

Washington Law Review

Volume 86
Number 3 *Symposium: Global Law and Its
Exceptions*

10-1-2011

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Recommended Citation

Katherine K. O'Brien, Notes and Comments, *Beyond Absurdity: Climate Regulation and the Case for Restricting the Absurd Results Doctrine*, 86 Wash. L. Rev. 635 (2011).

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BEYOND ABSURDITY: CLIMATE REGULATION AND THE CASE FOR RESTRICTING THE ABSURD RESULTS DOCTRINE

Katherine Kirklin O'Brien

Abstract: The absurd results doctrine of statutory interpretation allows courts to depart from clear legislative text when a literal reading would be “absurd.” Traditionally, courts defined an absurd result as one that offends fundamental social values. Over time, however, courts have expanded the concept of legal absurdity to include outcomes that do not violate moral principles, but instead present regulatory burdens deemed too onerous to reflect congressional intent. In June 2010, the U.S. Environmental Protection Agency (EPA) invoked this expansive reading of the absurd results doctrine to support a regulation known as the “Tailoring Rule,” which the agency promulgated as part of its first effort to regulate climate-changing greenhouse gases under the Clean Air Act (CAA). The CAA explicitly states that facilities emitting any regulated air pollutant in excess of specific quantities must obtain a permit from the EPA or authorized state agencies. The Tailoring Rule, however, raises the statutory permitting threshold for facilities that emit greenhouse gases, on the ground that applying the existing thresholds to greenhouse gas emitters would be so burdensome for the agency and industry as to constitute an absurd result. While the Tailoring Rule illustrates the practical expediency of an expansive absurd results doctrine, it also demonstrates the doctrine’s inconsistency with the constitutional separation of powers, administrative law principles, and the mandate of federal environmental statutes. Focusing on the example of environmental law and the Tailoring Rule in particular, this Comment argues that courts should restrict the absurd results doctrine to its traditional scope and reject arguments that a certain degree of congressionally mandated regulation is absurd as a matter of law.

INTRODUCTION

The Administrator concludes that . . . the case for finding that greenhouse gases in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions . . . and that the effects will only worsen over time in the absence of regulatory action. The effects of climate change on public health include sickness and death The effects on welfare embrace every category of effect described in the Clean Air Act's definition of "welfare" and, more broadly, virtually every facet of the living world around us In both magnitude and probability, climate change is an enormous problem. The greenhouse gases that are responsible for it endanger public health and welfare within the meaning of the Clean Air Act.

U.S. Environmental Protection Agency¹

"Absurd": ridiculously unreasonable, unsound, or incongruous . . . having no rational or orderly relationship to human life: meaningless.

Merriam-Webster English Dictionary²

In June 2010, amid heated controversy over the federal government's response to climate change,³ the U.S. Environmental Protection Agency (EPA) published a regulation known as the "Tailoring Rule" as part of its first efforts to regulate climate-changing greenhouse gases under the Clean Air Act (CAA).⁴ As written, the CAA requires facilities that emit

1. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,904 (proposed Apr. 24, 2009).

2. *Absurd Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/absurd> (last visited July 9, 2011).

3. See GREGORY E. WANNIER, EPA'S IMPENDING GREENHOUSE GAS REGULATIONS: DIGGING THROUGH THE MORASS OF LITIGATION 2 (Columbia Law Sch. Ctr. for Climate Change Law, Nov. 23, 2010), http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=551014 (describing the EPA's efforts to regulate greenhouse gases as "heavily contested" notwithstanding "express Supreme Court authorization" to undertake such regulation).

4. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (Jun. 3, 2010) [hereinafter Tailoring Rule]. The Tailoring Rule forms part of a suite of rules promulgated by the EPA to address greenhouse gas emissions following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007), which held that greenhouse gases fall within the CAA's definition of "air pollutants" and may therefore be regulated under that statute. See *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas*

more than 100 or 250 tons per year of a conventional air pollutant⁵ to obtain a permit from the EPA or authorized state agencies.⁶ The Tailoring Rule, however, presents the EPA's interpretation that this threshold does not apply to emissions of greenhouse gases.⁷ Based on this interpretation, the EPA substitutes a 100,000-tons-per-year threshold for greenhouse gas emissions,⁸ effectively exempting sources that produce less than 100,000 tons of greenhouse gases annually from immediate compliance with the statute.⁹ A cursory glance at the rule

Tailoring Rule, Fact Sheet, <http://www.epa.gov/nsr/documents/20100413fs.pdf> (last visited Sept. 13, 2011). For a history of the Tailoring Rule, see James R. Farrell, *The Future of the Greenhouse Gas Tailoring Rule*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,247, 10,249–51 (2011).

5. The CAA distinguishes conventional or “criteria” air pollutants from “hazardous” air pollutants, which are regulated under a separate section of the statute. See Robert J. Martineau, Jr., *Hazardous Air Pollutants*, in THE CLEAN AIR ACT HANDBOOK 227 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004). Conventional pollutants include substances such as sulfur dioxide, nitrogen oxide, carbon monoxide, and photochemical smog (also known as ground-level ozone). See Richard E. Ayres & Mary Rose Kornreich, *Setting National Ambient Air Quality Standards*, in THE CLEAN AIR ACT HANDBOOK 13 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004). Hazardous air pollutants are known or suspected to cause cancer or other serious health effects or have an adverse environmental effect. U.S. Env'tl. Prot. Agency, *About Air Toxics*, TOXIC AIR POLLUTANTS (Aug. 11, 2011), <http://www.epa.gov/air/toxicair/newtoxics.html>. Examples of hazardous air pollutants include benzene, dioxin, and mercury. See *id.* The CAA mandates a permit for facilities that emit more than ten tons per year of a single hazardous air pollutant or twenty-five tons per year of any combination of such pollutants. Clean Air Act, § 112(a)(1), 42 U.S.C. § 7412(a)(1) (2011).

6. The Tailoring Rule concerns two CAA permitting programs—the Prevention of Significant Deterioration (PSD) and title V programs. Tailoring Rule, *supra* note 4, at 31,514. The PSD program mandates permits for new or modified stationary (non-vehicle) sources of air pollutants located in clean air areas that emit or have the potential to emit at least 100 tons per year of a regulated pollutant and fall within twenty-eight specified categories. *Id.* at 31,520. New or modified sources in clean air areas that do not fall within the specified categories require a permit if they emit or have the potential to emit at least 250 tons per year of a regulated pollutant. *Id.* The title V program mandates permits for, inter alia, any new or modified stationary source that emits or has the potential to emit at least 100 tons per year of a regulated pollutant, regardless of the existing air quality in the area in which it is located. *Id.* at 31,521; 42 U.S.C. § 7602(j) (2011).

7. See Tailoring Rule, *supra* note 4, at 31,517.

8. See *id.* at 31,516.

9. The Tailoring Rule prescribes a two-part phase-in of permitting requirements for large sources of greenhouse gases. See Tailoring Rule, *supra* note 4, at 31,516. In the first phase, the rule requires sources that already hold a CAA permit to begin reporting their greenhouse gas emissions to the EPA or state permitting authority. See *id.* The second phase requires currently unregulated facilities to obtain a permit by July 1, 2011, if they emit more than 100,000 tons per year of greenhouse gases. See *id.* The rule fully exempts certain smaller sources from greenhouse gas permitting requirements until at least 2016. See *id.* While the EPA retains some flexibility to modify the applicable threshold during the 2011 to 2016 period, it has guaranteed that no source that emits less than 50,000 tons per year of greenhouse gases will be subject to regulation under the title V or PSD programs during that period. See *id.* at 31,524–25. For a detailed summary of the rule's application to specific source types under the phase-in approach, see Farrell, *supra* note 4.

raises the question: how can an agency “interpret” a statute so as to revise the permitting requirements numerically expressed in its text?

