defended this scheme on the ground that citizen-fathers presented special evidentiary difficulties that citizen-mothers did not,[117] but that argument invited an obvious retort: Even if citizen-fathers posed special problems, why not subject both citizen-mother and citizen-father claims to the more onerous set of requirements that only the latter currently received?[118] Why not, in other words, simply require the government to pursue its interests by way of a more restrictive alternative—one that simply imposed on citizen-mother children the heightened set of requirements that citizen-father children already faced?

To this question, Justice Kennedy's majority opinion offered two brief responses. The first centered on regulatory difficulties: expanding the evidentiary demands on everyone, Justice Kennedy suggested, would increase "the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie."[119] Congress was therefore entitled to maintain the more "easily administered scheme" it had chosen to put in place.[120] Second, the majority observed that heightening the evidentiary burdens on citizen-mother children "would be to insist on a hollow neutrality," given that a "facially neutral rule would sometimes require fathers to take additional affirmative steps which would not be required of mothers."[121] The real "biological differences" that existed between

115. *Id.* at 71.

116. *Id.* at 59–60.

117. Among other things, as the Court pointed out, "proof of motherhood" was "inherent in birth itself" whereas proof of fatherhood was not, and that fact would, on average, make citizen-mother relationships easier to verify. *Id.* at 62–64.

118. *See id.* at 79 (O'Connor, J., dissenting) (noting that the majority opinion "casually dismisses the relevance of available sex-neutral alternatives"). Just recently, the Court struck down the INA's application of different residency requirements for the children of unwed citizen-fathers and the children of unwed citizen-mothers. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017). In so doing, however, the Court reaffirmed its earlier decision in *Nguyen*, observing that "imposing a paternal-acknowledgement requirement on fathers [is] a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother establishes by giving birth." *Id.* at 1694.

119. *Nguyen*, 533 U.S. at 69.

120. *Id.*

121. *Id.* at 64. For example, Justice Kennedy noted that while Congress "could have required both mothers and fathers to prove parenthood within 30 days or, for that matter,

men and women, in other words, would likely render formally neutral rules non-neutral in effect, and that fact helped to excuse Congress's failure to process immigration applications in a more restrictive manner.[122]

The Court assumed a similarly dismissive attitude toward more restrictive means analysis in *Rostker v. Goldberg*,[123] in which it upheld the male-only registration requirements of the federal Selective Service Act.[124] True, the Court acknowledged, Congress might have pursued its interest in "raising and supporting armies" through the "alternative means" of requiring both men and women to register for the draft,[125] but that fact did not doom the gender-based requirements under review.[126] Among other things, the Court explained, the more restrictive alternative might turn out to serve the government's interest less well.[127] For example, the legislative record had revealed concerns that "training would be needlessly burdened by women recruits who could not be used in combat,"[128] that "administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist,"[129] and that "staffing non-combat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility."[130] Thus, the Court concluded the less restrictive, male-only draft was justified for the simple reason that "Congress simply did not consider it worth the added burdens of including women in draft and registration plans."[131]

D. Substantive Due Process

The Court has sometimes employed more restrictive means analysis when evaluating privacy- and autonomy-related claims under the Due Process Clause of the Fourteenth Amendment. Consider, for instance, Justice Powell's plurality opinion in *Moore v. City of East*

18 years, of the child's birth," it would nonetheless remain true that mothers' names always "will appear on the on the birth certificate as a result of their presence at the birth," whereas fathers' names would not always appear on the birth certificate. *Id.*

122. *Id.*

123. 453 U.S. 57 (1981).

124. *Id.* at 83.

125. *Id.* at 70.

126. *Id.*

127. *Id.* at 76–77.

128. *Id.* at 81 (quoting S. Rep. No. 96-226, at 9 (1979)).

129. *Id.* (quoting S. Rep. No. 96-826, at 159 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2612, 2649).

130. *Id.* at 81–82.

131. *Id.* at 81.

Cleveland.[132] An East Cleveland housing ordinance forbade cohabitation by non-family members and further defined "family" to exclude a variety of non-nuclear familial relationships.[133] The Court invalidated the law as an unconstitutional abridgement of "choices concerning family living arrangements."[134] Key to this determination was the plurality's conclusion that the ordinance bore only a "tenuous relation" to the "legitimate goals" of "preventing overcrowding," "minimizing traffic and parking congestion," and "avoiding an undue financial burden on East Cleveland's school system."[135] Justice Powell did not dispute that these goals were legitimate or that the cohabitation restrictions bore some connection to them.[136] The problem for East Cleveland lay in its unduly *permissive* treatment of persons not covered by the law.[137] For example, "the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car."[138] In addition, "[t]he ordinance would permit a grandmother to live with a single dependent son and children, even if his school age children number a dozen."[139] The law's failure to police overcrowding more aggressively thus contributed to the plurality's finding that it was unconstitutional as written.

Justice Harlan's dissenting opinion in *Poe v. Ullman*[140] advanced an argument along similar lines.[141] Having concluded that a Connecticut contraceptive ban implicated fundamental liberty interests,[142] Justice Harlan went on to ask whether the ban might nonetheless be justified in light of the state's countervailing interests in promoting morality.[143] The answer, Harlan reasoned, was an emphatic no.[144] Nothing the state had argued "even remotely suggests a justification for the obnoxiously intrusive means it has chosen to

132. 431 U.S. 494 (1977).
133. *Id.* at 498–99.
134. *Id.* at 499.
135. *Id.* at 499–500.
136. *Id.* at 500.
137. *Id.*
138. *Id.*
139. *Id.*
140. 367 U.S. 497 (1961).
141. *Id.* at 522 (Harlan, J., dissenting).
142. *Id.* at 548, 554 (Harlan, J., dissenting).
143. *Id.* at 554 (Harlan, J., dissenting).
144. *Id.*

effectuate [the] policy."[145] And this was so in part due to the state's lackadaisical enforcement of the law itself.[146] As Harlan put the point,

> the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time—in effect a right to hold this statute as an imminent threat to the privacy of the households of the State—conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.[147]

In Harlan's view, then, the unused, more restrictive alternative of a regularly enforced contraceptive ban severely undercut Connecticut's justifications for the law under review.[148]

Consider finally the Court's response to Texas's claim in *Roe v. Wade*[149] that its prohibition on abortions helped to safeguard the Fourteenth Amendment rights of unborn fetuses.[150] Although the Court's refutation of the argument relied primarily on textual considerations, Justice Blackmun's majority opinion also pointed to various non-restrictive features of the Texas law as further militating against the state's argument.[151] In particular

> [w]hen Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas

145. *Id.*

146. The majority in *Poe* had dismissed the case on ripeness grounds, pointing to the absence of any recorded prosecutions under the statute over an eighty-year period. *Id.* at 508 (majority opinion).

147. *Id.* at 554 (Harlan, J., dissenting).

148. *Id.* at 535–37. For a similar argument linking an absence of regular enforcement with a presumption of substantive unconstitutionality, see, for example, Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1453 (2004) (noting that "the fact that states make virtually no effort to enforce criminal prohibitions on private gay sexual activity makes it implausible to see the statutes as actually directed at the acts themselves").

149. 410 U.S. 113 (1973).

150. *Id.* at 156–59.

151. *Id.* at 157–59.

> exception appear to be out of line with the Amendment's command?[152]

Additional features of the Texas law struck the majority as not restrictive enough to sustain the state's "life of the fetus" justification: Texas law, for instance, did not treat the woman as "a principal or an accomplice with respect to an abortion upon her."[153] But, the Court asked, "[i]f the fetus is a person, why is the woman not a principal or an accomplice?"[154] And finally, the majority observed that Texas penalized criminal abortion far less severely than it penalized criminal murder. Again, however, it wondered: "[i]f the fetus is a person, may the penalties be different?"[155] In all these respects, then, the Court in *Roe* appeared to suggest that Texas's failure to enact a more restrictive abortion ban—one without a "life of the mother" exception, one that extended accomplice liability to the mother, and one that employed harsher penalties—contributed to the unconstitutionality of the less restrictive ban under review.[156]

E. Dormant Commerce Clause

The "dormant" or "negative" Commerce Clause prohibits states from erecting protectionist barriers to the free flow of interstate commerce.[157] Implementing this requirement, the Court has applied a "virtually per se rule of invalidity"[158] to laws that discriminate between in-state and out-of-state parties. Under this rule, a facially discriminatory law survives attack only if "it advances a legitimate local purpose that cannot be adequately served by reasonable

152. *Id.* at 157–58 n.54.

153. *Id.* at 158 n.54.

154. *Id.*

155. *Id.*

156. *Id.* at 157–58, 158 n.54. To be clear, the Court's argument on this point was not without difficulties. *See, e.g.*, Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 299–301 (2009) (noting that "[w]hen one remembers that the Amendment has a state action requirement, it is not at all clear why constitutional personhood for a human fetus would require the state to prohibit abortion," while also proposing a "duty to protect" reading of the Fourteenth Amendment that would help to "fill the gap in *Roe*'s reasoning"). But what is significant for our purposes is simply that the Court in *Roe* attempted such an analytical move, invoking a hypothetical more restrictive alternative for the purpose of highlighting a constitutional defect in a less restrictive law. *Roe*, 410 U.S. at 157–58 n.54.

157. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

158. *Id.*

nondiscriminatory alternatives."[159] Consequently, the Court has sometimes pointed to the existence of a more restrictive means as a reason to invalidate a law under the "virtually per se rule."[160] When a state can achieve its "legitimate local objectives" by worsening its treatment of in-state parties, the Court will often have reason to strike down the facially discriminatory law under attack.

In *City of Philadelphia v. New Jersey*,[161] for instance, the Court invalidated a New Jersey prohibition on the in-state disposal of out-of-state waste.[162] Resisting the charge that it had engaged in impermissible economic protectionism, New Jersey characterized the law as a legitimate exercise of the state's police powers, designed to protect New Jersey citizens from the health-and environmental-hazards of overflowing landfills.[163] But the Court rejected this argument, pointing to the possibility of utilizing other, facially neutral means of achieving those aims.[164] In particular, as the Court observed, rather than simply target out-of-state garbage, "New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected."[165] Restating the point less charitably, Justice Rehnquist's dissenting opinion highlighted the majority's wholehearted embrace of more restrictive means analysis:

> New Jersey must either prohibit *all* landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the state.[166]

On the majority's view, that is, New Jersey could achieve its health and safety interests in the more restrictive fashion of abolishing all landfills from its territory, and therefore its facially discriminatory

159. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).
160. *City of Philadelphia*, 437 U.S. at 624.
161. 437 U.S. 617 (1978).
162. *Id.* at 629.
163. *Id.* at 625.
164. *Id.* at 626–27.
165. *Id.* at 626.
166. *Id.* at 631 (Rehnquist, J., dissenting); *see also* Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 349 (1992) (Rehnquist, J., dissenting).

(but less restrictive) enactment could not pass constitutional muster.[167]

A more recent decision from the Fourth Circuit, *Beskind v. Ealey*,[168] relied even more explicitly on more restrictive means analysis in striking down a facially discriminatory law.[169] North Carolina's Alcoholic Beverage Control ("ABC") laws imposed a complex set of restrictions on the importation of wine by out-of-state wineries.[170] A consequence of the regulatory scheme was that in-state wineries could sell their products "directly" to in-state customers (thereby bypassing wholesalers and retailers altogether), whereas out-of-state wineries generally could not.[171] North Carolina defended the distinction by highlighting the difficulty of enforcing taxation requirements and other provisions of its ABC laws against out-of-state actors: by channeling all out-of-state wine to in-state sellers, the argument went, North Carolina could more easily ensure that the out-of-state wineries were in compliance with all of the relevant state-law restrictions.[172] But even if this were true, the Fourth Circuit pointed out, there existed an obviously nondiscriminatory means of achieving North Carolina's desired ends: namely, "requir[ing] in-state wines to pass through the same three-tiered scheme that all other wines must pass through."[173] North Carolina had argued the case as if the only nondiscriminatory alternative on the table involved extending to out-of-state wineries the same lenient regulatory treatment that it already extended to in-state wineries.[174] But that was not the only option. Because North Carolina had been "unable to explain why imposing the same restrictions on in-state wineries that it imposes on out-of-state wineries would not be a reasonable nondiscriminatory alternative," the facially discriminatory provisions of the ABC law could not be sustained.[175]

167. *City of Philadelphia*, 437 U.S. at 626; *see also* Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1257 (1998) (suggesting that the *City of Philadelphia*'s apparent embrace of more-restrictive-means analysis "created a perverse incentive toward a national waste crisis").

