Some judges, legislators, and scholars are calling for an end to the Chevron doctrine. The real "problem" with Chevron, however, is not the standard of review but unhappiness with the natural consequences of congressional reliance on agencies to resolve major policy issues. So long as Congress extends substantial policymaking discretion to administrative agencies, some variation of Chevron deference is inevitable.
From Deference to Constitutional Scrutiny: The Continuum of Judicial Review in the Realm of Administrative Law

• Speaker 3: Professor Lars Noah
  • *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*
  • Although the least restrictive means prong of heightened constitutional scrutiny may pose special difficulties when resolving challenges brought against governmental entities that enjoy more truncated powers than does the legislature, courts should not invariably excuse agency failures to consider ultra vires options.

• Q&A led by Professor Jonathan Siegel
CHEVRON’S INEVITABILITY

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For over thirty years, Chevron deference has been the target of criticism. Now, some judges and legislators are calling for an end to Chevron, and legal scholars are heralding the doctrine’s retreat. We agree that Chevron may be evolving, as it often does. But we disagree that Chevron is in decline or can be overturned in any meaningful sense. Rather, we argue that Chevron-style deference is inevitable in the modern administrative state. The real “problem”—to the extent one sees it as such—is not Chevron but rather unhappiness with the natural consequences of congressional reliance on agencies to resolve major policy issues.

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INTRODUCTION

Is the mighty Chevron deference on the wane? Maybe. Several legal scholars seem to think so.¹ But what does that mean, what would that look like, and what—really—would that accomplish?

The Chevron standard of judicial review, with its two-part test mandating judicial deference to permissible agency interpretations of ambiguous statutes derived from the Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, ² has dominated discussions of American administrative law for a generation and continues to do so.³ *Chevron* has been dissected, debated, and applied more than any other canonical administrative law case:⁴ more than *State Farm*⁵ or *Vermont Yankee*⁶; more than *Goldberg v. Kelly*⁷ or *Mathews v. Eldridge*;⁸ more even than all of *Overton Park*,⁹ *Abbott Labs*,¹⁰ *Chenery I*,¹¹ and *Chenery II¹² taken together.¹³ Only *Lujan v. Defenders of Wildlife* even comes close.¹⁴

² *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Speaking loosely, the *Chevron* standard requires a reviewing court to consider whether the meaning of the statute at issue is clear, and if it is not, then to defer to the administering agency’s permissible or reasonable interpretation thereof. *Id.* For a substantially lengthier examination of the *Chevron* Court’s description of this two-step mode, see *infra* Part II.A.
³ Richard J. Pierce, Jr., 1 ADMINISTRATIVE LAW TREATISE 140 (5th ed. 2010) (describing *Chevron* as “one of the most important decisions in the history of administrative law”).
⁴ According to Westlaw, *Chevron* has been has been cited more than 79,000 times, including roughly 14,600 cases and 10,700 law review articles.
⁶ *Vermont Yankee Nuclear Power Corp. v. Nuclear Regulatory Comm’n*, 435 U.S. 519 (1978) (holding that courts may not impose procedural requirements beyond those required by statute, by agency rule, or by the Constitution). According to Westlaw, *Vermont Yankee* has been cited just shy of 12,000 times, including roughly 1700 cases and 1600 law review articles.
⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare benefits are a protected interest under the Due Process Clause and laying the foundation for modern due process analysis). According to Westlaw, *Goldberg* has been cited approximately 10,400 times, including roughly 5100 cases and 2781 law review articles.
⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing the modern three-part standard for evaluating whether the Due Process Clause requires agencies to follow additional procedures before depriving parties of protected interests). According to Westlaw, *Mathews* has been cited roughly 23,500 times, including approximately 13,200 cases and 3900 law review articles.
But although judicial reliance on *Chevron* remains more or less constant, a reasonable case can be made that *Chevron* is under attack and on the decline. In *Perez v. Mortgage Bankers Association* in 2015, Justice Scalia—long one of *Chevron*’s greatest proponents—acknowledged that *Chevron* “did not comport with” the Administrative Procedure Act (APA) and that the Court was “heedless of the original design of the APA” in developing its deference jurisprudence.\(^16\) Shortly thereafter, in *Michigan v. EPA*, Justice Thomas contended that “*Chevron* deference raises serious separation-of-powers questions” and urged the Court to “stop to consider [the Constitution] before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”\(^17\) Judge Neil Gorsuch of the Tenth Circuit likewise recently advocated abandoning *Chevron*, characterizing it as “permit[ting] all too easy intrusions on the liberty of the people,” though conceding that *Chevron* is at least not “the very definition of tyranny.”\(^18\)

