

# Narrowly Tailoring the COVID-19 Response

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## INTRODUCTION

The greatest impact of the novel coronavirus on most of our lives has not been physiological. Rather, the impact has come from state governments’ *responses* to the virus. In much of the country, stay-at-home measures have shut down our lives—including our ability to continue with our employment, study, religious practice, socializing, and access to arts and entertainment.<sup>1</sup> Commentary on the legality of these measures has been limited at the time of writing, but some commenters have suggested that courts might find them vulnerable on the grounds that they cannot survive heightened judicial scrutiny.<sup>2</sup> These commentators contend that although the measures serve an important state interest, they are not narrowly tailored to limiting COVID-19’s spread. While most individuals have been acquiescent so far, these commentators argue that “the lawsuits” may “start flying,” and indeed, some challenges have

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1. *See infra* notes 18-27.

2. *See infra* notes 31-33.

commenced.<sup>3</sup> As this essay goes to press, over 40 challenges appear to have commenced.<sup>4</sup>

Given the situation that states have found themselves in, I believe that their response to the COVID-19 threat has been appropriate—and the limited judicial authority that exists at the time of writing agrees.<sup>5</sup> But any court that applies heightened scrutiny and is inclined to hold otherwise should take into account offsets the government has provided when the court assesses the burdens that any plaintiff must endure. That is, while the government has imposed broad burdens across society, it has also offset those burdens through a series of measures including expanded unemployment compensation, one-time stimulus payments, and other kinds of assistance.<sup>6</sup> As narrow tailoring requires the government to minimize the burdens placed on individuals, the narrow tailoring analysis should take into account both burdens *as well as* offsetting benefits that the government provides.

This approach to narrow tailoring is novel. When the government burdens constitutional rights, such as rights to speech, assembly, or equal protection, there have been no programs that get the government off the hook by compensating individuals for the burdens imposed. While the mitigation efforts associated with the COVID-19 response were not adopted specifically to mitigate constitutional burdens imposed by that response, the effect of these efforts has nonetheless been to mitigate the burdens than many individuals have experienced. To be sure, the various shortcomings and ambiguities in the mitigation efforts adopted in relation to COVID-19 may mean that they will prove insufficient and irrelevant to any constitutional analysis. However, they offer a rare opportunity to think more broadly about how constitutional scrutiny should handle mitigation efforts.

Part I offers an overview of the coronavirus pandemic and the government response. Part II offers a summary of the criticism that the response would fail to satisfy strict scrutiny because it is not narrowly tailored. Part III summarizes

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3. Harry Litman, *Column: Here's what's wrong with Gov. Newsom's stay-at-home order: It's a legal mess*, L.A. TIMES (Mar. 25, 2020), <https://www.latimes.com/opinion/story/2020-03-25/gavin-newsom-stay-at-home-order-quarantine-coronavirus-covid-19>; Lindsey Wiley, *The Coronavirus Lawsuits are Coming. That's Not a Bad Thing*, WASH. POST. (Mar. 23, 2020), <https://www.washingtonpost.com/opinions/2020/03/23/coronavirus-lawsuits-are-coming-thats-not-bad-thing/>; Marshall Zelinger, *Denver citing non-essential businesses for staying open during pandemic*, 9NEWS (Mar. 31, 2020), <https://www.9news.com/article/news/local/next/denver-citing-non-essential-businesses-for-staying-open-during-pandemic/73-d8623d7b-16ff-4e41-a823-3c41818fe0a2>.

4. John Kruzell, *Legal challenges to stay-at-home orders gain momentum*, THE HILL (May 16, 2020) [https://thehill.com/regulation/court-battles/498096-legal-challenges-to-stay-at-home-orders-gain-momentum?fbclid=IwAR28fj\\_7vF0ssPDxAjdBjclbjtsfkirF3qGGBhDVRFZlc4g1ugccb6kBEI](https://thehill.com/regulation/court-battles/498096-legal-challenges-to-stay-at-home-orders-gain-momentum?fbclid=IwAR28fj_7vF0ssPDxAjdBjclbjtsfkirF3qGGBhDVRFZlc4g1ugccb6kBEI).

5. See e.g. *Binford v. Sunuu*, Order on Pls'. Pet. for Prelim. Inj. & Def.'s Mot. to Dismiss, No. 217-2020-CV-00152, (N.H. March 25, 2020) <https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/032520Sununu-order.pdf>; *In re Abbott*, Order Granting Writ of Mandamus, 954 F.3d 772 (5th Cir. 2020), <https://www.documentcloud.org/documents/6827399-5th-Circuit-04072020.html>.

6. See *infra* Part III.

the offsets the government has adopted to mitigate the burdens imposed by its coronavirus response. Part IV then excavates more fully the concept of narrow tailoring and argues that the government offsets should be taken into account. Part V limits the argument, explaining that only offsets that have a nexus to a certain set of constitutional burdens should be cognizable.

## I.

### OVERVIEW OF THE CORONAVIRUS RESPONSE

Officially named Coronavirus Disease 2019, or COVID-19, the new or “novel” coronavirus was first identified in December 2019.<sup>7</sup> The condition is highly infectious because of its low mortality rate and its tendency to spread while the patient is asymptomatic.<sup>8</sup> Without intervention, the virus has a reproduction number (R0) of 2.2—that is, each infected person will spread the virus to more than two additional people.<sup>9</sup> Depending on the jurisdiction, responses to curtail spread have varied. The problem is threefold. First, COVID-19 is highly contagious, as already noted. Second, COVID-19 can survive on surfaces for days.<sup>10</sup> This leads to the third problem: there is a shortage of COVID-19 tests, which will not disappear anytime soon.<sup>11</sup> The President refuses to invoke statutory authority to produce more tests at the time of writing.<sup>12</sup> As a result of the shortage of tests, it is hard to identify who is contagious and who is not.