168. 325 F.3d 506 (4th Cir. 2003).

169. *Id.* at 516–17, 520.

170. *Id.* at 510.

171. *Id.*

172. *Id.* at 516.

173. *Id.* at 515.

174. *Id.* at 515–16.

175. *Id.* at 516. The Court gestured towards a similar argument in *Granholm v. Heald*, 544 U.S. 460 (2005), in which it struck down a similar set of wine-importation restrictions that New York and Michigan had each adopted. *Id.* at 490. The states defended the restrictions by invoking an interest in preventing underage drinking: by prohibiting direct

Consider by contrast the Court's decision in *Maine v. Taylor*,[176] which upheld a facially discriminatory restriction on interstate commerce.[177] Maine prohibited the importation of live baitfish from outside the state, citing an interest in protecting its local aquatic ecology against the threats posed by non-native species.[178] Much of the Court's analysis centered on the viability of various less restrictive alternatives that the challengers had proposed. The challengers had argued, for instance, that the state could allow the importation of live baitfish while inspecting out-of-state shipments for parasitic and non-native species.[179] The Court, however, found that these sorts of inspections posed practical difficulties that rendered them unworkable. Hence, the Maine law could stand because it "serve[d] legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives."[180]

Curiously absent from the Court's opinion was any analysis of more restrictive alternatives to the Maine baitfish law. Among these alternatives might have been a law that simply banned the sale (and/or use) of any and all live baitfish, whether or not imported into the state of Maine. Interstate baitfish sales would have remained prohibited, thus leaving Maine's waterways equally well insulated against the special threats posed by non-native species. But purely in-state baitfish sales would also have been prohibited, thus alleviating the problem of facial discrimination. That solution, to be sure, might well have been problematic for other reasons: perhaps it would have harmed the Maine fishing industry (and thus, by extension, the Maine economy as a whole) or perhaps it would still have proven unduly discriminatory in effect. But similar concerns were present in *Philadelphia v. New Jersey*[181] and the *Beskind*[182] case, and it is not

sales from out-of-state wineries, their laws made it more difficult for minors to procure alcohol over the Internet, where they could more easily misrepresent their age. *Id.* at 489. But this argument, as the Court pointed out, faced an obvious problem: "minors are just as likely to order wine from in-state producers as from out-of-state ones." *Id.* at 490. Given that New York and Michigan already enabled *in-state* wineries to sell their product directly to consumers, minors could thwart the state's regulatory objectives by simply channeling all of their online orders to in-state wineries instead. *Id.* at 490. The implication was thus clear: To the extent the states were genuinely concerned about preventing underage drinking, an obviously more restrictive alternative was available to serve that interest—namely, that of subjecting both in-state and out-of-state wineries to the same elevated sets of restrictions that only the latter endured. *Id.*

176. 477 U.S. 131 (1986).

177. *Id.* at 151–52.

178. *See id.* at 133.

179. *See id.* at 147.

180. *Id.* at 151.

181. *See supra* notes 161–67 and accompanying text.

immediately obvious why *Maine v. Taylor* should have come out any differently.[183] A total baitfish ban, after all, would have significantly reduced discriminatory treatment of in-state and out-of-state baitfish producers without in any way jeopardizing the state's ability to protect its waterways against the introduction of non-native species. Even so, the Court in *Maine v. Taylor* never appeared to consider this possibility.[184]

F. Equal Sovereignty

One byway of constitutional federalism doctrine involves the so-called "equal sovereignty" principle, which generally condemns the enactment of federal laws that treat some jurisdictions differently from others.[185] The future of this principle remains uncertain—the Court leaned heavily on it in *Shelby County v. Holder*[186] but without providing much detail as to (a) the scope of its operation, and (b) the applicable level of scrutiny triggered by laws that accord "disparate treatment of States."[187] But the doctrine plainly demands some level of means/ends fit manifested by laws that treat states unequally, such that courts now must ask whether differential treatment of state (and perhaps local) jurisdictions is sufficiently tailored to achieve a sufficiently important federal interest.[188] That methodology brings

182. *See supra* notes 168–75 and accompanying text.

183. *Cf. Maine*, 477 U.S. at 153 (Stevens, J., dissenting) ("[T]he invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce.").

184. The Privileges and Immunities Clause of Article IV also imposes constitutional limits on states' ability to discriminate against out-of-state actors, and here too the Court has occasionally invoked more restrictive alternatives in the course of invalidating a discriminatory state law. In *Supreme Court v. Piper*, 470 U.S. 274 (1985), for instance, the Court struck down a New Hampshire law that generally excluded nonresidents from the state bar association. *Id.* at 288. In an attempt to justify the law, New Hampshire invoked an interest in ensuring that members of the bar maintained a continued familiarity with "local rules and procedures." *Id.* at 285. But the law was underinclusive with respect to this interest, because as it still "permit[ted] lawyers who move[d] away from the State to retain their membership in the bar." *Id.* at 285 n.19. In that way, the more restrictive alternative of a categorical ban on nonresident bar membership helped to demonstrate the unconstitutionality of the "less restrictive" residency requirement that New Hampshire had adopted.

185. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2618, 2623–24 (2013).

186. 133 S. Ct. 2612 (2013).

187. *Id.* at 2623–24.

188. *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1155–56 (2016); *see also* Zachary S. Price, NAMUDNO*'s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 26 (2013) (noting that "[t]he implication [of the equal sovereignty principle] would seem to be that heightened scrutiny applies to legislation that treats states unequally").

along with it the possibility that more restrictive means analysis might sometimes enter into the equal sovereignty calculus. When Congress could just as well achieve its interests by increasing, rather than decreasing, the regulatory burdens on states it has singled out for favorable treatment, should that possibility militate in favor of invalidating the less burdensome, but more discriminatory, law under attack?

The Third Circuit briefly entertained a question of this sort when confronting a constitutional challenge to the federal Professional and Amateur Sports Protection Act ("PASPA").[189] PASPA outlaws sports betting across the United States, while exempting Nevada, Delaware, Oregon, and Montana from the full force of its prohibitions.[190] New Jersey challenged the law, relying in part on an equal sovereignty argument. The law violated the equal sovereignty of the states, New Jersey claimed, by according special treatment to a select handful of state jurisdictions. The court rejected this argument on several grounds, one of which involved the claim that PASPA's interstate discrimination was justified in light of the purposes it was meant to serve.[191] New Jersey's argument to the contrary was straightforward—if the aim of PASPA was to eliminate the evils of sports gambling, then any state-specific carve-out made no sense. A far more effective—and nondiscriminatory alternative—would have been a more restrictive law that prohibited sports gambling everywhere.

The court's response to this claim was twofold. First, it contended that New Jersey had "distort[ed] PASPA's purpose as being to wipe out sports gambling altogether."[192] Rather, the true purpose of the law was "to stop the *spread* of *state-sanctioned* sports gambling," in light of which "regulating states in which sports-wagering already existed would have been irrational."[193] Prohibiting gambling in all states would not have promoted this "anti-spreading"

189. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 214 (3d Cir. 2013).

190. The scope of the carve-out varies within each of the exempted states, with the statute permitting only those forms of sports betting that the state had authorized prior to PASPA's enactment. *See* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 250 n.3 (2005).

191. The court also reasoned that the equal sovereignty principle did not apply with full force to laws enacted pursuant to the commerce power and/or touching on matters "outside the context of 'sensitive areas of state and local policymaking.'" *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 238–39 (quoting *Shelby County*, 133 S. Ct. at 2624).

192. *Id.* at 239.

193. *Id.*

interest any more effectively, given that the exempted states had already sanctioned sports-gambling as of the date of PASPA's enactment. Second, the court questioned the sincerity of New Jersey's own position. New Jersey, after all, had not asked the court to invalidate PASPA's carve-out for exempted states, but it had instead asked the court to invalidate PASPA in its entirety (thus, in effect, leaving states free to permit sports-gambling everywhere).[194] New Jersey, the court contended, was trying to have its cake and eat it too: invoking the existence of a more restrictive alternative as a means of obtaining its preferred remedy of a less restrictive regulatory regime. "That New Jersey seeks Nevada's preferential treatment," as the court put it, "and not a complete ban on the preferences," thus "undermines [its] invocation of the equal sovereignty doctrine."[195]

The foregoing discussion reveals, if nothing else, that courts have taken a wide variety of approaches to more restrictive means analysis in adjudicating constitutional cases. Inconsistencies have emerged both within and across different doctrinal fields: sometimes courts have faulted government actors for failing to pursue a given regulatory objective in a more restrictive manner, and sometimes courts have excused them from doing so. And still other times courts have simply ignored the issue altogether. This hodgepodge of results suggests that courts lack a systematic framework for thinking through the question of when, if ever, the relative lenience of a legal measure should function as a reason for its invalidation. The remainder of this Article thus attempts to develop such a framework, while also offering prescriptive insights about the implementation of more restrictive means analysis in future cases.

III. THE CONSTITUTIONAL IMPORT OF MORE RESTRICTIVE ALTERNATIVES

As the foregoing discussion makes clear, more restrictive alternatives are typically invoked in response to the government's claim that a given regulatory interest justifies the enactment of a constitutionally suspect law. The aim, in other words, is to demonstrate an insufficient means/ends fit between the law being challenged and the interests it is said to serve. But how, in particular, does a more restrictive alternative serve to accomplish this goal? What is the underlying logic supporting the connection between the

194. *See id.*
195. *Id.*

availability of a more restrictive alternative, and the conclusion that the less restrictive law fails to pass constitutional muster?

This Part suggests that more restrictive alternatives might support at least one of two different types of attacks on a constitutionally suspect law. First, a more restrictive alternative might support an *equality-based* attack on the law, which purports to show that the government has unnecessarily utilized a disfavored form of *discriminatory treatment* to pursue interests that it could just as well achieve in a nondiscriminatory fashion. Second, a more restrictive alternative might support a *sincerity-based* argument against the law, which, by showing how much *more effectively* the more restrictive alternative could achieve a stated regulatory interest, functions to cast doubt on the government's actual commitment to the interest it has invoked. Put differently, the equality-based argument faults the government for needlessly discriminating, whereas the sincerity-based argument faults the government for failing to pursue its interests with sufficient vigor and aggressiveness. These two arguments, to be sure, may sometimes overlap. But they will often rest on different assumptions regarding the constitutional significance of a more restrictive alternative and raise different implications regarding the range of options available to the government in rebutting a challenger's claims.