The House of Representatives has passed the Separation of Powers Restoration Act (SOPRA), which purports to overturn *Chevron* by amending the APA to require de novo review of agency...
interpretations of law.\textsuperscript{19} Several prominent senators have expressed support for SOPRA as well.\textsuperscript{20}

Digging a little deeper, one can identify several ways in which the Court has arguably weakened \textit{Chevron} deference both in scope and in substance. Certainly, in \textit{United States v. Mead} in 2001, the Court restricted \textit{Chevron}’s application to agency actions carrying the “force of law” pursuant to congressionally delegated authority, relegating other agency actions like opinion letters, enforcement guidelines, and most informal adjudications to the lesser \textit{Skidmore} review.\textsuperscript{21} Much more recently in \textit{King v. Burwell}, the Court demonstrated its inclination to avoid using \textit{Chevron} in resolving so-called “major questions.”\textsuperscript{22} The Court arguably has exhibited a willingness to apply \textit{Chevron}’s two steps more aggressively as well, for example giving \textit{Chevron}’s second step greater heft by incorporating \textit{State Farm}’s reasoned decisionmaking requirement.\textsuperscript{23}


Still, *Chevron* was always controversial, even before its purported decline. Critics have offered all kinds of reasons why *Chevron* is flawed or misguided. And, perhaps joining or at least influenced by *Chevron*’s critics, commentators have long predicted that *Chevron* deference would not last. *Chevron* coincided approximately with the rise of textualism, and at *Chevron*’s ten-year mark, Thomas Merrill linked the Supreme Court’s increasing reliance on textualist reasoning to a “waning” of *Chevron*. Shortly after *Chevron*’s twentieth birthday, Linda Jellum similarly described *Chevron*’s “relevance” as “waning,” this time due largely to the Court’s limiting of *Chevron*’s scope in *United States v. Mead Corp.*.

We take a different view. Our purpose in this Article is to argue that, although *Chevron* has become a convenient administrative law bogeyman, complaints about its flaws and predictions of its demise are overblown. For one thing, the common narrative of *Chevron*’s revolutionary rise and dominance over administrative law jurisprudence is exaggerated. The sheer volume of cases in which courts must consider agency interpretations of statutes means courts inevitably apply *Chevron* a lot. But for all of the hype and attention, *Chevron* is just a

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26 Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 781 (2007); see also Linda Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 188 (2012) (“With two important changes to *Chevron’s* application—restricting the types of agency interpretations entitled to deference and curbing the implied-delegation rationale—the Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of *Chevron*.”).
standard of review—one among several standards the courts apply in evaluating agency action—and, rhetoric notwithstanding, is not truly outcome determinative in most cases.\(^{27}\)

Because the Justices have never been able to agree on precisely how *Chevron* review works, the Court has done a poor job of applying *Chevron* consistently. Consequently, *Chevron* is susceptible to competing theories regarding how it does and should operate, all employed here and there by one court or another, often seemingly interchangeably, without the courts’ acknowledging or perhaps even recognizing the distinctions.\(^{28}\) The jurisprudential inconsistency provides endless fodder for discussion, debate, and discontent over *Chevron’s* nuances. Yet standards of judicial review are never precise instruments, and many other legal doctrines are highly malleable in their application, without occasioning the level of vitriol presently being hurled toward *Chevron*.

Finally, predictions of *Chevron’s* reputedly pending demise fail to take into account that *Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress’s longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details.\(^{29}\) Unless Congress chooses to assume substantially more responsibility for performing that function itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide courts from intruding too deeply into a policy sphere for which they are ill-suited. In summary, *Chevron* really cannot and will not wane because, in a modern regulatory state in which Congress cannot help but delegate decisionmaking power and courts will not stop Congress from doing so, *Chevron* deference (or something much like it) is inevitable.

\(^{27}\) See infra Part III.A.

\(^{28}\) See infra Part II.