The solution has been to ask *everyone* to stay at home. This ensures that asymptomatic individuals cannot spread COVID-19 through contact, which is the standard purpose of quarantine.<sup>13</sup> It also ensures that uninfected individuals will not catch the virus, themselves becoming vectors of transmission.<sup>14</sup>

As is traditional, it is the states rather than the federal government that have imposed most coercive limitations.<sup>15</sup> These limitations seek to prevent contact between individuals that could result in transmission. New York and California,

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7. Anthony S. Fauci et al., *COVID-19 — Navigating the Uncharted*, 382 N. ENGL. J. MED. 1268 (2020).

8. *Id.*

9. *Id.*

10. N van Doremalen, et al, *Aerosol and Surface Stability of HCoV-19 (SARS-CoV-2) Compared to SARS-CoV-1*, N. ENG. J. MED., Mar. 17, 2020, available at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

11. Donald Judd, *America is Ramping Up Covid-19 Testing, but a Shortage of Basic Supplies is Limiting Capabilities*, CNN.COM (Mar. 28, 2020), <https://www.cnn.com/2020/03/28/politics/coronavirus-swabs-supplies-shortage-states/index.html>.

12. Joshua Gotbaum, *Use the Defense Production Act for more than just Ventilators*, WASH. POST (Mar. 28, 2020), <https://www.washingtonpost.com/opinions/2020/03/28/use-defense-production-act-more-than-just-ventilators/>.

13. Tara Parker-Pope, *What You Can Do About Coronavirus Right Now*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/interactive/2020/world/coronavirus-preparation-preparedness.html>.

14. *Id.*

15. Wendy E. Parmet & Michael S. Sinha, *Covid-19 — The Law and Limits of Quarantine*, N. ENG. J. MED. (April 9, 2020) <https://www.nejm.org/doi/10.1056/NEJMp2004211>.

which have had among the highest cases, are among several states that have imposed “stay at home” orders and required all non-essential businesses to transition to operating online or closing.<sup>16</sup> The businesses that states have shut down include restaurants, bars, coffee shops, spas, and barber shops.<sup>17</sup> The federal government, in turn, has limited entry into the country.<sup>18</sup>

The approach that the government has taken has affected the livelihoods of numerous individuals. Eighteen percent of respondents to a March 14 poll reported lost hours or employment.<sup>19</sup> Food preparation and serving occupations, which employ over 8.3 million individuals nationwide,<sup>20</sup> are projected to lose or limit 7.4 million jobs on one estimate.<sup>21</sup> Nearly 50,000 retail stores have been shut down.<sup>22</sup> Hotels have begun a first wave of laying off employees, nearly half a million of whom are under the age of 35.<sup>23</sup> Airlines will suffer about \$20 billion in losses and are laying off workers at a record pace.<sup>24</sup> Other industries that have

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16. Cal. Executive Order N-33-20 (Mar. 4 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>; *Governor Cuomo Issues Guidance on Essential Services Under The ‘New York State on PAUSE’ Executive Order*, NY.GOV (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>; Bill Chappell & Vanessa Romo, *New York, Illinois Governors Issue Stay At Home Orders, Following California’s Lead* (Mar. 20, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818952589/coronavirus-n-y-gov-cuomo-says-100-of-workforce-must-stay-home>.

17. Updated Notice of Public Health Order 20-22 Closing Bars, Restaurants, Theaters, Gymnasiums, Casinos, Nonessential Personal Services Facilities, and Horse Track and Off-Track Betting Facilities Statewide, Colorado Department of Public Health & Environment (Mar. 19, 2020), [https://drive.google.com/file/d/14X5zbYPY7LJ8zzzSv\\_GcApJauFmsc5Ju/view](https://drive.google.com/file/d/14X5zbYPY7LJ8zzzSv_GcApJauFmsc5Ju/view).

18. Andrea Salcedo, Sanam Yar, & Gina Chereus, *Coronavirus Travel Restrictions, Across the Globe*, N.Y. TIMES (April 15, 2020), <https://www.nytimes.com/article/coronavirus-travel-restrictions.html>.

19. NPR/PBS NewsHour/Marist Poll National Tables March 13th through March 14th, 2020, at 21, *available at* [http://maristpoll.marist.edu/wp-content/uploads/2020/03/NPR\\_PBS-NewsHour\\_Marist-Poll\\_USA-NOS-and-Tables\\_2003151338.pdf#page=3](http://maristpoll.marist.edu/wp-content/uploads/2020/03/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_2003151338.pdf#page=3).

20. Bureau of Labor Statistics (BLS), Household Data Annual Averages, 11b: Employed Persons by Detailed Occupation and Age, 2019 data, <https://www.bls.gov/cps/cpsaat11b.pdf>.

21. Challenger, Gray & Christmas Inc., *Update: COVID-19 Has Claimed Over 3K Jobs, Over 9M Threatened*, CHALLENGERGRAY.COM, <http://www.challengergray.com/press/press-releases/update-covid-19-has-claimed-over-3k-jobs-over-9m-threatened> (last accessed Mar. 29, 2020).