A. The Equality-Based Argument

With one exception,[196] the doctrines considered in the previous Part share the following important feature: each doctrine singles out for heightened means/ends scrutiny a form of regulatory treatment that discriminates on the basis of a constitutionally suspect criterion. In the free speech context, for instance, the Court has held that content-based laws trigger strict scrutiny, whereas content-neutral laws trigger intermediate scrutiny.[197] In the free exercise context, the Court has distinguished between religion-targeting laws, which trigger strict scrutiny, and laws that are neutral and generally applicable with respect to religion, which trigger no free-exercise scrutiny at all.[198] In the equal protection context, the Court applies strict scrutiny to laws that employ suspect classifications such as race and alienage; it applies intermediate scrutiny to laws that discriminate on the basis of gender; and it applies rational basis scrutiny to laws that discriminate on the

196. *See supra* Section II.D (discussing substantive due process doctrine).
197. *See supra* Section II.A.
198. *See supra* Section II.B.

basis of some other non-suspect classification.[199] Dormant Commerce Clause doctrine calls for heightened scrutiny of laws that distinguish between out-of-state parties and in-state parties.[200] And the equal sovereignty principle at least sometimes requires a more searching examination of means/ends fit when a federal law draws distinctions based on the identities of certain states.[201]

This Article earlier posited a connection between more restrictive alternatives and nondiscriminatory alternatives, noting that governments can eliminate constitutionally suspect forms of discrimination by worsening a law's regulatory treatment of a previously advantaged category of conduct. Absolute increases in restrictiveness can in this way alleviate relative disparities in treatment. And when those disparities are themselves constitutionally suspect, more restrictive (and nondiscriminatory) alternatives can deliver the constitutional benefit of promoting formal equality where formal inequality previously prevailed. From this observation, it is not difficult to identify one mechanism through which the existence of a more restrictive alternative helps to demonstrate the constitutional invalidity of a less restrictive law. Simply put, the more restrictive alternative highlights the *non-necessity* of discrimination.[202] Precisely because the more restrictive alternative provides a nondiscriminatory way to pursue the government's goal, it functions to defeat the government's claim that the goal itself warrants a facially problematic form of discriminatory treatment.

Consider *R.A.V. v. City of St. Paul*. The majority struck down a content-based ban on a subcategory of fighting words by pointing to the availability of a more restrictive alternative—namely, a content-neutral ban on *all* fighting words.[203] St. Paul defended its ban by

199. *See supra* Section II.C.

200. *See supra* Section II.E.

201. *See supra* Section II.F.

202. In this sense, claims of equality-based defectiveness capitalize on what Richard Fallon has characterized the "necessity prong" of the narrow-tailoring inquiry, which "insists that 'infringements of protected rights must be necessary in order to be justified.'" Fallon, *supra* note 2, at 1326. Professor Fallon notes that the Court sometimes "expresses . . . the same demand when it says that the government's chosen means must be the 'least restrictive alternative' that would achieve its goals." *Id.* (quoting Ashcroft v. ACLU, 542 U.S. 356, 366 (2004)). But insofar as the "protected right" incorporates a nondiscrimination norm, the necessity prong might also proceed via inquiry into the availability of more restrictive alternatives.

203. The Court's use of the terms "content-neutral alternative" in *R.A.V.* reflected something of an oversimplification. What the Court in *R.A.V.* termed a "content-neutral alternative" remained "content-based" in its own way; even a universal ban on "fighting words" still would have drawn a content-based distinction between words of the "fighting" and "non-fighting" variety. Nevertheless, and unlike the law that St. Paul had adopted, the

reference to an interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination."[204] The majority acknowledged that the city had a compelling state interest in pursuing this goal, but it reasoned that a content-neutral "fighting words" ban—i.e., a ban that covered all fighting words including but not limited to those based on race, color, creed, religion, or gender—would "have [had] precisely the same beneficial effect" in terms of the interest being sought.[205] And given that the "dispositive question" in the case was whether "content discrimination is reasonably necessary to achieve St. Paul's compelling interests," the more restrictive (but nondiscriminatory) alternative effectively sealed the fate of the less restrictive (but discriminatory) law.[206] Content discrimination was not reasonably related to St. Paul's compelling government interests, because a nondiscriminatory, more restrictive alternative stood ready to achieve those interests in an equally "beneficial" way.

The Fourth Circuit's decision in *Beskind v. Easley*—the wine importation case—utilized more restrictive means analysis in a similar fashion.[207] Under well-established rules of dormant Commerce Clause doctrine, states cannot facially discriminate against interstate commerce unless there exists no "reasonable nondiscriminatory alternative" capable of advancing the "legitimate local purpose" furthered by the law under review.[208] In *Beskind*, North Carolina had attempted to justify its differential treatment of in-state wineries and out-of-state wineries by reference to a "legitimate local purpose" in preventing out-of-state wineries from circumventing various distribution and taxation requirements.[209] But, as the Fourth Circuit pointed out, North Carolina could continue to achieve that interest by subjecting in-state wineries to the more burdensome regulatory treatment that the effective regulation of out-of-state wineries was said to require.[210] That regulatory scheme would have been

more restrictive alternative still would have utilized a *special form of content-discrimination* that the doctrine expressly permitted—namely, the content-based targeting of an entire category of unprotected speech. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992). Thus, the more restrictive alternative of a categorical "fighting words" prohibition, even though content-based in a technical sense, still would not have discriminated in a constitutionally problematic manner.

204. *Id.* at 395.
205. *Id.* at 396.
206. Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003).
207. *Id.* at 516.
208. *See, e.g.*, Or. Waste Sys. v. Dep't of Env't Quality, 511 U.S. 93, 101 (1994).
209. *Beskind*, 325 F.3d at 515 (quoting *Or. Waste Sys.*, 511 U.S. at 100–01).
210. *Id.*

nondiscriminatory, and it would have served the state's regulatory objectives in no less an effective way. And that was enough to condemn the state's law in its current form. As the Fourth Circuit put it, the question in the case was not "whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries."[211] Rather, it was "whether *discriminating* in favor of in-state wineries" helped to serve the state's regulatory purposes,[212] and the existence of a more restrictive alternative helped to demonstrate that the answer to this question was no.[213]

In short, whenever an area of doctrine identifies discriminatory treatment as a constitutional evil,[214] a more restrictive alternative might function to condemn a less restrictive law for the simple reason that that the former, unlike the latter, *does not discriminate*. The more restrictive means, in other words, identifies a desired middle path between the Scylla of disfavored discrimination and the Charybdis of unfulfilled regulatory needs. And the availability of such a middle path thus highlights an equality-based flaw in the less restrictive law under review.

It bears emphasizing that in order to highlight an equality-based defect in a less restrictive law, a more restrictive means must necessarily qualify as nondiscriminatory in the relevant doctrinal sense; that is, the equality-based argument works only if the more restrictive means itself avoids the form of problematic discrimination that is manifested by the less restrictive law. It need not be the case, however, that the more restrictive (and nondiscriminatory) alternative would function to alleviate discriminatory *effects*. That is due to the well-established principle—recognized both within and outside of the equal protection context—that effects-based discrimination poses a lesser constitutional evil than does a facially or

211. *Id.* at 517.

212. *Id.* (emphasis in original)

213. *Id.*

214. As the foregoing discussion should make clear, an established constitutional presumption against discriminatory treatment is a necessary prerequisite to an equality-based invocation of a more restrictive means. Equality-based defectiveness, that is, can exist only in connection with an established doctrinal presumption against some form of intentional or facial discrimination. And that in turn means that equality-based arguments need not themselves provide any explanation as to why the particular form of equality manifested by the more restrictive means (and flouted by the "less restrictive" law) is constitutionally valuable; that conclusion is already amply supported by the existence of a decision rule that presumptively condemns the form of discriminatory treatment at issue.

intentionally discriminatory law.[215] Given this distinction—i.e., between facial/intentional discrimination on the one hand and unintentional/effects-based discrimination on the other—equality-based invocations of a more restrictive alternative should not fail simply because the more restrictive alternative would give rise to lingering discriminatory effects. Put differently, if the Court seriously believes (as it repeatedly says it does) that *formal* rather than *functional* discrimination is the touchstone of unconstitutionality, then a more restrictive alternative need only qualify as a formally nondiscriminatory alternative in order to eliminate the constitutionally suspect form of discriminatory treatment under review.

The Court, to be sure, has not always recognized this point, occasionally invoking the prospect of discriminatory effects as a reason not to demand adherence to a more restrictive alternative. Recall, for instance, Justice Kennedy's assertion in *Nguyen v. INS* that the more restrictive alternative of subjecting citizen-mother children to a more onerous set of citizenship requirements would yield only a "hollow-neutrality" across gender-based lines, with the formally gender-neutral requirements still proving in practice more difficult for citizen-father applicants to satisfy.[216] This is an argument

215. The reluctance to apply heightened scrutiny to *effectively* discriminatory laws is typically associated with equal protection cases such as *Washington v. Davis*, 426 U.S. 229 (1976), and *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), in which the Court refused to apply heightened scrutiny to facially neutral laws that exerted problematic discriminatory effects. But the Court has embraced a similar distinction in many other areas of doctrine. With respect to the First Amendment's content-discrimination principle, for instance, the Court has said that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S 781, 791 (1989). With respect to the dormant Commerce Clause, the Court repeatedly distinguishes between "facially discriminatory," measures on the one hand, and measures that "regulate[] evenhandedly with only incidental effects on interstate commerce." Or. Waste Sys. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994). In the free exercise context, *Employment Division v. Smith* virtually announced the principle on its face, given its explicit rejection of free exercise claims predicated on the effects of neutral and generally applicable laws. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10 (1990) (noting that *Smith* makes "formal neutrality the dominant principle of the Court's free exercise jurisprudence"). And while the Court has not yet said anything about the equal sovereignty principle's application to facially neutral federal laws with discriminatory effects, the sheer number of such laws already on the books would likely militate against any sort of effects-based approach. *Cf.* Colby, *supra* note 188, at 1149–51.

216. Nguyen v. INS, 533 U.S. 53, 64 (2001). The idea, in short, was that even a formally gender-neutral proof-of-parentage rule would sometimes require fathers to take "additional affirmative steps," because mothers, by necessarily being present at the moment of a child's birth, were more likely to have their name recorded on a child's birth certificate. *Id.*

that, as Justice O'Connor noted in dissent, failed to take seriously the premium that the Justices had elsewhere placed on the value of formal neutrality (and instead took seriously a form of inequality whose doctrinal significance the Court had elsewhere minimized).[217] Put another way, by dismissing the more restrictive means as guaranteeing only "hollow neutrality," the Court in *Nguyen* characterized as "hollow" the very sort of neutrality that equal protection doctrine routinely demands. And in so doing, the Court generated a result at odds with other features of the doctrine writ large.[218]

B. The Sincerity-Based Argument

More restrictive means analysis does not arise exclusively in connection with the claim that a law unnecessarily discriminates in pursuit of a legitimate regulatory objective. That point should be immediately evident from the fact that not all of the doctrines I considered in Part II single out discriminatory treatment as a trigger of heightened scrutiny. (The notable outlier is substantive due process doctrine, which calls for heightened scrutiny of all laws—whether discriminatory or not—that infringe on fundamental rights.)[219] And in fact, many of the examples I discussed in Part II have utilized more restrictive means analysis not for the purpose of highlighting a nondiscriminatory means of achieving a stated regulatory objective, but instead for the purpose of questioning the government's level of commitment to the objective said to justify the law under review. In this way can a more restrictive means function to demonstrate sincerity-related defects in a constitutionally suspect law.[220]

217. *See id.* at 82 (O'Connor, J., dissenting) (contending that "the majority . . . denigrat[es] as 'hollow' the very neutrality that the law requires" (quoting *id.* at 64)).

218. Indeed, this feature of the majority opinion in *Nguyen*, along with others, has led to the suggestion that the majority did not in fact apply "intermediate scrutiny," instead extending special deference to Congress in light of its plenary power over matters of immigration and naturalization. *See, e.g.*, Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 148 n.352 (2010) ("The disagreement between the majority and the dissent in *Nguyen* may partly have been a disagreement about the level of scrutiny that should apply in this case.").

219. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1996).