The EPA’s answer rests in part on the “absurd results” doctrine,¹⁰ a canon of statutory interpretation that has been “a staple of American legal culture since the founding.”¹¹ As traditionally understood, the doctrine justifies a court’s departure from the plain meaning of a statute when applying the statute literally would contravene fundamental social values and common sense.¹² As the Tailoring Rule illustrates, however, agencies now invoke the doctrine to justify their departure from facially clear statutory language¹³ when applying the statute as written would present unmanageable regulatory burdens.¹⁴ Under this expansive view of the doctrine, a judge may declare a literal statutory interpretation absurd, thereby rendering the provision inapplicable, on the ground that it affects an overly broad set of actors or that its mandate would be too burdensome to implement.¹⁵

The Tailoring Rule marks the outer bounds of the contemporary absurd results doctrine. The EPA’s justification for revising the CAA’s permitting thresholds is that greenhouse gases, unlike other regulated pollutants, are produced by hundreds of thousands of small entities in quantities exceeding the 100/250-tons-per-year threshold prescribed in

10. Tailoring Rule, *supra* note 4, at 31,516. The agency also cites the “administrative necessity” and “one-step-at-a-time” doctrines to support the rule. *Id.*

11. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 85 (2010).

12. *See, e.g.*, United States v. Kirby, 74 U.S. 482, 486–87 (1868); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202–03 (1819).

13. Under the familiar framework for agency statutory interpretation laid out in *Chevron, U.S.A. v. Natural Resources Defense Council*, an agency may adopt an independent construction of a statute only if the statute is ambiguous on its face. *See* 467 U.S. 837, 842–43 (1984). Where the statutory language is clear, its plain meaning controls. *See id.*; *see also infra* notes 136–141 and accompanying text.

14. *See, e.g.*, *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001) (accepting EPA’s argument that reading § 303(d)(1)(C) of the Clean Water Act (CWA) literally would contravene congressional intent and therefore lead to absurd results); *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (accepting EPA’s argument that petitioner’s interpretation of the Safe Drinking Water Act would lead to absurd results); *see also* MANNING & STEPHENSON, *supra* note 11, at 98 (distinguishing “classic” absurd results cases such as *Kirby* from more contemporary decisions in which the court rejected statutory text not because its literal application would “violate some deeply and widely held social value,” but instead because of the court’s “assessment of what Congress would have intended, given the purposes of the bill and the dynamics of Washington politics”).

15. *See, e.g.*, *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 463–64 (1989) (holding that a literal interpretation of the Federal Advisory Committee Act would be absurd on the ground that it “would catch far more groups and consulting arrangements than Congress could conceivably have intended”).

the statute.¹⁶ As a result, the EPA estimated that applying the Act as written to greenhouse gas emitters would make the statute's permitting programs several hundred-fold larger.¹⁷ While not disputing the CAA's applicability to greenhouse gas emissions,¹⁸ the agency concluded that the sheer magnitude of regulation dictated by a literal application of the statute, and the attendant burden on permitting authorities and industry, constitutes an absurd result that Congress could not have intended.¹⁹ Therefore, the EPA concluded that the CAA does not require permits for sources of greenhouse gases according to the thresholds prescribed in its text.²⁰

The expansive interpretation of absurd results adopted in the Tailoring Rule magnifies a longstanding critique that the absurd results doctrine allows executive and judicial actors to depart from statutory text in contravention of the constitutional separation of powers.²¹ When an administrative agency invokes the doctrine, it also circumvents the limits on its interpretive discretion established by the U.S. Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council*²² by adopting an independent construction of a facially clear statute.²³ Moreover, because

16. See *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, Fact Sheet*, <http://www.epa.gov/nsr/documents/20100413fs.pdf> (last visited Sept. 13, 2011).

17. See Tailoring Rule, *supra* note 4, at 31,533.

18. See *id.* at 31,517 (“[T]he PSD and title V provisions and their legislative history do indicate a clear congressional intent . . . that the permitting programs do apply to GHG [greenhouse gas] sources.”).

19. See *id.* at 31,533 (stating that applying the statutory permitting thresholds literally to sources of greenhouse gases would make the PSD and title V programs “several hundred-fold larger than what Congress appeared to contemplate” and would cover small sources that Congress did not expect would require CAA permits).

20. See *id.*

21. See WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 267 (2009) (describing the argument that “judicial application of the absurdity doctrine bumps up against the Founder[s]’ commitment to the rule of law.”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2437 (2003) (“The absurdity doctrine, as traditionally conceived, approximates the very judicial behavior that [the] separation-of-powers tradition condemns.”). But see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 482 (1989) (advocating for the absurd results doctrine on the ground that courts possess superior institutional competency, relative to Congress, for determining whether a specific application of a general statutory provision is sound).

22. 467 U.S. 837 (1984).

23. See *id.* at 842–44 (stating that a court reviewing an agency’s interpretation of a statute that it administers will first ask whether congressional intent on the point at issue is clear and, if so, apply that intent as expressed in the text. If, however, congressional intent is not clear, the court will consider whether the agency’s interpretation reflects a permissible construction of the statute and apply the agency’s interpretation if it is reasonable.).

the doctrine fails to provide stable criteria for defining and remedying a purported absurdity,²⁴ there is no clear limit to the statutory revisions it could sanction.

These concerns are particularly acute in the context of contemporary environmental law. In the absence of affirmative congressional action to address climate change, litigants seeking redress for climate-related harms are exerting new pressure on existing environmental statutes.²⁵ Authorizing administrative and judicial interpretations that contravene facially clear legislation under the banner of absurd results could dismantle the regulatory machinery of federal environmental laws by giving agencies and judges license to revise statutory mandates that they deem overly onerous.

Focusing on the example of environmental law,²⁶ this Comment argues that courts should reject expanded application of the absurd results doctrine as inconsistent with the separation of powers, administrative law principles, and the mandate of federal environmental statutes. Part I describes the traditional formulation of the absurd results doctrine. Part II discusses how courts have expanded the concept of absurd results beyond its traditional sphere. Part III tracks this expansion in litigation under federal environmental statutes and highlights the specific issues raised by those cases. Using the example of the Tailoring Rule and the litigation challenging it,²⁷ Part IV argues that courts should

24. See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 139 (1994) (noting that courts applying the absurd results principle fail to define what constitutes an absurdity).

25. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (reviewing EPA's denial of rulemaking petition requesting that the agency regulate greenhouse gas emissions from new motor vehicles under the CAA); *Natural Res. Def. Council v. U.S. Army Corps of Eng'rs*, No. 1:09 CV 588, 2010 WL 1416681, at *1 (N.D. Ohio Mar. 31, 2010) (alleging, inter alia, violation of the National Environmental Policy Act for failure to consider climate impacts in permitting construction of coal-to-liquid fuel plant); *Complaint at 2*, *Ctr. for Biological Diversity v. EPA*, No. 2:09-cv-00670-JCC (W.D. Wash. filed May 14, 2009), 2009 WL 1390743 (alleging violations of EPA's duty under the CWA to regulate greenhouse gas emissions causing ocean acidification). For an updated list of climate-related litigation, see Arnold & Porter LLP, *Climate Change Litigation in the U.S.*, <http://www.climatecasechart.com> (last visited Sept. 13, 2011).

26. This Comment focuses on environmental cases for two reasons: First, the Tailoring Rule presents a powerful example of the expanded scope of the absurd results doctrine and its current relevance in controversial areas such as climate change law. Second, prior environmental cases involving the absurd results doctrine present a coherent narrative of the doctrine's expansion and varied treatment by federal courts over the second half of the twentieth century. While the author suspects that this critique of the expanded absurd results doctrine would have equal force in other legal contexts, in-depth discussion of other areas is beyond the scope of this Comment.

27. The Tailoring Rule has inspired more than twenty-five independent challenges in the D.C. Circuit Court of Appeals, many of which attack the EPA's use of the absurd results doctrine. See *Coal. for Responsible Regulation v. EPA*, No. 10-1073 (D.C. Cir. docketed Apr. 2, 2010); see also

reject administrative interpretations that a certain degree of congressionally mandated regulation is absurd as a matter of law.

I. COURTS TRADITIONALLY DEFINED “ABSURD RESULTS” AS OUTCOMES OFFENSIVE TO FUNDAMENTAL SOCIAL VALUES

Based on the presumption that Congress intends to legislate rationally, courts traditionally employed the absurd results doctrine only when a literal statutory interpretation would offend fundamental social values and could not be ascribed to any rational policy choice.²⁸ In this way, courts justified the absurd results doctrine as a means of implementing legislative intent.²⁹

A. *Historically, the Absurd Results Doctrine Authorized Departure from Statutory Text Only When a Literal Interpretation Would Contravene Fundamental Social Values*

The principle that judges should construe statutes to avoid absurd results is firmly established in the American legal system,³⁰ with origins traceable to early English common law.³¹ In the traditional view, the judicial obligation to apply statutory text is suspended when “the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”³² As the doctrine developed through the nineteenth century, courts consistently articulated the concept of legal absurdity in terms of this moral standard,³³ defining an “absurd result” as one that

WANNIER, *supra* note 3. Although this Comment critiques EPA’s use of the absurd results doctrine in the Tailoring Rule, it does not advance a position on the litigation nor endorse the petitioners’ arguments attacking the rule, arguments that are designed to avoid any regulation of greenhouse gases under the CAA.