22. Jordyn Holman et al, *47,000 U.S. Stores Closed in About a Week Over Coronavirus*, BLOOMBERG.COM (Mar. 24, 2020) <https://www.bloomberg.com/graphics/2020-coronavirus-retail-store-closings>.

23. Lisette Voytko, *Coronavirus Layoffs: Landry’s Inc., Philly YMCA Latest To Let Workers Go Amid Pandemic*, FORBES.COM (Mar. 26, 2020) <https://www.forbes.com/sites/lisettevoytko/2020/03/22/coronavirus-layoffs-airports-latest-to-shed-jobs-during-pandemic/#4c59f98c7b9d>; BLS, Labor Force Statistics from the Current Population Survey, Household Data Annual Averages, 18b: Employed Persons by Detailed Occupation and Age, 2019 data, <https://www.bls.gov/cps/cpsaat18b.htm>. (hotel housekeeping and hotel desk clerks).

24. Dawn Gilbertson, *American Airlines Cuts 55,000 Flights, Parks 450 Planes Amid Coronavirus: ‘Fight of Our Lives’*, USA TODAY (Mar. 18, 2020) <https://www.usatoday.com/story/travel/airline-news/2020/03/18/coronavirus-travel-fallout-united-jetblue-allegiant-slash-flights/2863432001/>; BLS, *supra* note 20.

been practically shut down include cruise lines,<sup>25</sup> rideshare transportation,<sup>26</sup> movie theaters,<sup>27</sup> and the film industry.<sup>28</sup>

Individuals do not, of course, come together just to work. The states' orders interfere with other important practices. For example, church pastors have been arrested for continuing in-person services with large groups of individuals.<sup>29</sup>

In the long run, an ideal solution *would* be to create some kind of targeted system to make sure only those who are contagious or potentially contagious are kept quarantined or isolated. Indeed, top Obama healthcare advisor Zeke Emanuel has suggested the creation of a coronavirus "certification system" to ensure that only individuals who have been cleared can go out into the workforce.<sup>30</sup> But existing technology and political will are far away from permitting such possibilities. After acknowledging that a coronavirus certification system "would require the full commitment and attention of the federal government," Emanuel himself ends his article proposing such a system with a question: "Is that possible?"<sup>31</sup> Unfortunately, the answer so far has been no.

## II.

### POSSIBLE CONCERNS ABOUT CONSTITUTIONALITY

On formal constitutional accounts, judicial scrutiny of a challenged government regulation consists of two main components: an analysis of the purpose of the regulation and an analysis of the fit between the purpose and the kinds of restrictions the regulation imposes. Rational basis scrutiny only requires a legitimate purpose and a reasonable fit.<sup>32</sup> Strict scrutiny, which applies in times of non-emergency when the government treads on fundamental rights, such as the right of assembly, requires a compelling interest to which the regulation is narrowly tailored.<sup>33</sup>

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25. Amy Laskowski, *Coronavirus Is Hitting the Cruise Line Industry Hard*, BU.COM (Feb. 25, 2020) <http://www.bu.edu/articles/2020/coronavirus-is-hitting-the-cruise-line-industry-hard/>

26. Grant Suneson, *Industries Hit Hardest by Coronavirus in the US Include Retail, Transportation, and Travel*, USA TODAY (Mar. 21, 2020) <https://www.usatoday.com/story/money/2020/03/20/us-industries-being-devastated-by-the-coronavirus-travel-hotels-food/111431804/>.

27. *Id.*

28. Adam Epstein, *Coronavirus is pushing an Already Vulnerable Film Industry Closer to the Edge*, QUARTZ, (Mar. 9, 2020) <https://qz.com/1813387/a-vulnerable-film-industry-feels-the-impact-from-coronavirus/>.

29. Tamara Lush & Chris O'Meara, *Florida megachurch pastor arrested for holding services, defying social distancing orders*, USATODAY.COM (Mar. 31, 2020) <https://www.usatoday.com/story/news/nation/2020/03/31/coronavirus-florida-megachurch-pastor-arrested-church-amid-orders/5093160002/>.

30. Ezekiel Emanuel, *We Can Safely Restart the Economy in June. Here's How*, N.Y. TIMES (Mar. 28, 2020) <https://www.nytimes.com/2020/03/28/opinion/coronavirus-economy.html>.

31. *Id.*

32. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-41 (1985).

33. *Id.* at 439.

Legal commentary on the COVID-19 response has been sparse at the time of writing. However, because the government has taken action to limit important rights in light of the emergency, at least some authorities suggest that courts may decide to subject the coronavirus response to strict scrutiny. Former U.S. Attorney Harry Litman for example, argues in the *Los Angeles Times* that the government must “show that it has a ‘compelling interest’ . . . and that its action is the ‘least restrictive’ means for achieving it.”<sup>34</sup> Public health law scholar Lindsey Wiley similarly suggests in the *Washington Post* that some judges may hold at least certain stay-at-home measures unconstitutional.<sup>35</sup> Other legal scholars have argued that quarantine case law indicates that these measures call for heightened scrutiny.<sup>36</sup> To be sure, there is authority that suggests that a heightened standard is not warranted. So far, courts reviewing state government actions have largely repudiated almost any judicial review,<sup>37</sup> though Steve Vladeck and Lindsay Wiley have argued for a more robust judicial examination (without advocating for strict scrutiny).<sup>38</sup>

Assuming, *arguendo*, that a court finds that fundamental rights are at stake and that some kind of heightened scrutiny therefore applies, a state would have to show both an important or compelling purpose—a requirement I assume is met here—and some kind of substantial tailoring between the purpose and the regulations at issue. But what exactly does this “narrow tailoring” mean? In his article *Narrow Tailoring*, Ian Ayres discusses various understandings of the concept.<sup>39</sup> He suggests that on one reading, the burdens and benefits that the government distributes cannot be over- or under-inclusive.<sup>40</sup> On another reading, the “government [must] achieve its compelling . . . interest in the way that least restricts or burdens the fundamental rights”—essentially, what amounts to a least restrictive alternative test.<sup>41</sup>

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34. Litman, *supra* note 3.