220. To be sure, the Court need not (and often does not) *explicitly* invoke a more restrictive means in order to sustain a sincerity-based attack on a less restrictive law. Oftentimes, the attack proceeds simply by reference to curiously permissive or lenient features of a law that make little sense in light of the interest it purports to achieve. But even by pointing out these features of the law, the Court is still *implicitly* drawing attention to the government's failure to regulate more restrictively. There is not much of a functional difference between saying: "this law doesn't regulate *A* even though the interest would seem to require it," or instead saying: "if the government had been serious about

The force of the sincerity-based argument derives from the notion that when the government invokes a "compelling," "important," "legitimate," or otherwise sufficiently strong regulatory interest on a law's behalf, that interest *really* ought to be the one that underlies the law. Even the most compelling government interest in the world cannot suffice to sustain a law that pursues that interest in an incomplete and halfhearted fashion. Rather, the intuition goes, a law must pursue that interest with some level of efficacy in order to claim the benefit of that interest's justificatory force. Whatever its ultimate philosophical underpinnings,[221] the gist of the idea has long been recognized and embraced by the Court. As the Court itself once put the point, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[222]

This idea gives rise to a second mechanism by which a more restrictive alternative might function to highlight the unconstitutionality of a less restrictive law. Consider again Justice Blackmun's suggestion in *Roe v. Wade* that Texas's failure to criminalize abortions necessary to save the life of the mother counted

pursuing this interest, it would have adopted a more restrictive alternative that encompassed the regulation of *A*." Both claims point to the same underlying defect: namely, a lack of a genuine commitment to the regulatory interest that the government claims on behalf of a constitutionally suspect law.

221. We can imagine a variety of reasons why courts might care about the extent to which a law actually does further an interest invoked on its behalf. The idea may have something to do with concerns about *subjective motives*, positing that the less effectively a law promotes a legitimate government interest, the more likely it was that the legislature enacted the law to achieve some other illegitimate purpose. *See* Fallon, *supra* note 2, at 1327; *see also* Volokh, *Freedom of Speech*, *supra* note 2, at 2420 (suggesting that a law's "underinclusiveness . . . may be evidence that an interest is not compelling, because it suggests that the government itself doesn't see the interest as compelling enough to justify a broader statute"). Relatedly, the intuition may stem from concerns about *objective appearances*: Even if the enactors of a less restrictive law intended for it to serve a legitimate interest, its patent inability at doing so might raise red flags in the eyes of outside observers who already have reason to doubt its constitutionality. *See* Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002) ("As a means of pursuing the objective . . . that respondents now articulate, the [law] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."). Or perhaps the intuition states a point about *proportionality* or *interest balancing*, maintaining that courts should tolerate the liberty-related costs of a constitutionally suspect law only when those costs are outweighed by real and substantial regulatory gains. *See* Fallon, *supra* note 2, at 1327 ("Even absent concern about governmental motives, the demand that restrictions on constitutional rights not be underinclusive reflects an insistence that the government not infringe on rights when doing so will predictably fail to achieve purportedly justifying goals.").

222. *Republican Party of Minn.*, 536 U.S. at 780 (quoting Florida Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

as a further strike against the law under review.[223] How could this seemingly lenient feature of the Texas law—one that spared women from an especially severe invasion of bodily autonomy—have contributed to its undoing? The answer, in short, had to do with a sincerity-related problem. Recall that Texas had claimed on behalf of its abortion ban a compelling—indeed, absolute—interest in safeguarding for unborn fetuses the right to life guaranteed by the Fourteenth Amendment's Due Process Clause.[224] But the state's eschewal of a more restrictive alternative raised doubts in the majority's minds about the veracity of this claim, suggesting that the protection of an absolute, Fourteenth Amendment "right to life" was not a regulatory object that Texas had genuinely set out to achieve. If the state had been truly concerned about the constitutional rights of the unborn, the Court argued, it would have enacted a far more restrictive anti-abortion measure.[225] And Texas's failure to enact such a law thus signaled to the Court that it was not being sincere in invoking this particularly rigorous and sweeping state interest on behalf of the less restrictive law it had chosen to enact.

Unlike its equality-based counterpart, then, the sincerity-based argument can apply even in the absence of an established constitutional presumption against discriminatory treatment. But it is also true that sincerity-related arguments remain available even where a law *does* discriminate in a constitutionally suspect manner. *Cleburne*, for instance, was an equal protection case, and the Court there identified insufficiently restrictive features of the city's zoning decision as evidence of its unconstitutionality.[226] But the more restrictive means analysis in *Cleburne* was not intended to highlight a nondiscriminatory path forward; rather, its function was to impugn a particular claim of interest that the government had proffered to the Court: for example, the Court pointed to the city's permissive treatment of fraternity houses and assisted living facilities as inconsistent with various goals that Cleburne had cited in support of its refusal to permit construction of a living center for mentally disabled individuals.[227] Had the city instead pursued the more restrictive alternative of a categorical ban on the construction of

223. Roe v. Wade, 410 U.S. 113, 157 n.54 (1973).

224. *Id.* at 154.

225. *Id.* at 157 n.54 ("But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?").

226. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985); *see supra* Section II.C.

227. *City of Cleburne*, 473 U.S. at 450.

group homes or a hard-and-fast occupancy limit for all dwellings, then its arguments about overcrowding, flood risks, and traffic congestion might have found greater purchase. But the city's failure to regulate more restrictively led the Court to cast those justifications aside.

Nor does the supposedly nondiscriminatory nature of a more restrictive means preclude it from also highlighting sincerity-based defects in a less restrictive law. Consider in this respect Justice Kennedy's majority opinion in *Lukumi*, the animal sacrifice case. Tellingly, the bulk of the Court's more restrictive means analysis preceded its application of strict scrutiny; that is, the Court alluded to more restrictive alternatives in the course of rendering its threshold determination that Hialeah's animal-sacrifice prohibitions were not in fact "generally applicable" with respect to religion.[228] That determination rested largely on the challenged law's insufficient restrictiveness. By cross-referencing the relatively narrow scope of the city's regulatory approach against the sorts of laws that would have more effectively achieved the City's claimed interest in promoting animal safety and public health, the Court was able to look past the patina of facial neutrality and find within the regulatory scheme an impermissible, religion-targeting object.[229] How could, for instance, Hialeah claim that its animal sacrifice laws furthered an interest in "public health," when it refused also to prohibit the "improper disposal" of animal carcasses by hunters or restaurant managers?[230] How could Hialeah claim that the ordinances furthered an interest in "preventing cruelty to animals," when it continued to permit fishing, rodent extermination, euthanasia of stray or unwanted pets, and even "the use of live rabbits to train greyhounds"?[231] The Court declared in so many words that the city both could have and would have pursued a more restrictive alternative if it had truly been serious about pursuing any of the religion-neutral interests it had invoked. The plethora of more restrictive (and generally applicable) alternatives available to serve the secular interests associated with the laws undermined the conclusion that these particular interests in fact had anything to do with the laws' enactment.

Thus, in contrast to the equality-based argument, which can apply only in connection with a constitutional norm against discriminatory treatment, the sincerity-based argument can apply both within and outside of doctrines that discourage facial

228. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 535–36 (1993).
229. *Id.* at 537.
230. *Id.* at 538.
231. *Id.* at 537–38.

discrimination. Similarly, whereas the equality-based argument requires as its input a more restrictive means that also qualifies as a nondiscriminatory means, the sincerity-based argument can work with a more restrictive means that is either discriminatory or nondiscriminatory in nature. Indeed, a more restrictive means can sometimes function successfully as a "more sincere means" even when it manifests precisely the same form of disfavored discriminatory treatment as the less restrictive law that it helps to condemn.[232] In these respects, then, the sincerity-based argument enjoys a broader range of operation than does its equality-based counterpart.

IV. THE REGULATORY VIABILITY OF MORE RESTRICTIVE ALTERNATIVES

Both the equality- and sincerity-based arguments provide reasons for concluding that the existence of more restrictive means cuts against the constitutionality of a less restrictive law. But more restrictive means arguments do not always succeed, and there are a variety of reasons why this might be so. One important set of reasons relates to issues of "regulatory viability." Simply put, if a posited more restrictive alternative is unlikely to achieve the relevant government interests as well as the less restrictive law, then that fact provides a straightforward reason for dismissing it as an inadequate regulatory substitute. This sort of argument frequently arises in cases involving more restrictive means analysis, with the government pointing to concerns about adverse regulatory consequences as justifying, or at least excusing, its failure to regulate more restrictively.

Questions of regulatory viability, to be sure, are by no means unique to more restrictive means analysis; they can just as easily arise when less restrictive alternatives are being considered as well. But these questions take on an added layer of complexity when applied to more restrictive alternatives—laws that, by definition, do not require the government to "ease up" on any of the parties that it already

232. In *Reed v. Town of Gilbert*, for instance, some of the posited more restrictive alternatives to the municipal sign ordinance under review might still have qualified as content-based; even so, the Court could still leverage such alternatives on behalf of the claim that the City was not pursuing its interests as aggressively as possible. 135 S. Ct. 2218, 2231 (2015) (noting that the City's ordinance problematically permitted the proliferation of "larger ideological signs"); *see also id.* at 2232 ("The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.").

regulates and thus, on their face, do not require any immediately obvious sacrifice in the way of the regulatory interests said to justify a law under review. In other words, if the state defends a law's burdensome (or non-beneficial) treatment of a particular individual by reference to some regulatory need, that need should presumably remain just as well served by a law that leaves that treatment no more burdensome (or non-beneficial) than it previously had been. At worst, the argument goes, a more restrictive alternative will result in the gratuitous coverage of previously uncovered parties—coverage that the government may regard as unnecessary but ultimately harmless to its regulatory goals. *Less* restrictive alternatives often require some degree of regulatory sacrifice on the part of the state, releasing certain parties from a form of adverse treatment the state claims is necessary to achieve some important underlying goal. But *more* restrictive alternatives steer clear of that difficulty, leaving entirely undiluted the particular set of burdens/benefit-denials the state had originally sought to impose.

That, at least, is the prima facie case for concluding that more restrictive alternatives will always serve the relevant government interests at least as well as their less restrictive counterparts. But the argument faces difficulties, as there exist at least four separate reasons why the government might plausibly object to a more restrictive alternative on viability-related grounds. First, government actors might resist enactment of a more restrictive means for the simple reason that it gratuitously regulates unproblematic conduct. Second, government actors might complain that a more restrictive alternative is unduly costly to administer. Third, government actors might argue that a more restrictive alternative affirmatively undermines the effective operation of a law's burden-imposing (or benefit-withholding) elements and thus compromises the regulatory interest that the government seeks to pursue. And finally, government actors might argue that a more restrictive alternative undermines *additional* government interests served by the lenient, or non-burden-producing, elements of the law under review. These arguments, as will be shown, can make sense on their own terms, but some are more effective than others in supplying a doctrinally sufficient justification for the government's failure to regulate more restrictively.

A. Nonexistent Regulatory Benefits

The first ground on which the government might resist adoption of a more restrictive means is the most straightforward: namely, the

government might maintain that a given regulatory problem does not require anything beyond what a less restrictive law already provides. The argument, in short, is one of nonexistent regulatory benefits. Where a challenged law covers only the conduct necessary to achieve the government's regulatory ends, expanding the scope of its coverage would deliver no additional benefits in connection with those ends. The claim, in other words, is not that the increase in restrictiveness would jeopardize the government's ability to achieve its interest, but rather that it would force the government to pursue that interest in a pointlessly overinclusive manner.