28. See MANNING & STEPHENSON, *supra* note 11, at 98 (distinguishing traditional applications of the absurd results doctrine from cases in which the court did not identify an affront to fundamental social values in the statutory text and appeared to consider the competing policy considerations animating the legislation).

29. See *id.* at 88.

30. See *id.* at 85 (describing the absurd results doctrine as “one of the oldest and most well-established principles of statutory interpretation”).

31. See *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868) (citing early English commentators); WILLIAM BLACKSTONE, COMMENTARIES *61 (“[T]he rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them”).

32. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819).

33. See, e.g., *Holy Trinity Church v. United States*, 143 U.S. 457, 465–67 (1892) (rejecting as

offends fundamental social values.³⁴

In the prototypical case *United States v. Kirby*,³⁵ the U.S. Supreme Court invoked the absurd results doctrine to overturn a sheriff's indictment under a federal statute criminalizing interference with the passage of the mail.³⁶ The sheriff faced charges for arresting a mail carrier suspected of murder.³⁷ Though no one disputed that the sheriff's detaining the mail carrier violated the letter of the statute, the Court refused to apply the statute to the facts of the case.³⁸ In the Court's view, it defied common sense to prosecute a law enforcement officer for arresting a murder suspect simply because the suspect was in the business of delivering the mail.³⁹

The 1889 case of *Riggs v. Palmer*⁴⁰ likewise typifies the traditional formulation of the absurd results doctrine. The plaintiffs in *Riggs* sought to invalidate their deceased father's will insofar as it bequeathed property to his grandson, who had been found guilty of murdering the testator to ensure speedy transmission of his inheritance.⁴¹ The New York Court of Appeals conceded that the plain language of the probate statute prohibited alteration of the will and required a transfer of property to the murderous grandson.⁴² Nevertheless, the Court refused to execute the will⁴³ on the ground that passing property to one who

absurd statutory language deemed offensive to dominant religious values); *see also* POPKIN, *supra* note 21, at 31 (“‘Absurdity’ focuses the judge’s attention on some conception of fundamental values that the judge should protect” and, according to the nineteenth century understanding, may be grounds for avoiding “‘absurd,’ not just ‘inconvenient’ results.”) The notable exception to this moral-referent rule is found in cases involving scrivener’s errors. In such cases, courts invoke the absurd results doctrine on the ground that drafting mistakes are not attributable to actual congressional intent, and judges are therefore not bound to enforce them. *See* WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 261 (2000).

34. *See* MANNING & STEPHENSON, *supra* note 11, at 88.

35. 74 U.S. (7 Wall.) 482.

36. *See id.* at 483–84.

37. *See id.*

38. *See id.* at 486–87.

39. *See id.* The *Kirby* Court defined the concept of legal absurdity primarily by analogy. *See id.* at 487. It compared the case before it to historical examples of absurd results, such as the prosecution of a surgeon who aided a person who collapsed in the street under a law punishing anyone who “drew blood in the streets.” *Id.* It is noteworthy that the *Kirby* Court also expressed uncertainty as to whether the Constitution authorized Congress to pass a statute that would preclude a law enforcement officer from performing his official duty. *Id.* at 486. However, its holding ultimately rested on the absurd results principle. *Id.* at 486–87.

40. 22 N.E. 188 (N.Y. 1889).

41. *See id.* at 188–89.

42. *See id.* at 189.

43. *See id.* at 191.

murdered the testator constitutes an absurd result.⁴⁴ Despite the unambiguous statutory mandate, the result dictated so offended common morals that the legislature could not have intended it.⁴⁵

B. Courts Traditionally Justified the Absurd Results Doctrine as a Means of Implementing Legislative Intent

As *Riggs* and *Kirby* illustrate, courts historically viewed the absurd results doctrine as a means of implementing legislative intent.⁴⁶ This notion, however, appears contradictory: because the text of a statute is generally considered to be the primary, if not exclusive, expression of legislative intent,⁴⁷ it is paradoxical that a judge would refuse to apply clear text in order to implement that intent.⁴⁸ The absurd results doctrine, however, rests on the assumption that Congress would not intend results that violate fundamental social values and would have altered the statutory language if it had anticipated the offensive outcome.⁴⁹ Therefore, where a literal application of a statute would cause an extreme affront to social or moral standards, a court may properly conclude that the text reflects “a failure of expression or foresight,”⁵⁰ instead of genuine legislative intent, so that judicial departure from the statute “is not [a] substitution of the will of the judge for that of the

44. *See id.* at 190.

45. *See id.* at 189–90.

46. *See also* Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) (noting the absurd results principle “demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way”); *United States v. Brown*, 333 U.S. 18, 27 (1948) (invoking the absurd results doctrine to avoid “blind nullification of the congressional intent” behind a statute); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (a court may invoke the absurd results doctrine when it would be “unreasonable to believe that the legislator intended to include the particular act” in the statute’s coverage).

47. *See, e.g.,* *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.” (citations omitted) (internal quotation marks omitted)); *Maine v. Thiboutot*, 448 U.S. 1, 6 n. 4 (1980) (stating that a court need not consult other sources to interpret a statute when the statute’s language is clear); *see also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (notwithstanding the judicial responsibility to enforce the legislature’s will, when judges interpret a statute “[they] do not inquire what the legislature meant; [they] ask only what the statute means”).

48. Professor Amy Coney Barrett notes that competing constitutional values may permit a federal court “to depart from the best interpretation of a statute in favor of one that is less plausible yet still bearable.” *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 163–64 (2010). Yet such departures are permissible only in the service of defined constitutional values, and in other contexts “[t]here is no justification for departing from the plain text of a constitutional statute.” *Id.* at 167.

49. *See* Manning, *supra* note 21, at 2389–90.

50. MANNING & STEPHENSON, *supra* note 11, at 88.

legislator.”⁵¹

As demonstrated by traditional absurd results cases, emphasizing affronts to common morality as the touchstone of legal absurdity limits the doctrine’s scope. First, it confines the doctrine’s application to situations in which the challenged interpretation would offend almost anyone,⁵² avoiding judicial revision of facially clear statutes where reasonable minds could differ over the soundness of a literal reading.⁵³ Second, the social norm that signals the absurd result stands in for the statutory text, defining what the legislature “must have” meant and limiting the range of possible outcomes once the text is held inapplicable.⁵⁴

II. CONTEMPORARY COURTS HAVE EXPANDED THE ABSURD RESULTS DOCTRINE TO AVOID ONEROUS REGULATORY BURDENS

In more recent cases, courts have identified legal absurdities where a literal statutory interpretation would not offend fundamental social values.⁵⁵ Under this expanded reading of the doctrine, courts refuse to apply a statute literally when it would impose regulatory burdens judged too onerous to reflect congressional intent.⁵⁶ The U.S. Supreme Court’s decision in *Public Citizen v. U.S. Department of Justice*⁵⁷ illustrates the expanded application of the absurd results doctrine.

Public Citizen concerned the applicability of the Federal Advisory Committee Act (FACA) to the American Bar Association Standing Committee on the Federal Judiciary (ABA Committee), which has advised the President regarding federal judicial nominees for nearly

51. *Holy Trinity*, 143 U.S. at 459.

52. *See* *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in the judgment) (distinguishing the expanded absurd results doctrine from the traditional cases in which “applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.”).

53. *See id.* at 471 (Kennedy, J., concurring in the judgment) (arguing that the Court risks substituting its policy preferences for that of the legislature when it expansively applies the absurd results doctrine).

54. *See* *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889).

55. *See, e.g., Pub. Citizen*, 491 U.S. at 463–65; *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

56. *See Mova Pharm. Corp.*, 140 F.3d at 1068 (defining an absurd result not only as one that “is contrary to common sense,” but also as one that “is inconsistent with the clear intentions of the statute’s drafters” as determined from “the particular statutory context”).