35. Wiley, *supra* note 3.

36. Parmet, *supra* note 15.

37. Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for ‘Regular’ Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis*, HARV. L. REV. BLOG (April 9, 2020) <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/>. See also *Binford v. Sununu*, Order on Pls’ Pet. for Prelim. Inj. & Def.’s Mot. to Dismiss, No. 217-2020-CV-00152, (N.H. March 25, 2020) <https://www.courts.state.nh.us/caseinfo/pdf/civil/Sununu/032520Sununu-order.pdf>; *In re Abbott*, Order Granting Writ of Mandamus, 954 F.3d 772 (5th Cir. 2020), <https://www.documentcloud.org/documents/6827399-5th-Circuit-04072020.html>.

38. Wiley & Vladeck, *supra* note 37.

39. Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1783 (1995). Ayres writes specifically in the context of affirmative action that seeks to remedy invidious discrimination. His account is not meant to be exhaustive, but it offers a framework through which to understand the concept.

40. *Id.* at 1787.

41. *Id.* at 1788. On yet a third account, which would apply in an equal protection context, narrow tailoring is designed to limit divisiveness between beneficiary and non-beneficiary groups. Situations where the government has to distinguish between beneficiaries and non-beneficiaries, especially in highly visible ways (such as by mandating racial quotas), can increase divisiveness. *Id.* at 1790-93.

The state would survive heightened scrutiny on the first understanding of narrow tailoring if we take it to mean that the state must avoid over- or under-inclusiveness as much as *possible*. Assuming that this requirement would permit states to isolate only individuals who are contagious (though the case law in the area remains murky), it is likely that few tests would be available due to supply chain disruption to determine who is contagious.<sup>42</sup>

The issue comes when we consider whether a regulation survives narrow tailoring under Ayres's second account of the concept: has the government minimized burdens arising from the regulation, or adopted the least restrictive version of the regulation that is compatible with COVID-19 control?

The extent to which the measures are necessary will change based on location and time. In much of the country, to be sure, it would appear that stay-at-home orders are necessary: Lacking tests, states must enforce these orders to prevent deaths. Deaths in New York City and New Orleans, for example, have grown exponentially, as have the number of cases.<sup>43</sup> Some outliers might emerge due to the success of government efforts: at the time of writing, the San Francisco Bay Area has managed to "flatten the curve," limiting the rate of increase of infections.<sup>44</sup> There are variations across other areas as well.<sup>45</sup> Further, if measures do not work, the virus spreads to new locations, requiring government in those locations to adopt measures.<sup>46</sup> Thus, whether a government action satisfies heightened scrutiny for a skeptical court will be a constantly evolving analysis depending upon where and when the litigation is occurring.

Nonetheless, even if a court applies heightened scrutiny, it may yet appropriately conclude that the exigent circumstances and lack of tests mean that the state has minimized burdens no matter the location. Indeed, I am on record suggesting that compliance is appropriate.<sup>47</sup> Moreover, the states' orders permit individuals to engage in essential activities, such as grocery shopping, and even outdoor exercise—they seem reasonably narrowly tailored.<sup>48</sup> And again, while tests would allow the states to ease restrictions, there is evidence that even if

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42. Robert P. Baird, *Why Widespread Coronavirus Testing Isn't Coming Anytime Soon*, NEW YORKER (Mar. 24, 2020) <https://www.newyorker.com/news/news-desk/why-widespread-coronavirus-testing-isnt-coming-anytime-soon>

43. Bernadette Hogan, *New York's Coronavirus Death Toll Jumps 100 in Just One Day to 385*, N.Y. POST (Mar. 26, 2020); Katy Reckdahl et al, *New Orleans Faces a Virus Crisis, and Mardi Gras May be Why*, N.Y. TIMES (Mar. 26, 2020).

44. Maura Caslyn et al, *Social Distancing To Fight Coronavirus: A Strategy That Is Working and Must Continue*, CENTER FOR AMERICAN PROGRESS (Mar. 25, 2020) <https://www.americanprogress.org/issues/healthcare/news/2020/03/25/482278/social-distancing-fight-coronavirus-strategy-working-must-continue/>.

45. *Id.*

46. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 24, 2020) <https://www.nytimes.com/article/coronavirus-timeline.html>.

47. Chelsea Brentzel, *Over 1,600 complaints related to COVID-19 health order filed in El Paso County*, KRDO (April 7, 2020) <https://krdo.com/news/2020/04/07/over-1600-complaints-related-to-covid-19-health-order-filed-in-el-paso-county/>

48. See Colorado order, *supra* note 17.

action had been taken sooner, availability would have been limited due to supply chain disruption.<sup>49</sup>

However, should courts conclude that the measures are too broad, it would appear that state governments would be faced with two alternatives: either do nothing and risk numerous deaths or issue broad stay-at-home orders that arguably impinge on individual rights.

