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D. Wiley Barker

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# The Absurd Results Doctrine, *Chevron*, and Climate Change

## I. INTRODUCTION

If Congress tells an agency to do something absurd, is the agency forced to comply? Courts have unequivocally constrained agency actions with the familiar shackles of the *Chevron* framework,<sup>1</sup> but have they also provided the agency with a means of escape? Some would argue that they have through the “absurd results doctrine,” a statutory tool of construction that allows an interpretation that departs from the plain meaning of the text when a literal reading produces absurd results.<sup>2</sup> But is this a license to ignore the *Chevron* doctrine altogether? This question weighs heavily on agencies’ approach to statutory interpretation generally, but more specifically, recent regulations promulgated by the Environmental Protection Agency (“EPA”) brought the issue to a head.

In what *Time* speculated “could be the most far-reaching environmental regulatory scheme in American history,”<sup>3</sup> the EPA issued what is known as the “Tailoring Rule” effective January 2, 2011, establishing a graduated system for the regulation of greenhouse gas emissions from stationary sources under the Clean Air Act.<sup>4</sup> The regulation has come under serious fire because it purposely and directly conflicts with the written language of the Act and seems to entirely ignore the parameters of *Chevron*. The EPA has simply rewritten the applicability criteria for two stationary-source programs prescribed in the Act, justifying its disregard for the statutory language in large part through the absurd results doctrine.<sup>5</sup> In response, the House of

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1. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

2. See *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989).

3. Bryan Walsh, *Battle Brews Over EPA’s Emissions Regulations*, TIME.COM (Jan. 3, 2011), <http://www.time.com/time/health/article/0,8599,2040485,00.html>.

4. Prevention of Significant Deterioration and Title V Greenhouse Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) [hereinafter *Tailoring Rule*]. For a summary of the rule, see ENVTL. PROT. AGENCY, FINAL RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE FACT SHEET, available at <http://www.epa.gov/nsr/documents/20100413fs.pdf> (last visited Feb. 23, 2011).

5. *Tailoring Rule*, *supra* note 4, at 31,516. The EPA also listed two peripheral justifications for the rule: the “administrative necessity” doctrine, and the “one-step-at-a-time” doctrine. *Id.* However, these justifications take a back seat to and merge with the absurd results doctrine throughout the rule. See *id.* at 31,517 (“Each of these doctrines supports our action separately, but the three also are intertwined . . .”). The absurd results are defined in part by the agency as the

Representatives has proposed legislation designed to kill the regulation,<sup>6</sup> both houses of Congress have engaged in heated debates regarding the rule,<sup>7</sup> and some states and other groups, public and private, have filed litigation in hopes of stopping the regulation of greenhouse gas emissions through the Clean Air Act.<sup>8</sup>

This Article proposes an innovative approach to the absurd results doctrine vis-à-vis *Chevron*, the avoidance approach, which introduces the tried and effective avoidance canon of statutory interpretation into the regulatory context. Under this approach, an agency interprets a statute in a way that avoids absurd results Congress did not intend, utilizing the proper tools of statutory construction while maintaining the integrity of the statutory text and the constraints of *Chevron*. To lay the foundation necessary to make this case, Part II of this Article begins by setting out how the courts traditionally have used the absurd results doctrine. It also discusses the doctrine's limited application up to this point in the context of the *Chevron* analysis. Part III then describes the relevant portions of the Clean Air Act that are in play in the EPA's Tailoring Rule. This Part mainly focuses on the differences in the mandates of the Clean Air Act and the Tailoring Rule and how the EPA justifies them. Part IV outlines the strengths and weaknesses of the two approaches to applying the absurd results doctrine to the Tailoring Rule. Specifically, the EPA's approach takes the route this Article refers to as nullification, meaning that if a literal reading of the statute produces absurd results, the agency can nullify that language and rewrite the statute to create a more appropriate outcome. On the other hand, many critics of the EPA's approach to the Tailoring Rule lean on textualism, which exclusively utilizes a literal reading of the statute and wholly rejects the use of the absurd results doctrine under any circumstances. In Part V, this Article advances the avoidance approach to the absurdity doctrine. Although the idea of avoidance in statutory interpretation is not new, such an approach is a novel way to frame the absurd results doctrine in the context of *Chevron*. This Part demonstrates why the avoidance approach is superior to the other approaches and how the EPA's use of the nullification

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administrative burdens that would result from failing to take a one-step-at-a-time approach to implementation of the rule in full. *Id.* at 31,547 (stating that a full and literal implementation of the statute "would create . . . impossible administrative burdens").

6. Associated Press, *House GOP Readies Ban on EPA Greenhouse Gas Regulations*, FOXNEWS (Feb. 2, 2011), <http://www.foxnews.com/us/2011/02/02/house-gop-readies-ban-epa-greenhouse-gas-regulations/>.

7. Elana Schor and Sarah Abruzzese, *Senate Dems Gear Up to Battle House GOP on EPA's Climate Regs*, N.Y. TIMES (Jan. 2, 2011), <http://www.nytimes.com/gwire/2011/01/07/07greenwire-senate-dems-gear-up-to-battle-house-gop-on-epa-22835.html?scp=12&sq=epa%20ghg%20regulations&st=csc>.

8. See, e.g., *Coal. For Responsible Regulation v. EPA*, No. 09-1322, 2010 WL 5509187 (D.C. Cir. Dec. 10, 2010) (consolidating eighty-seven cases).

approach to the absurd results doctrine will affect the Tailoring Rule as the EPA meets the challenges in court. Part VI concludes this Article.

## II. THE ABSURD RESULTS DOCTRINE

The absurd results doctrine is a tool of statutory interpretation the courts have traditionally used to justify an interpretation that departs from the plain meaning of the statute when a literal reading would produce absurd or incongruous results.<sup>9</sup> In other words, “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.’ In such cases, the intention of the drafters, rather than the strict language, controls.”<sup>10</sup>

The doctrine is by no means new; the Supreme Court has utilized it for more than a century.<sup>11</sup> “Its authority derives from its pedigree and, more fundamentally, from common sense.”<sup>12</sup> The flagship example is encompassed in the 1868 case of *United States v. Kirby*.<sup>13</sup> There, a sheriff was prosecuted for “obstructing and retarding” the delivery of mail when he arrested a postal worker in the process of delivering mail.<sup>14</sup> Upon review, the Court stated, “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.”<sup>15</sup>

The Court justified the interpretation through common sense, giving the following examples:

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, that whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner

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9. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989), *quoted in Tailoring Rule*, *supra* note 4, at 31,542.

10. *Id.* at 242 (second alteration in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (internal citations omitted).

11. *See, e.g.*, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531 (2007) (noting the “incongruous results” that would result from a literal construction of the statute); *Rector v. Holy Trinity Church*, 143 U.S. 457, 461 (1892) (stating that laws should not be construed to produce an “absurd consequence”).

12. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 138 (1994).

13. 74 U.S. 482 (1868); *see also* Dougherty, *supra* note 12, at 138–39.

14. *Kirby*, 74 U.S. at 484–85.