Recall, for instance, Justice Blackmun's plurality opinion in *Burson v. Freeman*—the case involving Tennessee's content-based ban on political solicitation within one hundred feet of polling places.[233] A more restrictive alternative to the law might have forbidden all forms of solicitation (commercial, charitable, ideological, etc.) within one hundred feet of the polls, thus allowing Tennessee to continue pursuing its interest in curbing election fraud without so obviously distinguishing between and among different types of speech. But to the *Burson* plurality, this approach seemed silly, amounting to a requirement that the state "regulate for problems that do not exist."[234] Expanding the coverage of Tennessee's anti-electioneering law, to be sure, would not necessarily have been detrimental to the compelling state interests underlying the law: a more restrictive alternative might still have deterred political solicitation just as forcefully as the less restrictive law under review. But the expansion, the plurality maintained, would also have been pointless, requiring the state to monitor for and to prohibit various forms of solicitation that posed no threat to the holding of fair and effective elections.[235] Therefore, the plurality held, Tennessee could continue to pursue its election-protection interests in the less restrictive but discriminatory manner that it currently embraced.[236]

How persuasive is this reasoning? The answer depends largely on the distinction introduced in the previous Part—i.e., between

233. *See supra* notes 53–57 and accompanying text.

234. Burson v. Freeman, 504 U.S. 191, 207 (1992) (plurality opinion).

235. *See id.*

236. *See id.* at 191. The Court credited a similar sort of argument in *Rostker*, pointing to several statements from the legislative record in which military officials claimed no need for the power to conscript female soldiers. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 76 (1981). This emphasis on needlessness, to be sure, did not amount to the whole of the argument for upholding the gender-based registration requirements, *see infra* Section IV.B (discussing claims in *Rostker* about administrative costs), but it did figure prominently in the majority opinion.

equality-based and sincerity-based invocations of a more restrictive alternative. Simply put, an argument about nonexistent regulatory benefits can offer a persuasive rebuttal to a sincerity-based challenge, but it does not offer much of a response to an equality-based challenge.

The sincerity-based argument, recall, carries force only when a more restrictive means would more effectively achieve the interests said to justify a less restrictive law. Consequently, if the only effect of increasing a law's restrictiveness would be to bring some amount of non-problematic conduct within its regulatory ambit, then the more restrictive means does little to cast doubt on the government's commitment to the problem it purports to address. Any attempt in *Burson*, for example, to infer from the Tennessee electioneering ban a lack of government seriousness about the fairness of its elections would have been severely undercut by a finding that *only* political solicitation posed a threat to electoral fairness. Much to the contrary, the finding would have suggested that Tennessee's decision not to enact the more restrictive law reflected nothing more than an accurate appraisal of the problem that it faced. And what is true of that particular example should be true of sincerity-based arguments more generally. From the mere fact that a more restrictive alternative would in no way *detract* from a law's efficacy, it should not follow that the less restrictive law is insufficiently tailored to achieve the interest it purports to serve.

In contrast, where a more restrictive alternative accompanies an *equality-based* attack on a law, the "nonexistent regulatory benefits" argument provides a much-weakened defense. As far as the equality-based argument is concerned, it should not matter much whether an increase in restrictiveness fails to translate into an increase in regulatory effectiveness. All that matters is that the increase in restrictiveness *not compromise* the government interests in question. This is so because the achievement of a constitutionally salient form of equality is a benefit in and of itself; that is the critical premise of the decision rule that triggered heightened review in the first place. Consequently, the needless regulation of nonproblematic conduct may simply be a price worth paying to ensure that the government does not discriminate on the basis of a constitutionally suspect classification.

Burson again helps to illustrate the point. For reasons already discussed, the availability of a more restrictive means in no way undermined Tennessee's claim that the challenged law really did

promote electoral fairness.[237] But it *severely* undercut the claim that the electoral fairness interest required a departure from the constitutional presumption in favor of content-neutral speech restrictions.[238] A categorical ban on all solicitation at the polls would still have allowed the state to achieve its electoral fairness interest and to do so in a content-neutral way. True, the more restrictive law might not have delivered any additional regulatory benefits in the way of regulatory efficacy,[239] but it would have delivered the significant *constitutional* benefit of avoiding content-discrimination in the first place. If Tennessee's only objection to the more restrictive alternative was that it prohibited non-problematic conduct, then that objection, in and of itself, should not have sufficed to save the less restrictive law from equality-based constitutional attack. Something more should have to be offered by the government to justify the content-discriminatory lines it had drawn.

All of that being said, it bears emphasizing that complaints about the absence of regulatory benefits do not normally appear in isolation. Rather, such complaints typically accompany other claims related to the costs of increasing a law's restrictiveness. From the government's perspective, that is, an unimproved status quo is by no means the worst-case result of a restrictiveness-increasing change in the law; more problematically, an increase in a law's restrictiveness can impose negative costs on both the government and the parties that it regulates. And, as the next Sections will show, these negative costs can sometimes provide valid reasons for excusing the government's failure to adopt a more restrictive alternative.

B. Administrative Costs

Consider first the prospect of administrative costs. Increasing the restrictiveness of legal prohibition often means increasing the costs of its implementation.[240] Criminalizing a wider range of conduct might

237. *Burson*, 504 U.S. at 207.

238. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

239. I should note that it is by no means inconceivable that a categorical solicitation ban would have prevented political solicitation more effectively than the less restrictive ban that Tennessee had employed. Perhaps, for instance, a categorical ban would have worked better by removing the need to conduct particularized inquiries into the nature of arguably "political" forms of solicitation, and by creating a sort of prophylactic deterrent against subtler efforts to influence or intimidate voters by means of ostensibly "non-political" advocacy.

240. Though not always. In the context of benefit-conferring laws, the more restrictive means will often prove far *less costly* to administer, thus defeating any governmental attempt to wave away the more restrictive means on cost-related grounds. Consider, for

require the investigation of more activities, the bringing of more prosecutions, and the adjudication of more cases. Ratcheting up procedural and evidentiary requirements might slow down the government's processing of administrative claims. Raising everyone's taxes might demand increased monitoring for tax evasion. And whenever administrative costs materialize, opportunity costs inevitably follow: all else equal, the more resources the government must devote to the administration of a more restrictive means, the fewer resources it can devote to the regulatory mission on which it has fixed its aim.

The prospect of administrative costs, especially when coupled with the prospect of nonexistent regulatory benefits, might therefore render a more restrictive means especially undesirable to government actors. And the Court has occasionally cited to such concerns as providing a legally sufficient basis for excusing a failure to regulate more restrictively. *Rostker v. Goldberg*[241] is a telling case in point. All parties there agreed that the Selective Service system helped to further the government's important interest in "raising and supporting armies."[242] What the parties did not agree on, however, was whether that same compelling interest necessitated the discriminatory nature of these requirements, or whether the interest could be equally well served (if not better served) by a more restrictive—and gender-neutral—set of registration requirements. The government said no, citing a variety of administrative difficulties likely to arise from its implementation of a gender-neutral military draft. The Court agreed, excusing the government's failure to adopt the more restrictive alternative in light of concerns about the added administrative costs that would result from training conscripted female soldiers alongside male soldiers and from developing housing policies and "physical standards" for co-educational regiments.[243] In short, the Court concluded that the various administrative costs of

instance, Justice Scalia's suggestion in *Locke v. Davey* that Washington could have alternatively achieved its interests by simply abolishing a program that provided scholarship money to eligible recipients. *See supra* note 86 and accompanying text. Certainly, the more restrictive alternative of a non-existent scholarship program would have been cheaper than the less restrictive scholarship program that the state actually administered.

241. 453 U.S. 57 (1981).

242. *Id.* at 70.

243. *See supra* notes 123–31 and accompanying text. Dissenting in *Rostker*, Justice Marshall objected to the majority's reliance on these and other administrative costs. *See Rostker*, 453 U.S. at 95 (Marshall, J., dissenting) ("This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig v. Boren* test.").

introducing females into Selective Service were significant enough to justify the government's continued adherence to a less restrictive, male-only registration system.[244]

One can sympathize with the proposition that the operative principles of constitutional doctrine should not force the government to devote time, money, and effort toward the regulation of conduct it deems unworthy of regulation. But should complaints about administrative costs generally suffice to demonstrate the non-viability of a more restrictive alternative?

In my view, they should not. It is, after all, a well-accepted feature of any well-functioning constitutional system that rights and structural protections will sometimes require government actors to work harder at solving a problem than they otherwise would need to do: the added degree of work is simply the cost of doing business in a system subject to constitutional constraints. An absolute ban on gun ownership might provide a more efficient means of gun control than any number of different registration, background check, and permitting requirements currently in place, but few would cite to that fact alone as a reason for upholding such a ban against a Second Amendment attack. Uncompensated takings of property might simplify the administration of public building projects, but few would cite that fact as a valid reason for ignoring the requirements of the Takings Clause. Imprisoning citizens without trial might permit the courts to function more efficiently, but the Due Process Clause would not permit reliance on such an administrative shortcut. And the same principle should hold in connection with the various constitutional norms that have been considered here: the comparative costliness of a more restrictive alternative should not in and of itself render it an inadequate substitute for a constitutionally suspect law.[245]

244. *Rostker*, 453 U.S. at 83. So, too, did the Court in *Nguyen* allude to similar concerns, approvingly characterizing the "less demanding" set of citizenship application requirements that Congress had enacted as an "easily administered scheme" that steered clear of the "subjectivity, intrusiveness, and difficulties of proof" to which a more restrictive (but gender-neutral) set of requirements might have given rise. Nguyen v. INS, 533 U.S. 53, 69 (2001); *see also id.* at 88 (O'Connor, J., dissenting) ("There is no reason to think that this is a case where administrative convenience concerns are so powerful that they would justify the sex-based discrimination . . . .").

245. *See generally* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 117 (2006) ("[G]enerally speaking, we protect many rights even though doing so imposes various burdens on individuals, the public at large, or the government. These burdens include administrative inconvenience or inefficiency costs, maintenance and wear and tear costs, out of pocket financial expenses and loss of revenue, and attenuated social instability and unlawful conduct costs."); *see also* Tussman & tenBroek, *supra* note 11, at 351 (noting that "the Court, while giving weight to pleas of

Of no small importance, the Court itself has endorsed this very idea, repeatedly asserting that claims of "administrative inconvenience" are inadequate to justify the enactment of otherwise unconstitutional laws.[246] In the sex-discrimination context, for instance, the Court has "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications."[247] Nor may racially discriminatory laws be justified by arguments based on "simple administrative convenience" and "the interest in avoiding . . . bureaucratic effort."[248] Similarly, in the free speech context, the Court has rejected claims of "small administrative convenience" as insufficient to justify the enactment of content-based laws,[249] and it has proclaimed more generally that "the First Amendment does not permit the State to sacrifice speech for efficiency."[250] So too for fundamental rights based claims involving equal protection and substantive due process: "the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights."[251] To be sure, administrative convenience arguments can and should prevail when subject to deferential forms of constitutional scrutiny.[252] But where stricter forms of means/ends analysis apply, the Court has been and should be reluctant to uphold a law on convenience-related grounds alone.

The discussion thus far has examined the problem of administrative costs as it applies to equality-based based invocations of a more restrictive alternative. But the same conclusions should generally hold true when sincerity-based arguments enter the picture. To see the point, consider once again Justice Harlan's observation in *Poe v. Ullman* that Connecticut's failure to enforce its anti-

administrative difficulties, must stand guard against an overconcern for mere 'convenience'").

246. *See* Brownstein, *supra* note 245, at 117–28.

247. Craig v. Boren, 429 U.S. 190, 198 (1976); *see also* Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.").

248. Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989); *see also* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) ("[T]hat the implementation of a program capable of providing individualized consideration [of college applications] might present administrative challenges does not render constitutional an otherwise problematic system.").

249. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 102 n.9 (1972).

250. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 795 (1988).