### III.

#### GOVERNMENT RELIEF

The burdens that the COVID-19 response has imposed are extensive, but the federal government has taken measures to minimize the burden. In its first bill, passed March 6, the federal government sought only to increase emergency preparedness for the virus and boost screening and testing capacity.<sup>50</sup> On March 18, the government passed a bill that would also alleviate the harms the response to the virus has imposed. The Families First Coronavirus Response Act<sup>51</sup> increases unemployment benefits, offering states nearly \$1 billion for paying unemployment insurance and processing fees, and increases assistance in certain states for individuals who have already exhausted benefits.<sup>52</sup> A similar amount is allocated to maintain food security, including funding for the Special Supplemental Nutrition Program for Women, Infants, and Children and for those households where the child's school has been closed for at least five consecutive days.<sup>53</sup> Finally, employers with fewer than 500 employees must provide employees with two weeks of paid sick leave if they are subject to quarantine, are experiencing symptoms of COVID-19, or have children in schools that have closed.<sup>54</sup>

The Response Act is dwarfed by an even larger stimulus statute, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) passed on March 27, with a price tag of \$2 trillion. The statute provides one-time \$1200 payments to individuals earning less than \$75,000 a year per their 2018 or 2019 tax returns, phasing these payments out as individuals approach \$99,000 a year.<sup>55</sup> Those eligible for payments receive \$500 per child.<sup>56</sup> Payments were intended

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49. Baird, *supra* note 42.

50. Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. 116-123 (Mar. 6, 2020).

51. H.R. 6201, Pub. L. 116-127 (2020) available at <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>.

52. *Id.* at 15-18.

53. *Id.* at 2-3, 7 to 12.

54. *Id.* at 12-15, 18-24.

55. H.R. 748 at 55 (enrolled bill), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> (hereinafter CARES Act).

56. *Id.*

to arrive within three weeks, per the Treasury Secretary.<sup>57</sup> The CARES Act also expands unemployment benefits for at least 13 weeks over what states usually offer and renders self-employed individuals and part-time workers eligible.<sup>58</sup> The statute provides for a three-month eviction moratorium for tenants in properties on which there are mortgages backed or owned by federal entities such as Fannie Mae or Freddie Mac, barring landlords from charging fees or penalties for nonpayment of rent.<sup>59</sup> It provides for \$350 billion to the Small Business Administration to provide loans of up to \$10 million per business, many of which are forgivable.<sup>60</sup> Finally, the statute allocates \$15.5 billion for the Supplemental Nutrition Assistance Program (SNAP), with an additional \$450 million for food banks and other community food programs.<sup>61</sup>

States are imposing similar relief measures. For example, executive orders by Colorado's governor instituted a moratorium on evictions and utility disconnection and sought to expedite unemployment claims payments in the face of record filings.<sup>62</sup> The city of Denver created a \$4 million relief fund for small businesses and artists.<sup>63</sup> Other states and localities have taken similar steps, which have included measures from the creation of community childcare centers to the implementation of microloan programs.<sup>64</sup>

For some, the benefits may be significant. Indeed, one scholar calculates that based purely on the federal unemployment benefits expansion, some workers earning up to \$60,000 per year who lose their jobs will earn more money through the unemployment benefits expansion than they would have earned when holding their jobs, as long as they receive the expanded benefits.<sup>65</sup> To be sure, this calculation does not take into account lost benefits, but many employers, for example restaurants, do not offer their employees benefits.<sup>66</sup> This calculation also does not take into account the \$1200 stimulus payment.

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57. Tara Bernard, *F.A.Q. on Stimulus Checks, Unemployment and the Coronavirus Plan*, N.Y. TIMES (Mar. 28, 2020) <https://www.nytimes.com/article/coronavirus-stimulus-package-questions-answers.html>.

58. CARES Act, *supra* note 55, at 35 (limiting assistance to 39 weeks). See Bernard, *supra* note 57 (states cap unemployment assistance at 26 weeks or less).

59. CARES Act, *supra* note 55, at 211.

60. *Id.* at 10, 17-21, 41.

61. *Id.* at 228.

62. Col. Exec. Order No. D 2020 012 (Mar. 20, 2020) available at [https://drive.google.com/file/d/1mMCRLb6PxMPI680\\_THFn4nqLGAty1jq9/view](https://drive.google.com/file/d/1mMCRLb6PxMPI680_THFn4nqLGAty1jq9/view).

63. Conrad Swanson, *Denver Mayor Announces Economic Relief for Businesses Hurt by Coronavirus*, DENVER POST (Mar. 19, 2020) <https://www.denverpost.com/2020/03/19/denver-coronavirus-small-business-relief/>.

64. Credit Karma Staff, *Coronavirus Federal, State and Local Relief Measures*, CREDIT KARMA (Mar. 28, 2020) <https://www.creditkarma.com/advice/i/coronavirus-us-state-local-relief-measures/>.

65. Email from Nadav Orien Peer to Craig Konnoth.

66. Rosie Bradbury, *31% of restaurants offer health insurance to workers, survey finds*, RESTAURANT DIVE (July 31, 2019) <https://www.restaurantdive.com/news/survey-31-of-restaurants-offer-health-insurance-to-workers/559857/>.