57. 491 U.S. 440 (1989).

sixty years.⁵⁸ FACA imposes public disclosure and government oversight obligations on any advisory committee that is “utilized” by the President or federal agencies to obtain advice or recommendations.⁵⁹ Thus, the case turned on whether the executive branch “utilized” the ABA Committee within the meaning of the statute.⁶⁰

The parties did not dispute that, in common parlance, the Department of Justice utilized the ABA Committee to obtain recommendations on nominees for the federal bench.⁶¹ Nevertheless, the Court accepted the government’s position that a literal application of the statute would be absurd because it “would catch far more groups and consulting arrangements than Congress could conceivably have intended.”⁶² The Court did not contend that applying FACA to the ABA Committee according to the statute’s plain meaning would offend social norms.⁶³ Nevertheless, it invoked the absurd results doctrine to narrowly construe the term “utilize” and avoid reading the statute in a manner deemed irreconcilable with Congressional intent.⁶⁴

Concurring in the judgment, Justice Anthony Kennedy forcefully rejected the majority’s reliance on the absurd results doctrine.⁶⁵ Justice Kennedy considered the majority’s broad application of the doctrine an unjustifiable rejection of clear statutory language, which differed from traditional absurd results cases.⁶⁶ He agreed that the majority’s result

58. *Id.* at 443. The plaintiffs sought access, consistent with FACA’s disclosure requirements, to the names of potential judicial nominees under consideration by the ABA Committee, as well as the committee’s reports and meeting minutes. *Id.* at 447.

59. *See id.* at 446–47.

60. *See id.* at 452.

61. *See id.*

62. *Id.* at 464–65.

63. *See id.* at 463–65.

64. *See id.* at 453 (illustrating with hypotheticals the broad reach that FACA could have if applied literally and arguing that Congress could not have intended the statute to have such scope). It is important to note, however, that the *Public Citizen* Court was straining to avoid the constitutional question lurking in the case. *See id.* at 465. The district court had held FACA unconstitutional as applied to the ABA Committee on the ground that it “infringed unduly on the President’s Article II power to nominate federal judges and violated the doctrine of separation of powers.” *Id.* at 466. The Supreme Court, in contrast, repeatedly referenced the principle of constitutional avoidance, which apparently influenced its decision that FACA did not apply on absurd results grounds. *See id.* at 465–67 (noting that the principle of constitutional avoidance “tips the balance” against FACA’s application in the instant case). Thus, it is not clear whether the absurd results analysis in *Public Citizen* would fully translate to a case that did not present a constitutional issue.

65. *See id.* at 467–78 (Kennedy, J., concurring in the judgment). Though he rejected the majority’s reliance on the absurd results doctrine, Justice Kennedy joined the judgment of the Court on constitutional grounds. *Id.* at 482.

66. *See id.* at 470–71 (Kennedy, J., concurring in the judgment).

was “quite sensible.”⁶⁷ However, he refused to “go along with the unhealthy process of amending the statute by judicial interpretation,”⁶⁸ which he considered an affront to the constitutional scheme.⁶⁹ When the meaning of a statute is clear and its dictates are constitutional, he argued, the Court’s only task is to apply the law to the facts of the case.⁷⁰ Thus, the inquiry into statutory meaning should have ended once the Court found that the Executive Branch “utilizes” the ABA Committee “in the common sense of the word.”⁷¹

As is typical of absurd results analyses,⁷² however, Justice Kennedy did not provide a precise definition of legal absurdity. He stated only that courts should limit the doctrine to cases in which a literal reading of the statute would be “patently absurd,”⁷³ not merely impractical or even unconstitutional.⁷⁴ Notwithstanding this ambiguous definition, he concluded that the majority in *Public Citizen* had overreached.⁷⁵ Rejecting clear statutory text because of a perceived conflict with legislative intent, and not an indisputable affront to common sense, was an abuse of the absurd results doctrine.⁷⁶

III. LITIGATION UNDER FEDERAL ENVIRONMENTAL STATUTES EXEMPLIFIES THE EXPANDED APPLICATION OF THE ABSURD RESULTS DOCTRINE

Litigants have consistently raised absurd results arguments in federal environmental litigation, relying on an expansive definition of legal absurdity that departs from the doctrine’s traditional concern with

67. *See id.* at 470 (Kennedy, J., concurring in the judgment).

68. *Id.*

69. *See id.* at 474 (Kennedy, J., concurring in the judgment).

70. *Id.* at 473 (Kennedy, J., concurring in the judgment).

71. *Id.* at 470 (Kennedy, J., concurring in the judgment).

72. *See* Dougherty, *supra* note 24, at 128 (noting that judges who invoke the absurd results doctrine generally fail to define what constitutes legal absurdity or specify situations in which the doctrine would properly apply).

73. *Pub. Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in the judgment).

74. *Id.* at 472 (Kennedy, J., concurring in the judgment).

75. *See id.* at 470 (Kennedy, J., concurring in the judgment) (arguing that the absurd results doctrine “remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline” by confining the doctrine to its traditional scope).

76. *See id.* at 471 (Kennedy, J., concurring in the judgment) (“I believe the Court’s 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.’” (alteration in original) (citations omitted)).

fundamental social principles.⁷⁷ Though the U.S. Supreme Court rejected an absurd results argument in a 1978 decision interpreting the Endangered Species Act (ESA),⁷⁸ litigants continue to invoke the doctrine in environmental disputes.⁷⁹ These cases illustrate the doctrine's expansion as well as the lack of stable criteria to guide its application.⁸⁰ They also frame a critical analysis of the Tailoring Rule and its likely role in defining the future reach of the absurd results doctrine.

A. *The U.S. Supreme Court Refused to Embrace an Expanded Reading of the Absurd Results Doctrine in TVA v. Hill*

In its first case interpreting the ESA, the U.S. Supreme Court considered the fate of the snail darter, an endangered fish native to the waters of Eastern Tennessee.⁸¹ The defendant Tennessee Valley Authority argued that a literal application of the ESA's core provision would lead to an absurd result,⁸² namely, halting federal construction of the multi-million dollar, near-complete Tellico Dam.⁸³ The ESA provision at issue, section 7(a)(2),⁸⁴ requires every federal agency to ensure that any action that it authorizes, funds, or executes will not jeopardize the survival of any endangered or threatened species or cause destruction or adverse modification of its critical habitat.⁸⁵ When environmental organizations learned that impoundment of water behind Tellico Dam would wholly eradicate the known habitat of the endangered snail darter and drive the species to extinction, they sued under section 7, arguing that its plain language compelled the court to enjoin the project.⁸⁶

77. See, e.g., *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001) (raising absurd results argument in CWA case); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 161–62 (D.D.C. 2002) (National Environmental Policy Act case); *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 763 (E.D. Tenn. 1976) (Endangered Species Act).

78. *Tenn. Valley Auth. v. Hill (TVA v. Hill)*, 437 U.S. 153 (1978).

79. See, e.g., *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006); *Muszynski*, 268 F.3d at 98–99; *Greater Yellowstone Coal.*, 209 F. Supp. 2d at 161–62.

80. See *ESKRIDGE*, *supra* note 33, at 262 (arguing that once a judge identifies a purported absurdity, the extent and content of statutory revision appropriate to correct it is a question “beyond precise judicial calibration”).

81. See *TVA v. Hill*, 437 U.S. at 158–59.

82. See *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1070 (6th Cir. 1977).

83. See *TVA v. Hill*, 437 U.S. at 166. Fifty-three million dollars in public funds had been invested in the project and the dam was eighty percent complete by the time the case commenced. *Id.*

84. See *id.* at 160.

85. See Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2010).

86. See *TVA v. Hill*, 437 U.S. at 164.

The trial court agreed with the defendant that applying section 7 literally to a near-complete project whose approval pre-dated the ESA's enactment would be absurd as a matter of law.⁸⁷ The court noted disapprovingly that a strict construction of section 7 would require "a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before"⁸⁸ However, the Sixth Circuit Court of Appeals reversed the trial court's judgment, rejecting the absurd results argument.⁸⁹ Finding a blatant statutory violation, the appellate court refused to engage in an independent balancing of dollars versus species, which Congress had already done in enacting section 7.⁹⁰ In language prescient of Justice Kennedy's anti-absurdity argument in *Public Citizen*, the Sixth Circuit reasoned that declining to apply the statute on absurdity grounds would exceed the bounds of the judicial role.⁹¹ Because "[c]urrent project status cannot be translated into a workable standard of judicial review," the court's function was limited to "preserv[ing] the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives."⁹² Despite the concededly extreme consequences of enjoining completion of the dam, the court refused to depart from the plain language of the statute.⁹³

The U.S. Supreme Court affirmed.⁹⁴ Writing for the majority, Chief Justice Warren Burger admitted uncertainty regarding Congress's actual intent that section 7 apply unbendingly to the case of the Tellico Dam.⁹⁵ Nevertheless, he could identify no legitimate basis for departing from the plain language of the statute, observing that "neither the Endangered Species Act nor Art[icle] III of the Constitution provides federal courts with authority to make such fine utilitarian calculations" where the statute clearly reflects congressional intent to prioritize species

87. See *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 763 (E.D. Tenn. 1976) (stating that Congress could not possibly have intended for section 7 to apply literally to the Tellico Dam).

