When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?

*Lars Noah**

Abstract

Scholars have raised various objections to the last and often decisive (narrow tailoring) prong of the different forms of heightened scrutiny, and these problems may become acute when courts consider constitutional challenges brought against government entities that enjoy far more truncated powers than do legislative bodies. This Essay argues, however, that agencies should enjoy no special dispensation for failing to consider less restrictive means simply because the legislature has failed to empower them to adopt such alternative courses of action.

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Introduction

Many years ago, I boldly (and without citation to any genuine authority) proclaimed that, "in considering the availability of less speech-restrictive alternatives, courts may not accept the argument that an agency lacks the statutory power to impose these options if some other governmental entity could do so."[1] One decade later, and

* Stephen C. O'Connell Chair and Professor of Law, University of Florida; author, *Law, Medicine, and Medical Technology* (Foundation Press 4th ed. 2017).

1 Lars Noah, *What's Wrong with "Constitutionalizing Food and Drug Law"?*, 75 Tul. L.

citing as authority nothing other than this passage, I briefly revisited the question in a footnote with just a bit more elaboration: "[L]ack of delegated authority would not, however, answer the constitutional objection (otherwise, we would have to countenance an inverted form of the greater-includes-the-lesser power argument, more readily sustaining restrictions on speech when Congress only grants an agency that power)."[2] This proposition may seem counterintuitive, akin to arguments occasionally heard in products liability circles that sellers have a duty to warn about or design against even "unknowable" risks.[3] Does it nonetheless accurately describe the judiciary's application of heightened constitutional scrutiny to agency actors, and how might one justify taking such a position?

Although this premise has remained largely unexamined (and its acceptance in the courts almost entirely invisible), I have practiced what I preached about narrow tailoring applied to agency actions. For instance, in questioning the constitutionality of restrictions on the advertising of "off-label" uses of therapeutic products imposed by the U.S. Food and Drug Administration ("FDA"), I have pointed to a variety of alternatives for accomplishing its ends that the agency plainly lacked the power to deploy.[4] Similarly, I have argued that, rather than restricting the advertising of cigarettes in order to reduce underage smoking, the government could have imposed a tax that

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REV. 137, 143 & n.35 (2000) (citing as support nothing other than an article that I had published four years earlier).

2 Lars Noah, *Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)*, 21 HEALTH MATRIX 31, 75 n.185 (2011).

3 *See, e.g.*, Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 745–52 (Wis. 2001) (affirming judgment against the seller of latex gloves used by health care workers even if it could not have known of the risk of allergic reactions at the time of sale); *see also* Lars Noah, *This Is Your Products Liability Restatement on Drugs*, 74 BROOK. L. REV. 839, 851–52 & n.47, 907–09 (2009) (collecting secondary sources and criticizing this approach). In design defect litigation involving knowable risks, a comparable debate has arisen about letting plaintiffs point to reasonable alternative designs ("RADs") that the defendant could not (yet) have marketed. *See id.* at 844–45, 880 n.173, 883; *id.* at 884 (applauding "the wisdom of the [ALI] Reporters' refusal to allow plaintiffs to rely on hypothetical RADs for prescription products").

4 *See* Lars Noah, *The Whole "Truthiness,"* 162 U. PA. L. REV. ONLINE 261, 262 (2014) ("If off-label uses have such little merit, then the government should—as it has done in limited cases—just ban the practice altogether . . . ."); Noah, *supra* note 2, at 74–75 (conceding that "any such initiative would trigger howls of protest from physician groups"); *id.* at 95 (arguing that "public health regulatory agencies have gone about their business in entirely the wrong way insofar as they prefer to manipulate the flow of information instead of directly tackling hazardous behaviors"); *see also* Lars Noah, *Permission to Speak Freely?*, 162 U. PA. L. REV. ONLINE 248, 253 (2014) ("Whenever government seeks to pursue collateral purposes such as dampening consumer demand, non-speech-restrictive alternatives (e.g., barring the underlying conduct) invariably exist for accomplishing such goals.").

would better discourage use by youngsters,[5] even while conceding that this particular federal agency did not enjoy the power to proceed in any such fashion.[6] Indeed, price regulation often gets mentioned as a less restrictive alternative in these sorts of cases.[7] Lastly, in connection with burdens on reproductive autonomy, I have wondered whether the FDA could allow only a limited class of specialists to prescribe fertility drugs,[8] or whether it could demand that teratogenic agents get bundled together with a hormonal contraceptive when indicated for use by female patients,[9] even though the agency did not at that time

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5 *See* Noah, *supra* note 1, at 143 n.35; *see also* Lars Noah, *Regulating Cigarettes: (Non)sense and Sensibility*, 22 S. ILL. U. L.J. 677, 690 (1998) (favoring an outright prohibition on "the sale of some or all types of tobacco products" or a congressional decision "to tax such products into oblivion" over a dubious FDA claim of jurisdiction to regulate their advertising, but recognizing the lack of political will to take such steps).

6 *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,453 (Aug. 28, 1996); *infra* note 49 (elaborating on this point); *see also* Betsy McKay, *Tobacco Tax Clouds Plans States Make*, WALL ST. J., Feb. 9, 2009, at A5 (reporting that Congress had more than doubled the federal cigarette tax, though it remained below the average tax imposed by states).

7 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (plurality opinion) ("[H]igher [alcohol] prices can be maintained either by direct regulation or by increased taxation."); *id.* at 530 (O'Connor, J., concurring in judgment); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 141–45; *see also* Karen Kaplan, *Can World Swallow a Soda Tax?; Health Officials Recommend Supersizing the Total Cost of Sugary Drinks*, L.A. TIMES, Oct. 16, 2016, at A3 (citing a study that found a marked decrease in consumption after the city of Berkeley imposed a penny-per-ounce tax); William Neuman, *Tempest in a Soda Bottle: Proposed Tax on Sugary Beverages Would Pay for Health Care Reform*, N.Y. TIMES, Sept. 17, 2009, at B1 (reporting that "research on price elasticity for soft drinks . . . has shown that for every 10 percent rise in price, consumption declines 8 to 10 percent").

8 *See* Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 654 (2003) (explaining that "intermediate risk-management . . . strategies might include distribution restricted to specialists (e.g., reproductive endocrinologists)"); *see also id.* at 659–65 (discussing flaws in constitutional objections lodged against efforts to restrict the use of fertility drugs); Lars Noah, *State Affronts to Federal Primacy in the Licensure of Pharmaceutical Products*, 2016 MICH. ST. L. REV. 1, 43–53 (discussing reproductive autonomy and related substantive due process objections to restrictions imposed by state agencies).