\(^{29}\) See infra Part III.C.
In support of our argument, this Article proceeds in three parts. Drawing from thirty years of *Chevron* jurisprudence and commentary, Part I recognizes and examines two competing narratives of *Chevron*’s trajectory—one quite dramatic tale of the revolutionary rise, dominance, and subsequent fall of a singular legal doctrine, and the other a more nuanced but also more realistic story of an important and routinely-applied but not omnipresent standard of review. Part II offers a taxonomy of sorts, documenting several operating variations of *Chevron* that together help explain why the doctrine has been confusing but durable. Lastly, Part III defends *Chevron*’s basic premise as well as its inevitability given Congress’s habit of delegating the power to make significant policy decisions to agencies in the first place.
When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?

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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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I. 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 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 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

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1. Lars Noah, *What’s Wrong with “Constitutionalizing Food and Drug Law”?*, 75 *Tul. L. Rev.* 137, 143 & n.35 (2000) (citing as support nothing other than an article that I had published five years earlier).


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); Johnson v. Raybestos-Manhattan, Inc., 740 P.2d 548, 549-50 (Haw. 1987) (same, in an asbestos case); *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”).
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. 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 would better discourage use by youngsters, even while conceding that this particular federal agency did not enjoy the power to proceed in any such fashion. Indeed, price regulation often gets mentioned as a less restrictive alternative in these sorts of cases. 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, or whether it could demand that teratogenic agents get bundled together with a hormonal

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”); see also 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”); 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 mechanisms (e.g., barring the underlying conduct) invariably exist for accomplishing such goals.”).

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 48 (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) (“[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 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, 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
contraceptive when indicated for use by female patients, even though the agency did not at that time have the power to impose such restrictions on access and distribution.

This Essay steps back to ask whether such an approach makes sense. Part II 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 III 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, I temper my claim as follows: 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 scrutiny.

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).

See Lars Noah, Too High a Price for Some Drugs?: The FDA Burdens Reproductive Choice, 44 San Diego L. Rev. 231, 239 (2007); id. at 240 n.35; 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, 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); 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).

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 access restrictions. See Lars Noah, Governance by the Backdoor: Administrative Law(lessness?) at the FDA, 93 Neb. L. Rev. 89, 134-37 (2014).
II. 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, while strict scrutiny demands that it pick the least restrictive means for achieving its compelling interests. “Narrow tailoring” could simply demand precision in crafting the scope of a restriction (in effect, barring overbreadth), which agency officials surely could do as well as (if not better than) legislators, 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. Putting to one side questions about whether the nuances in these verbal

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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. Educ., 476 U.S. 267, 280 n.6 (1986) (plurality) (“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).


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. Nat. Health U.S. v. Sebelius, 714 F. Supp. 2d 48, 70-72 (D.D.C. 2010) (ordering the FDA to allow, with milder disclaimers, anti-cancer 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 35-foot buffer zone around abortion clinics because the state had 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.”); id. at 389 (“An 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.”); Noah, supra note 2, at 35-65 (recounting this development in connection with the Supreme Court’s expanding
formulations make any great difference in practice, they share a preoccupation with identifying policy alternatives.

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

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).

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 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).
cautioned that “the Constitution does not, because it cannot, 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.” Writing exactly one quarter of a century earlier, however, Professor Breyer had showed no great compunction about recommending just such “magic solutions” as alternatives to classical economic regulations.

To be sure, courts occasionally express skepticism about far-fetched narrow tailoring. Practicalities aside, courts also may find it quite difficult to forecast the comparative effectiveness of hypothesized alternatives. As a consequence, the inquiry lacks predictability and may invite judges

18 Ashcroft v. ACLU, 542 U.S. 656, 688 (2004) (Breyer, J., dissenting); see also id. at 683-91 (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, 557 n.12 (1976) (“The defendants 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 non-speech 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
to conceal value-laden judgments. 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 arguably is less acute when reviewing agency action, Justice Breyer’s concern about “magic solutions” seems particularly apt when courts confront government entities that enjoy far more truncated powers than does the legislature.

B. Paying Attention to Institutional Context?

In an oblique way, this 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. As it happens, a survey of more than 450 strict scrutiny cases decided by the federal courts over a 14-year period found that it already collected. See Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 800 (1988); see also United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (plurality) (imagining a similar alternative to the Stolen Valor Act). Such an option hardly seems, however, to work nearly as well. See id. at 2559-60 (Alito, J., dissenting).

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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 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, 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 horizontal 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).
federal agencies did not fare appreciably worse than Congress, though it failed to isolate narrow tailoring as potentially erecting a particular hurdle for certain institutional actors. 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.”

After the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, some 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. In the health

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24 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).

25 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?”).