88. *Id.*

89. See *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1070 (6th Cir. 1977).

90. See *id.* at 1071.

91. See *id.*

92. *Id.*

93. See *id.* at 1069.

94. *Tenn. Valley Auth. v. Hill (TVA v. Hill)*, 437 U.S. 153, 172 (1978). Though the majority opinion does not explicitly discuss the absurd results doctrine, its analysis tracks that of the appellate court and implicitly rejects the defendant's absurdity argument.

95. See *id.* at 187 (acknowledging the argument that "the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter").

protection:⁹⁶

Here we are urged to view the Endangered Species Act “reasonably,” and hence shape a remedy that “accords with some modicum of common sense and the public weal.” But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities⁹⁷

The Court repudiated the central justification for the absurd results doctrine—the notion that judges need an escape hatch from clear statutory language when they feel that Congress would have chosen different words if it had anticipated the present circumstances.⁹⁸ The Court acknowledged that the ESA failed to precisely address section 7’s applicability to a major federal project so near to completion.⁹⁹ Yet this did not warrant recourse to other indicia of congressional purpose that might temper the textual directive.¹⁰⁰

Chief Justice Burger’s reasoning accords with scholarly arguments that the absurd results doctrine is ineffective, and therefore unjustifiable, as a means of implementing legislative intent.¹⁰¹ Yet the Court’s opinion

96. *Id.*

97. *Id.* at 194 (internal citations omitted). The Chief Justice noted that Congress had passed a series of more flexible statutes aimed at species protection prior to enacting the ESA. *Id.* at 174–77. Each time, it found that more stringent regulation was needed, as the countervailing forces of economic development and vested industrial interests were simply too strong to protect vulnerable species with a half-hearted approach. *Id.* This history—which is strikingly similar to that of the CAA, see *Whitman v. Am. Trucking*, 531 U.S. 457, 490–93 (2001) (Breyer, J., concurring in part and concurring in the judgment) (describing legislative history of the CAA and its amendments)—undermined the notion that judicial revision of the statutory text could be consistent with legislative intent. See *TVA v. Hill*, 437 U.S. at 184.

98. See *id.* at 194–95 (“Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.”).

99. See *id.* at 185 (“It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated.”).

100. See *id.* at 187 (noting but rejecting argument that the immense public burden of halting construction on the dam would be irreconcilable with congressional intent).

101. See Manning, *supra* note 21, at 2390 (arguing that judicial attempts to divine the congressional intent behind statutory text are futile, since the text is the product of political compromise and not a coherent expression of legislative will); Dougherty, *supra* note 24, at 132 (arguing that judges applying the absurd results doctrine “give a nod to legislative supremacy while actually responding to some other authority entirely”).

in *TVA v. Hill* has not discouraged expansive application of the doctrine, even in the environmental arena. Agencies and regulated parties continue to argue that statutes imposing significant economic or administrative burdens are absurd as a matter of law, and some of these arguments have gained traction in the courts.¹⁰²

B. A Circuit Split on the Meaning of “Daily” in the Clean Water Act Illustrates the Inconsistent Application of the Absurd Results Doctrine

The Clean Water Act (CWA) is one of several federal environmental statutes whose application has been challenged under the absurd results doctrine.¹⁰³ The CWA regulates the discharge of pollutants to waters of the United States,¹⁰⁴ primarily through “end-of-the-pipe” technology-based controls on sources such as industrial facilities and wastewater treatment plants.¹⁰⁵ Where such controls are inadequate to maintain ambient water quality standards, section 303 of the CWA requires the EPA or authorized state agencies to establish “total maximum daily loads” (TMDLs) for pollutants whose levels exceed the applicable standards.¹⁰⁶ A TMDL prescribes the maximum quantity of a pollutant that may be discharged into a particular water body on a daily basis, and it must be set “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety”¹⁰⁷

102. Both the Supreme Court and lower federal courts have since embraced absurd results arguments, both within and beyond the context of environmental law. *See, e.g.*, *United States v. Ron Pair Enters.*, 489 U.S. 235, 242–43 (1989) (interpreting bankruptcy statute); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1981) (Scalia, J., concurring in the judgment) (interpreting Federal Rules of Evidence); *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98–99 (2d Cir. 2001) (interpreting CWA); *Envtl. Def. Fund v. EPA*, 82 F.3d 451, 468 (D.C. Cir. 1996) (interpreting CWA); *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (interpreting Safe Drinking Water Act). *But see* *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 168–69 (4th Cir. 2010) (rejecting absurd results argument in CWA case); *Friends of the Earth v. EPA*, 446 F.3d 140, 146 (D.C. Cir. 2006) (rejecting absurd results argument in CWA case); *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 161–63 (D.D.C. 2002) (rejecting absurd results argument raised under the National Environmental Policy Act).

103. *See* cases cited *supra* note 77.

104. *See* Federal Water Pollution Control Act § 402, 33 U.S.C. §§ 1251(a), 1362(7) (2010).

105. *See id.* § 1342. End-of-the-pipe controls, which include chemical treatment or filtering, remediate contaminated wastewater before it is released into the environment. Such approaches may be contrasted with mandatory process changes, such as a prohibition on dioxin use in paper processing, which would alter the inputs to the waste stream instead of seeking to remediate the waste before it is disposed into the environment. *See Muszynski*, 268 F.3d at 94.

106. *See* 33 U.S.C. § 1313(d)(1)(C).

107. *Id.*

During the past decade, the Courts of Appeals for both the Second and D.C. Circuits have considered whether the CWA requires agencies to establish TMDLs exclusively in terms of daily discharges, or whether limits based on seasonal, annual, or other increments satisfy the statutory mandate.¹⁰⁸ In both cases, the EPA argued against a literal application of the term “daily” on the ground that requiring TMDLs exclusively in daily terms would lead to absurd results.¹⁰⁹ Though faced with essentially identical issues and arguments, the courts split in their holdings and in their treatment of the absurd results doctrine.¹¹⁰

In *Natural Resources Defense Council v. Muszynski*, environmental advocates challenged the EPA’s approval of TMDLs for eight New York State reservoirs that expressed phosphorous discharge limitations in annual, not daily, terms.¹¹¹ The Natural Resources Defense Council argued that establishing total maximum *daily* loads based on *annual* discharges violated the plain language of the CWA.¹¹² The Second Circuit, however, found this literal reading absurd and upheld the EPA’s approval of the annual New York standards.¹¹³ The court noted that the EPA and state agencies develop TMDLs for a broad range of pollutants, some of which concededly require regulation through daily discharge limitations because they cause significant environmental damage in small quantities.¹¹⁴ But the court reasoned that daily limits may not be necessary for pollutants whose impact on water quality is less immediate,¹¹⁵ notwithstanding the statute’s call for “total maximum *daily* loads.”¹¹⁶ The EPA’s argument in *Muszynski* is similar to its position in the Tailoring Rule; in both cases, it argued that the regulatory approach prescribed by Congress should not apply to a specific pollutant that the agency believes could be more efficiently controlled by a different method.¹¹⁷

108. See *Friends of the Earth*, 446 F.3d at 142; *Muszynski*, 268 F.3d at 96.

109. See *Friends of the Earth*, 446 F.3d at 146; *Muszynski*, 268 F.3d at 98.

110. Compare *Muszynski*, 268 F.3d at 98–99 (accepting absurd results argument), with *Friends of the Earth*, 446 F.3d at 146 (rejecting absurd results argument).