## IV.

## RECONSIDERING NARROW TAILORING

In light of this government relief, let us return to the least restrictive alternative approach to narrow tailoring. This approach is ubiquitous in heightened scrutiny analysis across constitutional doctrines.<sup>67</sup> Across each of these areas of doctrine, the court looks to see whether the government, at the *outset*, could have adopted a more limited regulation—one that minimized burdens on important interests—and still achieved its purpose.<sup>68</sup>

In the affirmative action context, for example, the Supreme Court has looked to see whether the government could have achieved its objective through “race-neutral” means, thus (in theory at least) not imposing the indignity of discrimination when it could have been avoided.<sup>69</sup> In the dormant Commerce Clause cases, similarly, the Court has looked to see whether states could have achieved their purpose without discriminating against out-of-state commerce.<sup>70</sup> Similarly, in the free speech context, the Court has disapproved state regulation that limited speech by pharmaceutical entities steering consumers towards higher priced drugs.<sup>71</sup> Instead of imposing that restriction, the Court noted, a state could counter pharmaceutical speech “through its own speech.”<sup>72</sup> More recently, in *Hobby Lobby v. Burwell*, the Court (in applying a statutory least restrictive alternative test) invalidated an Affordable Care Act that employer insurance offer contraceptive benefits.<sup>73</sup> The reason: the *government* could have established (and, in other circumstances, had established a program through which *it*, rather than the employer, would offer the coverage).<sup>74</sup>

67. See generally Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974) (discussing equal protection, First amendment, due process, and Commerce Clause case law). See also C. Scott. Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 950 n.89 (2016) (listing cases from numerous areas of constitutional law).

68. I envisage the challenges as due process rather than equal protection challenges since the restrictions are broad and apply to nearly every individual equally, notwithstanding their individual circumstances.

69. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013) (narrow tailoring “require[s] a court to examine with care, and not defer to, a university’s ‘serious, good faith consideration of workable race-neutral alternatives.’”). *But see* Ayres, *supra* note 39, at 1790 (arguing that race-neutral means counter this version of narrow tailoring).

70. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (asking “whether alternative means” where the state did not discriminate “could promote . . . [its] purpose as well”).

71. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2674 (2011) (asking whether state interest could “be served as well by a more limited restriction” (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980))); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective” (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997))).

72. *Sorrell*, 131 S. Ct. at 2671.

73. *Hobby Lobby v. Burwell*, 134 S. Ct. 2751, 2800–02 (2014). While the requirement for less restrictive means was statutorily imposed, the Court’s application was consistent with the constitutional cases on which it relied. Indeed, the statutory test was drawn from the Court’s since-overruled constitutional doctrine. *Id.* at 2760.

74. *Id.*

However, while these cases consider the burden the government imposed at the outset, they did not consider any offsetting compensation that the government may have offered to mitigate the burden. The reason for that is simple: the government rarely, if ever, provides an *offset* for a constitutional violation.

Commenters have considered the possibility of constitutional offsets, most prominently in the debate over whether constitutional rights should be protected by liability rules rather than property rules.<sup>75</sup> A property rule would render unconstitutional any action by the government that deprives an individual of rights. Under a liability rule, it would be constitutionally valid for the government to take actions that would otherwise violate protected rights as long as it pays for the privilege of doing so. Eugene Kontorovich, for example, argues that during national security emergencies, “upon finding a detention program unconstitutional, courts could refuse to enjoin it and instead award the detainees money damages for the duration of their confinement. This is essentially a Takings Clause approach to nonproperty rights.”<sup>76</sup> This, he argues, is the superior outcome, because in emergencies, especially those where transaction costs are high, courts will be reluctant to altogether enjoin detention programs carried out in the name of national security. Without a liability rule alternative, courts will likely simply hold these programs constitutional. Under a liability rule, those burdened will at least be paid for their pains.<sup>77</sup> Other authors have made similar arguments.<sup>78</sup>

Although my primary task here is not to critique Kantorovich’s approach, I do not think that it is the best way for constitutional law to take cognizance of government offsets. Indeed, I believe that critics of Kantorovich are correct in arguing that his conclusion is undermined by constitutional text, by the intent of the Framers, and for various other reasons.<sup>79</sup> Moreover, it represents a sharp departure from existing constitutional doctrine.

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75. Other scholars have briefly considered the issue. For example, Reva Siegel has noted that legislatures that impose abortion restrictions could adopt “measures to offset the consequences of compelled motherhood for women, whether by compensating them, or by protecting their employment and education opportunities, or by affording them needed medical services and child care.” Siegel, *Reasoning From the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 366 (1992). The failure to do so suggests that women are viewed stereotypically.

76. Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 759 (2004).

77. Notably, he invokes the possibility of applying this approach during quarantines as well. *Id.* at 825-26.

78. Michael Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2471 n. 102 (collecting numerous other articles).

79. *Id.* 2475-79 (offering numerous rebuttals to Kantorovich’s argument). Indeed, I believe that expressive harms from adopting liability rules are even higher, as individuals are less likely to see rights protected by liability rules as inalienable. Cf. Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1545 (1998) (noting that endowment effects are higher with property rules).

A far more natural doctrinal context in which to consider constitutional offsets that is far more consistent with existing case law, is the context of narrow tailoring, when courts consider whether the government has minimized the burdens it has imposed. In the consideration of whether burdens have been minimized, there seems to be no reason for not considering *both* the regulation imposing the burden, and complementary steps the government has taken to alleviate it. If the assessment that the Court employs—as it always has—is the total burden a regulation imposes on an individual, then the regulation itself, as well as corollary regulations should be taken into account.

