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Greater-or-Nothing Constitutional Rules

John Fee

GREATER-OR-NOTHING CONSTITUTIONAL RULES

John Fee†

ABSTRACT

Greater-or-nothing rules exist throughout constitutional law and constitute a growing trend. These rules give the government a choice: do nothing or take the desired action plus do something more. Yet often this "something more" is potentially more damaging to the constitutional value at stake. For example, the government can circumvent limitations imposed by the Free Speech Clause by regulating speech more broadly than originally intended. This Article unpacks this paradox and discusses justifications for greater-or-nothing rules, particularly in an increasingly complex society.

CONTENTS

† Professor, Brigham Young University Law School. I thank Thomas R. Lee, Fred Gedicks, RonNell Andersen Jones, and Alan Hurst for valuable comments on earlier drafts. I also thank Court Roper for valuable research assistance.

INTRODUCTION

Many constitutional rules force government actors to make a choice: either do something comprehensive or do nothing at all. What these rule prohibit is acting partway. Put another way, many rules hold that a greater governmental power does not always come with its lesser independent components. The power to do *A* plus *B* does not necessarily include the power to do *A* alone.

Greater-or-nothing rules exist in almost all major areas of constitutional law, and they often seem paradoxical. They include antidiscrimination rules, rules prohibiting unconstitutional conditions, procedural rules, rules that hinge on government-defined entitlements or background laws, and more. While some arise from the text of the Constitution, many greater-or-nothing rules are judicial creations. Remarkably, over the last several decades, judges seem to have become increasingly fond of creating and applying new greater-or-nothing rules. Whereas an older style of constitutional law depended more on direct judicial balancing of the costs and benefits of particular government decisions and setting corresponding boundaries on government behavior, courts today are more likely to insert themselves into the decisions of other branches by taking away partial options while leaving the ultimate decisions to the other branches. This Article attempts to explain why that might be.

This Article also seeks to unravel the paradox seemingly attached to many greater-or-nothing rules: that the government can get around these rules by doing something more—something possibly more damaging to the constitutional value at stake—but not by doing less. For example, sometimes the government can get around the limitations of the Free Speech Clause by restricting more speech[1] or by eliminating other public rights.[2] Sometimes the government can get around the regulatory takings doctrine by imposing greater regulations on property.[3] And sometimes the government can get past the Fourth Amendment's restriction on unreasonable searches by searching more people in the same intrusive manner that is prohibited

1. Ladue v. Gilleo, 512 U.S. 43, 50–51 (1994) (regulating the display of signs can be unconstitutional if it "restricts too little speech because its exemptions discriminate on the basis of the signs' messages").

2. *See* Virginia v. Hicks, 539 U.S. 113, 123–24 (2003) (finding an anti-trespass ordinance constitutional because it applied to more than just First Amendment speakers and it did not prohibit a "'substantial' amount of protected speech").

3. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836–37 (1987) (allowing an owner to build under conditions is unconstitutional, although the government retains the power to deny development altogether).

with one individual.[4] This paradox calls for an explanation, one that is often lacking in cases or commentary.

Although greater-or-nothing constitutional rules vary widely in their spheres of operation and their specific mechanics, I propose that there is value to addressing this large category of rules as a package. These rules share a similar structure and similar advantages, and they are vulnerable to a common kind of criticism. For these reasons, it should be possible to make some common claims about them, even if this analysis provides only a starting place for more particular application. Having a common analytical framework for these rules should make it easier to take the lessons that judges and scholars have learned from some of these rules and apply them to other doctrinal areas. Current scholarship provides no such framework.

I argue that greater-or-nothing constitutional rules make sense as structural decision-making rules that depend on the comparative advantages of the institutions involved. As applied by courts to legislative and executive branches of government, greater-or-nothing rules can be rational tools for maximizing public welfare. But these rules do not appear rational if we pretend that any part of the government can independently know the ultimate decisions that governments should make to maximize public welfare. Greater-or-nothing rules make particular sense as judicial tools for scrutinizing other branches, which the judiciary neither fully understands nor fully trusts, and as an alternative to either simple deference or simple substitution of judicial judgment. When working properly, these rules use the comparative advantages of politically insulated courts and of politically accountable branches of government together to achieve a set of results better than either could achieve alone.[5]

Because greater-or-nothing rules are founded on judicial uncertainty as to specific policy outcomes, it makes sense that they would proliferate in a society that is becoming increasingly complex and that depends on greater specialization. They are often more appropriate for a pluralist society that is skeptical of universal truth, and that recognizes both the legitimacy and enormous range of preferences on such topics as speech, religion, family, and the good life. To borrow a phrase from Richard Epstein, they are "simple rules

4. *Compare* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that a "roving patrol" unconstitutionally searched car without a warrant) *with* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding that a security checkpoint that stopped every car could exercise judgment in selecting the cars to be searched without warrant).

5. This is loosely consistent with John Hart Ely's seminal work, *Democracy and Distrust* (1980), which describes constitutional law as a judicial tool to enhance democratic processes of government rather than standing in opposition to them.

for a complex world"[6]—rules that are designed to manage the incentives of competing actors, in this case government actors, in a society that has far too many components for effective judicial micromanagement. They are also decentralized rules, which have many advantages over centralized ones,[7] and seem particularly appropriate as applied to courts, the least politically accountable branch of government. This justification has roots in public-choice theory[8] and depends on certain assumptions about different kinds of government actors and government decisions. Identifying these assumptions suggests not only an answer to why such rules exist and are growing more common but also to why they are not always best.

Parts I and II of this Article will discuss the defining features of greater-or-nothing rules and their proliferation in many areas of constitutional law. Part III will explore various justifications for these rules based on the institutions involved. Part IV will discuss how these rules are well suited to the growing complexity of government and society.

I. WHAT IS A GREATER-OR-NOTHING RULE?

A. Definition

Greater-or-nothing constitutional rules follow a simple form. They provide that the government may perform some action (Action *A*), but only if it performs something additional (Action *B*). A rule of this type allows the government a greater, more active option (the power to do *A* plus *B*) as well as the option to do nothing, but does not allow the government some lesser subset of the greater power (the power to do *A* alone).

Let us call *A* the restricted action and *B* the enabling action. Depending on the rule, the relationship between *A* and *B* could be reciprocal, such that the government is also barred from doing *B* unless it does *A*, but this is not an essential feature of greater-or-nothing rules. The enabling action could be something small, such as when the Due Process Clause requires the government to give a hearing when depriving a person of life, liberty, or property.[9] Or it could encompass a large set of activity, such as when the Equal Protection Clause requires the government to regulate all similarly situated people in order to regulate one person.[10] In either case, the

6. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 21 (1995).

7. *See* Todd J. Zywicki, *Epstein and Polanyi on Simple Rules, Complex Systems, and Decentralization*, 9 CONST. POL. ECON. 143 (1998).

8. GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY, at x–xi (1985).

9. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

10. U.S. CONST. amend. XIV, § 1.

government can do something particular only if it is willing to include the act as part of something larger, sometimes massively larger. Greater-or-nothing rules are an alternative to simply allowing or prohibiting the particular action under review. And they seem, at least in form, indifferent as to whether the government should take a more active or a more passive option.