111. See *Muszynski*, 268 F.3d at 96.

112. See *id.* at 97.

113. See *id.* at 98–99.

114. See *id.* at 98.

115. See *id.* at 98–99.

116. *Id.* at 99 (emphasis added).

117. Compare *id.* at 98 (noting that the CWA requires establishment of TMDLs for “an open-ended range of pollutants,” some of which may be effectively regulated via discharge limitations measured in non-daily terms), with Tailoring Rule, *supra* note 4, at 31,517 (describing how statutory permitting thresholds generally applicable to pollutants regulated under the CAA would be

The D.C. Circuit Court of Appeals rejected this argument when it considered a similar challenge to TMDLs in 2006.¹¹⁸ In *Friends of the Earth v. EPA*,¹¹⁹ an environmental organization sought review of TMDLs that prescribed annual limits for oxygen-depleting pollutants and seasonal limits for pollutants contributing to turbidity in the Anacostia River in Washington, D.C.¹²⁰ The D.C. Circuit observed that “[d]aily means daily, nothing else,” and held that the EPA could not avoid the literal mandate of section 303 on absurdity grounds.¹²¹ The court rejected the Second Circuit’s reasoning in *Muszynski*, finding that the range of pollutants for which the EPA must set or approve TMDLs does not render a literal reading of “daily” absurd.¹²² Rather, the court found in section 303 neither a hint of congressionally authorized flexibility nor legitimate textual ambiguity that called for construction by the agency.¹²³

Like Justice Kennedy in *Public Citizen*, the D.C. Circuit did not insist on a wholesale abandonment of the absurd results doctrine.¹²⁴ Instead, the court held that the EPA failed to make the requisite showing that mandating TMDLs in exclusively daily terms could not possibly reflect congressional intent.¹²⁵ The court was unwilling to accept the EPA’s absurdity argument because section 303 squarely addressed the issue at hand and its requirement of daily discharge limitations was effective for many pollutants.¹²⁶ Simply put, the court refused to accept that the

unmanageable in the case of greenhouse gases).

118. *Friends of the Earth v. EPA*, 446 F.3d 140 (D.C. Cir. 2006). Interestingly, the court framed the issue slightly differently than the Second Circuit had, asking “whether the word ‘daily,’ as used in the CWA, is sufficiently pliant to mean a measure of time other than daily,” thereby permitting EPA to comply with section 303 by setting seasonal or annual pollutant limits. *Id.* at 142. The Second Circuit, by contrast, had asked whether EPA violated the Administrative Procedure Act by approving TMDLs that were deficient for non-compliance with section 303. *Muszynski*, 268 F.3d at 96–97.

119. 446 F.3d 140 (D.C. Cir. 2006).

120. *See id.* at 142–43.

121. *See id.* at 142 (“If EPA believes using daily loads for certain types of pollutants has undesirable consequences, then it must either amend its regulation designating all pollutants as ‘suitable’ for daily loads or take its concerns to Congress.”).

122. *See id.* at 146.

123. *See id.* at 144 (“The law says ‘daily.’ We see nothing ambiguous about this command. ‘Daily’ connotes ‘every day.’”).

124. *See id.* at 146 (discussing parameters of absurd results doctrine).

125. *See id.*

126. *See id.* (“Here, EPA has failed to make . . . a showing [of absurd results] for a simple reason . . . establishing daily loads makes perfect sense for many pollutants. Given this . . . we see no way to conclude that as a matter of logic and statutory structure, [Congress] almost surely could not have meant to require daily loads.” (internal quotations omitted)).

absurd results doctrine allows an agency to “avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.”¹²⁷

IV. COURTS SHOULD LIMIT THE ABSURD RESULTS DOCTRINE TO ITS TRADITIONAL SCOPE

As discussed above, decisions such as *Public Citizen* and *Muszynski* illustrate the expansion of the absurd results doctrine. In contrast to the traditional understanding, expanded application of the doctrine allows judges to reject unambiguous legislation that they perceive as unduly burdensome.¹²⁸ The EPA’s Tailoring Rule may represent the broadest interpretation of the absurd results doctrine to date, as it revises unambiguous, numerical statutory standards despite the agency’s concession that Congress intended the CAA to apply to greenhouse gases.¹²⁹

Courts should reject the expansive conception of the absurd results doctrine invoked in the Tailoring Rule. First, such a broad reading of the doctrine is inconsistent with constitutional separation of powers principles, the *Chevron* doctrine of agency statutory interpretation, and the mandate of federal environmental statutes. Second, when addressing unmanageable regulatory burdens, administrative agencies possess alternative tools that do not require revision of clear legislation; these include the administrative necessity doctrine, de minimis exemptions, general permits, and the ability to lobby Congress for legislative change. Finally, the fact that the Tailoring Rule concerns the first federal attempt to regulate climate-changing greenhouse gas emissions adds importance to the task of clarifying and limiting the reach of the absurd results doctrine.

A. *The Tailoring Rule Exemplifies the Expanded Reach of the Absurd Results Doctrine and its Inconsistency with Separation of Powers and Administrative Law Norms*

The EPA’s absurd results justification for the Tailoring Rule differs from past uses of the doctrine in that the statutory text at issue is neither

127. *Id.* at 145 (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

128. *See, e.g., Pub. Citizen v. Young*, 831 F.2d 1108, 1112 (D.C. Cir. 1987) (noting that the absurd results doctrine may enable a court to avoid “pointless burdens on regulated entities”).

129. *See Tailoring Rule, supra* note 4, at 31,517 (noting “clear congressional intent” that the PSD and title V permitting programs apply to sources of greenhouse gases).

general nor ambiguous, but consists of explicit numerical criteria establishing permitting requirements.¹³⁰ This signals a significant break from the traditional understanding of the absurd results doctrine, under which only “[g]eneral terms should be so limited in their application so as not to lead to injustice, oppression, or an absurd consequence.”¹³¹ Even more recent cases such as *Public Citizen*, which expand the definition of legal absurdity beyond its traditional moral focus, have rested on some perceived textual ambiguity.¹³²

By allowing agencies to reject unambiguous statutory text like that at issue in the Tailoring Rule, courts embracing an expansive reading of the absurd results doctrine violate separation of powers principles. As Justice Kennedy argued in *Public Citizen*, agency revision of duly enacted statutes impermissibly usurps legislative authority,¹³³ regardless of its practical expediency. When a court embraces an agency’s absurdity argument, it exacerbates the separation of powers violation by effectively restricting congressional authority to select a regulatory approach.¹³⁴ Reliance on the absurd results doctrine also offends fundamental rule of law norms by facilitating ad hoc exemptions from

130. See *id.* at 31,514 (explaining that the Tailoring Rule’s purpose is to address the applicability of the CAA’s 100/250-tons-per-year permitting threshold to stationary sources of greenhouse gases). Cf. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452 (1989) (accepting absurd results argument where the key statutory term—“utilize”—was “a woolly verb, its contours left undefined by the statute”); *Muszynski*, 268 F.3d at 98 (accepting absurd results argument on the ground that petitioner’s literal construction was “overly narrow” and the key statutory term was “susceptible to a broader range of meanings”); *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (accepting absurd results argument to support agency’s interpretation of the undefined term “feasible” in provision containing no numerical triggers or guidelines).

131. *United States v. Kirby*, 74 U.S. 482, 486–87 (1868) (emphasis added); see also Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law* 4 (John M. Olin Law & Econ., Working Paper No. 158 (2002)) (arguing that the absurd results doctrine is an appropriate remedy for dealing with “excessive generality” in statutory text).

132. See *Pub. Citizen*, 491 U.S. at 452 (describing key statutory term as “wooly”); *Muszynski*, 268 F.3d at 98 (authorizing agency’s use of seasonal or annual pollutant discharge limitations to satisfy statutory requirement for “total maximum daily loads” on the ground that “daily” as used in the statute is sufficiently flexible to embrace “a broader range of meanings” than a strictly diurnal measure).

133. See *supra* note 69 and accompanying text; ESKRIDGE, *supra* note 33, at 262 (critiquing traditional applications of absurd results doctrine and arguing that, where appropriate, troublesome statutes should be held unconstitutional instead of “absurd”); see also Lisa Heinzerling, *Climate Change and the Clean Air Act*, 42 U.S.F. L. REV. 111, 117 (2007) (noting Supreme Court precedents mandating agency fidelity to clear statutory text).