9 *See* Lars Noah, *Too High a Price for Some Drugs?: The FDA Burdens Reproductive Choice*, 44 SAN DIEGO L. REV. 231, 239, 240 n.35 (2007); *see also id.* at 241–58 (questioning the constitutionality of mandatory contraception or sterilization). My work has confronted similar sorts of questions in other constitutional domains as well. *See, e.g.*, Lars Noah, *Treat Yourself: Is Self-Medication the Prescription for What Ails American Health Care?*, 19 HARV. J.L. & TECH. 359, 385–91 (2006) (discussing takings and procedural due process objections to license modifications); *see also* Lars Noah, *Turn the Beat Around?: Deactivating Implanted Cardiac-Assist Devices*, 39 WM. MITCHELL L. REV. 1229, 1255–86 (2013) (addressing end-of-life choices).

have the power to impose such restrictions on access and distribution.[10]

This Essay steps back to ask whether such an approach makes sense. Part I discusses the growing preoccupation with less restrictive means in heightened scrutiny cases, first as a general matter and then in connection with judicial review of constitutional claims against regulatory officials. Part II evaluates potential arguments against a test that would demand consideration of alternatives beyond the power of a particular agency before explaining the justifications that would support such an unforgiving standard for evaluating the constitutionality of agency action. Ultimately, however, once we appreciate the ramifications of using least restrictive means in this institutional context, it may provide still another reason for skepticism about the judiciary's increasingly stringent application of narrow tailoring in cases of intermediate scrutiny. Thus, courts should reserve this demanding test for cases that genuinely necessitate strict constitutional review.

I. Debates About Narrow Tailoring in Constitutional Review

The final step in heightened constitutional scrutiny asks about different options for promoting the government's important purposes: intermediate scrutiny inquires whether the government has selected an option narrowly tailored to attain its substantial interests,[11] while strict scrutiny insists that it pick the least restrictive means for achieving its compelling interests.[12] "Narrow tailoring" could simply demand

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10 *See* Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 U. Kan. L. Rev. 149, 189–93 (2004) (explaining, however, that nothing would prevent Congress from doing so). Congress subsequently gave the agency limited authority to impose such access restrictions. *See* Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 Neb. L. Rev. 89, 134–37 (2014) [hereinafter Noah, *Governance by the Backdoor*].

11 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 797–800 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783.

12 *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion) ("The term 'narrowly tailored,' so frequently used in our [equal protection] cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used."). The concept appears in other fields as well. *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927 (2016); Alan O. Sykes, *The Least Restrictive Means*, 70 U. Chi. L. Rev. 403 (2003) (international trade agreements).

precision in crafting the scope of a restriction (in effect, barring overbreadth),[13] which agency officials surely could do as well as (if not better than) legislators,[14] but this prong has taken on aspects of its strict scrutiny cousin by also asking about entirely other ways of tackling a significant public concern.[15] Putting to one side questions about whether the nuances in these verbal formulations make any great difference in practice,[16] they share a preoccupation with identifying policy alternatives.[17]

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13 *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–67 (2001); *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997); Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989) (addressing parallel issues in equal protection).

14 *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128–31 (1989) (holding that the Commission's earlier rules to limit minors' access to dial-a-porn demonstrated that a later statutory amendment entirely banning such services failed the narrow tailoring prong); All. for Nat. Health US v. Sebelius, 714 F. Supp. 2d 48, 70–72 (D.D.C. 2010) (ordering the FDA to allow, with milder disclaimers, anticancer claims for dietary supplements containing selenium).

15 *See* McCullen v. Coakley, 134 S. Ct. 2518, 2537–40 (2014) (invalidating under intermediate scrutiny a statute that created a thirty-five-foot buffer zone around abortion clinics because the state failed to establish that less speech-restrictive alternatives would not serve its interests); Thompson v. W. States Med. Ctr., 535 U.S. 357, 388 (2002) (Breyer, J., dissenting) ("The Court . . . too readily assumes the existence of practical alternatives. It thereby applies the commercial speech doctrine too strictly."); Noah, *supra* note 2, at 35–65 (recounting this development in connection with the Supreme Court's expanding protection of commercial speech); *see also* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814–24 (2011) (suggesting that the least restrictive means test emerged in nineteenth century dormant Commerce Clause cases before spreading to other areas); *id.* at 803 (explaining the centrality of this inquiry in the proportionality analysis favored by courts in other countries); Roy G. Spece, Jr., *The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection*, 33 VILL. L. REV. 111, 145–51 (1988).

16 *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1297–337 (2007); *id.* at 1326 ("[T]he necessity or narrow tailoring prong of the strict scrutiny test has sparked little systematic investigation. . . . [T]he test contains significant, unresolved ambiguities of which the Court appears startlingly unaware."); Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 313–17 (2015); *see also* Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406 (2016) (focusing on variations in defining appropriate ends).

17 *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 253 (1997) (O'Connor, J., dissenting) (explaining that, even under intermediate scrutiny, "the availability of less intrusive approaches to a problem serves as a benchmark for assessing the reasonableness of the fit between Congress' articulated goals and the means chosen to pursue them"); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 524 (1996) (Thomas, J., concurring in judgment) (explaining that "directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product"); United States v. Robel, 389 U.S. 258, 267–68 (1967) (invalidating a ban on the employment of members of Communist organizations after suggesting various alternatives that Congress could have selected in order to

A. Least Restrictive Means What?

Commentators have raised various objections to this last—and often decisive—prong of the different forms of heightened scrutiny. For instance, the requirement gets attacked for disregarding the practical obstacles that may confront legislators. Thus, in a dissenting opinion, Justice Breyer cautioned that "the Constitution does not . . . require the Government to disprove the existence of magic solutions, *i.e.*, solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness . . . [and] are not constrained by the budgetary worries and other practical parameters within which Congress must operate."[18] Writing exactly one quarter of a century earlier, however, then-Professor Breyer had no great compunction about recommending just such "magic solutions" as alternatives to classical economic regulations.[19]

To be sure, courts occasionally express skepticism about far-fetched narrow tailoring.[20] Practicalities aside, courts also may find it

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guard against sabotage in national defense industries); *see also* Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL'Y 259, 265 (2001) ("At the core of the narrow tailoring inquiry—regardless of what level of scrutiny is chosen—the Court must envision alternatives to the challenged regulation and analyze whether those alternatives would constitute a lesser burden on speech." (footnote omitted)); *id.* at 261 (examining a fundamental issue "virtually ignored by the literature . . . , [i.e.,] what is the *range* of alternatives a court must survey when determining if a regulation is narrowly tailored?"); *id.* at 278 (urging "a more deliberate consideration of both speech and nonspeech alternatives within every narrow tailoring analysis"); Robert M. Bastress, Jr., Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1032–35 (1974); *id.* at 1038–39 (observing that First Amendment and dormant Commerce Clause cases more often involved alternatives that differed "in kind" rather than simply in degree from the challenged legislation).

18 Ashcroft v. ACLU, 542 U.S. 656, 688 (2004) (Breyer, J., dissenting); *see also id.* at 683–89 (objecting at length to the majority's suggestion that, instead of requiring age-verification screens to access obscene materials on the Internet, the government instead could have spent money to encourage the use of blocking or filtering software in order to safeguard children); United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011) ("In the abstract, such a thing can never be proven conclusively; the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics, is infinite."); W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 718 (1999) ("A prohibitively expensive approach to furthering the state's interests is not feasible, and, thus, fails to satisfy the least restrictive alternative test because it does not qualify as a genuine alternative at all."); *cf.* Spece, *supra* note 15, at 148 ("The monetary costs of alternatives have not been stressed in prior cases, although the Court has on occasion explicitly pointed out that alternatives would be required even though they entail additional expense.").