Analyzing narrow tailoring in this manner offers a new lens upon the restrictions the government has imposed. If courts choose to impose heightened scrutiny and then find that the government's actions are not justified even by the exigent circumstances that exist, courts should look to offsets. Offset legislation, like the Response and CARES Acts, may render the regulation more narrowly tailored.

The narrow tailoring approach I offer would not represent a massive doctrinal innovation. Courts have not, to my knowledge, considered offsets in determining whether narrow tailoring has occurred, but they have not had the opportunity: governments appear never to have *provided* such offsets or argued that those offsets provide for narrow tailoring. But when courts consider how much individuals are burdened, it would make little sense for them to exclude benefits and compensation that accompany the burden. Existing constitutional doctrine, then, is compatible with considering the burden imposed *in toto*.

At the same time, such offset legislation may offer greater leeway to legislatures. Courts often defer to legislatures in cases of scientific uncertainty.<sup>80</sup> But where legislatures fear that courts may not defer, for whatever reason—for example, where research is uncertain or contradictory—legislatures may offer offsets that minimize burdens to further insulate their regulation from judicial invalidation.

I emphasize, however, that while it offers us an opportunity to *think* about how to incorporate offset analysis into constitutional scrutiny, my claim here is not that offset legislation would necessarily insulate stay-at-home orders from constitutional challenge. First, the Response and CARES Acts have proven to be a limited response to the challenges individuals face. Housing protections have been uncertain and unclear.<sup>81</sup> Small business assistance has run out within days of its enactment.<sup>82</sup> Further, as this Essay goes to press, states are facing deep shortfalls, in part from the shutdown policies they pursued, and will be cutting

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80. Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 J. of Const. L. 671, 673 (2009).

81. Email from Jana Happel, Colorado Legal Services, to Craig Konnoth, on file with author.

82. Erica Werner et al, *Treasury's Mnuchin seeks additional \$250 billion to replenish small-business coronavirus program*, WASH. POST (April 7, 2020) <https://www.washingtonpost.com/us-policy/2020/04/07/treasury-coronavirus-small-business/>.

spending to important programs such as Medicaid.<sup>83</sup> This may affect the analysis of the net burden individuals experience.

More importantly, the Acts were not passed in order to minimize burdens on fundamental rights: they minimize the burdens of economic harms, which may or may not align with a fundamental rights analysis. It is, after all, unclear that the right to come together to engage in economic production and earn a livelihood is fundamental.<sup>84</sup> It is clear that the right to assemble for religious worship is fundamental.<sup>85</sup> The CARES Act, however, is designed to offset burdens for those who have suffered economic harm. Thus, all individuals do not obtain benefits from the Act to the same degree. Those who remain employed and enjoy a high income, for example, may obtain no aid. If those individuals challenge state actions, the government can show no offset. But the vast majority of Americans will be able to claim *some* offset as a result of the CARES Act, and the courts should take into account those offsets when deciding whether the states' actions pass constitutional muster.<sup>86</sup>

## V.

### NEXUS BETWEEN BURDENS AND OFFSETS

How exactly do we assess whether a burden and offsetting benefits are sufficiently related such that they should be assessed together? In other words, imagine an individual who owns a renewable energy business challenges the stay-at-home regulation, which costs her significant revenue.<sup>87</sup> Unrelated to those public health orders, the legislature passes significant subsidies for renewable energy, the same day the stay at home order is issued, that would end up effectively revitalizing the individual's business.<sup>88</sup> Assume that the subsidy legislation had been in the works for months, long before COVID-19 was a known entity. It would seem strange for a court to conclude that it should take

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83. Elise Schmelzer & Sam Tabachink, *Gov. Jared Polis limits evictions, cuts immediate state spending by \$228.7 million*, DENVER POST (May 1, 2020) <https://www.denverpost.com/2020/05/01/polis-coronavirus-covid-state-spending/>.

84. To my mind, it should be, within appropriate limits. See Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1104 (1986).

85. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (noting the heightened protections of religious organizations).

86. To take economic stimulus payments as an example, 70% of American households in 2018 earned \$99,000 or less in 2018 and are eligible for offsetting stimulus payments under CARES. <https://www.statista.com/statistics/203183/percentage-distribution-of-household-income-in-the-us/>.

Assuming that at least some of the additional 22% of households that earn less than \$199,000 are two-income households, they too would be eligible for offsets. Moreover, individuals can take advantage of employment compensation benefits no matter what their income.

87. See Michael Holder, *Coronavirus: Falling Power Demand is Impacting Clean Energy*, GREEN BIZ (Mar. 26, 2020) <https://www.greenbiz.com/article/coronavirus-falling-power-demand-impacting-clean-energy> (discussing how the virus's spread is affecting renewable energy).

88. See Craig Konnoth, *Preemption through Privatization*, 134 HARV. L. REV. (forthcoming 2021) (discussing such subsidies).

the unrelated subsidy legislation into account when assessing the burden of the public health order.