While some greater-or-nothing rules are explicit, many arise from the structure and preconditions of the doctrines that courts apply. For this reason, greater-or-nothing options might exist ex ante where they do not exist ex post, it being too late for the government to take the more active option in the case under review. And yet, for purposes of examining the rationality of rules as regulators of government behavior, the ex ante effects of rules are often most significant.

Consider, for example, the public forum doctrine. Suppose the government fines Mary for distributing literature on a public sidewalk in violation of city regulations. She may defend her case on the grounds that she was acting in a traditional public forum (a city sidewalk), and that she accordingly has a right to distribute literature in that place. In the given case, ex post, it will be too late for the government to change the features of the location to something other than a traditional public forum, so there is not a greater option affecting the judgment against Mary. But if the deciding court defines a traditional public forum according to criteria that the government has authority to change in the future, the court may effectively offer the government a greater-or-nothing option ex ante. The legal framework provides that the government must either allow the broad range of public rights that go along with a traditional public forum or eliminate enough public rights by qualifying the space as something else.[11] For example, under current law, the government might eliminate a public forum by divesting itself of ownership or changing the use of its property. In this sense, the traditional public forum doctrine operates as a greater-or-nothing rule.

The alternative to greater-or-nothing rules are those that establish fixed areas of impermissible government action. Let us call these boundary rules. Like greater-or-nothing rules, constitutional boundaries may exist in the form of bright-line rules or case-by-case tests and standards. Either way, what makes a constitutional principle operate as a boundary is that (a) the rule restrains the government from taking some ultimate action and (b) the government

11. *Compare* First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1129 n. 11 (10th Cir. 2002) (creation of a privately owned pedestrian plaza does not eliminate a public forum while a public easement remains), *with* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256–57 (10th Cir. 2005) (subsequently vacating the public easement on the same, private plaza caused it to lose its public forum status).

cannot avoid the restraint by taking additional action. Unlike the greater-or-nothing rules, the prerequisites and elements of a boundary rule's constitutional principle are beyond the regulated government's power to turn on or off on its own. For example, the Supreme Court imposed a boundary rule in *Roe v. Wade*[12] by holding that a pregnant woman has a right to abortion during the first trimester of her pregnancy.[13] The Court also established a boundary in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[14] by holding that the government may not unduly burden a woman's right to an abortion through regulation.[15] The latter is more of a standard than a bright-line rule, but still functions as a boundary by declaring some type of government actions entirely out of bounds.

B. Paradoxical and Nonparadoxical Rules

Some greater-or-nothing rules seem paradoxical, whereas others do not. A greater-or-nothing rule is not paradoxical if the enabling action would directly mitigate the negative consequences of the restricted action. For example, the Takings Clause provides that the government can take a citizen's property only if it provides just compensation.[16] This is a greater-or-nothing rule because it makes one kind of government action (taking property) conditional on the performance of an additional action (compensation). The rule makes sense on its face, however, because the enabling action directly addresses a harm that the restricted action would cause to the individual. In this case, the combination of two actions would cause less harm to constitutional interests than one of those actions alone would cause.[17]

By contrast, a greater-or-nothing rule is paradoxical if the enabling action does not seem to mitigate the constitutional harm of the restricted action. If the enabling action requires a cost to the government actor that does not help the individual affected by the restricted action, the rule may seem flawed. Why should the

12. 410 U.S. 113 (1973).

13. *Id.* at 163.

14. 505 U.S. 833 (1992).

15. *Id.* at 895, 901.

16. U.S. CONST. amend. V.

17. This assumes that the Takings Clause is designed to protect an individual's economic status relative to the government. For an argument that the Takings Clause functions more completely as an equality rule between citizens, see John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003). Under the latter perspective, the Takings Clause remains arguably paradoxical, insofar as the government may still tax property owners and use the revenue to take away their property.

government get away with causing a particular kind of constitutional harm just because it is willing to do something extra that is either unrelated or adds to the harm? This is the common paradox of greater-or-nothing rules. If the judiciary (or constitutional drafter) has enough information to determine that Action *A* is harmful enough to prohibit (whether categorically or on a case-by-case basis), then a decision establishing boundaries seems most sensible. Alternatively, if the action has enough potential merit such that it should be within the government's power, then to defer makes the most sense. But either way, it seems puzzling to allow the action only when coupled with extra action that does not reduce its harm.

Of course, whether a greater-or-nothing rule is paradoxical depends on one's perception of the constitutional value at stake. For this reason, reasonable people might disagree as to whether a particular rule is paradoxical. Consider, for example, the Supreme Court's management of the free exercise of religion. If the Free Exercise Clause is designed to protect individual freedom to practice religion,[18] then the rule set forth in *Employment Division v. Smith*[19] seems on the surface to be quite puzzling. *Smith* holds that a government may restrict a person's religious conduct, even conduct that is central to that person's religions practice, so long as it does so through laws that are generally applicable and facially neutral.[20] So the government can avoid the restraints of *Smith* as applied to religious adherents by making its regulations sufficiently broad and religiously neutral. How does this serve either religious freedom or general liberty if the rule encourages the government to make its regulations affect more people?[21] To the person who is denied the ability to practice her religion, it hardly seems like compensation to know that other people are similarly restricted. And to those others whom the law encourages the government to regulate (beyond the religious worshiper), the rule causes an additional loss of freedom. If fewer regulations affecting religion is the purpose of the rule, a court would more directly achieve this by interpreting the First Amendment to exempt religious conduct from even general regulation, at least when the governmental interest is weak.

18. U.S. CONST. amend. I.

19. 494 U.S. 872 (1990).

20. 494 U.S. at 878–82.

21. *See generally* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627 (2003) (examining the general applicability requirement in both theory and practice and concluding that the requirement distributes constitutional exemptions in an unprincipled and random manner).

But if the purpose of the Free Exercise Clause is to promote religious neutrality, rather than to promote individual religious autonomy, the rule stated in *Smith* makes more sense. The rule directly achieves this value whether the government responds to the rule with more or less regulation. Recognizing **g**reater-or-nothing rules and their potential paradoxes may sometimes help in the simple way of causing us to identify the constitutional purposes of such rules more accurately.

Restating the constitutional purpose of a rule, however, does not always persuasively resolve the paradox. For example, for the rule of *Smith*, many would say that religious neutrality alone is not the same as individual free exercise of religion and, further, that neutrality ought to be a means of achieving religious freedom rather than an end in itself.[22] At a broader level, we should recognize that one can always claim that a rule is rational because it accomplishes precisely what it is structured to accomplish, but this circular reasoning is only persuasive if one is unwilling to dig deeper. It is particularly tempting to justify greater-or-nothing rules with large comparative ideals such as equality, neutrality, and fairness. These are such regular terms of constitutional law that they have become axioms that substitute for deeper analysis. Those who are satisfied with stopping at such terms are likely to see few paradoxical constitutional rules.

For those who prefer to treat fairness, equality, and neutrality as means of maximizing public welfare in more concrete substantive terms rather than as stand-alone axioms,[23] there are many constitutional rules that need further explanation to avoid the greater-or-nothing paradox, including even equal protection rules. Americans have a strong affection for fairness and equal treatment,[24] often backed by an intuitive sense that equal protection rules and other antidiscrimination rules of constitutional law lead to improved public welfare, but it would be useful to unpack this intuition and figure out if and why this works as a substantive matter. Analyzing equal protection rules alongside other accepted yet paradoxical greater-or-nothing rules can help provide an answer.