15. *Id.* at 486–87.

who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—for he is not to be hanged because he would not stay to be burnt.<sup>16</sup>

These examples have been cited in numerous opinions invoking the absurd result doctrine.<sup>17</sup>

Perhaps because the absurd results doctrine asks courts to substitute their judgment over that of the legislative branch, the Court has repeatedly taken the position that the absurd results doctrine should only be used in rare or exceptional cases.<sup>18</sup> While it is true that the courts' "task is to give effect to the will of Congress,"<sup>19</sup> the courts must observe that "where [Congress's] will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'"<sup>20</sup> Even in cases where further investigation into congressional intent is necessary, the court must first look to the text before venturing into legislative history or elsewhere. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."<sup>21</sup> Further, the absurd results doctrine is not a license for the courts to rewrite the statutes. In many cases, the remedy "lies with Congress and not with [the courts]. Congress may amend the statute; [the courts] may not."<sup>22</sup>

Some circuit courts have also discussed the use of the absurd results doctrine in the context of *Chevron*, although these cases are surprisingly rare. The *Chevron* test, to which all administrative agency regulation must conform, first asks "whether Congress has directly spoken to the precise question at issue."<sup>23</sup> If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>24</sup> On the other hand, "if the statute is

16. *Id.* at 487 (internal quotation marks omitted).

17. See, e.g., *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 n.2 (1988); *Baender v. Barnett*, 255 U.S. 224, 226 (1921); *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892); see also *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998); *United States v. Mendoza*, 565 F.2d 1285, 1288 n.2 (5th Cir. 1978); *Anderson v. Rives*, 85 F.2d 673, 675 n.1 (D.C. Cir. 1936).

18. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quoting *Comm'r v. Brown*, 380 U.S. 563, 571 (1965)); *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). Cf. *Tailoring Rule*, *supra* note 4, at 31,542 (comparing the statement of the D.C. Circuit in *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991)).

19. *Griffin*, 458 U.S. at 570.

20. *Id.* (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

21. *Id.* at 571 (quoting *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940)); see also *Pub. Citizen v. United States*, 491 U.S. 440, 454 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)) ("[T]he words used [in the statute], even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning . . .").

22. *Griffin*, 458 U.S. at 576.

23. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

24. *Id.* at 842-43.

silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>25</sup> The absurd results doctrine applies in this context, but what if the unambiguous expression of Congress results in absurdity?

The D.C. Circuit has made clear that even in the case of absurd results an agency must abide by the *Chevron* doctrine and respect the language of the statute. In *Mova Pharmaceutical Corp. v. Shalala*, for example, the D.C. Circuit invalidated a Food and Drug Administration ("FDA") regulation based on the absurd results doctrine.<sup>26</sup> Congress enacted a statute permitting generic drug manufacturers to file an abbreviated application for approval with the FDA based on the assertion that the generic drug does not infringe on the original drug manufacturer's patent.<sup>27</sup> The statute allowed the first such applicant to exclusively market his generic drug for 180 days from "the date of a decision of a court . . . holding the [original drug manufacturer's] patent to be invalid or not infringed."<sup>28</sup> This "exclusivity period" would allow the first applicant to "market his generic drug without competition from other [generic drug] applicants."<sup>29</sup> The FDA was concerned that the statute would produce absurd results if the first applicant was never sued or if it lost the initial suit because later applicants would be indefinitely delayed from marketing similar generic drugs.<sup>30</sup> In an attempt to remedy the problem, the FDA issued a regulation, which disallowed the exclusivity period unless the applicant had also "successfully defended against a suit for patent infringement brought within 45 days of the patent owner's receipt of notice,"<sup>31</sup> known as the "win-first rule."<sup>32</sup>

The court explained that the proper role of the absurd results doctrine in the context of *Chevron* is to avoid a reading that produces absurd results but not at the expense of the statutory language. According to the court, "[t]he rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the 'unambiguously expressed intent of Congress,' and thus to overcome the first step of the *Chevron* analysis."<sup>33</sup> As in all *Chevron* reviews, the agency must then provide a permissible construction of the statute; however, "the agency does not thereby obtain

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25. *Id.* at 843.

26. 140 F.3d 1060, 1076 (D.C. Cir. 1998).

27. *Id.* at 1063.

28. *Id.* at 1064 (citing 21 U.S.C. § 355(j)(5)(B)(iv) (1994)).

29. *Id.*

30. *Id.* at 1067.

31. *Id.* at 1065 (emphasis removed) (quoting 21 C.F.R. § 314.107(c)(1)).

32. *Id.* at 1069.

33. *Id.* at 1068 (quoting *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)) (internal citation omitted).

a license to rewrite the statute. . . . [I]t may deviate no further from the statute than is needed to protect congressional intent.”<sup>34</sup>

In the end, the court ruled that the FDA’s regulation was “inconsistent with the unambiguously expressed intent of Congress,” language that points directly back to the original *Chevron* analysis, for two reasons: first, because it was “gravely inconsistent with the text and structure of the statute,”<sup>35</sup> and second, because the FDA’s change was not “needed to avoid ‘a result demonstrably at odds with the intentions of [the] drafters.’”<sup>36</sup> The court prohibited the FDA from performing a statutory “transplant operation” when “corrective surgery” would suffice.<sup>37</sup> In other words, “the successful-defense requirement [was simply] too blunt an instrument.”<sup>38</sup>

In another case, then-Judge Ruth Bader Ginsburg authored the majority opinion for the D.C. Circuit in *American Water Works Ass’n v. EPA*, which followed substantially the same reasoning.<sup>39</sup> There, the organic statute required the EPA to apply a maximum contaminant level (“MCL”) for contaminants that could affect human health<sup>40</sup> but also gave the EPA the authority to set a different “treatment technique” instead of an MCL if it found that setting an MCL was not “economically or technologically feasible.”<sup>41</sup> Instead of using the plain meaning, the EPA interpreted the word “feasible” to mean “capable of being accomplished in a manner consistent with the [statute].”<sup>42</sup> In this case, the EPA felt that a literal reading of the statute would produce an absurd result because if an MCL was applied to water, it may reduce one contaminant, but it would dramatically increase others.<sup>43</sup>

The court concluded that when the absurd results doctrine applies, the agency must abide by *Chevron*’s guiding principles and may not stray from what is reasonably within the bounds of the statute. Despite the presence of absurd results, the court did not allow the agency to ignore the *Chevron* doctrine, evaluating the EPA’s interpretation of the term according to whether it was reasonable.<sup>44</sup> The court ruled that “where a literal reading . . . would lead to absurd results,” the term becomes “the proper subject of construction by the EPA and the

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34. *Id.*

35. *Id.* at 1069.

36. *Id.* (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

37. *Id.*

38. *Id.* at 1074.

39. 40 F.3d 1266, 1268 (D.C. Cir. 1994).

40. *Id.* at 1269.

41. *Id.* (quoting 42 U.S.C. § 300f(1)(C)(ii) (1994)).

42. *Id.* at 1270 (internal quotation marks omitted).

43. *Id.* at 1270–71.

44. *Id.*

courts.”<sup>45</sup> Under *Chevron*, the agency’s interpretation must be reasonable in order to be proper.<sup>46</sup> After a thorough evaluation, the court found the EPA’s interpretation to be reasonable,<sup>47</sup> carefully choosing language to operate inside the *Chevron* framework.

Having set out the legal framework, this Article now provides some background of the Tailoring Rule and how it relates to the absurdity doctrine.