19 *See* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 578–603 (1979). In all fairness, he had not offered these various "less restrictive alternatives" in order to question the constitutionality of existing approaches to regulation.

20 *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 556 n.12 (1976) ("The defend-

quite difficult to forecast the comparative effectiveness of hypothesized alternatives.[21] As a consequence, the inquiry lacks predictability and may invite judges to conceal value-laden judgments.[22] Moreover, when they venture a guess along these lines and essentially legislate (inexpertly) from the bench, courts arguably usurp a function entrusted to a coordinate branch of government. Although the last objection seems to be less acute when reviewing agency action, Justice Breyer's concern about "magic solutions" remains entirely apt when courts confront government entities that enjoy far more truncated powers than does the legislature.

A pair of the Supreme Court's commercial speech decisions helps to illustrate but not answer the central problem. In 2002, the Court entertained a challenge to an advertising restriction imposed by Congress though lodged only against the implementing agencies; the majority invalidated the statutory provision after identifying a number of non-speech-restrictive options,[23] while the four dissenters quibbled

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ants argue at length that . . . the flow of illegal immigrants could be reduced by means other than checkpoint operations [by the U.S. Border Patrol]. As one alternative they suggest legislation prohibiting the knowing employment of illegal aliens. The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 219–23 (1997) (considering but rejecting several nonspeech alternatives to a statutory requirement that cable system operators carry local broadcasts).

21 *See* Spece, *supra* note 15, at 173 ("[S]tate ends might be sacrificed by erroneous findings that equally or more effective alternatives exist when they do not. And this possibility is heightened if the burden of proof regarding the non-existence of alternatives is placed on the state."); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 468–69, 472–74 (1969); *see also* Spece & Yokum, *supra* note 16, at 348 (conceding that courts "cannot determine precise equivalences in cost and effectiveness of the government's action as compared to alternatives"). For instance, the Supreme Court invalidated a state law requiring that charitable solicitors disclose what percentage of donations actually reach the charity because the state instead could have published the financial disclosure forms that it already collected. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (plurality opinion) (imagining a similar alternative to the Stolen Valor Act). Such alternative options hardly seem, however, to work nearly as well. *See id.* at 2559–60 (Alito, J., dissenting).

22 *See* R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 186–98 (1997); *id.* at 195 ("[C]ourts typically understate the normative elements and the sheer manipulability of the narrow tailoring inquiry."); *see also* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring) ("A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007) (illustrating the force of this objection with reference to Supreme Court decisions resolving equal protection challenges to affirmative action programs in higher education).

23 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 372–73 (2002). Several of the re-

with these suggested alternatives but failed to note that the named defendants enjoyed essentially no power to take such steps.[24] Three years earlier, the Court struck down a statutory prohibition against certain advertising by casinos after offering several less restrictive alternatives—a variety of measures related to the operation of such businesses—even though the Federal Communications Commission ("FCC"), which the petitioners had named alongside the "United States" as a defendant, plainly could have done none of these things.[25]

B. Paying Attention to Institutional Context?

In an oblique way, this Essay's central question has gotten a bit of attention recently. A few scholars have emphasized the importance of considering institutional context in constitutional review, though they focus primarily on the level of governmental actor—namely, federal, state, or local—rather than possible differences among types of actors within any one of those levels.[26] As it happens, a survey of more than

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strictions imagined by the Court explicitly borrowed from the FDA's older Compliance Policy Guide ("CPG"), but the majority evidently forgot that the agency only considered these factors (e.g., the use of commercial-scale equipment) as indicia that a pharmacy may have exceeded the bounds of permissible compounding exempt from new drug approval requirements. *See id.* at 362–63; *see also* Noah, *supra* note 2, at 54–65 (explaining that the Court badly misunderstood or intentionally mischaracterized the operation of the statute). The Court also failed to note that the FDA's CPG lacked the force of law. *See* Noah, *Governance by the Backdoor*, *supra* note 10, at 118–19. Thus, the named defendants—including the Secretary of Health and Human Services ("HHS") whose department houses the FDA—probably could not themselves have directly imposed these purportedly less restrictive options.

24 *See W. States*, 535 U.S. at 385–86 (Breyer, J., dissenting).

25 *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 192 (1999) (finding "practical and nonspeech-related forms of regulation—including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements—that could more directly and effectively alleviate some of the social costs of casino gambling"); *id.* at 196 (Rehnquist, C.J., concurring) (recognizing that such alternatives would require "Congress to undertake substantive regulation of the gambling industry"); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) (explaining, in a pre-enforcement challenge to a statute implemented by the FCC, that "if a less restrictive means is available for the Government to achieve its goals, the Government must use it").

26 *See, e.g.*, Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. Rev. 1681, 1693–96, 1699–701 (2007); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. Pa. L. Rev. 1513, 1516, 1636–37 (2005); *id.* at 1520 ("Sensitivity to what level of government is acting . . . is critical because the different levels of government are sufficiently dissimilar that a particular limitation as applied to one may have very different repercussions when applied to another."); *id.* at 1633–36 (discussing "horizontal" tailoring only insofar as constitutional review might tolerate some geographical nonuniformity to reflect varied local conditions); Adam Winkler, *Free Speech Federalism*, 108 Mich. L. Rev. 153, 155 (2009) ("[T]he level of government is a very good predictor of whether a speech restriction is likely to be upheld by the federal courts."); *cf. id.* at 184–87 (discussing the possibility of horizon-

450 strict scrutiny cases decided by the federal courts over a fourteen-year period found that federal agencies did not fare appreciably worse than Congress,[27] though it failed to isolate narrow tailoring as potentially erecting a particular hurdle for certain institutional actors.[28] In the First Amendment context, at least, the apparent equivalence in the treatment of the legislative and executive branches at the federal level seems mildly curious insofar as the constitutional text provides, among other things, that "*Congress* shall make no law . . . abridging the freedom of speech."[29]

After the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,[30] a few commentators focused on the majority's stringent application of narrow tailoring to federal requirements that health insurers fully reimburse for all FDA-approved prescription contraceptive products.[31] In the health care reform legislation, Congress had not

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tal distinctions within a given level of government, and noting that universities and prisons appear to get extra deference from courts, but warning that these and other "bureaucratic entities" may well deserve less leeway in constitutional review).

27 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 818 (2006) ("Laws adopted by Congress (49%) and federal administrative agency regulations (45%) survive nearly half the time."); *cf. id.* at 817 (In other respects, "it may be that courts are already silently attuned to institutional context when they apply a test such as strict scrutiny, even if the test itself is ostensibly blind to the identity of the governmental actor."); *id.* at 870 (concluding that "courts are acutely attuned to the identity of the governmental actor behind a law," but again focusing primarily on vertical rather than horizontal differences).