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22. *E.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1129–52 (1990) (critiquing the *Smith* standard as a measure of religious freedom).

23. Notable critics of using equality and fairness as legal axioms include LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) and Peter Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982).

24. *See* Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992 (2002) (reviewing KAPLOW & SHAVELL, *supra* note 23) (examining ways that fairness as a preference is relevant to policymaking).

II. THE TREND TOWARD GREATER-OR-NOTHING RULES

While some greater-or-nothing rules have existed since the Constitution's ratification, the Supreme Court has become especially fond of making new ones in recent decades. Among the new greater-or-nothing rules are antidiscrimination rules, rules against unconstitutional conditions, rules based on government-controlled background conditions, procedural rules, and more. They seem to have proliferated in almost every area of constitutional law, including those that are based on constitutional clauses that appear on their face to offer no greater-power options. The new preference for greater-or-nothing rules seems to transcend liberal-conservative ideologies on the Court: they were featured prominently in the Warren Court and have continued to expand in the Burger, Rehnquist, and Roberts Courts. And among the Justices who seem to prefer greater-or-nothing rules the most are those as opposite as Justices Scalia and Brennan.

Part of the proliferation of greater-or-nothing rules may be due to the simple growth of constitutional law; there are many more cases and sub-categories of constitutional law than there used to be. However, it also appears that the Supreme Court's style of jurisprudence has significantly changed. Whereas the Supreme Court used to be strongly inclined to impose simple boundaries for government behavior based on either a balancing of interests or more formal methods, it now seems to prefer a more conditional approach, identifying a part of the analysis that is for the court to decide while leaving government regulators a range of options. The result has been a massive growth of greater-or-nothing rules.

A. Antidiscrimination Rules

The most obvious example of greater-or-nothing rules are the many antidiscrimination rules of constitutional law. By antidiscrimination rules, I mean not only rules that prohibit discrimination between people but any rule that recognizes disfavored distinctions or underinclusiveness in the law. These rules encourage the government to treat certain classes of people, products, behavior, or situations equivalently or face heightened scrutiny for doing otherwise. Such rules can encourage the government to broaden its regulations to avoid constitutional restraint.

Equal Protection Clause jurisprudence exemplifies this kind of rule, although it is not the only source. What is remarkable about equal protection law is not that it imposes greater-or-nothing choices, which one should expect from the text of the Fourteenth Amendment, but rather that the Court has made it so dominant in the field of constitutional law since the 1950s. This represents a judicial choice. A century ago, despite having the same Equal Protection Clause, the Supreme Court allowed many forms of discrimination that today are not allowed. Beginning in the 1950s, the Warren Court created a

revolution in equal protection law with *Brown v. Board of Education*[25] and other civil rights era decisions, giving new focus to questions of discrimination in constitutional law. Since then, equal protection law has continued to expand and increase its rigor. New areas of application include sex and gender,[26] political representation by geography,[27] sexual orientation,[28] language,[29] disability,[30] and class-of-one cases.[31] We have moved a long way from *Plessy v. Ferguson*[32] to *Bush v. Gore*.[33] If one takes a step back, the breadth and pervasiveness of equal protection law today compared to an earlier era is astonishing and illustrates the kind of comparative jurisprudence that the Supreme Court has chosen to favor. This has made it more difficult than ever for the government to regulate one or a few people as compared to many. This development has come at roughly the same time as the Court has moved away from setting substantive boundary-type limits on the government's power to regulate the economy, as it did during the era of *Lochner v. New York*.[34]

Perhaps more remarkably, antidiscrimination has become dominant in Free Speech Clause and Free Exercise Clause jurisprudence, even though the First Amendment says nothing about equality, neutrality, or discrimination. Today, one of the most important threshold questions in a freedom of speech case is whether the government has regulated speech on the basis of content, or, in other words, whether the law differentiates between different categories of expression on the basis of content elements, such as words, viewpoint, subject matter, or communicative impact.[35] This means that a regulation that applies to all speech regardless of content will usually avoid strict scrutiny and is likely to be constitutional,[36] but if the same regulation makes content-based

25. 347 U.S. 483 (1954).

26. United States v. Virginia, 518 U.S. 515 (1996).

27. Reynolds v. Sims, 377 U.S. 533 (1964).

28. Romer v. Evans, 517 U.S. 620 (1996).

29. Lau v. Nichols, 414 U.S. 563 (1974); Katzenbach v. Morgan, 384 U.S. 641 (1966).

30. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

31. Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

32. 163 U.S. 537 (1896).

33. 531 U.S. 98 (2000) (per curium).

34. 198 U.S. 45 (1905).

35. *See* John Fee, *Speech Discrimination,* 85 B.U. L. REV. 1103, 1122–30 (2005).

36. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (holding constitutional a content-neutral restriction on megaphones).

exceptions, it will rarely survive constitutional review.[37] This framework means that a speech regulation will often fail constitutional muster because it does not regulate enough speech. This is so, even though the relevant clause of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech,"[38] seems to work in only one direction, toward greater permissibility for speech.

But content discrimination has not always been a focus in freedom of speech law.[39] The Supreme Court's freedom of speech cases prior to the 1960s do not mention content discrimination but rather depend on a kind of boundary analysis. In the earlier twentieth century, speech cases turned essentially on whether someone's expression counted as "protected" speech and, if so, whether the government's regulation was reasonable.[40] This approach was a kind of balancing framework that factored the individual's interest and the government's interest, but it did not depend much on how the government treated similarly situated speakers or speech content.

In fact, it was not until the 1970s that the Supreme Court began saying in clear terms that a law is presumed unconstitutional if it regulates on the basis of content.[41] In *Police Department of Chicago v. Mosley*,[42] the Court went so far as to describe this as the primary concern of the First Amendment. "[A]bove all else," the Court said, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[43] Since *Mosley*, the Supreme Court has continued to extend the rule against speech discrimination with rigor,[44] while seemingly relaxing its scrutiny of nondiscriminatory speech

37. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

38. U.S. CONST. amend. I.

39. For a more thorough overview of the change of focus in speech jurisprudence, see Fee, *supra* note 35, at 1116–22.

40. *See id.* at 1116–17 (describing the shift toward antidiscrimination in free speech law in the latter twentieth century).

41. *See e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (describing the "usual rule that governmental bodies may not prescribe the form or content of individual expression").

42. 408 U.S. 92 (1972).

43. *Id.* at 95.

44. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (finding that content discrimination in the regulation of even unprotected action, such as vandalism or threats, makes a law unconstitutional).

regulations. In today's free speech jurisprudence, balancing matters less while the presence or absence of discrimination matters more.[45]

The Supreme Court's changes to Free Exercise Clause jurisprudence were similar but more dramatic. Prior to 1989, free exercise of religion primarily functioned as a boundary between individuals and government; it asked whether a law substantially burdened a person's religious exercise and, if so, whether it served a compelling governmental interest.[46] But in *Employment Division v. Smith*,[47] the Supreme Court surprised many observers by holding that individual and governmental interests do not matter as long as a law is sufficiently broad and religiously neutral.[48] While thus reducing religious freedom in one sense, the Court followed *Smith* by increasing its scrutiny of underinclusive laws in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[49] In *Lukumi,* the Court made clear that the threshold questions of neutrality and general applicability are rigorous ones that take into account both legislative history and underinclusivity.[50]

Dormant Commerce Clause[51] jurisprudence has moved in a similar direction since its origins: toward greater emphasis on discrimination and less on boundaries and balancing. The underlying principle of the Dormant Commerce Clause is that states may not impose regulations that substantially burden interstate commerce. Originally, this did

45. Several First Amendment scholars claim that government neutrality, rather than individual substantive freedom, is the sole or dominant goal of the Free Speech Clause. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

46. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

47. 494 U.S. 872 (1990). Congress responded to *Smith* and "attempt[ed] to accord heightened statutory protection to religious exercise" by passing the Religious Freedom Restoration Act of 1993, which was subsequently ruled unconstitutional as applied to state and local governments. Sossamon v. Texas, 131 S. Ct. 1651, 1655–56 (2011) (citing City of Boerne v. Flores, 521 U.S. 507 (1997)). Congress then passed the Religious Land Use and Institutionalized Persons Act of 2000. *Id.*

48. 494 U.S. at 876–80 ("[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely an incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

49. 508 U.S. 520 (1993).

50. *Id.* at 531–46. In *Lukumi,* the Court held unconstitutional a city ordinance prohibiting the unnecessary ritual slaughter of animals. Among the ordinance's constitutional flaws was the fact that it exempted some secular purposes for slaughtering animals but did not exempt religious purposes. *Id.* at 542, 546.

51. U.S. CONST. art. I, § 8, cl. 3.

not seem to have much to do with discrimination against interstate commerce relative to intrastate commerce but rather, and more simply, whether a state regulation went too far and addressed matters more appropriate for federal regulation.[52] Over time, however, and particularly since the mid-twentieth century, the Supreme Court has increasingly applied the Dormant Commerce Clause doctrine as a rule that prohibits discrimination against out-of-state interests. A regulation that exempts in-state businesses will rarely survive constitutional scrutiny,[53] whereas a regulation that contains no such exemptions is likely to be constitutional.[54]

Even the jurisprudence of the Fourth Amendment's Search and Seizure Clause[55] shows the influence of modern antidiscrimination thinking. The text of the Fourth Amendment prohibits only "unreasonable searches and seizures," which seems to have little to do with whether a law is underinclusive or discriminatory.[56] And yet, beginning in the 1970s, the Supreme Court established two separate lines of search-and-seizure cases; one in which the government action involved an ad hoc search of one person and one in which the search was part of broad consistent scheme affecting many in the same way. When, for example, government officers establish a checkpoint at which all peoples or vehicles are stopped consistently, a lower standard of review applies, even though the search may be equally intrusive and affect more people.[57]

B. Rules Regarding Government Property and Government-Controlled Background Criteria

The trend toward antidiscrimination rules in modern constitutional law is unmistakable and alone deserves greater scholarly focus, but the Supreme Court's modern preference for

52. *E.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886); Cooley v. Bd. of Wardens, 53 U.S. 299, 321 (1851).

53. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

54. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (holding an Arizona law constitutional insofar as it (a) required produce grown and packaged within the state to be labeled with the state name and (b) "forbid the misleading use of its name on produce that was grown or packaged elsewhere"); *see also* James D. Fox, Note, *State Benefits Under the* Pike *Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 206–13 (2003) (proposing that the *Pike* balancing test should be considered as simply rational basis scrutiny).

55. U.S. CONST. amend. IV.

56. *Id.*

57. *See* cases cited *supra* note 4.

greater-or-nothing rules extends further than this. The Supreme Court has also favored new greater-or-nothing rules that depend on how the government uses or controls its property or other background conditions that the government controls.

The traditional public forum doctrine fits squarely within this trend at the Supreme Court. In the nineteenth century, when confronted with whether free speech rights exist on government property, the Supreme Court rejected a greater-or-nothing approach and instead saw the analysis simply as one of boundaries.[58] The Court found that since the government possesses the greater power to control and dispose of public property, it must necessarily have the lesser power as a proprietor to prohibit speech there.[59] A generation later, however, the Supreme Court overruled this line of thought when it held that government dedication of property as a street or sidewalk comes with constitutional obligations so long as the government continues to dedicate the property in a particular manner.[60] The Supreme Court's more recent cases have expanded this doctrine and considered what it takes to establish or eliminate a traditional public forum, thus making the greater-or-nothing aspect of the public forum doctrine more explicit and even deliberate.[61]

The Supreme Court has also added greater-or-nothing rules by recognizing exceptions to constitutional rules based on government-controlled criteria. For example, there exists an exception to the rule disfavoring content-based speech regulation in situations where the

58. *See* Davis v. Massachusetts, 167 U.S. 43, 47 (1897) (comparing the legislature's conditional prohibition on public speaking to the right of an individual to forbid another individual to enter his house).

59. *Id.* at 48 (positing that "the greater power contains the lesser").

60. *E.g.*, Jamison v. Texas, 318 U.S. 413, 416 (1943) ("[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. . . . [including] by handbills and literature as well as by the spoken word."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 518 (1939) (Stone, J.) (holding void sections of an ordinance that prohibited individuals from distributing printed materials and holding public meetings in streets and other public places); Schneider v. Town of Irvington, 308 U.S. 147, 160 (1939) ("So long as legislation . . . does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.").

61. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–80 (1992) (discussing the "forum based" approach to assessing restrictions of speech on government property); *id.* at 699–700 (Kennedy, J., concurring) (noting that the government may not remove a public forum's designation and "by fiat assert broad control over speech"); United States v. Kokinda, 497 U.S. 720, 725–30 (1990) (plurality opinion) (discussing the characteristics of the Postal Service sidewalk at issue and ultimately concluding that it was a nonpublic forum).

government identifies the favored category of speech as its own.[62] In other words, the government may sometimes intentionally skew a speech environment toward certain favored viewpoints if the government is willing to make clear that doing so is the very purpose of the program under review.[63] Similarly, an exception to regulatory-takings rules applies where background principles of state law allow the kind of government action in question.[64] This gives state governments ex ante control over the scope of the regulatory takings doctrine applicable to them. And constitutional rules that prevent overregulation of commercial speech allow the government to prohibit advertising of illegal transactions—a category that can be created by state law.[65] For example, if a state makes the sale of alcohol illegal, then it can also prohibit the advertising of alcohol sales. But its power to restrict advertising will be limited if it allows alcohol sales to remain legal.[66] The greater power to prohibit sales *and* advertising does not include the lesser power to prohibit advertising alone.

C. Rules Banning Unconstitutional Conditions

Another large area of expanding greater-or-nothing rules are those against unconstitutional conditions. Unconstitutional-condition rules prohibit the government from offering regulatory exemptions or government benefits with coercive conditions attached. They are greater-or-nothing rules if the government retains the greater power to deny the benefit or regulatory privilege altogether while being constitutionally restrained from offering it conditionally as an incentive for something that the government could not compel directly.

The Supreme Court has seemed to favor these kinds of rules in recent decades. For example, in *Nollan v. California Coastal*

62. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 481 (2009) (holding that the placement of a privately donated monument in a public park is government speech, and, thus, not subject to the Free Speech Clause).

63. For more on government speech, see Fee, *supra* note 35, at 1136–40 (describing the government-supported viewpoints and public education exceptions to the First Amendment's rule against content discrimination).

64. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992) (remanding for determination of the background principles of South Carolina nuisance or property law that could impact whether the contested government prohibition is a taking).

65. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity." (citations omitted)).

66. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

Commission,[67] the Supreme Court held that the government violated the Takings Clause by conditioning land use permissions on the granting of unrelated property interests to the government.[68] The government can often deny an owner's proposed land use altogether, but it cannot offer a deal unless it meets certain criteria.[69] Likewise, the government may refuse to offer a job to any person, but, since the mid-twentieth century, the Supreme Court has limited the government's ability to coerce private decisions through offers of employment.[70] And most recently, the Supreme Court held that while the Federal Government may condition federal grants to states in many ways, there is a limit to the use of these coercive conditions where the States lack realistic choices.[71] According to this principle, the Supreme Court struck down provisions of the Affordable Care Act that impose new Medicaid requirements on states.[72]

Finally, the Supreme Court in recent decades has dramatically increased the procedural rigor by which governments must prove that a person deserves to be punished or to lose some entitlement, thus representing yet another expansion area for greater-or-nothing rules. For example, consider the constitutional criminal procedure revolution of the mid-twentieth century[73] or the Supreme Court's extension of

67. 483 U.S. 825 (1987).

68. *Id.* at 841–42.

69. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (adding a "rough proportionality" requirement, and thus more rigor, to the *Nollan* rule).

70. *E.g.*, McDaniel v. Paty, 435 U.S. 618, 626–29 (1978) (holding unconstitutional a state rule prohibiting ministers from serving as legislators); United States v. Robel, 389 U.S. 258, 265–68 (1967) (holding unconstitutional a law that broadly prohibited any member of the Communist party from employment in a defense facility); Elfbrandt v. Russell, 384 U.S. 11, 16–19 (1966) (holding unconstitutional an overbroad law that required all state employees to take an oath of loyalty and threatened discharge from public office any oath signatory who associated with a group seeking to overthrow the government).

71. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012) (holding that the federal government cannot withdraw a state's existing Medicaid funds for failure to participate in the new program set forth in the Affordable Care Act).

72. *Id.*

73. *See, e.g.*, Burch v. Louisiana, 441 U.S. 130, 137–39 (1979) (holding that trials for nonpetty defenses must be decided unanimously if tried by six-member juries); Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968) (holding that the Sixth Amendment applies to state criminal cases for nonpetty offenses); Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he government seeking to punish an individual [must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth[, including during a custodial interrogation]."); *see also* Corinna Barrett Lain,

due process to new classes of property in the 1970s, including government jobs[74] and regulatory entitlements.[75] These rules involving unconstitutional conditions are greater-or-nothing rules because they leave open to the government various ex ante options to avoid procedures in the long run, such as eliminating elements of offenses that are difficult to prove and relying instead on prosecutorial discretion, changing elements into sentencing factors,[76] increasing the statutory punishment for offenses to pressure defendants into plea bargains, and legislating away regulatory entitlements. Like many other new greater-or-nothing rules, these particular rules have changed the dynamic of government decisions in important ways while declaring few outcomes to be categorically off limits.

III. WHY GREATER-OR-NOTHING RULES?

Why might the Supreme Court prefer greater-or-nothing rules in constitutional law? In this section, I will outline some reasons why greater-or-nothing rules can make sense under the right assumptions, producing outcomes for law that are preferable to either boundary rules or deference to other branches. A common theme of these justifications is the dependence on comparative advantages of politically insulated courts and other parts of government. As the gap between these comparative advantages increases with society's growing complexity, it makes sense that courts would turn increasingly to greater-or-nothing rules.

Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. PA. L. REV. 1361 (2004) (describing the Warren Court's criminal procedure holdings in a historical legal context).

74. *See* Board of Regents v. Roth, 408 U.S. 564, 576–78 (1972) (acknowledging that tenured public college professors, untenured college professors and staff members discharged during their contract terms, and teachers with "a clearly implied promise of continued employment" possess "interests in continued employment that are safeguarded by due process").

75. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that an individual's receipt of welfare benefits constituted an interest that is protected by procedural due process); Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (noting that due process applies where the government seeks to terminate an individual's Social Security disability benefits).

76. *See* Apprendi v. New Jersey, 530 U.S. 466, 491–97 (2000) (rejecting a New Jersey law that allowed a defendant first to be convicted of a second-degree offense by a jury that found guilt beyond a reasonable doubt and then to receive punishment equivalent to that of a first-degree offense after a judge finds, by a preponderance of the evidence, that the defendant acted with the requisite "purpose").

A. Assumptions and Methodology

For these purposes, let us assume a realist and consequentialist approach to constitutional law. That is to say, let us assume that all constitutional rules should be designed ultimately to produce social benefits that exceed social costs.[77] Within this framework, any constitutional rule that prohibits the government from performing some category of action should be premised on the idea that (a) the costs of such actions are likely greater than their benefits and (b) the government actors whom the rule restricts cannot be fully trusted to avoid such harmful action on their own. In this context, the term constitutional rule does not include only bright-line rules and textual rules but also judicially managed standards, balancing tests and case-by-case holdings. While bright-line rules and case-by-case standards each have their respective advantages,[78] the choice between them is itself a policy decision that does not affect the analysis of greater-or-nothing rules.

Let us further assume for simplicity that there are two types of actors in a constitutional system: those that make and apply the constitutional rules and those that are controlled by them. The former includes the Constitution's drafters as well as courts that make, interpret, and expound particular doctrines of constitutional law. Among those restricted by the rules are executive and legislative branches of government that are more responsive to the will of the people and, in some cases, have particular expertise.

By treating judges as rule makers and focusing on the policy reasons for rules from their perspective, I do not intend to suggest that real-world judges are free-wheeling policymakers who are unconstrained by constitutional authority. We know that they are not and should not act as such. But for purposes of analyzing the rationality of rules applied by the judiciary to other branches of government, it is useful to set aside questions of judicial authority, textual interpretation, and activism. For these purposes, it does not matter to what extent particular rules come from constitutional conventions, constitutional text, previous judicial decisions, or the courts' own policy judgments in particular cases. What matters instead is that the constitutional rules courts apply to other branches of government should reflect a sound policy judgment regarding the weaknesses of those restricted branches of government. And if the

77. For a defense of cost-benefit analysis as an underlying First Amendment principle, see Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis,* 54 STAN. L. REV. 737, 740 (2002).

78. For contrasting views, see Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

rules do not make sense, they should be changed, whether through judicial decision or constitutional amendment.

Therefore, when the judiciary enforces constitutional rules against other branches of government, it should reflect some comparative advantage that courts have relative to other branches. Granted, for most decisions made by executive officers and legislators, we trust that their own policy judgment is superior to that of courts and that democracy is the best way to ensure that these actors make optimal decisions. But if this were always true, the judiciary would have no meaningful role in constitutional law. Judicially enforceable constitutional rules make sense where the judiciary has some comparative advantage over more politically responsive government actors.[79]

With that framework in place, let us restate the problem of greater-or-nothing rules in terms of government institutions. Every enforceable constitutional rule should reflect a policy judgment of some kind, including a judgment that the restricted branches of government cannot be trusted to decide some ultimate policy questions on their own, at least not without judicial review. For judicial review to make sense, judges must have some kind of institutional advantage over political branches. But if we could count on judges to have a complete advantage on the question under review, then only boundaries are necessary. A judiciary that is wiser on all components of a decision would either prohibit the reviewable action or allow it. But it should not need to say to another branch: "The choice is yours; you may proceed with the suspect action only if you choose to combine it with some other action."