134. Dougherty, *supra* note 24, at 137 (observing that, under the absurd results doctrine, “legislators will not be allowed to intend an absurdity, or, even if they do, the courts will not enforce it”); see also POPKIN, *supra* note 21, at 268 (“Contemporary rationality analysis in constitutional law argues against courts refusing to defer to a statute that would otherwise pass muster under the rational basis test.”).

laws of general application.¹³⁵

In addition, the expanded absurd results doctrine allows agencies to circumvent the framework for agency statutory construction established by the U.S. Supreme Court in *Chevron*.¹³⁶ Under *Chevron*, an agency that establishes genuine ambiguity in the statutory text may adopt a reasonable construction based on its interpretation of congressional intent.¹³⁷ Where, however, the statute is clear on its face, the inquiry into statutory meaning begins and ends with the text; the court will not inquire into the agency's interpretation but will apply the statute as written.¹³⁸ Under a broad reading of the absurd results doctrine, however, an agency that fails to demonstrate ambiguity in a statute may nevertheless adopt an independent construction of the statutory text.¹³⁹ In the Tailoring Rule, for example, the EPA does not dispute Congress's intent that the CAA apply to greenhouse gases, but instead attacks as absurd the regulatory approach mandated in the law.¹⁴⁰ In such circumstances, the agency operates outside the normal *Chevron* process, and a court's revision of complex regulatory legislation to accommodate the agency's interpretation constitutes precisely the type of "fine utilitarian calculations" that the U.S. Supreme Court has found to exceed the federal judicial power.¹⁴¹

135. See Manning, *supra* note 21, at 2393. *But see* Dougherty, *supra* note 24, at 134 (arguing that strict literalism undermines the rule of law value of coherence in the legal system, since "a legal interpretation that results in absurdity is likely to offend some other legal principle").

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

137. *See id.*

138. *See id.*

139. Some courts have conflated the *Chevron* analysis with the absurd results argument. *See, e.g., Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (stating that where a literal application of a statute would produce absurd results, the provision at issue "simply has no plain meaning . . . and is the proper subject of construction by EPA and the court" (internal quotations omitted)). The EPA similarly presents the two doctrines as interrelated in the Tailoring Rule, *supra* note 4, at 31,533. However, the agency concedes that there is clear evidence of Congress's intent that the relevant provisions of the CAA apply to regulation of greenhouse gases. *Id.* at 31,517. Therefore, EPA relies on the absurd results doctrine to depart from concededly unambiguous statutory text. *Id.* at 31,533 (describing absurd results doctrine as an exception to the general rule of *Chevron* that an agency must follow clear statutory text that addresses the question at issue).

140. *See* Tailoring Rule, *supra* note 4, at 31,517 (noting "clear congressional intent" that PSD and title V permitting programs apply to sources of greenhouse gases); *id.* at 31,517 (asserting that "the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs . . . at the statutory levels . . . should be considered 'absurd results'").

141. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978).

B. An Expanded Absurd Results Doctrine Threatens the Effectiveness of Regulatory Statutes

On a practical level, an expanded absurd results doctrine threatens the efficacy of regulatory statutes such as the CAA by allowing non-legislative actors to invalidate applicable statutory provisions by claiming that their administrative burdens are legally absurd. In effect, the likelihood of judicial rejection of clear legislation increases with the seriousness of the problem presented, as Congress's regulatory response will tend to be most obtrusive where the statute concerns a particularly urgent or pervasive issue.

Climate change illustrates this phenomenon. By definition, regulatory responses to climate change will be far-reaching.¹⁴² Granting courts authority to invalidate legislation that addresses climate impacts on absurdity grounds, regardless of a clear statutory mandate, could preclude federal regulation of climate change and statutory remedies for climate-related harms.¹⁴³ Moreover, this displacement of legislation could occur in the absence of clear criteria for finding or addressing a purported absurdity.¹⁴⁴ As a result, courts and agencies will have unfettered authority to set the regulatory agenda and revise or reject environmental statutes that, by their terms, apply to the impacts of climate change.¹⁴⁵

Allowing non-legislative actors to revise statutory standards is particularly troubling in the context of the CAA, as Congress structured the legislation with the explicit aim of making it adaptable to new challenges.¹⁴⁶ Moreover, to effectuate the CAA's strong public health

142. See U.S. DEPARTMENT OF STATE, U.S. CLIMATE ACTION REPORT 2010, AT 1–4 (2010), available at <http://www.state.gov/documents/organization/140636.pdf> (discussing the need for aggressive regulatory responses to climate change and summarizing initiatives undertaken by the Obama Administration).

143. On the other hand, it is important to note that judicial fidelity to the literal meaning of a statute does not always advance the statute's goals. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 732–35 (2006) (applying dictionary definitions of the jurisdictional terms in the CWA to severely curtail federal regulatory authority to protect wetlands); Norman A. Dupont, "Plain Meaning" Construction of Environmental Statutes, 21 NAT. RESOURCES & ENV'T 66 (2006).

144. See Dougherty, *supra* note 24, at 139 (noting that cases invoking the absurd results doctrine fail to define what outcomes qualify as legally "absurd").

145. See Barrett, *supra* note 48, at 111–12 (contrasting the absurd results doctrine with constitutionally based canons of construction that "draw from an identifiable, closed set of norms" instead of "undifferentiated social values").

146. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that, though the Congress that enacted the CAA might not have been expressly concerned with regulation of greenhouse gases, "they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language . . . reflects an

and environmental mandate, courts have consistently, if controversially, interpreted the Act to clearly limit the areas in which EPA may exercise regulatory discretion and the factors it may consider when doing so.¹⁴⁷ Accordingly, the Tailoring Rule demonstrates how an unconstrained absurd results doctrine undermines the purpose and operation of a carefully crafted statutory scheme.

C. Agencies Possess Alternative Means to Address Conflicts Between Statutory Directives and Practical Regulatory Challenges

The voluminous legal challenges to the Tailoring Rule attest to the difficulties that the EPA faces in satisfying its statutory obligations in the face of competing economic and political realities.¹⁴⁸ The present controversy surrounding the rule likely anticipates many more situations in which the uniquely pervasive effects of climate change will cause clashes between the scale of regulation needed to forestall catastrophic impacts and the practical obstacles to implementation.¹⁴⁹

However, these practical considerations do not resolve the doctrinal issues that an expanded absurd results doctrine presents. Moreover, limiting the doctrine to its traditional scope would not leave agencies without recourse. The established doctrine of administrative necessity and the strategies of de minimis exemptions and general permits may, in appropriate circumstances, allow an agency to ease its administrative burden without engaging in reinterpretation of facially clear statutes. Agencies also have the option of attempting to implement the statutory directive while pressuring Congress to revisit the issue.

In limited circumstances, the administrative necessity doctrine excuses an agency's failure to immediately comply with an

intentional effort to confer the flexibility necessary to forestall such obsolescence.”); *see also* William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 VT. J. ENVTL. L. 1–42 (forthcoming 2011).

147. *See, e.g.*, *Whitman v. Am. Trucking*, 531 U.S. 457, 465 (2001) (holding that section 109 of the CAA, which requires EPA to set national ambient air quality standards “requisite to protect the public health with an adequate margin of safety,” does not permit EPA to consider implementation costs). The *American Trucking* Court described the public health mandate expressed in section 109 as “absolute.” *Id.* (internal quotation marks omitted).

148. For a discussion of the issues facing EPA in its attempts to address climate change using federal statutes enacted before climate change was widely understood, *see generally* George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. RICH. L. REV. 919 (2010); *see also* Editorial, *A Coming Assault on the E.P.A.*, N.Y. TIMES, Dec. 24, 2010, at A28.