251. Carey v. Population Servs., Int'l, 431 U.S. 678, 691 (1977).

252. *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673, 682 (2012) (quoting Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 511–12 (1937)).

contraception statutes "conduce[d] to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary."[253] And now suppose that Connecticut had responded to this argument with a variant on the "administrative costs" defense, attributing its non-enforcement of the law to its concerns that the requisite investigations, prosecutions, and adjudications would drain its treasury of the resources needed to deal with other, more important laws on the books. Even if these concerns had been 100% real, they would only have served to confirm Justice Harlan's original suspicions. Connecticut, simply put, did not consider the goals of its anti-contraceptive statute to be important enough to warrant a substantial investment of time, money, and regulatory effort—concluding instead that the resources were better spent on other regulatory goals. Put somewhat differently, if a state is going to claim a "compelling" or "important" interest on behalf of a particular law, it should at the least be required to put its money where its mouth is. And if the state instead attributes an incomplete pursuit of that interest to concerns about administrative costs, the very relevance of the "administrative cost" concern should count as a reason *for* rather than *against* faulting the government for its lack of regulatory sincerity.

C. Diminished Regulatory Efficacy

Government actors might also resist a more restrictive alternative on the ground that it actively undermines the regulatory interests that prompted the enactment of the less restrictive law. The claim, to be clear, is not simply that the more restrictive means would fail to deliver additional regulatory benefits. Nor is it simply that the more restrictive means would require an additional investment of government resources. Rather, the claim involves the bolder proposition that increased restrictiveness would actually *undermine* the effectiveness of the challenged regulatory scheme. Put another way, the "difficult regulation" argument holds that expanding the scope and/or increasing the stringency of a law's prohibitions will carry the counterintuitive result of reducing its efficacy as a regulatory tool.[254]

253. Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

254. Notice that a diminished regulatory efficacy argument, if successful, would provide grounds for rejecting *both* equality- and sincerity-based applications of more restrictive means analysis. If the government can successfully show that an increase in restrictiveness would actively undermine its achievement of an important government

At first glance, the diminished regulatory efficacy argument may seem to rest on a faulty set of premises. How can it be, one might reasonably ask, that *increasing* the restrictiveness of a law will somehow render it less effective at achieving its underlying aims? From the government's perspective, the more restrictive alternative should carry the signal virtue of *not* requiring regulators to relax the burdens imposed on any parties whose adverse treatment is required by a government interest. If, in other words, the state defends a law's burdensome (or non-beneficial) treatment of a particular individual by reference to some regulatory need, that need should presumably remain just as well served by a law that treats that particular individual exactly the same as before. At worst, the argument goes, a more restrictive alternative will result in the gratuitous coverage of previously uncovered parties—coverage that the government may regard as unnecessary but ultimately harmless to its regulatory goals.

In the real world, however, regulation is a complicated enterprise with lots of moving parts. Contrary to the implications of a simplified academic model, more regulation does not necessarily mean more in the way of desired regulatory effects. Sometimes, the opposite result might obtain, with new (and perhaps unforeseen) regulatory interactions throwing sand in the gears of the administrative machinery. Increasing restrictiveness could therefore result in a regulatory program that turns out to be less effective at achieving its aims—not only as applied to the new activities the law has been expanded to cover but also as applied the old activities that the law had originally targeted.

Consider in this respect Justice Rehnquist's plurality opinion in *Michael M. v. Superior Court*. Challengers to California's gender-based statutory rape law had raised the possibility of expanding its prohibitions to cover both underage males and underage females. That modification, at first glance, would have seemed to render the law a more effective means of achieving California's stated interest in preventing teenage pregnancies. As Justice Brennan argued in dissent, the more restrictive alternative would have covered "twice as

interest, then the more restrictive means will not in fact constitute a viable regulatory alternative to the law under review. And if the more restrictive means is not a viable regulatory alternative, then it cannot support either of the inferences on which the equality- and sincerity-based arguments respectively depend. Even if the more restrictive means is nondiscriminatory, it will, on account of its diminished regulatory efficacy, fail to demonstrate the possibility of achieving the government's interest in a nondiscriminatory fashion. And where a more restrictive means is in fact a *less* effective regulatory measure, the government's decision to forgo the measure would seem to affirm, rather than impugn, its commitment to the regulatory interests in question.

many potential violators," thus functioning as a "potentially . . . *greater* deterrent of sexual activity than a gender-based law."[255] Justice Rehnquist, however, reached precisely the opposite conclusion, citing to the state's concerns that the more restrictive alternative would "frustrate its interest in effective enforcement" by deterring females from coming forward to report violations of the law.[256] The total number of successful prosecutions, Rehnquist appeared to claim, would therefore go down rather than up, with female participants in underage sex unwilling to inform prosecutors about conduct for which they themselves could be prosecuted. Consequently, even if the law on the books might appear to deter more effectively, the law on the ground would actually deter less effectively. Or so the plurality argued.[257]

I am not aware of other cases in which the Justices have explicitly embraced arguments of this sort, but variations on the theme are readily imaginable. It might have been argued in *Lukumi*, perhaps, that a broadened animal cruelty ordinance—one that included not just animal sacrifice rituals but also fishing, hunting, and euthanasia—would stretch prosecutorial resources so thin as to undermine the city's ability to go after the most heinous and harmful forms of the conduct being regulated.[258] Or perhaps it could have been argued in *Burson* that prohibiting all forms of solicitation at polling places would have made it more difficult for election monitors to deal with the targeted problem of undue interference with voters.[259] Especially when one considers that law enforcement resources are finite, it may well be the case that increasing the restrictiveness of law will result in weaker enforcement across the board.

Still, while a more restrictive alternative might sometimes introduce new regulatory complications into the mix, the diminished regulatory efficacy argument faces two serious difficulties. The first difficulty is the previously mentioned "administrative inconvenience" rule. If, as the Court has said, constitutionally suspect laws should not in fact be sustained on grounds of administrative ease, then government actors should not be able to escape the implications of a more restrictive means argument by simply claiming that the more restrictive law would be more difficult to enforce. Complaints about diminished regulatory efficacy, in other words, may turn out to be

255. Michael M. v. Superior Court, 450 U.S. 464, 494 (1981) (Brennan, J., dissenting).
256. *Id.* at 473–74 (plurality opinion).
257. *See id.*
258. *See supra* notes 74–80 and accompanying text.
259. *See supra* notes 53–57 and accompanying text.

nothing more than complaints about administrative costs in disguise. Indeed, even California's enforcement-related concerns in *Michael M.* might have been analyzed along these lines. The claim in *Michael M.* was not so much one about the impossibility of convicting guilty parties under a gender-neutral statutory rape law, but rather about the added administrative burdens of bringing successful prosecutions in the absence of fewer voluntary reporters.[260]

At the very least, then, the Court in *Michael M.* should have offered some explanation for its decision to validate California's enforcement-related concerns. Perhaps, for instance, the Court regarded the concerns as stating something other than a complaint about administrative inconvenience? Perhaps the Court regarded *Michael M.* as a sex discrimination case in which the administrative inconvenience bar should not have applied? The Court, however, failed to grapple with these questions.

The broader question raised by the *Michael M.* case is whether diminished regulatory efficacy arguments should *always* be dismissed on the ground that they implicate concerns about administrative costs. At some point, the regulatory burdens of enforcing a more restrictive alternative may become so prohibitively high as to pose a bona fide obstacle to regulatory success—an obstacle that, realistically speaking, government actors cannot overcome by simply doubling down on their regulatory efforts. In that sense, the difference between arguments grounded in diminished regulatory efficacy and arguments grounded in administrative costs may be one of degree rather than kind. The more severe the regulatory burdens, the less plausible it becomes to characterize the complaint as one of administrative inconvenience, and the more plausible it becomes to say that a more restrictive alternative would actually thwart the government's regulatory objectives. The relevant challenge for the court, then, is figuring out where on the severity spectrum this distinction should lie. Thus, when the government resists a more restrictive alternative on grounds of diminished regulatory efficacy, courts should validate the argument only when the government has adequately demonstrated the infeasibility or impracticability of compensating for the diminished efficacy through added regulatory work. Precisely what counts as "infeasible" or "impracticable" will not always be an easy question to answer, but it is a question that courts have no choice but to confront.

260. 450 U.S. at 473–74.

But even where a diminished regulatory efficacy argument states more than a complaint about administrative costs, a further difficulty remains: more restrictive alternatives will often yield effectiveness-related gains at the same time that they deliver effectiveness-related losses. And when a more restrictive alternative simultaneously detracts from and contributes to the government's regulatory goals, courts should not view the detractions in isolation from the contributions. This point was critical to the dissenters' disagreement with the plurality in *Michael M.*: even if, as Justice Brennan explained, a gender-neutral statutory rape law would have undermined the government's pregnancy-prevention goals by discouraging voluntary reporting of prohibited sexual encounters, a more restrictive law would have simultaneously furthered the government's interests by doubling the scope of the law's coverage.[261] The plurality, in other words, had simply identified one respect in which a gender-neutral statutory rape law might have failed to deter as effectively as its male-only counterpart. But given the possibility that a more restrictive alternative might also have generated countervailing, deterrence-promoting forces, the plurality's conclusion of diminished regulatory effectiveness in no way followed from its premise of "reduced voluntary reporting." This argument, as the dissenters persuasively demonstrated, had a missing link. The plurality needed to show that the deterrence-*reducing* mechanisms of the more restrictive means (i.e., the reduced likelihood that females would "turn in" violators of law) would outperform their deterrence-*promoting* counterparts (e.g., the increased likelihood that *both* males and females would abstain from engaging in underage sexual encounters for fear of violating the law).[262] The absence of such a showing in *Michael M.* thus significantly undercut the plurality's arguments about diminished regulatory efficacy.

To summarize, increasing a law's restrictiveness can sometimes carry the counterintuitive consequence of diluting its efficacy. But the prospect of diminished regulatory efficacy should not make a legal difference unless two further propositions turn out to be true. First, the government must be genuinely unable to overcome the newly-created regulatory obstacles of the more restrictive means. Otherwise, a diminished regulatory efficacy claim collapses into an administrative costs claim and finds itself subject to the administrative inconvenience bar. Second, the government must demonstrate that the effectiveness-

261. *See id.* at 494 (Brennan, J., dissenting).
262. *See id.* at 493.

related losses it has identified are not offset elsewhere by the effectiveness-related gains to be had from the increase in a law's restrictiveness. Only when both of these showings have been made should a court reject a more restrictive alternative on regulatory-effectiveness grounds.

D. Government Interests in Lenience

Thus far, this Part has considered issues of regulatory viability in connection with the government interests advanced by a law's *adverse treatment* of regulated parties. This is in keeping with the Court's general approach to more restrictive means analysis. In *Burson*, for instance, the Court identified a government interest in suppressing political solicitation (i.e., an interest in protecting voters against fraud and intimidation), and it then asked whether that interest would be equally well served by a law that prohibited all solicitation.[263] Similarly, in *Rostker*, the Court identified a government interest in registering men for the selective service (i.e., an interest in raising and supporting an army), and it then asked whether the interest would be equally well served by a law requiring both men and women to register for the draft.[264] In neither case, however, did the Court explicitly consider the possibility that the laws' non-adverse treatment of non-regulated parties reflected additional government interests of their own. The Court did not ask in *Burson*, for instance, whether the government had an important interest in permitting non-political solicitation at the polls, nor did it ask in *Rostker* whether the government had an important interest in exempting females from the draft. In both instances, rather, the Court identified the relevant government interest by reference to the burden-imposing aspects of the laws under review, and it then evaluated the more restrictive means by reference to that interest and that interest alone.

Many laws, however, may simultaneously pursue multiple government interests, including interests that relate to their non-adverse treatment of unregulated (or favorably regulated) conduct. A criminal statute may simultaneously further a government interest in criminalizing a bad activity and a separate government interest in not criminalizing a good activity. The eligibility criteria of a benefits program may simultaneously further a government interest in withholding benefits from unworthy recipients and a separate government interest in furnishing benefits to worthy recipients.