### III. THE MECHANICS OF THE CLEAN AIR ACT AND THE TAILORING RULE

The Clean Air Act contains two permitting programs that are affected by the EPA’s Tailoring Rule: Prevention of Significant Deterioration (“PSD”) <sup>48</sup> and Title V.<sup>49</sup> These programs are triggered when the EPA finds that an emission “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,”<sup>50</sup> commonly referred to as an “endangerment finding.”<sup>51</sup> Emitters subject to these programs must comply with significant substantive and procedural restrictions.<sup>52</sup> The express terms of the Clean Air Act set out clear numerical criteria indicating which emitters are subject to the programs.<sup>53</sup> The Tailoring Rule rewrites these numeric terms to increase the applicability criteria several hundred fold, severely reducing the number of emitters that must comply with the programs’ requirements.<sup>54</sup>

#### A. *Massachusetts v. EPA and the PSD and Title V Programs*

In *Massachusetts v. EPA*, the Supreme Court ordered the EPA to either issue an endangerment finding for greenhouse gas emissions or provide reasonable grounds for why it declined to do so under the Clean Air Act.<sup>55</sup> In this case, several states and local governments filed suit in federal court after the EPA denied a petition to regulate greenhouse gases

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45. *Id.* (quoting *Chem. Mfrs. Ass’n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985)).

46. *Id.* (“We must defer to the EPA’s interpretation of ‘feasible’ if it is reasonable . . .”).

47. *Id.*

48. 42 U.S.C. §§ 7470–7492 (2006).

49. *Id.* §§ 7661–7661f.

50. *Id.* § 7521(a)(1).

51. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

52. *See* 42 U.S.C. §§ 7475, 7661c.

53. *See infra* Part IIIA.

54. *Tailoring Rule*, *supra* note 4, at 31, 516.

55. 549 U.S. 497, 534–35 (2007).

under the Clean Air Act.<sup>56</sup> The EPA submitted a “laundry list of reasons,” which the Court rejected.<sup>57</sup> For example, the agency claimed that not only did it lack authority to regulate greenhouse gas as a pollutant, but also that the legislative history of the Act, other enactments, uncertainty, conflicting regulation, and possible interference with foreign policy all justified its decision.<sup>58</sup>

The Court found that the expansive scope of the definition of pollution clearly granted the EPA the authority to regulate greenhouse gases, including carbon dioxide.<sup>59</sup> Although the EPA claimed that Congress did not intend to use the Clean Air Act “to regulate substances that contribute to climate change,”<sup>60</sup> the Court found this line of reasoning was not viable because “the statutory text foreclose[d]” such a reading,<sup>61</sup> and there was no reason “to accept [the] EPA’s invitation to read ambiguity into a clear statute.”<sup>62</sup> Instead the Court required the EPA to provide a “reasonable explanation” in the case of inaction “as to why it cannot or will not exercise its discretion to determine whether [greenhouse gas emissions contribute to pollution].”<sup>63</sup> As a result of the Court’s decision, the EPA changed its position, issued an endangerment finding, and later promulgated the Tailoring Rule based on the absurd results doctrine to apply the PSD and Title V programs to greenhouse gas emissions.<sup>64</sup>

The PSD and Title V programs protect air quality through a variety of permitting requirements, which can be time consuming and costly for those facilities that fall under their jurisdiction.<sup>65</sup> The PSD program

56. *Id.* at 510, 514.

57. *Id.* at 533.

58. *Id.* at 511–14.

59. *Id.* at 528–29.

60. *Id.* at 528. The EPA has since completely reversed itself on this issue, now finding that Congress did intend to regulate greenhouse gas emissions under the Clean Air Act. *Tailoring Rule*, *supra* note 4, at 31,558 (“Looking at these provisions and the legislative history together, we think Congress can be said to have intended that the PSD program apply to GHG sources as a general matter.”); see generally Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (June 3, 2010) (to be codified at 40 C.F.R. ch. 1) [hereinafter *Endangerment Finding*].

61. *Massachusetts*, 549 U.S. at 528. Oddly enough, this language suggests that Justice Kennedy approached the case from a new textualist point of view, and may have been open to an absurd results argument.

62. *Id.* at 531.

63. *Id.* at 533.

64. *Tailoring Rule*, *supra* note 4, at 31,519.

65. PSD applicants are subject to a lengthy permitting process, which by EPA estimates cost the applicant 866 hours and \$84,500. *Id.* at 31,534. This includes waiting for the EPA to conduct a notice and comment period on the pending application. *Id.* at 31,520. Once an applicant becomes a permit holder, the EPA performs a thorough review of the facility and requires the permit holder to employ the Best Available Control Technology, referred to as BACT, to prevent air quality deterioration. *Id.* The permit holder must also use its own resources to “analyze impacts [from the emissions] on ambient air quality[,] . . . soil, vegetation, and visibility.” *Id.* Under certain

applies only to what qualifies as a “major emitting facility” under the Clean Air Act.<sup>66</sup> Major emitting facilities are defined in the Act as those facilities emitting “one hundred tons per year or more of any air pollutant” if they are one of the twenty-eight types of stationary sources enumerated in the statute, and “any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.”<sup>67</sup> Any stationary source emitting less than this amount will not be regulated by the PSD program, regardless of whether the source is emitting pollutants.<sup>68</sup>

The Title V program’s applicability is structured in a manner similar to the PSD program. Title V is limited to “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”<sup>69</sup> Also like the PSD program, any source emitting less than this amount is not regulated by the Title V program regardless of its emissions.<sup>70</sup> This Article will refer to these original PSD and Title V applicability requirements collectively as the “100/250 rule” because they are so similar, and because, as will be shown below, the Tailoring Rule alters both programs in a similar manner.

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circumstances, additional requirements will be imposed depending on the quality of the air. *Id.* Although these measures may improve air quality for the surrounding community, it is nonetheless costly to those subject to the PSD program. Title V is also designed to protect air quality by imposing numerous procedural obligations upon those who fall under its regulation. The EPA estimates that every applicant will spend 350 hours and \$46,400 to finish the application. *Id.* at 31,534. In addition, Title V applicants must conform to several time-consuming and costly requirements to ensure their compliance with the Clean Air Act, such as a “public notice and a 30-day public comment period, including a period for a public hearing,” an “EPA and affected state review,” and an “application completeness determination.” *Id.* at 31,521. Permit holders are also subject to “[p]ermit revisions and re-openings” if new requirements arise or the holder makes changes to the source. *Id.* Like the PSD program, while these procedural requirements assist in providing clean air, they impose serious costs on the applicants.

66. 42 U.S.C. § 7479(1) (2006). The PSD program applies to attainment and nonattainment areas; however, the EPA does not anticipate that nonattainment areas will apply to greenhouse gas emission. *Tailoring Rule*, *supra* note 4, at 31,520.

67. 42 U.S.C. § 7479(1).

68. *Id.* This is standard for almost all types of pollutants governed by the PSD program. *Id.* Hazardous pollutants are regulated at a much lower standard under the Clean Air Act, *id.* § 7412(a)(1), but that is outside the scope of this comment.

69. *Id.* § 7602(j). When dealing with “hazardous air pollutants,” Title V’s applicability is expanded to “any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants,” *id.* § 7412(a)(1); however, that is outside the scope of this article.

70. *Id.* § 7602(j).