149. *See, e.g.*, Complaint at 2, *Center for Biological Diversity v. EPA*, No. 2:09-cv-00670-JCC (W.D. Wash. filed May 14, 2009), 2009 WL 1390743 (challenging EPA's alleged failure to regulate climate change impacts on marine water quality under the CWA).

unmanageable statutory directive.¹⁵⁰ The EPA already relies on administrative necessity as part of its suite of justifications for the Tailoring Rule.¹⁵¹ Unlike the absurd results doctrine, administrative necessity claims do not involve agency or judicial revision of unambiguous statutory text. On the contrary, an agency invoking administrative necessity must find that the language of the statute means what it says, while assuming that Congress intends statutes to be administrable.¹⁵² This assumption justifies the agency's acknowledgment that it cannot immediately comply with the statutory directive, though it must continue working toward full implementation.¹⁵³ The distinction is significant, as the administrative necessity analysis avoids independent agency construction of unambiguous legislation. It also confines the scope of administrative and judicial discretion by focusing on the statute as the source of legislative intent, instead of an open set of social norms. In addition, the administrative necessity doctrine requires that the agency develop and adhere to a schedule of full compliance with the statutory mandate.¹⁵⁴

An agency facing unmanageable regulatory burdens may also have the option of promulgating a de minimis exemption from the statutory requirement at issue. Based on the premise that the law does not concern itself with trivialities, a de minimis exemption relieves the agency's obligation to formally regulate entities that are captured by the statutory text but do not make a meaningful contribution to the problem the law seeks to address.¹⁵⁵ Unless the legislative design implies otherwise, an agency generally possesses a narrow authority to promulgate a de

150. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 358 (D.C. Cir. 1980) (“Considerations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute” where “the conventional course . . . would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.”).

151. *See Tailoring Rule*, *supra* note 4, at 31,576–78.

152. *See id.* at 31,577. Understood this way, one could argue that the EPA's tandem invocation of absurd results and administrative necessity is contradictory: the former assumes that Congress did not intend to regulate small sources of greenhouse gases under title V and PSD, while the latter assumes that Congress did so intend but the agency requires flexibility in implementing that directive.

153. *See id.* (noting that, when applying the administrative necessity doctrine, an agency must “develop what is in effect a compliance schedule with the statutory requirements, under which the agency will implement the statute as much as administratively possible and as quickly as administratively possible.”).

154. *Id.*

155. *See Ala. Power*, 636 F.2d at 360–61. *But see Pub. Citizen v. Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987) (holding that Congress adopted an “extraordinarily rigid” position in its proscription of FDA approval of carcinogenic color additives under the FDCA, a position that precluded a de minimis exemption).

minimis exemption “when the burdens of regulation yield a gain of trivial or no value.”¹⁵⁶

Certain statutory schemes also allow for the issuance of general permits applicable to a class of similarly situated facilities,¹⁵⁷ which can obviate the need for individual assessment of thousands of entities in a single sector.¹⁵⁸ For example, the EPA currently utilizes general permits to regulate construction sites under the CWA, as such sites are receptive to common pollution-control strategies and are so numerous that individual permitting would be a formidable challenge.¹⁵⁹ When the statutory scheme allows, general permits enable an agency to regulate all of the entities that Congress intended to reach at a significantly reduced administrative cost.

Finally, agencies retain the option of making a good-faith effort to apply the law as written while pressuring Congress to amend the statute.¹⁶⁰ Admittedly, climate change has engendered considerable political controversy, resulting in legislative stalemate.¹⁶¹ However, Congress has demonstrated its ability to amend environmental laws to address emerging issues.¹⁶² For example, after the U.S. Supreme Court’s

156. *Ala. Power*, 636 F.2d at 360–61. However, the court in *Alabama Power* was careful to point out that the de minimis doctrine does not authorize an administrative exemption from statutory requirements based on the agency’s assessment that the burdens of regulation do not outweigh the benefits. *See id.* at 361.

157. In the CAA context, for example, general permits could be issued under title V but not under the PSD program, as the latter is source-specific by design.

158. *See* *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1381 (D.C. Cir. 1977) (rejecting EPA’s administrative infeasibility argument to support a wholesale exemption of several source categories from CWA permitting requirements and noting the availability of general permits as a permissible alternative for relieving the agency’s administrative burden).

159. *See* EPA, NPDES General Permit for Stormwater Discharges From Construction Activities (Jan. 8, 2009), http://www.epa.gov/npdes/pubs/cgp2008_finalpermit.pdf. It should be noted, however, that general permits are not without their critics, and are far from perfect as a resolution of the conflict between administrative burdens and statutory commands. *See generally* Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409 (2007) (arguing that EPA’s CWA general permits procedures have numerous and significant legal deficiencies).

160. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 (1978) (questioning whether Congress intended the loss of millions of dollars in public funds to save an endangered species, but applying the statutory text to preserve the status quo and allow Congress to make any necessary changes to the statute).

161. *See* Jonas Monast et al., *Avoiding the Glorious Mess: A Sensible Approach to Climate Change and the Clean Air Act 1* (Oct. 2010) (Nicholas Inst. for Envtl. Policy Solutions, Duke Univ., working paper), *available at* <http://nicholasinstitute.duke.edu/climate/policydesign/avoiding-the-glorious-mess>.

162. *See* ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 503–06 (6th ed. 2009) (describing series of major amendments to the CAA from the 1970s–90s); *id.* at 266–67 (discussing series of major amendments to the Safe Drinking Water Act to

decision in *TVA v. Hill*, Congress revised section 7 of the ESA to include a limited hardship exemption that could be invoked to avoid the provision's rigid "no jeopardy" mandate if authorized by a high-level committee.¹⁶³ Though the committee has never fully exempted a project,¹⁶⁴ the Court's refusal to enact a judicial exemption to the statute and Congress's subsequent move to do so demonstrate the viability of this approach.

Although these strategies might not fully resolve the EPA's quandary over greenhouse gas regulation, they demonstrate that restricting the scope of the absurd results doctrine in future cases would not relegate agencies and courts to being "helpless slaves to literalism."¹⁶⁵ The existence of alternatives makes the practical necessity argument for expanding the absurd results doctrine unpersuasive.

CONCLUSION

The history of the absurd results doctrine—particularly its use in federal environmental litigation from *TVA v. Hill* through the present suits challenging the Tailoring Rule—illustrates its expansion and inconsistent treatment by the federal courts. Broad application of the doctrine allows agencies and judges to engage in independent construction of unambiguous legislation in violation of administrative law and separation of powers principles. As the divergent results in the environmental cases illustrate, the absurd results doctrine facilitates this

address administrative challenges). Notably, Congress has at other times declined the opportunity to revise statutory mandates and regulatory structures despite EPA's claim of administrative impossibility in the courts. *See id.* at 689 (noting that Congress left largely intact the CWA permitting requirements that the EPA described as administratively impossible in *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), except as to a single source category). Thus, the challenges that climate change presents are not—insofar as they raise issues of multi-branch environmental governance—entirely novel.

163. *See* PERCIVAL, *supra* note 162, at 948.

164. *See id.*

165. *Pub. Citizen v. Young*, 831 F.2d 1108, 1112 (D.C. Cir. 1987). Professors Manning and Stephenson argue that alternative substantive canons could even obviate the need to apply the absurd results doctrine in the traditional cases in which a literal statutory application would offend a fundamental social or moral principle. MANNING & STEPHENSON, *supra* note 11, at 101. For example, they note that the *Kirby* Court could have reached the same result by applying the established principle that criminal prohibitions are generally inapplicable to reasonable enforcement actions by the police. *Id.* Such alternative canons are preferable to absurd results because they provide a defined set of governing principles to guide judicial discretion. *Id.*; *see also* Barrett, *supra* note 48, at 111–12 (distinguishing constitutionally derived substantive canons from those that rely on "undifferentiated social values"). However, this author is satisfied to advocate rejection of the expanded absurd results doctrine and leave a more comprehensive critique for another day.

controversial phenomenon without providing meaningful criteria to constrain interpretive discretion.

The EPA's absurd results justification for the Tailoring Rule stretches the concept of legal absurdity in new ways by applying it to unambiguous, numerical statutory standards while conceding Congress's intent that the CAA cover greenhouse gas emissions. If accepted by the courts, this broad definition of absurd results would threaten the effective functioning of regulatory statutes such as the CAA by enabling non-legislative actors to declare a certain degree of statutorily mandated regulation absurd as a matter of law. As the country grapples with the specter of climate change and political stalemate on how to address it, the practical impact could be severe.

In the end, the Tailoring Rule may well stand on the other doctrinal foundations constructed by the EPA. Whether that would be "good" with respect to U.S. climate policy is open to debate. However, the doctrinal problems with upholding the rule on absurdity grounds are apparent: the inconsistency with constitutional and administrative law principles, the lack of criteria for identifying and addressing an absurd result, and the potential for an expanded doctrine to undermine environmental governance strongly support rejection of the EPA's absurd results argument in the Tailoring Rule and a clear restriction on the doctrine's scope.