If we assume, however, that the judiciary has an advantage on only some components of a decision, while the other branch retains advantages on other components, then the advantage of greater-or-nothing rules becomes apparent. Much as the rules of a market economy govern the incentives of private actors without making ultimate decisions for them in a top-down manner, greater-or-nothing rules of constitutional law are useful measures to correct the incentives of government actors without directing them to a predetermined result.

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79. This was the theme of the famous footnote 4 of *United States v. Carlene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (declining to opine as to "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"), as well as in John Hart Ely's work in *Democracy and Distrust*. *See generally* ELY, *supra* note 5 (describing constitutional law as a judicial tool to enhance democratic processes of government rather than standing in opposition to them).

B. Mitigation Rules

The easiest rules to justify by the concept of partial comparative advantage are mitigation rules. These rules effectively say to a government actor: "You may go forward only if you take precautions or otherwise clean up the harm." These rules work where the rule maker lacks the information or capacity to say whether the government should ultimately take a particular course of action (such as convicting a particular suspect) but does have the capacity to appreciate the dangers of such actions and the appropriate ways to mitigate those dangers (such as through a full trial of the evidence). Judicially imposed mitigation rules make sense where the judiciary *does not* know as well as other branches when particular kinds of government actions are preferable, but *does* know better than other branches that (a) government actions of that type do cause material harm; (b) such harm can be prevented or diminished by additional government action; and (c) the prevention measures would impose fewer social costs than their social benefits in the long run. In these circumstances, a greater-or-nothing mitigation rule should lead to better outcomes than either simple boundaries or deference alone could achieve.

C. Government Would Never Take the Greater Option

In some cases, courts might predict that the enabling option is so costly to the government that it would never choose it. Such a rule, therefore, is designed to achieve a particular outcome and functions similarly to a boundary. For example, courts may have assumed in creating the traditional public forum doctrine that cities would not eliminate public parks and sidewalks to avoid public forum obligations. When this assumption is at work, then we could describe the rule as a false greater-or-nothing rule. While they purport to offer choices, the government is never supposed to choose the greater option, and any time that it does so the rule will have backfired.

This explanation for greater-or-nothing rules is relatively weak for two reasons. First, if the purpose of a greater-or-nothing rule is to deter a particular government action in all circumstances, it would be simpler and more candid for courts to simply prohibit the action. Second, a prediction that the government would never take the more harmful greater option could often be mistaken. This error is especially likely if courts consider the options in all-or-nothing terms or too narrowly based on the case at hand, without considering the wide spectrum of ex ante choices that a rule sometimes leaves open and encourages. For example, while few cities have bulldozed public sidewalks to avoid First Amendment obligations, it could be that the public forum doctrine has discouraged cities from building public sidewalks in areas of new development, causing a loss of free speech

and other public advantages arising from having government-owned pedestrian areas.[80]

D. Separating Exceptional Cases

A related and better justification for greater-or-nothing rules could be to deter the government from compromising important constitutional values except in exceptional cases. This use of a greater-or-nothing rule supposes a distrust of politically accountable branches of government in usual cases, but it also supposes that the political branches are better able than courts at recognizing extreme situations that justify a change to the normal rules.

Consider the clause of the Constitution that allows Congress to suspend the writ of habeas corpus in cases of rebellion or invasion.[81] The Supreme Court has interpreted this as a greater-or-nothing rule in the sense that Congress retains the power to suspend habeas corpus altogether for reasons of public emergency, but does not have more limited power to reduce the procedural protections of habeas corpus incrementally while retaining the writ.[82] The premise of this legal system seems to be that judicial review of regulations that alter (without suspending) habeas corpus is necessary because Congress and the executive branch cannot be trusted alone to balance interests of national security against due process values. At the same time, allowing Congress to suspend the writ assumes that there are some emergency cases that would justify a deviation from regular due process and that courts cannot be trusted to exercise habeas corpus power during such times. The judiciary may not appreciate national security concerns enough.

80. *See* Jennifer Niles Coffin, Note, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM 615, 617–21 (2000) (describing the developing trend toward private shopping malls that do not allow free speech at the expense of traditional public forums).

81. U.S. CONST. art. I, § 9, cl. 2.

82. *See* Boumediene v. Bush, 553 U.S. 723, 787–92 (2008) (holding that the procedures provided by statute for trying Guantanamo Bay detainees were constitutionally inadequate as a substitute for habeas corpus).

It is possible to graph the potential effects of a greater-or-nothing rule under this set of assumptions. Figure 1 imagines the optimal level of process for military detainees as a cost-benefit spectrum, ranging from full due process rights in peacetime to the absence of all process in times of extreme emergency. Between these extremes, diminished procedures are optimal at various degrees, as depicted by the downward sloping curve in the center of the graph. Figure 1 also shows the spectrum as Congress and the judiciary might erroneously perceive it; that is, with Congress undervaluing due process and thus willing to diminish procedures too readily in times of risk, and with the judiciary failing to appreciate security interests and thus willing to impose procedures too late. Leaving the full decision to either Congress or the judiciary would cause a deviation from the optimal along either of these curves.

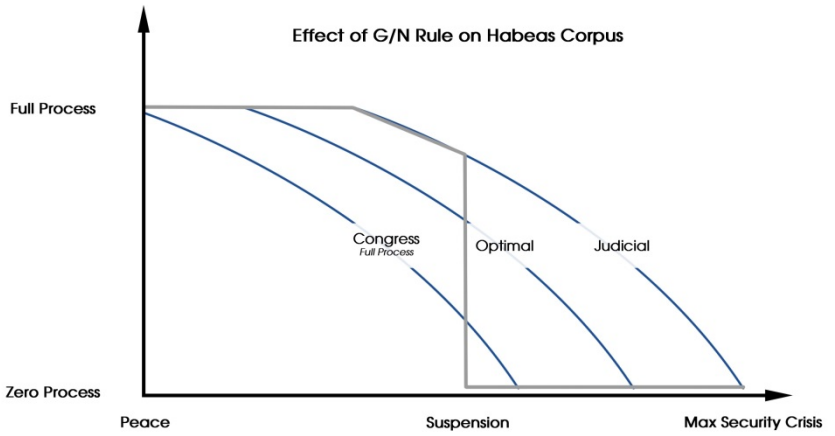

Figure 1: Graph depicting the effect of greater-or-nothing rules on the suspension of habeas corpus.

Finally, Figure 1 depicts in bold how an all-or-nothing rule might affect outcomes relative to what is optimal and to what Congress or the judiciary alone would choose. If Congress has no power to diminish habeas corpus but retains the power to suspend it altogether, we can predict that it would allow habeas corpus where there is only modest risk (at a level that the judiciary would control, possibly above the optimum). But at such point that Congress perceives enough of an emergency, it would suspend habeas corpus altogether, driving results below the optimum and possibly below even what Congress would choose if it were allowed partial options (because middle options are unavailable). Even though this rule is not perfect, it could be rational if it is better than the alternatives. If neither Congress nor the courts can fully be trusted, then there is no rule that can reach the optimal result in all cases. A rule giving full control to

the judiciary does best when closer to the peacetime end of the spectrum, and a rule giving full control to Congress does better at the emergency end of the spectrum. But only a greater-or-nothing rule preserves these optimal results at both ends of the spectrum. It does so, however, by distorting results (in both directions) at the middle of the spectrum.