28 *See id.* at 870 ("[M]any more questions remain to be answered. Which prong of strict scrutiny is more deadly, the ends analysis or the fit requirement? . . . Is there a functional difference between a fit analysis that emphasizes over- and under-inclusiveness on the one hand and less restrictive alternatives on the other?").

29 U.S. CONST. amend. I (emphasis added). The Bill of Rights included no other amendments directed solely at Congress, but almost everyone assumes that the First Amendment covers the other branches as well. *See* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1243–47 (2015); David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 30–34 (2015).

30 134 S. Ct. 2751, 2759 (2014) (holding that the Religious Freedom Restoration Act entitled the owners of closely held corporations with religious objections to opt out of federally mandated health insurance coverage for contraceptive drugs and devices thought to interfere with the implantation of a fertilized egg).

31 *See* Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 140 (2015) ("[T]he Court concluded that there is a pie-in-the-sky least restrictive means for the government's compelling interest to be served, where least restrictive means apparently do not need to take into account economic or political feasibility of the lesser restrictive means. If the supposed lesser restrictive means is impossible to achieve, it should not be considered an alternative."); Talya Seidman, Note, *The Strictest Scrutiny: How the* Hobby Lobby *Court's Interpretation of the "Least Restrictive Means" Puts Federal Laws in Jeopardy*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 133 (2015). Most commentators, however, have focused their criticism on the central

specified what types of preventive care insurers would have to cover, leaving that task to the Health Resources and Services Administration ("HRSA"), an agency housed within the Department of Health and Human Services ("HHS").[32]

When challenged under the Religious Freedom Restoration Act ("RFRA"),[33] a bare majority of the Court concluded that the HHS regulations had failed to adopt the least restrictive means available: "The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[34] Although it did not explain how HHS would do this without a separate act of Congress,[35] the majority elsewhere cited a *statutory* provision that had created a federal program of providing vaccines to certain children with inadequate health insurance coverage.[36] In the end, however, the Court decided that it need not rely on this least restrictive means insofar as the agency had already crafted an opt-out mech-

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premise of the Court's opinion—namely, the recognition that for-profit corporations enjoy free exercise rights. *See, e.g.*, Carol Goforth, *A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to* Burwell v. Hobby Lobby, 67 S.C. L. REV. 73 (2015); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727 (2015).

32 *See Hobby Lobby*, 134 S. Ct. at 2762; *cf. id.* at 2763 n.6 ("The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments."). In issuing the rules, however, HHS had identified a different unit, the Centers for Medicare & Medicaid Services ("CMS"), as responsible for their implementation. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013).

33 42 U.S.C. §§ 2000bb to bb-4 (2012). Although the respondents' objections arose under this statute rather than the First Amendment, Congress had enacted RFRA in order to resurrect what it understood as the Supreme Court's older approach to free exercise objections. *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995) ("RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.").

34 *Hobby Lobby*, 134 S. Ct. at 2780 (adding that "HHS has not shown that this is not a viable alternative" (citation omitted)); *see also id.* at 2781 (imagining that "the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor").

35 *See id.* at 2781 ("HHS contends that RFRA does not permit us to take this option into account because 'RFRA cannot be used to require creation of entirely new programs.'" (quoting HHS brief)).

36 *See id.* at 2783 n.42 (citing 42 U.S.C. § 1396s).

anism, though one reserved for a far more limited class of employers.[37]

Justice Kennedy, in providing the essential fifth vote, offered a short concurring opinion that seemed troubled by the public funding alternative discussed but not relied upon by the lead opinion, preferring instead to extend the accommodation mechanism already provided in the regulations.[38] In this connection, Kennedy cited the brief for one of the respondents,[39] which had argued as follows:

> [Under RFRA,] *the government* (which surely includes Congress) has the burden of demonstrating that no less restrictive means could achieve its allegedly compelling interest. If Congress had wanted to accommodate religious exercise only where there was no budget-neutral least restrictive alternative or no least restrictive alternative available within the existing corpus of federal programs, presumably it would have said so.
>
> The most obvious less-restrictive alternative is for the government to pay for its favored contraceptive methods itself. See, *e.g.*, 42 C.F.R. § 59.5(a)(1)) [sic] (authorizing grants to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services" through Title X of the Public Health Service Act).[40]

The cited rule relates to a program implemented by the Public Health Service ("PHS"), a different unit of HHS. Moreover, as the four dissenters explained, Title X represented a safety net program not intended to assist persons already covered by health insurance.[41]

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37 *See id.* at 2781–82 ("[W]e need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test.").

38 *See id.* at 2786–87 (Kennedy, J., concurring); *see also* Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 815–20, 820 n.231 (2015); *id.* at 782 ("Although there is some language in the majority opinion that can be read broadly, ultimately the opinion—especially Justice Kennedy's concurrence—is a limited, fact-specific accommodation, whose extension beyond the contraceptive mandate is questionable.").

39 *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

40 Brief for Respondents at 57–58, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 546899 (second alteration in original) (footnote omitted).

41 *See Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting); *see also* Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 157–58, 161–63 (2015); *id.* at 161 ("Funding for direct government coverage of contraceptives or a substantially larger exchange-tax credit is not politically viable, and it is disingenuous to suggest otherwise. Religious and political conservatives have been trying to defund federal contraception-coverage programs since the Reagan administration . . . ."); *id.* at 162 ("The political realities blocking government funding of contraception serve as stark reminders that[,] whatever lawyers or judges might conjure up as hypothetical alternatives, in the real world . . . an increase in Title X funding or the

Thus, only four members of the *Hobby Lobby* Court evidently thought that the HHS rules might founder insofar as Congress could have provided for public funding to reimburse contraceptive use in the event of religious objections by employers, and ultimately they rested their narrow tailoring analysis on a more readily available alternative. This Essay tackles the question left unresolved in *Hobby Lobby* (and unremarked upon in some of the Court's earlier decisions[42]), asking whether an agency's assertion that it lacked the power to adopt a suggested less restrictive means should serve to defeat a constitutional objection.

II. Narrow Tailoring Confronts Constrained Agency Choices

At one time, the Supreme Court embraced the notion that the "greater" power—to, for instance, prohibit an activity altogether—included the "lesser" power—to, for instance, restrict the advertising of such an activity.[43] A decade later, it expressly disavowed any further adherence to this beguiling but simplistic approach to First Amendment (and other) challenges.[44] As suggested at the outset,[45] the question presented here stands this notion on its head—namely, does the *absence* of the greater power more readily excuse an agency's resort to the constitutionally problematic lesser power? Whatever its superficial appeal, allowing governmental entities to interpose a plea of impossibility in response to hypothesized less restrictive means would invite potential mischief.

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creation of any other such program to fill the gap caused by RFRA exemptions is politically dead on arrival in Congress."); *cf.* Juliet Eilperin, *Trump Picks Antiabortion Activist to Head HHS Family Planning Section*, Wash. Post, May 4, 2017, at A7 (reporting that Teresa Manning would take charge of the Title X program, adding that she, "a former lobbyist with the National Right to Life Committee and legislative analyst for the conservative Family Research Council, has criticized several family planning methods over the course of her career").