27 134 S. Ct. 2751 (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).

care reform legislation, Congress had not 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). 29

When challenged under the Religious Freedom Restoration Act (RFRA),30 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.”31 Although it did not explain how HHS would do this without a separate act of Congress,32 the majority elsewhere cited a statutory provision that had created a federal program of providing vaccines to certain children with inadequate health insurance coverage.33 In the end, however, the Court decided that it need not rely on this least restrictive means insofar as the agency already had crafted an opt-out mechanism, though one

29 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).

30 42 U.S.C. §§ 2000bb to bb-4 (2016). 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.”).

31 Hobby Lobby, 134 S. Ct. at 2780 (adding that “HHS has not shown . . . that this is not a viable alternative”); 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”).

32 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.’”).

33 See id. at 2783 n.42 (citing 42 U.S.C. § 1396s).
reserved for a far more limited class of employers.34

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.35

In this connection, Kennedy cited the brief for one of the respondents,36 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) (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).37

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.38
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 statutory analysis on a more readily available alternative. A dozen years earlier, in *Thompson v. Western States Medical Center*, the Supreme Court entertained a commercial speech challenge to an advertising restriction imposed by Congress though lodged only against the implementing agencies (i.e., HHS and the FDA); the majority invalidated the statutory provision after identifying a number of non-speech-restrictive options, while the four dissenters quibbled with these suggested alternatives but failed to note that the named defendants enjoyed essentially no power to take such steps.

This Essay tackles the question left unresolved in *Hobby Lobby* (and unremarked upon in *Western States*), 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.

increase in Title X funding or the creation of any other such program to fill the gap caused by RFRA exemptions is politically dead on arrival in Congress.”)

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See *id.* at 372-73. Several of the restrictions 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 defendants probably could not themselves have imposed these less restrictive options.

See *W. States,* 535 U.S. at 385-86 (Breyer, J., dissenting); 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”); Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 192 (1999) (invalidating, in a challenge that also had named the FCC as the implementing agency, a statutory prohibition of certain advertising by casinos, 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,” though the FCC plainly could have done none of these things); *id.* at 196 (Rehnquist, C.J., concurring) (recognizing that such alternatives would require “Congress to undertake substantive regulation of the gambling industry”).
III. 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. A decade later, it expressly disavowed any further adherence to this beguiling but simplistic approach to First Amendment (and other) challenges. As suggested at the outset, 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 constitutionality 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.

A. Making the Case for Disregarding Ultra Vires Options

Under the rulemaking provisions of the Administrative Procedure Act (APA), agencies must respond to public comments that urged selecting some other regulatory option. Courts have,

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44 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 . . . .”).


however, recognized that an agency may ignore as immaterial comments proposing alternatives that it had no power to implement. 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.

Collateral statutes or executive orders also sometimes obligate agencies to consider regulatory alternatives. For instance, the National Environmental Policy Act (NEPA) requires attention to alternative courses of action when preparing an environmental impact statement (EIS). Some of the early NEPA case law provided that an agency must consider reasonable alternatives even if they fall outside of its jurisdiction, which the Council on Environmental Quality (CEQ) codified when

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47 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.” (internal quotation marks omitted)); 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.”).

48 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 rule on statutory grounds. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

49 See, e.g., 5 U.S.C. § 604 (2016) (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 See Env'tl Defense Fund, Inc. v. Corps of Engineers of 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 Env'tl Defense 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
promulgating regulations to implement the statute.\textsuperscript{52} 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.”\textsuperscript{53}

Although these principles have emerged from judicial review of rules challenged on procedural rather than substantive grounds, the same logic seemingly 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.\textsuperscript{54} True, agencies could ask that the legislature grant them the desired project requiring separate Congressional authorization. We disagree.”); Oliver A. Houck, \textit{Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws}, 60 U. COLO. L. REV. 773, 815 (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.”).

\textit{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”); \textit{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. 17, 1981).

\textsuperscript{52} 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”); \textit{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. 17, 1981).

\textsuperscript{53} (“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.”); \textit{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. Czarnecki, \textit{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 case law). Nonetheless, the relevant clause in the CEQ’s regulation remains unchanged. \textit{Compare} WildEarth Guardians v. Nat’1 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), \textit{with} Jackson Cnty. 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).

\textsuperscript{54} \textit{See, e.g.,} Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 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); \textit{see also id.} at 2528 (pointing out that the “FDA does not have the
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 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. Even if relatively straightforward at times, congressional delegations of authority routinely suffer from ambiguities, and pleas of impossibility might arise in

[statutory] authority to permit preliminary health claims”).