263. *See* Burson v. Freeman, 504 U.S. 191, 207–08 (1992).
264. *See* Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

Simply put, laws that create both winners and losers need not further only those objectives associated with the losses of the losers; they may also further additional objectives associated with the wins of the winners.

And where there exist such government interests in lenience, there may also exist good reason to question the regulatory viability of a more restrictive means. The more restrictive means will often serve the interests associated with a law's burden-imposing (or benefit-withholding) elements, because the more restrictive means leaves those forms of adverse treatment fully intact. But the same cannot be said of the interests associated with a law's burden-withholding (or benefit-conferring) elements, some of which will not survive an increase in overall restrictiveness. Insofar as the adoption of a more restrictive means would compromise a law's overall leniency, it might also threaten to undermine the government interests associated with that leniency.

Recall, for instance, Justice Scalia's suggestion in *Locke v. Davey* that, instead of withholding scholarships from theological students, Washington could have just as well achieved its "anti-establishment" interest by abolishing the scholarship program altogether.[265] That argument makes perfect sense if one stipulates that the only government interest implicated by the scholarship program was the interest advanced by the law's adverse treatment of theological students. That particular interest, everyone agreed, involved the avoidance of an Establishment Clause violation, and that particular interest would have remained perfectly well served by a law that rendered everyone ineligible for public scholarships, period. But the argument becomes far less persuasive when one recognizes that the scholarship program's inclusion of non-theology students served a significant government interest of its own—namely, a governmental interest in educating its citizens. That interest, unlike the anti-establishment interest, would have suffered under the more restrictive alternative proposed by Justice Scalia, with the state no longer able to subsidize what it regarded as worthy educational pursuits. In *Davey*, at least, it was likely the state's educational interests (and not its anti-establishment interests) that illustrated the non-viability of the more restrictive means that Scalia had proposed.

The Court more explicitly embraced "lenience-related" interests when it recently upheld Florida's partial ban on judicial campaigning in *Williams-Yulee*—a ban said to further the state's interest in

265. *See* 540 U.S. 712, 729 (2004) (Scalia, J., dissenting).

promoting judicial integrity.[266] Viewed exclusively from the perspective of this judicial integrity interest, the Florida ban did indeed appear to be "fatally underinclusive."[267] Among other things, the law still permitted judicial candidates to create campaign committees to solicit money on their behalf, and it also allowed such candidates to write "thank-you notes" to donors after their contributions had been received.[268] Surely, the dissenters argued, a more restrictive alternative that encompassed these and other activities would only have helped to achieve the state's "judicial integrity" interests even more effectively, and surely, they continued, the state should be faulted for its failure to close the current law's loopholes.[269] But the majority cast these alternatives in a different light. The judicial campaigning law, Chief Justice Roberts pointed out, implicated not just Florida's interest in preserving judicial integrity but also Florida's separate interest in "respect[ing] the First Amendment interests of candidates" and "resolv[ing] the 'fundamental tension between the ideal character of the judicial office and the real world electoral politics.'"[270] With these additional government interests on the table, the regulatory viability of the more restrictive means was no longer so obvious. Yes, the more restrictive means would have served the judicial integrity interest as effectively as (or even more effectively than) the less restrictive law, but it simultaneously would have *disserved* the speech accommodation and electoral flexibility interests that the law's limitations helped to advance.[271]

Government interests in lenience will therefore sometimes provide a strong doctrinal basis for discounting the viability of a more restrictive alternative. But the argument can be taken too far. Government actors, after all, will always be able to identify *some* interest underlying a decision to "go easy" on a favorably-treated set of parties—at the very least, every government choice to limit the breadth of a burden-imposing regulation in some manner promotes the liberty or property interests of the unregulated group—and not

266. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015) (citing Burson v. Freeman, 504 U.S. 191, 207 (1992)).

267. *See id.* at 1670

268. *See id.* at 1677 (Scalia, J., dissenting).

269. *See, e.g.*, *id.* at 1680–81.

270. *Id.* at 1669 (majority opinion) (quoting Chisom v. Roemer, 501 U.S. 380, 400 (1991)).

271. *See also id.* at 1670 ("We will not punish Florida for leaving open more, rather than fewer, avenues of expression.").

every such interest should automatically excuse the government for its failure to regulate more restrictively.

The Third Circuit's decision regarding PASPA, the federal sports-gambling law, is susceptible to criticism on this ground. Dismissing an equal sovereignty challenge to the law's special treatment of Nevada and a few other states, the court rejected the challengers' suggestion that the more restrictive alternative of a truly nationwide sports-gambling ban would have just as effectively achieved Congress's interest in discouraging gambling on sports.[272] That argument, the court held, misapprehended the "true purpose" of the statute, which was to "stop the spread of state-sanctioned sports gambling" beyond the jurisdictions that were exempted from its requirement.[273] The Third Circuit, in other words, deflected the challengers' "more restrictive means" argument by invoking a "lenience interest" latent in the federal sports-gambling act. PASPA may have sought to deter sports gambling via its adverse treatment of non-exempt states, but it also sought to *preserve* sports gambling via its non-adverse treatment of exempted states, and a categorical sports-gambling ban would have frustrated this latter interest.

What was missing from the Third Circuit's analysis, however, was any explanation as to why this latter "gambling preservation" interest should have qualified as important or significant enough to validate the claim.[274] PAPSA, the Third Circuit seemed to be saying, should be upheld because it was "precisely tailored" to serve the government's interest in doing what PAPSA did. That was undoubtedly true. But the question remained: was the government's interest in doing what PAPSA did important enough to justify a departure from the equal sovereignty principle?[275]

272. Indeed, as Thomas Colby has pointed out, if Congress's true goal with PASPA to discourage sports gambling, the statute's coverage scheme got things precisely backwards, by permitting sports gambling in areas where the practice thrived the most. *See* Colby, *supra* note 188, at 1156–57.

273. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 239 (3d Cir. 2013).

274. Defenders of the law had argued, for instance, that the "grandfathering" interests helped to safeguard the reliance interests of states that already depended on revenue streams from sports gambling and thus stood to lose much more than their fellow states from an across-the-board prohibition on the practice. *See, e.g.*, Response Brief of Plaintiffs-Appellees at 16–17, Nat'l Collegiate Athletic Ass'n v. Governor of N.J., Nos. 13-1713, 13-1714, 13-1715 (3d Cir. June 7, 2013) (discussing Congress's recognition of some states' "reliance interests" on sports gambling revenues).

275. One can understand along similar lines the then-Justice Rehnquist's argument in *Michael M.* that California's less restrictive statutory rape measure helped to "equalize the deterrents on the sexes" in a way that a more restrictive, gender-neutral measure would not. Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) (plurality opinion). Recast as

In sum, government interests in lenience may sometimes provide good reason to characterize a more restrictive alternative as an inadequate regulatory substitute for a less restrictive law. The logic of the argument is simple and sound: sometimes the government pursues goals related to the non-adverse treatment of various legal entities, and a more restrictive means would frustrate those goals insofar as it would require the government to treat those entities less favorably. But the argument should succeed only where the lenience-related interests are themselves shown to be sufficiently strong, satisfying whatever criterion of significance (i.e., "legitimate," "important," "compelling") the applicable level of scrutiny sets forth. Absent such a requirement, lenience-related interests would provide a too-easy excuse for the government's failure to adopt a more restrictive means, permitting the government to justify a constitutionally suspect law by reference to little more than its own desire to adopt the constitutionally suspect law. There is a reason why means/ends analysis probes not just the degree of means/ends fit but also the importance of the ends themselves. And that should remain the case when lenience-related interests enter the picture.

This Part has explored a variety of different avenues by which the government might contest the proposition that a more restrictive means constitutes an adequate regulatory substitute to a less restrictive law. Some are more promising than others. Arguments about nonexistent regulatory benefits can offer a persuasive response to sincerity-based, but not equality-based, invocations of a more restrictive means. Arguments about administrative costs should rarely succeed, at least insofar as the Court continues to insist that heightened means/ends scrutiny does not permit justifications based on convenience and administrative ease. Arguments about diminished regulatory efficacy carry more promise, but only insofar as (a) they assert something more than a complaint about administrative costs, and (b) they account for compensating regulatory benefits that

an argument about lenience-related interests, the claim goes as follows: California's statutory rape law actually pursued two government interests simultaneously: (1) the interest in deterring teenage pregnancies, which was furthered by the imposition of penalties on underage male,; and (2) a "lenience-related" interest in accommodating the "physical" sanction of an unwanted pregnancies, which was furthered by the *withholding of* penalties from underage females. *Id.* The more restrictive alternative of a gender-neutral prohibition might not have undermined the first interest, but—the plurality seemed to suggest—it *would* certainly have undermined this second interest, by "over-penalizing" the female-participant in sexual conduct. *Id.* On that basis, Rehnquist's opinion concluded that the more restrictive alternative turned out to be an inadequate regulatory substitute for the less restrictive law that California had enacted. *Id.* at 473–74.

might also result from the adoption of a more restrictive alternative. Finally, arguments about lenience-related interests should often succeed, provided that the lenience-related interests qualify as sufficiently important regulatory objectives.

But even where all of these regulatory viability arguments fail, there remains one last arrow in the government's quiver. When challengers wield a more restrictive means for purposes of attacking on a less restrictive law, the government might redirect the constitutional attack towards the more restrictive means itself. In other words, governments might sometimes defend a less restrictive law by suggesting that the more restrictive alternative would itself be unconstitutional. The next Part considers the promises and pitfalls of such an approach.

V. THE CONSTITUTIONAL VIABILITY OF MORE RESTRICTIVE ALTERNATIVES

A final potential justification for the government's failure to regulate more restrictively circles back to the Constitution itself. Simply put, the government might claim that a more restrictive alternative, even if an adequate regulatory substitute, would find itself subject to constitutional invalidation. Surely, the argument goes, the Court should not fault the government for a failure to adopt a more restrictive means that would itself turn out to violate the Constitution as well.

This argument is intuitively forceful, but it should not always be decisive. Its persuasiveness, rather, depends once again on the distinction between equality-based and sincerity-based invocations of a more restrictive means. Let us consider each argument in turn.

A. The Equality-Based Argument

The equality-based argument invokes more restrictive alternatives for the purpose of suggesting that a regulatory interest does not require the government to discriminate in a constitutionally suspect manner. That is, the availability of the more restrictive alternative serves to undercut the government's argument that it must unavoidably discriminate in order to meet a pressing regulatory need.

In order for this type of claim to succeed, the more restrictive means must itself pass constitutional muster. Otherwise, the argument will collapse. "We would like to pursue this interest in a non-discriminatory fashion," the government would respond, "but given the obvious unconstitutionality of the more restrictive option, we

have concluded that this discriminatory law was the least constitutionally objectionable option at our disposal." Where the relevant interests are sufficiently strong, and where the posited more restrictive alternatives would themselves violate the Constitution, the government thus retains a strong justification for its decision to discriminate. The government can argue, in effect, that the discriminatory law represents the "least constitutionally bad" of the regulatory options at its disposal.

The more interesting puzzle here lies in asking how a more discriminatory, but less restrictive law could ever pose fewer constitutional problems than a nondiscriminatory, but more restrictive counterpart. If, after all, an area of doctrine has tagged nondiscriminatory laws as constitutionally preferable to discriminatory laws, why should the court ever regard a *discriminatory* law as constitutionally preferable to a nondiscriminatory alternative? A moment's thought provides the answer: In many cases, the increased restrictiveness of the more restrictive (but nondiscriminatory) law will itself give rise to new constitutional defects that the less restrictive (but discriminatory) law manages to avoid. That a given area of doctrine generally favors discriminatory over nondiscriminatory laws does not make *every* discriminatory law constitutionally preferable to every nondiscriminatory law. And that is especially so where the former proves to be more restrictive than the latter.