42 *See supra* notes 23–25 and accompanying text.

43 *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–47 (1986).

44 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996) (plurality opinion); *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999). *See generally* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 Vand. L. Rev. 693 (2002); William W. Van Alstyne, *To What Extent Does the Power of Government to Determine the Boundaries and Conditions of Lawful Commerce Permit Government to Declare Who May Advertise and Who May Not?*, 51 Emory L.J. 1513 (2002).

45 *See supra* note 2 and accompanying text; *cf.* Noah, *supra* note 2, at 79 ("The FDA then explained that it had narrowly tailored its guidance [on continuing medical education ("CME")] because it applied only to industry-supported programs that involve discussions of company products (not surprising insofar as it lacked jurisdiction to reach beyond that point) and in no way limits what independent scientists and organizations may say . . . .").

A. Making the Case for Disregarding Ultra Vires Options

Under the rulemaking provisions of the Administrative Procedure Act ("APA"),[46] agencies must respond to public comments that urged selecting some other regulatory option.[47] Courts have, however, recognized that an agency may ignore as immaterial comments proposing alternatives that it had no power to implement.[48] Indeed, the FDA made precisely that point in the course of responding to suggestions that it increase the price of cigarettes rather than restrict their advertising.[49]

Collateral statutes or executive orders also sometimes obligate agencies to consider regulatory alternatives.[50] For instance, the National Environmental Policy Act ("NEPA")[51] requires attention to al-

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46 5 U.S.C. § 553(c) (2012).

47 *See, e.g.*, La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080–81 (D.C. Cir. 2003); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169–70 (D.C. Cir. 1987); Indep. U.S. Tanker Owners Comm. v. Dole, 809 F.2d 847, 852–54 (D.C. Cir. 1987); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977).

48 *See, e.g.*, Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 340 (D.C. Cir. 1968) (crediting an agency's response that it "did not have the authority under the Act to require purchasers of vehicles to install equipment"); *see also* Ron Peterson Firearms, LLC v. Jones, 760 F.3d 1147, 1163 (10th Cir. 2014) ("Agencies are not required to 'consider every alternative proposed nor respond to every comment made. Rather, an agency must consider only "significant and viable" and "obvious" alternatives.'" (quoting 10 Ring Precision, Inc. v. Jones, 722 F.3d 711, 724 (5th Cir. 2013))); *cf.* Del. Dep't Nat. Res. & Envtl. Control v. EPA, 785 F.3d 1, 15–16 (D.C. Cir. 2015) ("EPA seeks to excuse its inadequate responses [to public comments concerned about the proposed rule's impact on the reliability of the power grid] by passing the entire issue off onto a different agency. Administrative law does not permit such a dodge.").

49 *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,453 (Aug. 28, 1996) ("The agency cannot act on these comments as it lacks the authority to levy taxes or mandate prices."). This passage did not, however, come from the agency's extended defense of the rules' constitutionality. *See id.* at 44,469–538. The FDA offered a detailed explanation of how it had "narrowly drawn" each provision, *see id.* at 44,496–536, but it did not reiterate the point about lacking the power to increase prices, *cf. id.* at 44,498–500 (alluding to this question in the course of explaining that better enforcement by other agencies of existing age restrictions would not serve its purposes as well). For more on the flaws in the agency's curious assertion of jurisdiction, see Noah, *supra* note 5, at 679–87. In the end, the Supreme Court invalidated the rules on statutory grounds. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

50 *See, e.g.*, 5 U.S.C. § 604 (2012) (regulatory flexibility analysis ("RFA")); Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (providing that an agency must, inter alia, "(2) tailor its regulations to impose the least burden on society . . . ; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits . . . ; and (5) identify and assess available alternatives to direct regulation"); *see also* Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA, 415 F.3d 1078, 1100–02 (9th Cir. 2005) (finding no basis for objections to the RFA prepared for a rule allowing limited importation of cattle from Canada because the agency had considered and rejected the suggested alternatives of country-of-origin labeling or voluntary testing).

51 42 U.S.C. §§ 4321–4370m-12 (2012 & Supp. III 2015).

ternative courses of action when preparing an environmental impact statement ("EIS").[52] Some of the early NEPA caselaw provided that an agency must consider reasonable alternatives even if they fall outside of its jurisdiction,[53] which the Council on Environmental Quality ("CEQ") codified when promulgating regulations to implement the statute.[54] It remains somewhat unclear, however, whether this seemingly peculiar requirement survived the Supreme Court's admonition in 1978 that "the concept of alternatives must be bounded by some notion of feasibility."[55]

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52 *See id.* § 4332(C)(iii), (E). NEPA only required that agencies identify and consider alternatives; the statute imposed no substantive obligation to select an option likely to pose less of a threat to the environment.

53 *See* Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 492 F.2d 1123, 1135 (5th Cir. 1974); Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 834–35 (D.C. Cir. 1972); *see also* Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972) ("The Corps also argues that it was not necessary to discuss in greater detail the alternative of acquiring land to mitigate the loss of natural resources because this alternative was a separate project requiring separate Congressional authorization. We disagree."); Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 814 (1989) ("NEPA's alternatives requirement got off to a strong start . . . [and] was not limited even by the agency's legislative authority to implement an alternative, a proposition that has drawn its share of criticism.").

54 *See* National Environmental Policy Act—Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55,978, 55,996 (Nov. 29, 1978) (codified at 40 C.F.R. § 1502.14(c) (2016)) (calling on agencies to "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); *see also id.* at 55,983–84 ("A few commenters inquired into the basis for these provisions. Subsections (c) and (d) are declaratory of existing law."). The agency elaborated on this clause a few years later as follows: "An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable . . . because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

55 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978); *see also id.* ("Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man."); *id.* at 552–53 ("[T]he concept of 'alternatives' is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood."); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1074 (1st Cir. 1980) ("Courts cannot force agencies to include within an EIS alternatives too fanciful or hypothetical."); Jason J. Czarnezki, Comment, *Defining the Project Purpose Under NEPA: Promoting Consideration of Viable EIS Alternatives*, 70 U. CHI. L. REV. 599, 602–04 (2003) (recognizing this tension in the caselaw). Nonetheless, the relevant clause in the CEQ's regulation remains unchanged. *Compare* WildEarth Guardians v. Nat'l Park Serv., 703 F.3d 1178, 1184–85 (10th Cir. 2013) (referencing this rule and attempting to reconcile these seemingly conflicting positions), *and* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 814 (9th Cir. 1999) (same), *with* Jackson Cty. v. FERC, 589 F.3d 1284, 1291–92 (D.C. Cir. 2009) (rejecting the notion that agencies would have to consider alternatives beyond their jurisdiction).