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 . . . .”).

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’ 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).

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.”).
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, they might well hesitate to do so when such a construction emerged during subsequent litigation attacking a regulation on constitutional or other grounds. Moreover, just because an agency technically cannot take a particular action hardly renders it powerless in practical terms: agencies routinely manage to secure extra-statutory concessions from regulated entities. For instance, and

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58 See, e.g., Coalition 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.”). 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). See generally Michael Herz, Chevron Is Dead; Long Live Chevron, 115 COLUM. L. REV. 1867 (2015); Symposium, Chevron at 30: Looking Back and Looking Forward, 83 FORDHAM L. REV. 475 (2014).

59 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) (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).

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.

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, either on behalf of the “United States,” particularly when prosecuting a case, or in the name of the Attorney General (and/or the implementing agency), particularly when defending against a pre-enforcement challenge.

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61 See Noah, Governance by the Backdoor, supra note 10, at 129-30 & n.177. Similarly, Congress has sidestepped its diminished direct authority over alcoholic beverage sales, see supra note 56, 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 Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602-07 (2012) (plurality) (narrowing the scope of the Spending clause); id. at 2666-67 (Scalia, J., dissenting) (counting seven votes for invalidating the Medicaid expansion as exceeding this power of Congress).

62 See 28 U.S.C. § 516 (2016) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”); see also Fed. Election Comm’n 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 . . . .”).

63 See Tara Leigh Grove, Standing Outside of Article III, 162 U. PA. L. REV. 1311, 1329 (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.”).

In rare cases the DOJ has declined to defend a statute, which might allow Congress to participate in litigation questioning the constitutionality of its handiwork.

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. In the case of federal legislation or regulations governing block grants administered by state or local agencies, pre-enforcement challenges might get lodged against those non-federal actors even if the former had precisely dictated the terms—such as eligibility requirements imposed on beneficiaries—that the state or local agencies applied. In such

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 CAL. L. REV. 915 (2011).


See 2 U.S.C. §§ 288e(a), 288h(7) (2016) (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).

See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 735-36 (1996) (plurality); 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. After the Bureau denied the petition, the company lodged a First Amendment challenge against the Secretary of Treasury and the Director of BATF, but, 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 courts allowed the U.S. House of Representatives to do so as an intervenor. See Adolph Coors Co. v. Brady, 944 F.2d 1543, 1546 (10th Cir. 1991).

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)
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 target at the most general level, 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, 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, while one would rarely see specific centers or regional offices within these departmental subunits called to task. In addition to recognizing some of the perhaps manipulable (plurality) (rejecting a free exercise challenge lodged against federal and state officials in such a case); cf. Paulsen, supra note 30, at 280-82 (suggesting that RFRA might have altered the outcome in Bowen v. Roy).

69 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 multi-member commission or board structure). 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).

70 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.”).

71 Nonetheless, the APA’s relevant definition has an infinite regress quality to it. See 5 U.S.C. § 551(1) (2016) (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. 422 (2015). Although unlikely in the case of rulemaking, subdelegations of authority from the head(s) of an agency may empower subunits to take
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 in pursuit of some noble purpose. 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, marketing, and pricing), it decides to create a brand-new entity with this as its sole purposes: the Bureau of Advertising for final action on license applications and the like.

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).
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 promulgated rules banning advertising for all types of tobacco products. 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. 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?

IV. 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

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73 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 statement in the labeling of any products so advertised.

74 Similarly (and somewhat less dramatically), courts occasionally suggest individualized screening of ads as less restrictive than across-the-board prohibitions, 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).
constitutional rights into more appropriate decisionmaking fora such as legislative bodies. For critics of commercial free speech (or other constitutional rights invoked by regulated entities), however, this would simply ensure that nothing will get done. In that event, it might make sense to limit this unforgiving narrow tailoring approach to strict scrutiny cases. 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.

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75 Cf. Matthew C. Stephenson, *The Price of Public Action: 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.”).

76 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. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (plurality) (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 95 (recognizing the possibility of “a central flaw in the Supreme Court’s approach to commercial speech cases insofar as its increasingly stringent application of *Central Hudson*’s nexus prongs has effectively narrowed the range of substantial government interests that can pass muster”); *supra* note 28 (noting similar criticisms of the Court’s expansive interpretation of RFRA).

77 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).