*B. The EPA's Use of the Absurd Results Doctrine  
and the Tailoring Rule*

The EPA's explanation of the absurd results doctrine rests mainly on the Supreme Court's articulation in *United States v. Ron Pair Enterprises*, which states that "in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters \* \* \* [in which case] the intention of the drafters, rather than the strict language, controls."<sup>71</sup> It then explains how the absurd results doctrine applies to the first and second steps of the *Chevron* test.<sup>72</sup> Regarding step one, the EPA states:

Under these circumstances, [which produce absurd results,] the agency must not take the literal meaning to indicate congressional intent. As the DC Circuit has explained, where a literal reading of a statutory term would lead to absurd results, the term simply has no plain meaning \* \* \* and is the proper subject of construction by the EPA and the court. Under these circumstances, if the agency can find other indications of clear congressional intent, then the agency must implement that intent. This may mean implementing the statutory terms, albeit not in accordance with their literal meaning, but in a way that achieves a result that is as close as possible to congressional intent.<sup>73</sup>

The EPA then asserts that when a literal meaning of the statute leads to absurd results, and there is either no other indication of congressional intent or there are "multiple ways of avoiding a statutory anomaly, all equally consistent with the intentions of the statute's drafters," then the agency should evaluate the question under *Chevron* step two, "based on a permissible construction of the statute."<sup>74</sup>

The EPA then applies the doctrine to justify rewriting the applicability requirements in the Clean Air Act through the Tailoring Rule.<sup>75</sup> According to the EPA, a literal application of the Act to greenhouse gas emissions, using the 100/250 rule, produces absurd results by "creat[ing] undue costs for sources and impossible administrative burdens for permitting authorities."<sup>76</sup> For example, a plain

71. *Tailoring Rule*, *supra* note 4, at 31,542 (alterations in original) (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)) (internal quotation marks omitted). The EPA also gives numerous examples of articulations of the doctrine from the Supreme Court and the D.C. Circuit. See generally *id.* at 31,542-43.

72. *Id.* at 31,545.

73. *Id.* at 31,545-46 (alterations in original) (internal citations omitted) (quoting *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994)) (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 242-43 (1989)) (internal quotation marks omitted).

74. *Id.* at 31,546 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998)).

75. *Id.* at 31,516.

76. *Id.* at 31,547. The EPA estimates that leaving the applicability criteria as is would

reading of the statute would increase current PSD applications from 280 per year to 82,000 per year, “virtually all of which would be smaller than the sources currently in the PSD program and most of which would be small commercial and residential sources.”<sup>77</sup> The impact on Title V applicants would be even more extreme, increasing the number of applicants from 14,700 per year to 6.1 million per year.<sup>78</sup> Like those sources swept into the PSD program, “[t]he great majority of these will be small commercial or residential sources.”<sup>79</sup> Therefore, the EPA devised a plan to eliminate these absurd results by implementing a two-step process to streamline application of the Clean Air Act to greenhouse gas emissions.<sup>80</sup>

This two-step process “tailor[s] the applicability criteria that determine which [greenhouse gas] emission sources become subject to the PSD and title V programs.”<sup>81</sup> In other words, it rewrites the level at which sources become subject to the Clean Air Act. The first step replaces the 100/250 rule with a 75,000 rule.<sup>82</sup> The Tailoring Rule therefore rewrites the definition of “major emitting facility” to include those sources emitting greenhouses gases in excess of 75,000 tons per year instead of 100 or 250 tons per year depending on the type of stationary source.<sup>83</sup> Additionally, step one will apply to only those sources that already are required to permit under the PSD or Title V programs.<sup>84</sup>

Step two again rewrites the statute by eliminating the 100/250 applicability criteria and replacing it with a 75,000/100,000 criteria.<sup>85</sup> According to the EPA, those sources “not already subject to Title V that emit, or have the potential to emit, at least 100,000 [tons per year] will become subject to the PSD and title V requirements.”<sup>86</sup> Also, “sources that emit or have the potential to emit at least 100,000 [tons per year] and that undertake a modification that increases net emissions of [greenhouse gases] by at least 75,000 [tons per year] will also be subject to PSD requirements.”<sup>87</sup>

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increase applications 300 fold for the PSD program and 400 fold for the Title V program. *Id.* at 31,554, 31,562.

77. *Id.* at 31,556.

78. *Id.* at 31,562.

79. *Id.*

80. *Id.* at 31,516.

81. *Id.* (internal footnotes omitted).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 31,547.

86. *Id.*

87. *Id.*

Clearly, each step in the Tailoring Rule is a direct departure from the express terms of the statute. By changing the clearest of the words contained therein—the numerical minimums that trigger the statute’s applicability—the EPA disregards the plain meaning of the statute in favor of criteria it has determined will produce an acceptable number of applications for the PSD and Title V programs. While this solves the problems of overwhelming the EPA and regulating small sources, it reaches beyond the viable bounds of the absurd results doctrine by declaring war<sup>88</sup> through agency fiat<sup>89</sup> on the express terms enacted by the Legislative Branch.

#### IV. FRAMING THE DISCUSSION: NULLIFICATION AND TEXTUALIST APPROACHES, THE ENDS OF THE SPECTRUM

The absurd results doctrine could present itself in a plethora of ways. This Article now sets the framework for the analysis by focusing on the nullification and textualist approaches. The nullification approach represents the most liberal use of the absurd results doctrine and is espoused by the EPA in its approach to the Tailoring Rule. If a literal reading of the statute would produce absurd results, this approach allows the agency to nullify the language of the statute and to replace it with language that yields results the agency feels are more appropriate. On the other hand, the textualist approach represents the opposite extreme of the spectrum. This approach eschews any use of the absurd results doctrine, accepting the text as the exclusive tool for statutory interpretation. These distinct approaches set the stage for a novel approach to the absurd results doctrine in the context of *Chevron*, known as the avoidance approach, which dictates that in interpreting a statute, an agency should construe the language in a way that avoids absurd results without rewriting the statute or adhering blindly to its written language.

##### *A. The Nullification Approach*

The nullification approach proposes that where a literal reading of the statute would produce absurd results, the agency may nullify the express terms of the statute and replace them with its own language to achieve what the agency perceives as a more acceptable result. This best represents the EPA’s current approach to the Tailoring Rule. Some case law appears to support this approach to the absurd results doctrine;

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88. See *Coyle v. United States*, 415 F. 2d 488, 490 (4th Cir. 1968) (finding that the agency interpretation was “at war with both the language of the statute” and Congress’ intent).

89. For an analogous discussion of “judicial fiat,” see *Li v. Yellow Cab Co of Cal.*, 532 P.2d 1226, 1246 (Cal. 1975) (Clark, J., dissenting).

however, this support may be somewhat artificial.<sup>90</sup> For example, in *American Water Works Ass'n v. EPA*, the Court characterized the absurd results doctrine as authorizing the agency to completely strip the meaning from the words used in the statute: "where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning . . . and is the proper subject of construction by the EPA and the courts.'"<sup>91</sup> Other decisions disregard all natural meaning from the written words of the statutes. For example, in *Lynch v. Overholser*, the Court concluded that interpretation is not limited "to the bare words of a statute . . . for 'literalness may strangle meaning.'"<sup>92</sup> These expressions of the absurd results doctrine may be among the most expansive.