Although these principles have emerged from judicial review of rules challenged on procedural rather than substantive grounds,[56] the same logic should apply where such public comments (or later the arguments of litigants) question the constitutionality of an agency's rule for failing to adopt less restrictive means.[57] True, agencies could ask that the legislature grant them the desired additional authority, and on occasion they manage to do so,[58] but it would be equally (im)plausible to note that a legislative body missing a particular power could secure it by initiating the process for a constitutional amendment.[59]

B. Why Even Hypothetical Alternatives Should Count

It may seem entirely sensible to conclude that impossible options should not count against agency action challenged on constitutional grounds. If that limitation applied to the narrow tailoring prong of heightened scrutiny, however, then one might worry about some undesirable responses. Declining to consider ultra vires options as less

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56 An agency's failure to consider an alternative course of action could render its decision arbitrary and capricious, amounting to a substantive failure, though still procedurally curable on remand by providing some additional explanation. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) ("Nor do we broadly require an agency to consider all policy alternatives in reaching decision. . . . But the airbag is more than a policy alternative to the passive restraint Standard; it is a technological alternative within the ambit of the existing Standard.").

57 *See, e.g.*, Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2396 (Jan. 6, 1993) (emphasizing that Congress had forced the agency to issue nutrient content claim regulations rather than adjudicate individual cases under its existing misbranding authority: "indeed, FDA had no choice but to do so, given the congressional mandate"); Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2527–28 (Jan. 6, 1993) (arguing in defense of its rule barring the use of approved health claims on foods containing disqualifying levels of some other nutrient that Congress had allowed disclaimers as an alternative only under limited circumstances); *see also id.* at 2528 (pointing out that the "FDA does not have the [statutory] authority to permit preliminary health claims").

58 *See* Noah, *Governance by the Backdoor*, *supra* note 10, at 134 n.203 ("This seems like a recurring pattern over the last few decades: the FDA tries something that arguably exceeds the bounds of its delegated authority, and Congress later endorses the effort by granting the agency explicit authority that it previously lacked . . . .").

59 For instance, with the repeal of Prohibition, Congress ceded some of its erstwhile legislative authority to the states. *See* U.S. CONST. amend. XXI, § 2; *see also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712–16 (1984). If the federal legislature, exercising its retained powers in that area, acted in a way that allegedly infringed on the rights of persons selling alcoholic beverages, then it would seem odd for a court to point to Congress's failure to consider less restrictive means (e.g., minimum age requirements for purchasers) that only state legislatures could have adopted. *Cf.* Rubin v. Coors Brewing Co., 514 U.S. 476, 490–91 (1995) (suggesting in dicta that, instead of prohibiting the disclosure of alcohol content in the labeling of beers, the federal government could have capped the amount).

restrictive means might complicate the resolution of constitutional litigation against governmental actors, and such a rule also might create distorted incentives when principals decide how to delegate regulatory authority in the first place.

At the very least, courts would have to resolve collateral questions about the purported impossibility of a hypothesized alternative.[60] Even if relatively straightforward at times, congressional delegations of authority routinely suffer from ambiguities, and pleas of impossibility might arise in circumstances where an agency could not count on getting strong deference to its interpretation of the enabling statute. Although courts may defer to an agency's judgment that Congress had not delegated any power to adopt an alternative offered in public comments on a proposed rule,[61] judges might well hesitate to do so when such a construction emerged during subsequent litigation attacking a regulation on constitutional or other grounds.[62] Moreover,

60 *Cf.* Berger v. City of Seattle, 569 F.3d 1029, 1062 (9th Cir. 2009) (Kozinski, C.J., dissenting) ("Fortunately for my colleagues, *their* proposed solutions don't need to pass constitutional muster; they can just toss them out as supposedly superior alternatives. But if the city were gullible enough to follow these suggestions, my colleagues would find reasons to strike down the new rules in the next round of litigation."); Note, *supra* note 21, at 471 ("[W]here the alternative is very dissimilar, the Court may also have to decide the constitutionality of the alternative means.").

61 *See, e.g.*, Coal. of Battery Recyclers Ass'n v. EPA, 604 F.3d 613, 625 (D.C. Cir. 2010) ("Even assuming the Clean Air Act was ambiguous with regard to whether EPA was empowered to grant other waivers, EPA's interpretation of its authority under the statutory scheme is permissible under *Chevron* step two and entitled to deference by the court." (citation omitted)). I do not believe that agencies should ever receive strong judicial deference in connection with "jurisdictional" questions, at least not when they attempt to expand the scope of their operations. *See* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1516–30 (2000); *id.* at 1521 ("[T]he Court extended *Chevron* deference to agency interpretations narrowing the reach of their jurisdiction. Such an asymmetry in approach would make sense if the Supreme Court was more concerned about the undue expansion as opposed to contraction of agency powers." (footnote omitted)); *see also* Lars Noah, *Managing Biotechnology's [R]evolution: Has Guarded Enthusiasm Become Benign Neglect?*, 11 VA. J.L. & TECH. 4, ¶ 63 & n.236 (2006) (applauding the FDA's "exercise of healthy institutional restraint by declining uncertain jurisdiction" over a genetically modified pet fish).

62 *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); Nat. Res. Def. Council, Inc. v. FDA, 760 F.3d 151, 163, 166 (2d Cir. 2014); *see also* United States v. Mead Corp., 533 U.S. 218, 234 (2001) (explaining that *Chevron* deference may require procedural formality). Furthermore, even if announced in a procedurally acceptable format, an agency's claim of powerlessness technically would not have resulted from the exercise of the purportedly undelegated authority. *See id.* at 226–27 ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *cf.* U.S. Dep't of Commerce v. FERC, 36 F.3d 893, 897 (9th Cir. 1994)

just because an agency technically cannot take a particular action hardly renders it powerless in practical terms: agencies routinely manage to secure extrastatutory concessions from regulated entities.[63] For instance, and notwithstanding its lack of formal authority to control the prices of pharmaceutical products, the FDA occasionally has used threats in order to influence pricing decisions.[64]

This also poses an entirely practical question: when challenging the constitutionality of agency action, which parties are properly joined in such litigation? Simply naming the federal government (or a particular state or municipality) would fail to particularize exactly whose choices a citizen has decided to assail in court. When a litigant challenges federal legislation on constitutional grounds, the Department of Justice ("DOJ") normally represents the government,[65] either on behalf of the "United States," particularly when prosecuting a case,[66] or in the name of the Attorney General (or the implementing

(Trott, J., dissenting) (objecting to the majority's failure to defer to the agency's view that it lacked jurisdiction to require licensing for a small dam of a creek on private land).

63 *See* Noah, *Governance by the Backdoor*, *supra* note 10, at 123–36. The FDA is hardly alone in this respect. *See, e.g.*, Lars Noah, *Challenges in the Federal Regulation of Pain Management Technologies*, 31 J.L. MED. & ETHICS 55, 63 (2003) (noting an illustration from the Drug Enforcement Administration); Lars Noah, *Coerced Participation in Clinical Trials: Conscripting Human Research Subjects*, 62 ADMIN. L. REV. 329, 331–35, 331 n.7, 342–66 (2010) (criticizing CMS for using its leverage to persuade beneficiaries to "volunteer" for medical research); *see also* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 876–98 (documenting this behavior at almost a dozen federal agencies); *id.* at 899–908 (adding state and local actors).