In other words, there should be some relationship between the government legislation that burdens and the legislation that offsets the burden. We might look to other areas of the law that similarly demand a nexus between pieces of legislation. Most prominently, Spending Clause doctrine requires that Congress may induce states to engage in certain behavior as a condition of federal funding only if, *inter alia*, the condition is stated unambiguously and is “directly related” to some specific, national program.<sup>89</sup> Thus, in *National Federation of Independent Businesses v. Sebelius (NFIB)*, the Court held that Congress could not “terminate . . . independent grants” if the state did not accept its conditions.<sup>90</sup> At issue in *NFIB* was a condition Congress imposed in the Affordable Care Act: either states expanded Medicaid to cover numerous additional categories of individuals, or they lost all Medicaid funding.<sup>91</sup> A bare majority of the Court held that the changes “accomplishe[d] a shift in kind, not merely degree” and were a whole new program.<sup>92</sup> The dissent disagreed, noting that Medicaid had been expanded dramatically before.<sup>93</sup> Either way, as *NFIB* is the first time that the Court struck down Spending Clause legislation in this way, the doctrine is not sufficiently developed to be instructive for other areas of law.

The test I propose is a causal nexus between the offsets and the burdens that are imposed. That is, the offsets would not have been provided *but for* the regulatory burdens. It would not matter whether the legislation is in the same or different bill: sometimes provisions in omnibus bills are completely unrelated.<sup>94</sup> And as with the COVID-19 response, related regulatory responses may pass weeks apart from each other.

Indeed, offsets may be adopted not just at different times but by different authorities. The shelter-in-place orders are the product of municipal and state regulation. While the federal offsets sometimes give discretion to local entities to determine whether or not to mitigate, many of the key steps are federally driven. However, it would be wrong to conclude that since the *states* did not engage in mitigation, their public health measures are therefore not narrowly tailored.<sup>95</sup> The federal government’s response is understandable only in light of the measures that states have adopted. Indeed, as scholars of federalism emphasize, states and the federal government often act as partners, including by

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89. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

90. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (plurality opinion).

91. *Id.*

92. *Id.* at 583.

93. *Id.* at 641 (Ginsburg, J., dissenting).

94. Abbe Gluck et al, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015).

95. Indeed, given the states’ lack of ability to obtain supplies for COVID-19 testing and mitigation, it would appear that they have no means at their disposal to mitigate the burden beyond lobbying the federal government.

co-administering programs such as the health insurance exchanges in the Affordable Care Act (some run by state governments and some by federal entities),<sup>96</sup> co-enforcing federal health privacy laws,<sup>97</sup> and coordinating on law enforcement.<sup>98</sup>

States are similarly enmeshed within Centers for Disease Control programs: the CDC has established state networks for key initiatives such as injury prevention, on which states take the lead.<sup>99</sup> The CDC has funded state responses to COVID-19,<sup>100</sup> and, starting in January, began hosting calls with “state and local partners” to monitor the COVID-19 situation.<sup>101</sup> State public health orders should be seen as a product of such federal-state partnerships rather than as solely determined by individual states. Similarly, states often play a role in shaping federal legislation; indeed, on certain understandings of federalism, states are represented through their congressional delegation, especially by their Senators, in shaping legislation.<sup>102</sup> And the federal legislative response would make no sense outside of the context of state-led efforts. Thus, the federal legislation should be seen as a response to the state legislation, that is, as an effort to mitigate the measures states adopted in consultation with the CDC. Narrow tailoring analysis should proceed with an eye to these efforts to mitigate.

#### CONCLUSION

The response to COVID-19 is not yet over. The approach I have offered gives governments flexibility should their public health orders be found constitutionally wanting. Additional offsets are already on the table: politicians at both the state and federal level are calling for further remedial measures.<sup>103</sup>

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96. See generally *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (describing federal and state exchanges); Konnoth, *supra* note 88.

97. Konnoth, *supra* note 88.

98. U.S. Dep’t of Justice, Law Enforcement Coordination, <https://www.justice.gov/usao-ndca/law-enforcement-coordination> (last accessed Mar. 29, 2020).

99. Ctrs. For Disease Control & Prevention, Injury Prevention & Control, Regional Networks, <https://www.cdc.gov/injury/stateprograms/regionalnetworks/index.html> (last accessed Mar. 29, 2020).

100. Ctrs. For Disease Control & Prevention, *CDC to Award Over \$560 Million to State & Local Jurisdictions in Support of COVID-19 Response* (Mar. 11, 2020) <https://www.hhs.gov/about/news/2020/03/11/cdc-to-award-over-560-million-to-state-local-jurisdictions-in-support-of-covid-19-response.html>.

101. Global Bio Defense, *CDC National Call Series on Novel Coronavirus Monitoring & Preparedness* (Feb. 10, 2020) <https://globalbiodefense.com/event/cdc-national-call-series-on-novel-coronavirus-monitoring-preparedness-3/>.

102. Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1698 (2017).

103. Lauren Vella, *Ocasio-Cortez Blasts Coronavirus Stimulus Package As ‘Shameful’ on House Floor*, THE HILL (Mar. 27, 2020) <https://thehill.com/homenews/house/489863-ocasio-cortez-blasts-22t-coronavirus-stimulus-package-as-shameful-on-house>; Heather Caygle, *Pelosi Eyes Next Relief Package as Republicans Downplay Need*, POLITICO.COM (Mar. 26, 2020) <https://www.politico.com/news/2020/03/26/congress-coronavirus-relief-package-150338>; Zack Budryk, *Cuomo Calls \$2T Stimulus ‘Reckless,’ Says It Fails to Meet New York’s Needs*, THE HILL (Mar. 26, 2020) <https://thehill.com/homenews/state-watch/489653-cuomo-calls-2t-stimulus-reckless-says-it-failed-to-meet-local-government/>.

Such measures present insufficiencies and ambiguities that may render them constitutionally irrelevant in the COVID-19 crisis—but they do offer new ways to think about narrowly tailoring constitutional scrutiny.