Other support for the nullification approach stems from the fact that applying a strictly literal interpretation of a statute that produces absurd results destroys the rule of law by undermining "the coherence of the legal system as a whole."<sup>93</sup> For example, in *Green v. Bock Laundry Machine Co.*, a convicted felon filed a product liability suit for an injury he sustained during a work release program.<sup>94</sup> At trial, the manufacturing company introduced evidence of his criminal background, which resulted in a jury verdict for the defense.<sup>95</sup> The evidentiary rule allowed admission of such certain criminal history if "'the probative value . . . outweighs its prejudicial effect to the defendant.'"<sup>96</sup> The issue for the Court was whether it should read the rule literally, using the balancing test to limit evidence only against criminal and civil defendants but not against civil plaintiffs.<sup>97</sup> The Court rejected a literal reading because it would dismantle the coherence of the legal system by "offend[ing] fundamental principles of special protection for criminal defendants and equal treatment of civil litigants."<sup>98</sup> In other words, a literal reading could not stand in the face of constitutional protections, such as the Equal Protection and the Due Process clauses.<sup>99</sup> Allowing an absurd literal reading would "establish a precedent in conflict with other parts of the legal system, and thereby undermine the system's coherence" and

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90. Language from other cases could just as easily be used to seriously cabin the doctrine. See, e.g., *Pub. Citizen v. United States*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982).

91. 40 F.3d 1266, 1271 (D.C. Cir. 1994) (quoting *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1985)).

92. 369 U.S. 705, 710 (1962) (citations omitted) (quoting *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946)).

93. Dougherty, *supra* note 12, at 134.

94. 490 U.S. 504, 506 (1989).

95. *Id.*

96. *Id.* at 509 (emphasis added) (quoting FED. R. EVID. 609(a)).

97. *Id.* at 511.

98. Dougherty, *supra* note 12, at 134 nn.29 & 195.

99. *Green*, 490 U.S. at 510.

destroy the rule of law.<sup>100</sup>

The nullification approach also is bolstered by reasonableness and common sense.<sup>101</sup> Harkening back to the original examples of the absurd results doctrine from *Kirby*, no reasonable person would require that a physician who had “opened the vein of a person that fell down in the street in a fit” to save his life should be punished by a law that prohibits “dr[awing] blood in the streets.”<sup>102</sup> Equally, no reasonable person would require that “a prisoner who breaks out when the prison is on fire” should be “hanged because he would not stay to be burnt.”<sup>103</sup> Common sense tells us that the enacting legislature in no way intended these results. It is even more preposterous to assume that Congress intended a court capable of exercising common sense to nevertheless apply the law literally and sanction the absurd result when it has the power to avoid it. In fact, the ordinary person likely relies heavily on the absurd results doctrine based on these two premises.<sup>104</sup> In the case of an absurd result, such a person would say to himself, “That makes no sense at all—[the law] can’t mean that.”<sup>105</sup> The person would then likely operate according to what they believe the law should reasonably say. Failing to correct the words of a statute, which literally read produce absurd results, would destroy its common-sense foundation, as well as confidence in the legal system.

Despite the aforementioned support, the nullification approach suffers under withering criticism. First, case law, founded in constitutional doctrine, does not support an agency rewriting the express terms of a statute. In *Griffin v. Oceanic Contractor, Inc.*, the Court forcefully declared this opposition to the nullification approach.<sup>106</sup> While recognizing that the absurd result doctrine is appropriate in some cases, the Court made clear that express statutory terms must not be disturbed.<sup>107</sup> Displaying its respect for the separation of powers and statutory primacy, the Court held, “It is enough that Congress intended

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100. Dougherty, *supra* note 12, at 134. As Veronica Dougherty points out, in this way the absurd results doctrine is a necessary part of literalism because it serves “the principal of legislative supremacy which literalism is meant to serve.” *Id.* Without it “literalism could not serve the rule of law.” *Id.*

101. *Id.* at 162. Additionally, statutory language is often slow to keep up with the changing circumstances of reality. See, e.g., Jonathan D. Barker, *Society’s Carnivores, Both Good and Bad. The Internet Wiretap: Why We Need It, and How It Should be Regulated*, 74 UMKC L. REV. 945 (2006). The nullification approach is bolstered by the argument that the Legislative Branch is unable to address every possible situation.

102. *United States v. Kirby*, 74 U.S. 482, 487 (1868).

103. *Id.*

104. Dougherty, *supra* note 12, at 162.

105. *Id.* (internal quotation marks omitted).

106. 458 U.S. 564, 565 (1982).

107. *Id.* at 576.

that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.”<sup>108</sup> Doing so would encroach upon the legislature’s constitutionally allocated powers. In the agency context, rewriting the statute may violate other constitutional parameters, such as the non-delegation doctrine.<sup>109</sup>

Further, in *Mova Pharmaceutical Corp.* as described above, the court condemned adding language not included in an agency’s organic statute.<sup>110</sup> Although the court applied the absurd results doctrine, it pointed out “the agency does not thereby obtain a license to rewrite the statute.”<sup>111</sup> When the absurd results doctrine applies, “[the agency] may deviate no further from the statute than is needed to protect congressional intent.”<sup>112</sup> Interpretation is reserved for “[g]eneral terms”<sup>113</sup> with “contours [that are] left undefined by the statute itself.”<sup>114</sup> Common sense behind a single statute does not trump these constitutional concerns. Courts will not ignore the strictures of the Constitution to honor an agency’s interpretation of its organic statute.

Perhaps most importantly, allowing an agency to rewrite a statute destroys the *Chevron* framework. This is something the Court will not allow. *Chevron* dictates a two-step process for evaluating whether an agency has stepped outside of its statutory authority. First, the court asks “whether Congress has directly spoken to the precise question at issue.”<sup>115</sup> If so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>116</sup> The Court also has determined on numerous occasions that “[t]here is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>117</sup> On the other hand, “if the statute is silent or ambiguous . . .

108. *Id.*

109. See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring) (plurality opinion) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)) (“That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

110. 140 F.3d 1060, 1068 (1998).

111. *Id.*

112. *Id.*

113. *United States v. Kirby*, 74 U.S. 482, 486 (1868).

114. See *Pub. Citizen v. United States*, 491 U.S. 440, 452 (1989) (defining “utilize” as a “woolly verb”).

115. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

116. *Id.* at 842-43.

117. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940); see also *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 664 (1988); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>118</sup>

Allowing an agency to nullify the text of the statute and replace the words with whatever it determined would produce a reasonable result eliminates the best evidence of congressional intent. The constitutionally blessed congressional enactment trumps agency preference, even when what Congress intends seems absurd to the agency. Otherwise, although Congress may have spoken to the precise issue, it would no longer be the end of the matter, which would obviate the first step of *Chevron*. The second step would also be void because once the agency has changed the best evidence of congressional will, a permissible construction of that will molds to whatever the agency chooses. Doing so removes any intelligible principle from the statute and allows an agency to run roughshod over the legislative power constitutionally reserved to Congress.

The EPA embraced this approach in its interpretation of the Tailoring Rule, which creates an untenable outcome for greenhouse gas regulation. Substituting the plain language of the statute's 100 or 250 tons per year to qualify for the PSD and Title V programs with 75,000 or 100,000 tons per year unabashedly rewrites the statute. Although some words are ambiguous, or may be used in an ambiguous fashion,<sup>119</sup> no word is less ambiguous than a number. Its meaning is virtually unmistakable. Therefore, interpreting it to mean anything but its plain meaning is contrary to the statute, violates *Chevron*, and eliminates the best indicator of congressional intent. Contrary to the EPA's position, the very fact that a true textualist approach would produce absurd results may indicate that Congress never intended the Clean Air Act to apply to greenhouse gas emissions.