64 *See* Noah, *Governance by the Backdoor*, *supra* note 10, at 129 & n.177. Similarly, Congress has sidestepped its diminished direct authority over alcoholic beverage sales, *see supra* note 59, by using its power under the Spending Clause to condition grants to the states on taking desired initiatives. *See* South Dakota v. Dole, 483 U.S. 203, 206–12 (1987) (holding that Congress could indirectly regulate the drinking age by conditioning state highway funding even if it could not directly impose a mandatory minimum age); *see also* Ashcroft v. ACLU, 542 U.S. 656, 669 (2004) (rejecting "the argument that filtering software is not an available alternative because Congress may not require it to be used"); *cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–85 (2012) (plurality opinion) (narrowing the scope of the Spending Clause); *id.* at 689 (Scalia, J., dissenting) (counting seven votes for invalidating the Affordable Care Act's expansion of Medicaid as exceeding this power of Congress).

65 *See* 28 U.S.C. § 516 (2012) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see also* FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994) (recognizing that "an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office"); Case, Inc. v. United States, 88 F.3d 1004, 1011 (Fed. Cir. 1996) ("[T]he statutory scheme grant[s] the Department of Justice exclusive and plenary power to supervise and conduct all litigation to which the United States is a party . . . .").

66 *See* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1329

agency), particularly when defending against a pre-enforcement challenge.[67] In rare cases the DOJ has declined to defend a statute,[68] which might allow Congress to participate in litigation questioning the constitutionality of its handiwork.[69]

In the case of federal legislation that delegated power to regulatory officials, pre-enforcement constitutional challenges to implementing rules and the like typically would get lodged against that particular agency or its leader, even though the DOJ would handle the defense absent independent litigation authority granted to the named agency.[70] In the case of federal legislation or regulations governing

(2014) ("To enforce any law in federal court, the executive must be prepared to defend that law against constitutional challenge. . . . Other cases commence as suits for a declaratory judgment to avert the future enforcement of federal law."); *see also id.* at 1326–27 ("[T]he executive has standing to assert the interests of the federal government, not the executive.").

67 *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (rejecting facial challenge to a federal statute banning "partial-birth" abortion); Ashcroft v. ACLU, 542 U.S. 656, 665–73 (2004) (affirming preliminary injunction against enforcement of provision in a federal statute that required an age-verification step in order to access obscene Internet material); Reno v. ACLU, 521 U.S. 844, 874–82 (1997) (invalidating provisions designed to protect minors from sexually explicit material on the Internet); United States v. Edge Broad. Co., 509 U.S. 418, 429–36 (1993) (rejecting as-applied commercial speech challenge to a federal statute implemented by the FCC that restricted lottery advertising); *see also* Theodore C. Hirt, *Current Issues Involving the Defense of Congressional and Administrative Agency Programs*, 52 ADMIN. L. REV. 1377, 1391 (2000) ("One of the paramount responsibilities of the [DOJ's] Federal Programs Branch is defending the constitutionality of Acts of Congress. In most situations, a civil suit that presents such a challenge is filed against the agency that administers the challenged statute or, if there is no such agency, against the United States *eo nomine*."). *See generally* Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563 (2009); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011).

68 *See* Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1 (reporting that "it is rare for an administration not to defend the constitutionality of a statute"). *See generally* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

69 *See* 2 U.S.C. §§ 288e(a), 288h(7) (2012) (purporting to authorize such action by the Senate Counsel); *see also* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 608–32 (2014) (discussing the limited role of the office of counsel for the House and the Senate, and arguing that Congress lacks standing to defend federal statutes apart from possible amicus participation).

70 *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 735–36 (1996) (plurality opinion); *see also* Noah, *Governance by the Backdoor*, *supra* note 10, at 122–23 & n.149 (discussing the DOJ's coordinating role). In one unusual case that eventually reached the Supreme Court, *see* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), a beer manufacturer petitioned the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms ("BATF," subsequently renamed the Alcohol and Tobacco Tax and Trade Bureau) to authorize labeling barred by an old statute (as well as implementing regulations that did little more than track the statutory prohibition). *See id.* at 478. After the Bureau denied the petition, the company lodged a First Amendment challenge against the Secretary of Treasury and the Director of BATF, but,

block grants administered by state or local agencies, pre-enforcement challenges might get lodged against those nonfederal actors even if the former had precisely dictated the terms—such as eligibility requirements imposed on beneficiaries—that the state or local agencies applied.[71] In such cases, however, the federal agencies (doing the bidding of Congress) or the state agencies (doing the bidding of their federal overseers) will respond that they had little choice in the matter, forcing courts to decide whether the institutions delegating authority downstream can thereby dodge responsibility.

If impossibility served as a defense to the constitutional tailoring inquiry, then litigants might engage in strategic behavior: private challengers would want to aim for the highest plausible level within the executive branch, while the DOJ may seek the dismissal of all but departmental subunits as nominal parties. For that reason, it might make more sense to focus on the executive branch as a whole in these sorts of cases,[72] but even initiatives that originate centrally in the administration ultimately must emerge from a smaller organizational unit. Cabinet-level departments frequently get named alongside particular agencies that they house,[73] while one would rarely see specific centers or regional offices within these departmental subunits called

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because the DOJ (and, by extension, the executive branch agencies) initially opted against defending the constitutionality of the agency's action under these laws, the lower courts allowed the U.S. House of Representatives to do so as an intervenor. *See* Adolph Coors Co. v. Brady, 944 F.2d 1543, 1545–46 (10th Cir. 1991).

71 *See, e.g.*, 45 C.F.R. § 205.52 (2016) (mandating that state public assistance plans require applicants to supply the state or local agency with their social security numbers); *see also* Bowen v. Roy, 476 U.S. 693, 708–12 (1986) (plurality opinion) (rejecting a free exercise challenge lodged against federal and state officials in such a case); *cf.* Paulsen, *supra* note 33, at 280–82 (suggesting that RFRA might have altered the outcome in *Bowen v. Roy*).

72 *Cf.* Monarch Chem. Works, Inc. v. Exon, 466 F. Supp. 639, 651 (D. Neb. 1979) ("Courts that have required a consideration [under NEPA] of alternatives by an agency that has no power to put these alternatives into effect usually contemplate the involvement of other federal agencies."). Perhaps one would not require such a broader view when judging the actions of genuinely independent agencies. *Cf.* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 6–8 (D.C. Cir. 2016) (holding that Congress could not establish an agency headed by a single individual unless removable by the President, which means that independent agencies must use a multimember commission or board structure), *vacated reh'g granted*, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017) (en banc). *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015).

73 *Cf.* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1261 (2006) ("When a litigant sues the Secretary of Health and Human Services, or Congress summons the Commissioner of the Food and Drug Administration to a hearing, both assume that these high-level officials have effective control over the bureaucracies that they manage.").

to task.[74] In addition to recognizing some of the perhaps manipulable though manageable practical problems, this discussion seeks to highlight the conceptual difficulty: as one descends the hierarchies of the bureaucracy, the range of powers exercised at any particular level becomes more constrained.