In summary, whether a greater-or-nothing rule is best for separating exceptional cases from a general set of constitutional rules along a spectrum depends on some key assumptions. First, it depends on assuming that neither the judiciary nor other branches of government are capable of balancing the costs and benefits on their own. Second, it depends on whether most scenarios are likely to be near the extremes on the spectrum of potential conditions and choices, where outcomes are improved by a greater-or-nothing rule relative to the alternatives.

E. Baseline Decisions

Greater-or-nothing rules might also work where the government has made background decisions that the judiciary uses to infer optimal results. This creates a potential for distorting the incentives of government actors, but if there is no other effective way to enforce a particular constitutional standard, it might be the best available option. Such rules work better if the government decisions to which the Constitution is tied are relatively inelastic, such that the attachment of constitutional consequences to such decisions is likely to cause little change.

One could justify the public forum doctrine in this way. Perhaps what the First Amendment ideally would require is for the government to provide the optimal quantity of locations for public speech, but this principle would be impossible for the judiciary to enforce as a boundary rule without taking over the details of local land-use planning. As a next best option, the judiciary might choose to infer that where the government has deemed an area optimal for public pedestrian traffic, the area is also optimal for public speech. Courts might further assume that where a city has not made a place available as a public sidewalk or park, it would be too costly to make it available for speech. Although this assumption will not always be accurate, it could be more accurate than the judicially available alternatives. Another doctrine that could fit this rationale is the rule that habeas corpus applies only to noncitizen detainees in areas under U.S. sovereign control.[83] This doctrine relies on the government's baseline decisions as to the placement of alien detainees (whether to

83. *See id.* at 764–66 (discussing the federal government's position that the Constitution had no effect in Guantanamo Bay with regard to noncitizens because the United States had disclaimed sovereignty there).

move them to U.S. sovereign areas after capturing them) as an indication of whether habeas corpus would do more harm than good.

The skewing effect of these kinds of rules are less significant if the baseline government decisions are costly to change relative to the bias that the doctrine serves to correct. A public forum doctrine that would require the government to tear up public sidewalks and physically devote the space to something else is preferable to one that would allow the government to get around the rule by merely changing the form of its ownership.[84] The more elastic the government's baseline decisions are, and the more biased the government is likely to be on the constitutional question under review, the more likely this kind of rule would backfire and cause more harm than good.

F. Comparative Decisions

Greater-or-nothing rules can also improve government decision making by tying biased government decisions to comparable decisions lacking in bias. This principle often works for rules that disfavor discrimination or underinclusiveness. By forcing the government to choose to act on all or none of a particular classification in the same manner, courts allow those branches of government with primary expertise to assess the costs and benefits that are beyond judicial competence while correcting for some known flaw in the government's cost-benefit function. In this way, a better outcome would result than if either the court or the elected branch of government were acting alone.

Consider how the Supreme Court has interpreted the First Amendment to strongly disfavor content-based speech regulations.[85] One need not believe that there is something inherently wrong with government favoritism for some kinds of speech to support the greater-or-nothing approach that the Supreme Court has infused into First Amendment law.[86] A cost-benefit approach to the freedom of speech supports the judiciary's use of an antidiscrimination approach to First Amendment analysis as well. Under a cost-benefit approach, a court's job in reviewing a speech regulation is essentially to determine whether a regulation that inhibits some person's speech is socially important enough to outweigh the loss of freedom that it

84. *See* Venetian Casino Resort, L.L.C., v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 948 (9th Cir. 2001) (holding that transferring title to public sidewalks, while retaining a public easement, does not avoid the public forum doctrine).

85. *See supra* notes 35–45 and accompanying text.

86. There are many environments in which the government is allowed to discriminate on the basis of content or even viewpoint. *See* Fee, *supra* note 35, at 1136–48 (describing areas of permissible content discrimination).

causes. But given the many kinds of regulations that can burden speech and the many variables that regulators understand better than courts on such matters, it is often dangerous for courts to second-guess directly whether particular regulations are important enough to outweigh their costs. Fortunately, courts can predict that government regulators are more likely to be biased against speech interests when they know precisely what speech they are regulating. Conversely, courts can reasonably infer from the breadth of a regulation that the government's interests are more likely credible and substantial; otherwise, the government would not be willing to inhibit speech that it favors along with all other speech. In this sense, rules favoring content neutrality are an aid to judicial review indirectly indicating (from the consistency of the regulator's own decisions) what interests are important. Such rules also have a positive effect on the incentives of regulators. Encouraging the government to regulate speech broadly or not at all tends to correct its inherent biases, causing it to more accurately strike the optimal balance between speech interests and regulatory interests.

Understanding the greater-or-nothing feature of free speech law as a tool of judicial review aimed toward improving government decisions also helps to explain why there are exceptions to the rules favoring content neutrality. There are times where courts allow content-based regulations and times that they disallow content-neutral ones, indicating that neutrality is not the goal of First Amendment law for its own sake and that sometimes courts are confident enough to declare some categories of regulation unconstitutional or constitutional without relying on indicators of content neutrality.[87] First Amendment law is a patchwork of boundary rules and greater-or-nothing rules, not because the law is lacking in principles, but because boundaries and greater-or-nothing rules have different kinds of advantages.

We can see the same greater-or-nothing principle behind other antidiscrimination rules of constitutional law, including those relating to the Equal Protection Clause, the Dormant Commerce Clause, and the Free Exercise Clause. In each of these areas, a rule that requires equivalent treatment of people, ideas, or institutions—in defined situations—can make sense as a way of dividing responsibility between courts and elected government institutions, using the government's decisions in less biased situations to infer the proper results in more biased situations. Whether or not one accepts equality as a fundamental value in our constitutional system, it is a highly

87. *See id.* at 1107–13 (describing speech maximization and antidiscrimination as two competing values that are inherent in cases involving freedom of speech).

useful tool of judicial review for assessing whether other branches of government are doing their job well enough.

G. Comparative Terms

A parallel principle of judiciary review can illuminate rules that prohibit government deals with unconstitutional conditions. As described earlier, rules against unconstitutional conditions are greater-or-nothing rules because they presume to allow the government a choice to grant or deny some opportunity categorically but prohibit it from offering the opportunity under only specified conditions (such as that affected individual pays the government officer a bribe). Constitutional rules that prohibit some kinds of conditions make sense if they are ways of gauging, from the judiciary's perspective of limited information, whether the government has a sufficient interest to support even the limited restriction or denial of benefit that it threatens to impose. In many fields of government activity, courts cannot tell directly when the government should offer or deny an opportunity to some regulated individual; but this judicial disadvantage does not prevent courts from seeing that certain conditions are likely to distort the government regulator's decisions in ways that undermine the usual principles of deference. Accordingly, when courts require the government to disperse certain benefits or regulatory exemptions in an all-or-nothing fashion, without suspect conditions attached, it improves that process of government decision making.