### *B. The Textualist Approach*

The textualist approach represents the opposite end of the interpretation continuum from the nullification approach. This approach uses the text as the exclusive tool of interpretation.<sup>120</sup> Under no circumstances would it be appropriate to allow the use of the absurd results doctrine and construe a statute contrary to its plain meaning. This approach rejects the absurd results doctrine because it is susceptible to

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118. *Chevron*, 467 U.S. at 843.

119. See *infra* Part IV.B.

120. This approach is not the "new textualism" described by some scholars. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

abuse by the agency utilizing it and it is based on unauthoritative documents.

The textualist approach draws its support primarily from case law that ratifies the primacy of the statutory text in the context of interpretation. Courts generally will begin with “the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”<sup>121</sup> This respect for statutory text stems from more than a century of jurisprudence, including Justice Holmes’s famous quote that “[w]e do not inquire what the legislature meant; we ask only what the statute means.”<sup>122</sup> In other words, “[t]he words of the statute, and not the intent of the drafters, are the law.”<sup>123</sup>

Support for this approach finds additional support in traditional justifications of strictly textual interpretation. The text of the statute offers fundamental notice and reliance assurances to those required to obey the law. Although contrary to Dougherty’s position that the average person will rely on what he believes the law should be,<sup>124</sup> the argument can be made that the average person will instead rely on the statute as written. It strains logic to suggest that the lay person goes any further than the statutory text for the full meaning of the law. Using the elusive idea of congressional intent or the spirit of the law would only serve to undermine what the average citizen considers the full statement of the law, creating notice and reliance problems.

Textualism also finds support in the constitutional structure. This approach embraces the idea that the legislature, and only the legislature, is entitled to write the statute.<sup>125</sup> The structure of the Constitution is offended when a member of the judiciary branch “interprets” the law so extensively as to rewrite its provisions, regardless of what legislative material the judge may claim as his basis. Additionally, the text of the

121. *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

122. Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 26 (2006) (alteration in original) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)) (internal quotation marks omitted). Many times Congress may have more than one intention or implication for important legislation. *See, e.g.*, Andrew Barker, “Pleasant Scenes” or Nazi Icons? Returning Art Wrongfully Confiscated During World War II, 71 UMKC L. REV. 841, 857 (arguing that Congress passed the Holocaust Victims Redress Act specifically to “restore property to Jewish victims of the Nazis” but that it also “showed the steps the United States was willing to take to fix the problems of wartime property confiscation”).

123. Gold, *supra* note 122 at 26 n.8 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 60 (1988)).

124. Dougherty, *supra* note 105 and accompanying text.

125. “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1 (emphasis added).

statute is the substance on which every representative in the Legislature has voted, and it has passed the requirements of bicameralism and presentment. Congress's opportunity to speak is given in this format and no other.<sup>126</sup> These procedures act as a refiner's fire for potential enactments, eliminating bills and ideas. The text of the statute is supreme and should be regarded as the final word of what the law is.<sup>127</sup>

The textualist approach eschews the absurd results doctrine because of its potential for abuse and the materials upon which it is based. These criticisms are best represented in Justice Kennedy's concurrence in *Public Citizen v. United States*,<sup>128</sup> although Kennedy himself is not opposed to the proper use of the doctrine. There, a statute required that any committee "utilized by the President" must make its records available to the public.<sup>129</sup> The Court found that giving the word "utilized" its usual meaning would produce the absurd result of applying these requirements to every "formal organization, from which the President or an Executive agency seeks advice," which would include even the most miniscule contacts.<sup>130</sup> Therefore the Court delved into an extensive search of the statute's legislative history to determine the true meaning of the word "utilized."<sup>131</sup>

Concurring in judgment, Justice Kennedy criticized an expansive approach to the absurd results doctrine because of "its susceptibility to abuse."<sup>132</sup> The doctrine allows a judge to substitute his own will for that of Congress based upon materials that have no judicial authority.<sup>133</sup> Such a "loose invocation of the 'absurd result' canon of statutory construction creates too great a risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substitut[ing] [its own] pleasure to that of the legislative body.'"<sup>134</sup> Kennedy warns, "[T]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."<sup>135</sup> Where the language of a statute is unambiguous, the Court should not "rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute

126. Easterbrook, *supra* note 123, at 60 (noting the inadequacy of legislative history).

127. Gold, *supra* note 122, at 26 (stating that where the text is unambiguous, "[t]he court's determination of the objective meaning of the statute ends the inquiry").

128. 491 U.S. 440 (1989).

129. *Id.* at 446-47, 452 (emphasis added).

130. *Id.* at 452 (citation omitted).

131. *Id.* at 473-74 (Kennedy, J., concurring).

132. *Id.* at 474.

133. See generally *id.* at 469-82.

134. *Id.* at 471 (alterations in original) (quoting THE FEDERALIST NO. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961)).

135. *Id.* at 473.

with which the Court is more comfortable.”<sup>136</sup>

In this way, a textualist approach respects the *Chevron* analysis. The first step of the *Chevron* analysis asks whether Congress has spoken to the precise issue.<sup>137</sup> The text is the greatest indicator of congressional intent. No one would be justified in accusing an agency of overstepping its bounds if the agency simply looked to the formal, constitutionally sanctioned text of the statute it is interpreting. Again in the second step, an agency’s interpretation will almost certainly be found reasonable if it ties closely to the textual contours of the statute it is construing.<sup>138</sup> Conversely, agencies often run into trouble when their construction of a statute is far from the plain meaning of its terms.<sup>139</sup> Even more so when the terms of the statute have been nullified and replaced with what the agency feels is more suitable for the facts and circumstances at hand.<sup>140</sup>

In recent years, however, the textualist approach has been subjected to increasing criticism. A strict textualist approach has been almost completely eradicated, being replaced in most cases with a hybrid approach to statutory interpretation simply because a strictly textualist approach nearly is impossible.<sup>141</sup> This is a corollary of the fact that common sense, as well as longstanding judicial philosophy, tells us that reading a statute literally, despite the absurd outcome, offends traditional notions of fairness and justice on which the law is based. Words are inherently ambiguous and Congress uses them in an ambiguous manner, and applying a strict textualist approach runs directly contrary to previous iterations by the Court of what is appropriate to consider in analyzing congressional intent under *Chevron*.

First, a strict textualist approach contradicts common sense and longstanding case law when such a reading would produce an absurd result. As articulated in the aforementioned classic examples of the absurd results doctrine in *Kirby*, it strains logic to advocate for punishing a physician who offers medical assistance or a prisoner who escapes a fire.<sup>142</sup> Ignoring this fundamental notion of common sense, which has guided judicial philosophy for more than a century,<sup>143</sup> in favor of a strictly literal reading, unnecessarily restricts the agency from considering the full variety of factors that justify its statutory construction.

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136. *Id.*

137. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

138. *Id.* at 843.

139. *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

140. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

141. *See, e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (finding that a literal reading would conflict with constitutional rights).

142. *See supra* note 12 and accompanying text.

143. *See supra* note 13 and accompanying text.