To see the point, consider again *Holder v. Humanitarian Law Project*. There the Court upheld a federal criminal prohibition on providing material support to foreign terrorist organizations, even while acknowledging the content-discriminatory nature of the prohibition before it.[276] I earlier noted that the Court failed even to consider whether there existed any more restrictive (but nondiscriminatory) alternatives to the federal material support statute. Nowhere, in particular, did Chief Justice Roberts ask whether the government might alternatively have pursued its terrorism-prevention interests via a content-neutral (i.e., nondiscriminatory) prohibition on any and all communications with a designated terrorist organization.[277] Such an alternative, after all, would have militated strongly against the conclusion that content discrimination was in fact necessary to achieve a compelling government interest. The material-support statute was content-based, the more restrictive means would

276. *See supra* notes 66–70 and accompanying text.
277. *See supra* text accompanying notes 69–70.

have been content-neutral, and the latter would have presumably been no worse than the former at deterring terrorism-aiding conduct. How, then, could the Court justify its decision to permit the government to combat terrorism in a content-based manner when there existed an obviously content-neutral means of doing the same?

We cannot know for sure why the Court in *Humanitarian Law Project* declined to go down this road, because the Court did not address the issue. But I suspect that the majority would have answered the question as follows: the more restrictive alternative, even if content-neutral, would have been irredeemably unconstitutional. And the fallacy in concluding otherwise lies in the failure to notice that content-neutral statutes are not themselves automatically valid under the First Amendment. In fact, content-neutral statutes must still withstand intermediate scrutiny, one component of which requires that the "incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of [the government] interest."[278] The more restrictive alternative would have fared especially poorly on that score, bringing within its reach a wide range of communications with especially dubious connections to the government's terrorism-prevention interests. Put somewhat differently, the more restrictive alternative might have eliminated (or mitigated) the constitutional defect of content discrimination, but only at the expense of introducing (or exacerbating) the constitutional defect of a dramatically overinclusive coverage scheme. Given that fact, the government should not have been faulted for failing to enact a law that would have generated serious First Amendment problems of its own.[279]

The more general point is this: from the different levels of scrutiny accorded to discriminatory and nondiscriminatory laws, it does not automatically follow that nondiscriminatory laws are always less unconstitutional than their discriminatory counterparts. Differential levels of scrutiny reveal that discriminatory treatment is a variable that weighs against a finding of constitutional validity, but they do not reveal that the presence of discriminatory treatment qualifies as the exclusive such variable. It is not enough to say that a

278. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

279. To be clear, the point is not that the Court decided *Holder* correctly: Even putting to one side the issue of more restrictive alternatives, there exist other grounds for criticizing the decision. *See, e.g.*, Jackson, *supra* note 2, at 3139 (noting that the Court in *Holder* "arguably applied a less stringent means-ends test" in upholding the material support law, as evidenced, for instance, by the Court's failure to "explain how the 'contribution' of training in international law could be 'fungible' with support for terrorist activities, in the way other forms of contribution (such as money) could be").

more restrictive alternative would pass constitutional muster simply because it is nondiscriminatory. That the more restrictive alternative is nondiscriminatory explains only that it would trigger a less demanding form of scrutiny were it ever to face a constitutional challenge. One must therefore go on to ask how the more restrictive alternative would fare under that level of scrutiny before concluding that the more restrictive alternative would also be a constitutionally valid one. And precisely because such an alternative would yield an increase in the law's restrictiveness, there will often be good reason to conclude that this is not the case.[280]

B. The Sincerity-Based Argument

In contrast to equality-based arguments, sincerity-based arguments can sometimes derive support from more restrictive alternatives of dubious constitutional validity. This point should be evident from some of the cases already considered. For example, the thrust of the Court's analysis in *Roe* left strong signals that the Court would have struck down (and still would strike down) a law that prohibited abortions deemed necessary to safeguard the life of the mother[281] Nevertheless, the Court still pointed to Texas's refusal to adopt such a law as a reason to invalidate the relatively less restrictive abortion ban under review. Not all of the Court's cases, to be sure, have alluded to more restrictive alternatives with so little a chance of being upheld, but these and other examples at least raise the question of how a constitutionally invalid more restrictive means might nonetheless manage to carry persuasive force. How could the government's refusal to enact a possibly (or even obviously) unconstitutional law end up jeopardizing the fate of the less restrictive law that it did in fact choose to enact?

280. Arguments related to the unconstitutionality of more restrictive alternatives will sometimes blend into "lenience-related" arguments of the sort we considered in the previous Section. *See supra* Section IV.D. Rather than defend its failure to regulate more restrictively by citing the independent unconstitutionality of a more restrictive alternative, the government might defend the less restrictive law as advancing a supplemental interest in avoiding the imposition of constitutional harms on non-regulated parties. That is to say, the constitutional defects of a more restrictive alternative might highlight not just the legal impossibility of pursuing a government interest in a nondiscriminatory fashion but also a valid and sufficiently strong lenience interest in sparing regulated parties from excess constitutional harm. *Cf.* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1669 (2015) (suggesting that by avoiding the more restrictive alternative of a content-neutral ban on judicial fundraising, a Florida law helped to advance the government interest in "respect[ing] the First Amendment interests of candidates").

281. *See supra* notes 149–56 and accompanying text.

An answer to this question becomes apparent if the sincerity-based argument is understood to operate as a backward-looking claim about legislative motive. Understood in this way, the role of the more restrictive means is not so much to highlight alternative means of future regulation as it is to raise doubts about the reasons for which the government regulated in the past. And where the more restrictive means functions in this way, its own present-day unconstitutionality need not undermine its own doctrinal force. Consider again the example of *Roe*: even if an exception-less abortion prohibition would have faltered under the logic of *Roe* itself, its hypothetical availability to the Texas legislature still reveals something about the factual and normative premises that Texas legislators embraced when they enacted the less restrictive measure that the Court struck down. In short, a more restrictive means that is obviously unconstitutional today can still shed light on the reasons for which the government acted yesterday. And those reasons, in turn, can provide a basis for invalidating the less restrictive law under review.

That is not to say that the constitutional validity (or lack thereof) of a more restrictive alternative is necessarily irrelevant to a backwards-looking determination about improper government motives. The greater the constitutional defectiveness of a more restrictive alternative, the easier it becomes for the government to attribute its past non-enactment to something other than a lack of regulatory seriousness. "Yes," government actors might say, "we know that the particular regulatory alternative you have identified would have served our interests much more effectively, but we also knew that it would never have stood a chance of being upheld in court. So, rather than underscoring our lack of commitment to a particular regulatory objective, the more restrictive means simply reflects our reluctant bow to the realities of operative constitutional doctrine." Constitutional invalidity, that is, might offer a valid excuse for the government's failure to adopt even the most effective of regulatory measures, thus defeating any inference that the government sought to pursue some other set of illegitimate interests when it put the less restrictive law into effect.

Consider in this respect the Court's opinion in *Brown v. Entertainment Merchants Association*,[282] which, in striking down California's prohibition on violent video games, characterized the law's "wildly underinclusive" nature as a critical constitutional

282. 564 U.S. 786, 802 (2011).

defect.[283] California had invoked an interest in promoting the wellbeing of children, citing concerns that the early exposure to video games would lead to the development of violent behavioral tendencies in many of its citizens.[284] But, as the majority observed, children in California remained exposed to other depictions of violence that were equally likely to cause that same harm.[285] From there the Court went on to explain:

> Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.[286]

The Court in *Brown* thus pointed to California's failure to adopt a more restrictive means as indicative of government insincerity, while simultaneously characterizing as wise that same failure to regulate more restrictively. But the narrowness of California's anti-violence measure was wise precisely because the more restrictive means envisioned by the Court would itself almost certainly have been struck down. So, rather than reveal a nefarious government attempt to suppress a disfavored set of viewpoints, the underinclusive scope of the California law might simply have reflected a straightforward *legal* judgment by the state about what sorts of materials the First Amendment did not (yet) prohibit it from regulating. In accusing California lawmakers of regulatory insincerity, the Court in *Brown* never considered the possibility that California's decision not to restrict minors' access to more traditional media stemmed from a bona fide attempt to comport with then-existent First Amendment principles.

So how can we tell whether an obviously more restrictive alternative is capable of supporting a backwards-looking inference

283. *Id.* at 791–92.
284. *Id.* at 800–01.
285. *Id.* at 801–02.
286. *Id.* (citing City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994); Fla. Star v. B.S.F., 491 U.S. 524, 540 (1989)).

about government motives? The relevant distinction must be one of *timing*. The Court's more restrictive means analysis in *Brown* was questionable because the pre-*Brown* case law already cast doubt on the constitutionality of prohibiting minors from purchasing movies, books, and photographs. And the availability of such a benign explanation for the law's underinclusiveness thus undercut the Court's accusations of government insincerity. The same point might not be true, however, when the constitutional defects of a more restrictive means stem from doctrinal developments that postdate the government's decision to regulate less restrictively. In *Roe*, for instance, Texas would have had more trouble attributing the non-categorical nature of its abortion to ban to a desire to stay within then-existing constitutional limits. Texas's ban had gone into effect well before the Court had restricted a state's ability to prohibit any abortions, much less medically necessary abortions.[287] The more restrictive means, in other words, might have been obviously unconstitutional according to *Roe* itself, but it would not have been obviously (or even remotely) unconstitutional according to the norms that prevailed *when* the state registered its decision not to prohibit abortions categorically. Thus, whereas California in *Brown* might plausibly have attributed the relative lenience of its law to an external legal constraint over which it had no control, Texas in *Roe* could not have done the same.

CONCLUSION

Where does all this leave us? My thesis, in short, has been that "more restrictive means" analysis constitutes a real and analytically valid method of constitutional decision-making, which derives naturally from the Court's longstanding emphasis on formal equality and government sincerity as values of constitutional importance. It remains to be asked whether these values *should*, in fact, matter as much as they do, and that is not a question that this Article purports to answer. But I hope to have demonstrated that, if constitutional doctrine embraces these values, the doctrine must also embrace at least some forms of more restrictive means analysis as well. One can question the wisdom of treating a law's relative lenience as a constitutional liability, just as one can defend the centrality of equality- and/or sincerity-related values within a range of different

287. According to the Court in *Roe*, Texas's first abortion prohibition was enacted in 1854 and "was soon modified into language that has remained substantially unchanged to the present time." 410 U.S. 113, 119 (1973). Subsequent versions of the law, according to the Court in *Roe*, exempted abortions necessary to save the life of the mother. *Id.*

doctrines. But one cannot easily do both of these things at the same time.

I also hope to have shown that embracing more restrictive means analysis does not mean resigning oneself to a regime of ever-escalating restrictiveness. The equality-based and sincerity-based arguments should not always succeed, as governments have at their disposal several different means of contesting the claim that they could have or should have pursued their interests in a more restrictive fashion. Some of these defenses, to be sure, can implicate difficult judgment calls. It will not always be easy to determine, for instance, whether a failure to produce additional regulatory benefits should count against a more restrictive law,[288] whether a particular lenience-related interest qualifies as important enough to justify a refusal to regulate more restrictively,[289] whether a set of enforcement-related concerns amounts to more than just a complaint about administrative convenience,[290] whether a posited more restrictive alternative would itself run afoul of the Constitution (and, if so, the extent to which that fact should matter),[291] and so forth. These and other questions will often prove difficult to answer, and no amount of abstract theorizing can likely change that fact. Even so, I do believe that by confronting these sorts of questions directly and on their own terms, courts can more clearly and cogently identify those circumstances in which more restrictive alternatives should make a constitutional difference.

288. *See supra* Section IV.A.
289. *See supra* Section IV.D.
290. *See supra* Section IV.B.
291. *See supra* Part V.