The Supreme Court's approach to the Takings Clause in *Nollan v. California Coastal Commission*[88] and *Dolan v. City of Tigard*[89] is an example of this principle at work. In *Nollan* and *Dolan*, the Supreme Court held that the government may not use conditions on land-use permits to coerce property owners to cede property rights to the government except in narrow situations. Land-use exactions of private property are valid only when the requested property interest would (a) redress specific impacts that the land development would otherwise cause (such as the property would serve infrastructure needs of the new proposed community) and (b) be proportional to those impacts.[90] This rule works under the assumption that courts

88. 483 U.S. 825 (1987).

89. 512 U.S. 374 (1994).

90. *Nolan*, 483 U.S. at 836–37 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'"); *Dolan*, 512 U.S. at 391 ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere.") (citing *Nolan*, 483 U.S. at 836).

should typically defer to the government's assessment of costs and benefits when they regulate land use. But the rule also assumes that when a government equivocates in such a way that it introduces a potential benefit to itself that ideally should be irrelevant, then judicial deference is improper. Compared to what regulators were doing, the *Nollan-Dolan* rule cuts for and against property owners. It surely causes some regulators to favor property owners by allowing land use unconditionally, but also causes other governments to favor regulatory interests by denying land use proposals categorically (because the benefits of improper exactions are not available). Either way, if the rule's assumptions are accurate, the rule should make the government's decisions more reliable.

H. Disclosure Rules

Yet another type of greater-or-nothing constitutional rule requires the government to add public procedures, disclosures, or statements to reach an ultimate decision that it admittedly has the power to reach. While such rules sometimes seem toothless and wasteful, they make sense where one assumes that government decision-making is improved by informed public oversight. When the judiciary imposes such rules, it need not understand the particular costs and benefits of government decisions, but rather it only needs to predict that government actors are likely to have some biases that informed voters do not share to the same degree. Disclosure rules therefore can nudge government decisions toward what would please informed voters.

The government-speech doctrine of the First Amendment seems to work in this manner, as do rules affecting public education and limited public forums. In some environments, the government can favor speech on the basis of content and even viewpoint, contrary to the usual rules, if it is willing to declare in clear terms that the very purpose of the program involves the kind of speech preference in question.[91] This supposes that government speech discrimination is sometimes worth its cost, but it also supposes that government actors are likely to do too much of it if allowed to discriminate under the public radar. What otherwise seems like a doctrinal loophole makes sense if one considers political influence to sometimes be valuable in achieving a well-functioning marketplace of ideas. A similar principle can arguably justify many other judge-made rules that enforce constitutional values, including federalism, freedom of religion, and criminal procedure.

91. *See, e.g.*, Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 472–81 (2009) (holding that government acceptance of privately donated monuments for a public park was government speech and did not require acceptance on a content-neutral basis).

IV. Greater-or-Nothing Rules in a Complex Society

The justifications for greater-or-nothing rules discussed in the last section share a common assumption: that there are some constitutional principles that courts are ill equipped to enforce as direct boundaries on government actors in other branches. Because we know that the judiciary has its own weaknesses, often the best rule is one that simply defers to other branches. But where government actors are known to be biased in predictable ways, deference can also lead to poor results. Greater-or-nothing rules provide a third alternative. Typically they require suspect government actions to be tied to other government actions in ways that are calculated to improve the decision maker's incentives. The judiciary often makes these rules where its own institutional advantages enable it to identify weaknesses in government decision making that can be corrected in small ways. Greater-or-nothing rules are a way to use the advantages of courts and other branches of government to achieve results better than either could achieve alone.

If comparative differences of courts and other branches of government explain why many greater-or-nothing rules exist, such differences also provide a powerful explanation for why courts have been increasingly turning to rules of this type. Greater-or-nothing rules tend to work best in environments in which the courts are least able to appreciate all of the effects of their decisions. This will more likely be true as society becomes more complex and diverse.

A century ago the economy was relatively simple. Most Americans were farmers, business relationships were simple, and we had few complex regulatory structures. Perhaps this is why the judiciary of that era imposed its own economic vision on the political branches in a more direct manner in the form of constitutional boundaries rules, including substantive due process limits, the Commerce Clause, and the Dormant Commerce Clause, ways that the Court avoids today.

The same could be said of changes in culture, ethical values, and religion. A century ago, Americans were far more homogenous, such that it probably seemed natural for the Supreme Court to enforce ideals such as the freedom of speech and freedom of religion through boundaries based on common social assumptions of what is religion and what is valuable speech. As society has become more diverse and lacking on consensus, this undoubtedly has become a more difficult job for judges to perform. Increasingly, they have responded by abandoning the old boundary principles in favor of newer structural constitutional principles that manage the process of democracy rather than its results.

Seen in this way, greater-or-nothing rules are what Richard Epstein might call simple rules for a complex society[92] or what Michael Polanyi might call decentralized rules for a spontaneous system of order.[93] Both authors describe how the more complicated a system becomes, the more necessary it is to govern outcomes through simple, decentralized rules that referee independently motivated actors rather than through result-oriented, top-down governance of a hierarchical chain of command.[94] They are rules for divided authority, which can have enormous advantages in terms of efficiency and accuracy over centralized systems of authority.[95] While Epstein, Polanyi, and Zywicki are primarily concerned with how the government should regulate private actors in an increasingly complex market economy,[96] the same insight can explain the relationship between the judiciary and other branches of government. Greater-or-nothing constitutional rules enable a decentralized system of government, analogous to a decentralized economy. And like a market economy, a decentralized government with proper structural incentives can more effectively improve the public welfare on a wider range of policy areas than any single hierarchical system could accomplish.

Thus, as society becomes more complex and diverse, it is natural for the judiciary to apply greater-or-nothing rules more often. At the same time, we should not become so comfortable with such rules as to lose sight of the assumptions that make them work. Nor must we assume that they are categorical imperatives such that we should ignore their consequences. There remain situations where greater-or-

92. EPSTEIN, *supra* note 6, at 53–149 (proposing simple rules in the areas of autonomy and property; contract; torts; necessity, coordination, and just compensation; and take and pay).

93. MICHAEL POLANYI, THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS 159 (1951) ("When order is achieved among human beings by allowing them to interact with each other on their own initiative—subject only to laws which uniformly apply to all of them—we have a system of spontaneous order in society.").

94. *See* EPSTEIN, *supra* note 6, at 21 ("The proper response to more complex societies should be an ever greater reliance on simple legal rules, including older rules too often and too easily dismissed as curious relics of some bygone horse-and-buggy age."); Zywicki, *supra* note 7, at 144–46 (summarizing and supplementing Polanyi's argument that a decentralized model of spontaneous order is essential for complex systems)

95. *See* EPSTEIN, *supra* note 6, at 30–36 (discussing the ability of simple rules to balance administrative cost and the risk of erroneous incentives); Zywicki, *supra* note 7, at 147 (discussing the benefits offered by simple rules of general applicability, including longevity, predictability, and allowance for individual discretion)

96. *See generally* Zywicki, *supra* note 7, at 147 (discussing the impact of legal rules on individual actors within a larger system, such as the economy).

nothing rules could be inferior to either complete judicial deference or judicial scrutiny of final outcomes. It is further possible that some existing rules could be tweaked and improved while retaining their structure. Understanding the phenomenon, structure, and types of greater-or-nothing rules should make it easier to analyze them and ensure that they work as they should.