Perhaps more seriously, if pleas of impossibility work against narrow tailoring inquiries, then legislative bodies (whether federal, state, or local) might prefer creating limited-purpose agencies with few powers other than those vulnerable to constitutional attack and dictating that they employ these powers in pursuit of some noble purpose.[75] At the very least, the prospect of better insulating actions from constitutional attack would give legislators still another reason to delegate such difficult choices rather than tackle them directly by choosing among their fuller range of available regulatory options. To a lesser extent, and all other things being equal, leaders of the executive branch might prefer for initiatives to emerge from agencies that enjoy a relatively more limited range of powers. In order to guard against such sleights of hand, why not ask whether another unit of the executive branch could have used a less restrictive means to get at the same problem?

Imagine that Congress wants to put an end to all mass media advertising of tobacco products. Instead of directly doing so itself, however, or delegating the task to an existing agency with a broad range of powers (including control of product design, labeling, distribution,

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74 Nonetheless, the APA's relevant definition has an infinite regress quality to it. *See* 5 U.S.C. § 551(1) (2012) (providing that "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency"); *see also* Raising the Level of Rulemaking Authority of the Food and Drug Administration in Matters Involving Significant Public Policy, 46 Fed. Reg. 26,052 (May 11, 1981) (announcing that HHS would no longer exempt all FDA rulemaking initiatives from the Department's centralized review process). *See generally* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–40, 1059–60, 1073 (2011); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015). Although unlikely in the case of rulemaking, subdelegations of authority from the head(s) of an agency may empower subunits to take final action on license applications and the like that might trigger constitutional objections.

75 An agency with limited tools may then, however, encounter more serious difficulties under the purpose prong. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976) ("[I]f the Congress or the President had expressly imposed the citizenship requirement [for federal employment], it would be justified by the national interest . . . ; but we are not willing to presume that the Chairman of the Civil Service Commission . . . was deliberately fostering an interest so far removed from his normal responsibilities."); *id.* at 115 ("[T]he interests which the [agency] petitioners have put forth as supporting the Commission regulation . . . are not matters which are properly the business of the Commission."). *See generally* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 33–35 (2009) (discussing efforts to subdivide multipurpose agencies).

marketing, and pricing), it decides to create a brand-new entity with this as its sole purpose: the Bureau of Advertising for Injurious Tobacco ("BAIT"). Under the legislation, BAIT must issue regulations within two years that ban all forms of promotion in the media for cigarettes, and it also may extend this prohibition to other tobacco products as it sees fit. Taking the hint, the Bureau dutifully promulgates rules banning advertising for all types of tobacco products.[76] Even if the industry could lodge a First Amendment objection to the cigarette ad ban as emanating from Congress, the application of the rules to other forms of tobacco more clearly represent a choice left open by the legislature and made by BAIT, though the Bureau had no range of choices once it decided to reach beyond cigarettes.[77] Should not both decisions encounter equivalent constitutional difficulties insofar as Congress had plenty of other ways to address its substantial interests in discouraging tobacco product use?

Conclusion

Insofar as heightened scrutiny of agency action appears at times to demand the impossible, the standard is undoubtedly harsh but not necessarily incoherent. Perhaps narrow tailoring is best understood as a thought exercise about ideal policy design, largely divorced from practical reality (much like academia itself). At the very least, it may serve to shunt difficult choices that threaten constitutional rights into more appropriate decisionmaking fora such as legislative bodies.[78] For

76 Along similar lines, disclosure requirements might serve the purposes of a flat prohibition equally well. *See* Noah, *supra* note 2, at 67 & n.153. Even so, it might become important to differentiate between advertising and labeling insofar as a particular agency lacked authority over both. For instance, a jurisdictional split impacts food and nonprescription drugs: the FDA regulates labeling while the Federal Trade Commission ("FTC") regulates advertising. *See* Anne V. Maher & Lesley Fair, *The FTC's Regulation of Advertising*, 65 Food & Drug L.J. 589, 591, 602 (2010). If the FTC issued a rule entirely forbidding a certain type of advertising for such products, then it plainly would have had the less restrictive option of requiring a disclaimer in such advertising, but it could not have demanded a comparable disclosure statement in the labeling of any products so advertised.

77 Similarly (and somewhat less dramatically), courts occasionally suggest individualized screening of ads as less restrictive than across-the-board prohibitions, *see* Noah, *supra* note 1, at 145, but a legislature could sidestep this alternative by granting an agency solely rulemaking authority and no mechanism for engaging in an adjudicatory capacity (or legislate the prohibition directly and then, when confronted with the argument that case-by-case review offers a less restrictive alternative, respond that legislatures enjoy almost no power to engage in such an adjudicatory fashion, though plainly they could have delegated such a task to the executive or judicial branch).

78 *Cf.* Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 Cornell L. Rev. 901, 920–25 (2008) (commenting on the FDA's generally cavalier attitude to such issues); Matthew C. Stephenson, *The Price of Public Action:*

critics of commercial free speech or other sorts of constitutional rights invoked by regulated entities, however, this would simply ensure that nothing will ever get done.[79] In that event, it might make sense to limit this unforgiving narrow tailoring approach to strict scrutiny cases,[80] so that courts would return to demanding only a reasonable fit under intermediate scrutiny.[81] Putting that larger debate aside, my intuition about the more limited question may have been on the right track after all, even if the answer required a good deal more explanation than I had thought to offer all of those years ago.

Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs, 118 YALE L.J. 2, 34–36 (2008); *id.* at 36 n.71 ("[B]y raising the costs to legislators, narrow tailoring rules may implement a screening mechanism independent of any other effects on legislative reflection or consideration.").

79 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 389 (2002) (Breyer, J., dissenting) ("[A]n overly rigid 'commercial speech' doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections."); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (plurality opinion) (cautioning against "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems"); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (complaining that the more protective commercial speech doctrine represents a triumph for deregulation); *see also* Noah, *supra* note 2, at 60 n.131 ("The majority's unforgiving application of the nexus requirement [in *Western States*] approaches the least restrictive means test normally reserved for strict scrutiny cases and demands a probably unattainable level of legislative precision."); *supra* notes 31, 41 (noting similar criticisms of the Court's expansive interpretation of RFRA).

80 *See* NAACP v. Button, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); *see also* Spece & Yokum, *supra* note 16, at 348 ("We embrace an interpretation that requires use of alternatives—even if the alternatives are somewhat less effective or more expensive—because it incorporates the balancing that should take place to give appropriate weight and respect to the individual rights at stake."); *id.* at 310 ("We prefer the former articulation because it robustly protects individual rights . . . . It places the risk of error and the burden of not being able to make precise calculations on the government, not individuals."); *cf.* Spece, *supra* note 15, at 149–50, 167–74 (advocating use of a least restrictive means test as the sole form of intermediate scrutiny, but making it milder than the version used as a part of strict scrutiny insofar as less effective or costlier options would not count).

81 *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476–77 (1989) (explaining that the fourth prong "requires something short of a least-restrictive-means standard"); *id.* at 480 ("[W]e have not gone so far as to impose upon [regulators] the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is . . . a fit that is not necessarily perfect, but reasonable . . . .").