Literal reading becomes almost impossible considering the inherent ambiguity of the words themselves and the ambiguous nature of their use by legislators. If this be conceded, a purely textualist approach becomes extremely problematic. As Justice Frankfurter pointed out, “[T]he problem derives from the very nature of words.”<sup>144</sup> Words are simply “symbols of meaning . . . [that] seldom attain[] more than approximate precision.”<sup>145</sup> As a result, they “can hardly achieve [the] invariant meaning or assured definiteness,” which would be necessary to justify relying exclusively on the statutory text.<sup>146</sup> This requires the agency to look beyond the statutory text and find the true meaning elsewhere.

Further, even if the meaning of each word were perfectly clear, Congress uses the words of statutes in an ambiguous manner. Whether it is the result of unintentional error, a “deliberate legislative choice to leave conflictual decisions to agencies or the courts, *or* the result of social or legal developments the most clairvoyant legislators could not have foreseen,”<sup>147</sup> the result is the same: the statute’s meaning cannot be determined without consulting other indicative material. In fact, in the case of unforeseen circumstances, it is doubtful that even a perfectly drafted statute would make any difference at all.<sup>148</sup> A statute’s meaning cannot always be deciphered from the naked text. The futility of a strictly textualist approach is highlighted by the position of modern textualists, most famously Justice Antonin Scalia, who accept the absurd result doctrine, albeit in a more-limited form.<sup>149</sup>

Finally, a strictly textualist approach is inappropriate because it cabins the *Chevron* analysis beyond what has been permitted by case law. As mentioned above, the well-known *Chevron* test consists of two steps aimed at extracting congressional intent. At the first step of the *Chevron* analysis, the Court has charged the judiciary with “employing traditional tools of statutory construction [to] ascertain[] that Congress had an intention on the precise question at issue.”<sup>150</sup> The text of the statute is just one tool in the interpreter’s tool belt. Although there is some debate on what these tools are,<sup>151</sup> certainly by virtue of the use of

144. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

145. *Id.*

146. *Id.*

147. Eskridge, *supra* note 120, at 677 (citations omitted) (citing William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1506–11 (1987)); *see also* Gold, *supra* note 122, at 40.

148. Eskridge, *supra* note 120, at 677 (citations omitted) (citing William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1506–11 (1987)).

149. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (Scalia, J., concurring) (requiring legislative proof “to justify a departure from the ordinary meaning” of the text).

150. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

151. *See, e.g.,* Melina Forte, *May Legislative History be Considered at Chevron Step One?*

the plural form of the word “tools,” they contain more than just the text. The Court has been more explicit at *Chevron* step two, authorizing the judiciary to extract congressional intent “based on the text, structure, and legislative history.”<sup>152</sup> Restricting *Chevron* step two to simply the text is contrary to the appropriate evaluation of an agency’s interpretation of a statute. If a court were to simply ignore the structure or legislative history that pointed toward a different interpretation of the statute, it could expect to be reversed.

Both the nullification and the textualist approach offer some beneficial insights of how to approach the absurd results doctrine; however, both are also plagued by problems that cannot be squared with statutory text, case law, and the *Chevron* doctrine. This Article now offers an innovative method to interweave the absurd results doctrine and *Chevron*, known as the avoidance approach. While avoidance has been used in other interpretive contexts, its application in the *Chevron* context has not yet been explored, and it offers the best balance of the two extreme approaches described above, while avoiding the problems that make each of them untenable.

## V. THE AVOIDANCE APPROACH

The avoidance approach offers agencies a dynamic balance of the nullification and textualism approaches to the absurd results doctrine in the *Chevron* context. It incorporates the benefits and avoids the extreme situations of the other two approaches by offering a reasonable middle ground. The agency has the opportunity to freely utilize all of the traditional tools of construction prescribed in *Chevron* but is prohibited from completely rewriting the statute to comport with its own desires. It respects the parameters set out in case law at both the Supreme Court and appellate court levels. If the EPA were to adopt this approach as the baseline for its greenhouse gas regulation, the Tailoring Rule would stand a much better chance of surviving the impending scrutiny of the courts.

The avoidance approach is designed to avoid the extremes of the nullification and textualist approaches and allows the agency to make use of all the Court-sanctioned tools of interpretation. It leaves the statutory language intact, while ensuring that an absurd result is not exacted upon unsuspecting parties. Generally, the meaning of the text would be respected; however, if a literal reading led to an absurd result, the agency would find a solution to avoid such an outcome, while still adhering

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*The Third Circuit Dances the Chevron Two-Step in United States v. Geiser*, 54 VILL. L. REV. 727 (2009).

152. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995).

closely to the statutory mandate.

In this way, the avoidance approach to the absurd results doctrine vis-à-vis *Chevron* functions very similarly to the constitutional avoidance canon as articulated in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.<sup>153</sup> In that case, the Clean Water Act charged the Army Corps of Engineers with issuing permits for the “discharge of dredged or fill material” into “the waters of the United States.”<sup>154</sup> A problem arose when the Corps issued a regulation, claiming that intrastate waters “used as habitat by . . . migratory birds which cross state lines” would also fall under the Clean Water Act.<sup>155</sup> The Solid Waste Agency of Northern Cook County challenged this regulation, claiming the Corps had “exceeded [its] statutory authority in interpreting the [statute].”<sup>156</sup> The Court’s main concern was that the Corps’ interpretation of the Clean Water Act to include the “Migratory Bird Rule” stepped outside the constitutional boundaries of congressional power granted by the Commerce Clause.<sup>157</sup>

The Court applied the avoidance approach to questions of constitutionality. “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>158</sup> Allowing an agency to push the constitutional envelope of congressional power requires “a clear indication that Congress intended that result.”<sup>159</sup> If no such indication is present, the Court will interpret the regulation to avoid the constitutional issue completely.<sup>160</sup> This rule is based on the Court’s “prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”<sup>161</sup>

The avoidance approach to the absurd results doctrine works in a similar way. Simply put, where a construction of a statute would produce absurd results, the agency should construe the statute to avoid them unless those results were clearly Congress’s intent. This is not a license

153. 531 U.S. 159 (2001).

154. *Id.* at 163 (quoting 33 U.S.C. §§ 1344(a), 1362(7) (2000)) (internal quotation marks omitted).

155. *Id.* at 164 (quoting 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (to be codified at 33 C.F.R. pts. 320–30)).

156. *Id.* at 165–66.

157. *Id.* at 172–73.

158. *Id.* at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

159. *Id.* at 172 (citing *DeBartolo Corp.*, 485 U.S. at 575).

160. *Id.*

161. *Id.* at 172–73.

to rewrite the statutory language or ignore the mandate of Congress. Rather, it is the innovative application of a tried interpretive tool to a new context. The approach is based on respect for the legislative process. The agency assumes that Congress acts responsibly and constitutionally and does not authorize agencies to change the statutory text. The Court's acceptance of the avoidance approach in other interpretive contexts makes it more likely that the Court would be willing to accept a regulation from an agency based upon the same approach.

This avoidance approach may be referred to as step 1.5 in the *Chevron* analysis. At step one, courts will consider whether Congress has spoken to the precise issue.<sup>162</sup> At this new step 1.5, courts will then ask whether a literal reading of the statute will produce absurd results. If so, the statute will be construed to avoid such results unless Congress has clearly intended the absurd outcome; however, the agency is still required to operate within the *Chevron* framework and will not be allowed to rewrite the statute or disregard its express terms. In this way, step 1.5 would also affect the second step of *Chevron*, which provides that if Congress has not spoken to the precise issue, the agency must give a permissible construction of the statute.<sup>163</sup> Since Congress is presumed not to have intended absurd results, under step 1.5, a permissible construction of the statute would not reflect an absurd result.

Regardless of its incorrect choice of approach, the EPA simply has chosen the wrong time to utilize the absurd results doctrine. Had the EPA applied the avoidance approach to its greenhouse gas regulation, the regulation would look much different than its current form. Ironically, the EPA seems to have applied the textualist approach when deciding whether greenhouse gases should be regulated by the Clean Air Act.<sup>164</sup> When confronted with comments regarding the costs and administrative burdens that would surely accompany the regulation of greenhouse gas emissions,<sup>165</sup> the EPA dismissed the arguments, directing these

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162. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

163. *Id.* at 843.

164. See 74 Fed. Reg. 66,496, 66,501 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

165. *Id.* at 66,515 ("These commenters contend that the incredible costs associated with using the inflexible regulatory structure of the CAA will harm public health and welfare, and therefore EPA should exercise its discretion and find that greenhouse gases do not endanger public health and welfare because once EPA makes an endangerment finding under CAA section 202(a), it will be forced to regulate greenhouse gases under a number of other sections of the CAA, resulting in regulatory chaos."). Commenters also warned the EPA that because of the strict structure of the Clean Air Act, once the EPA decided to regulate greenhouse gas emission, it would not be able to stop the required regulation. *Id.* The EPA dismissed this argument as well through a somewhat condescending analogy, stating that "the question of whether the cure is worse than the illness is different than the question of whether there is an illness in the first place." *Id.* It seems the EPA was swept away in the current of the statute it has been charged with implementing. Additionally, the EPA's contention that the Supreme Court requires it to decide whether to regulate greenhouse gas emissions solely on science and not policy is irrelevant in this context because the EPA did not raise

commenters to “take up their concerns with Congress, not [the] EPA.”<sup>166</sup> At that time, the EPA was confident in its ability to “take a measured approach to address greenhouse gas emissions.”<sup>167</sup> Now that the EPA finds that administering the Clean Air Act to greenhouse gas emissions creates a self-imposed, impossible administrative burden, it has left the textualist approach behind and converted to the opposite extreme of the spectrum, the nullification approach. Had the EPA taken these commenters seriously, it would have recognized the absurd results that would follow from its decision to apply the Clean Air Act to greenhouse gas emissions. It should have employed the avoidance approach to the absurd result doctrine at that time to interpret the statute, instead of belatedly trying to cover itself after the damage had been done.

The ramifications of failing to employ the avoidance approach are severe for the EPA. The Supreme Court may have found for the EPA in *Massachusetts v. EPA* had it employed the avoidance approach to the absurd results doctrine at that time. The Court did not rule on whether the EPA should issue an endangerment finding; the Court simply ruled that whatever the EPA decided, it must give a reasonable explanation for its actions.<sup>168</sup> The avoidance approach likely would have given the Court the “reasonable explanation” it sought, especially considering the increased burdens on small emitters and agency resources that it now uses to justify the Tailoring Rule.<sup>169</sup> If Congress truly had intended greenhouse gas regulation, it could have provided the EPA with a governing statute that did not produce an absurd result when literally applied. That statute could have set an appropriate level of applicability allowing the EPA to promulgate regulation instead of legislative amendment without having to promulgate a statute-amending regulation. On the other hand, Congress could have approved of the EPA’s decision not to regulate greenhouse gas emissions as pollutants by refusing to take up the issue at all. In either scenario, the absurd result doctrine would have been used appropriately, the *Chevron* framework would have been respected, and the people, through the democratically elected Congress, would have decided how such regulation should apply.

Instead, the EPA has placed itself in the difficult position of hitching itself to a runaway train. By determining that Congress intended the

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the absurd results doctrine in that case. *See generally*, *Massachusetts v. EPA*, 549 U.S. 497 (2007). As noted above, the Court has accepted this doctrine for more than a century unlike the policy considerations the EPA attempted to use to persuade the court. *Id.* at 533 (stating that the EPA “has offered a laundry list of reasons not to regulate,” including voluntary programs, interference with foreign policy, and the need to avoid a “piecemeal approach” to climate change).

166. 74 Fed. Reg. at 66,515. *Cf.* *Griffin v. Oceanic Contractor, Inc.*, 458 U.S. 564, 576 (1982).

167. 74 Fed. Reg. at 66,516.

168. *Massachusetts*, 549 U.S. at 533, 534.

169. *See supra* note 65 and accompanying text.

Clean Air Act to apply to greenhouse gas emissions, the EPA has missed its stop. It has waited too long to utilize the absurd results doctrine. The only avenue now available is to stretch the absurd results doctrine beyond its limits and attempt to rewrite the statute by citing congressional intent that cannot justify nullifying the plain language in the statute's text. Like in *Massachusetts v. EPA*, "the statutory text [of the Clean Air Act] forecloses" this option<sup>170</sup> and the Court has no reason "to accept [the] EPA's invitation to read ambiguity into a clear statute."<sup>171</sup> The very fact that the EPA has resorted to such an extreme approach to the absurd results doctrine clearly illustrates that it should have used the absurd results doctrine as measuring tape to determine whether greenhouse gas emissions should be regulated by the Clean Air Act, rather than as a crowbar to force it to fit.

## VI. CONCLUSION

The avoidance approach presents the best option for the absurd results doctrine as a general statutory tool of construction in the regulatory context. It offers an innovative approach to blending the absurd results doctrine with the *Chevron* analysis by utilizing a tried and effective approach to statutory interpretation in a distinct context. The approach eliminates the problems posed by the nullification and textualist approaches, while incorporating their strengths. It respects the statutory text but does not exclude other useful tools of statutory interpretation sanctioned by the courts and particularly by *Chevron*. It works as an interim step in the *Chevron* analysis, which allows agencies to consider whether a plain reading of the statute will truly effect a result never intended.

The avoidance approach also offers a salutary alternative to the problems the EPA has created with its nullification approach to the Tailoring Rule. The nullification approach it has employed does the most violence to the statutory language by changing the clear numbers of the statute. As a result, under the *Chevron* analysis, the EPA faces an uphill battle before the courts. The avoidance approach would have been most effective in the beginning by informing the Court that the Clean Air Act was never intended to apply to greenhouse gas emissions. Congress could have then created a workable statutory scheme for the EPA to implement. Instead, the EPA finds itself unable to operate within the statutory framework in which it has entangled itself; however, failure to

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170. 549 U.S. at 528. As mentioned in footnote 61, this language suggests that Justice Kennedy approached the case from a new textualist point of view and may have been open to an absurd results argument.

171. *Id.* at 531.

apply the absurd results doctrine correctly is not now a license to destroy the Clean Air Act's provisions and replace them with what the EPA deems fitting. Just as the avoidance approach leads to proper statutory interpretation generally, it will lead the EPA to the proper application of the Clean Air Act to pollution. All agencies should adopt this approach to benefit from its respect for Congress, the statutory text, case law, and *Chevron*.

*D. Wiley Barker\**

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\* Graduate, *magna cum laude*, April 2011, Brigham Young University Law School; B.A. *summa cum laude*, 2007, Utah State University. The author would like to thank his wife Kate, his son Christian, and his father David for their encouragement, patience, and support throughout. The author is also grateful to Professor Brigham Daniels for his expert insight and sincere interest in the development of this comment.