EPA’s Attempt to Regulate Greenhouse Gases Under the Clear Air Act: Will Chevron Allow the Tailoring Rule to Withstand Judicial Review? And Why the Answer Doesn’t Matter

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EPA’s Attempt to Regulate Greenhouse Gases Under the Clear Air Act: Will *Chevron* Allow the Tailoring Rule to Withstand Judicial Review? And Why the Answer Doesn’t Matter

James Valvo*

Abstract

The Environmental Protection Agency has issued three new Clean Air Act regulations targeting greenhouse gases, as a response to the Supreme Court’s ruling in *Massachusetts v. EPA*. One of these proposals, the Tailoring Rule, seeks to adjust the applicability thresholds that trigger the prevention of significant deterioration and title V permit requirements. EPA is attempting to use the Tailoring Rule to soften the blow of new greenhouse gas regulations on both businesses and state permitting agencies. This proposed rule clearly violates the expressed congressional intent in the statute. Legal challenges to EPA’s actions are looming and the standard of review the court selects will determine whether we witness “absurd results” or a vacated rule.

I. Introduction

On October 27, 2009, the Environmental Protection Agency (EPA) issued a proposed rule to tailor the prevention of significant deterioration (PSD) and title V provisions of the Clean Air Act (the Act), as they apply to greenhouse gases (GHGs), as a means to facilitate EPA’s broader effort to regulate GHGs under the Act.¹ The proposed rule envisions a phased approach wherein during the first six years EPA would raise the applicability threshold for PSD and title V permits from the statutorily mandated 100-250 tons per year (tpy) (depending on source category) to 25,000 tpy carbon dioxide equivalent (CO₂e) for GHGs only.² In the next phase, EPA would conduct a second round of rulemaking to issue “revised applicability and significance level thresholds and other streamlining techniques . . . .”³ The second phase would

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² *Id.* at 55,292, 55,295.
³ *Id.* at 55,292.
allow EPA to reevaluate the Act’s handling of GHGs and lower the threshold as EPA finds administratively feasible.\textsuperscript{4} The proposed Tailoring Rule raises the question: can EPA, acting on its own authority, change a congressionally mandated applicability threshold as it applies to one specific type of air pollutant?

EPA asserts that the legal doctrines of “absurd results” and “administrative necessity” allow it to change the statutory language and apply the phased approach.\textsuperscript{5} EPA’s analysis finds that unless they unilaterally tailor the Act, “permitting authorities [mostly state agencies] would receive approximately 40,000 PSD permit applications each year—currently, they receive approximately 300—and they would be required to issue title V permits for approximately some six million sources—currently their title V inventory is some 15,000 sources.”\textsuperscript{6} EPA notes this burden would cripple state agencies and bring all permitting to a virtual standstill.\textsuperscript{7} The administrative burden EPA is bringing down on itself by putting GHGs under the Act is clear, but will the Tailoring Rule survive judicial review?

The courts have become an important tool for both sides of the global warming debate, and legal actions will almost certainly arise from this latest round of agency action. Any challenge to EPA’s Tailoring Rule will likely revolve around one major legal question: whether the Supreme Court’s characterization of GHGs as air pollutants in \textit{Massachusetts v. EPA} is influential enough to create judicial deference for EPA to tailor the PSD and title V provisions of the Clean Air Act in spite of explicit statutory language.

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\textsuperscript{4} Tailoring Rule, 74 Fed. Reg. at 55,296.
\textsuperscript{5} \textit{Id.} at 55,292.
\textsuperscript{6} \textit{Id.} at 55,295; \textit{See also} Portia Mills and Mark Mills, \textit{A Regulatory Burden. The Compliance Dimension of Regulation CO\textsubscript{2} as a Pollutant.} U.S. CHAMBER OF COMMERCE (Sept. 2008).
\textsuperscript{7} Tailoring Rule, 74 Fed. Reg. at 55,304.
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This article is organized as follows. The first section discusses the Tailoring Rule in the context of EPA’s broader effort to regulate GHGs under the Act. The next section explains *Chevron* deference and a brief of history of the Roberts Court’s attitude toward the doctrine. The next section details the doctrines of “absurd results” and “administrative necessity,” the legal authority EPA adduced to tailor the PSD and title V applicability provisions of the Act. This section also includes states’ reactions to these doctrines and EPA’s proposal. The final section introduces the noninterference doctrine as an alternative method of judicial review and provides political context for its application.

II. Putting the Tailoring Rule in Context

The Tailoring Rule is part of a trio of new regulatory actions EPA is taking to add GHGs to its regulatory portfolio under the Act. The proposed Tailoring Rule compliments the December 15, 2009 final endangerment finding, which classifies GHGs as pollutants likely to cause or contribute to “endanger both the public health and the public welfare of current and future generations.”\(^8\) The third piece of the effort is a joint rulemaking between EPA and the Department of Transportation issued on March 26, 2010 to establish “new standards for light-duty vehicles that will reduce [GHG] emissions and improve fuel economy.”\(^9\) This regulation creates a second set of national vehicle emission standards alongside the current corporate average fuel economy requirements.

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EPA’s entire campaign to bring GHGs under the Act is predicated on the landmark 2007 ruling in *Massachusetts v. EPA*, where the Court ruled EPA must ground its regulation, or lack of regulation, of GHGs in the text of the Act. EPA has decided this trio of new regulations will act in unison as its response to *Massachusetts* and believes it will be helpful to have all three in place to effectively move forward. The endangerment finding is necessary because EPA must define GHGs as air pollutants that endanger the public health or welfare in order to satisfy section 202(a) of the Act before they can put vehicle or stationary source regulations into place. The Court used *Massachusetts* to clarify that GHGs are considered air pollutants with respect to the Act, but the endangerment issue has yet to undergo judicial review. The light-duty vehicle standards are a response to the long battle several states—primarily California—have been waging to enact stricter GHGs emissions standards on mobile sources. Finally, because there is no firewall to block a section 202(a) endangerment finding from triggering regulation of other sources in other sections of the Act, EPA is attempting to use the Tailoring Rule to temper the PSD and title V impact on stationary sources. Otherwise, the new regulations would bring about—what EPA itself has called—“absurd results” that would cripple the economy and the agency. While it is important to understand the broader context, this article focuses primarily on looming legal and judicial actions hovering around interpretation of the Tailoring Rule.

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14. Tailoring Rule, 74 Fed. Reg. at 55,292; although no firewall exists in the statute, in *Environmental Defense v. Duke Energy*, 549 U.S. 561 (2007), the Supreme Court held an agency can interpret the meaning of a term differently in different sections of a statute. The judiciary has yet to review whether this variance can apply to an endangerment finding.
III. *Chevron*, Roberts and the Tailor

A. EPA Wants the Court to Skip Step One of Chevron Analysis

Since 1984, courts have responded to questionable agency actions by applying *Chevron* deference.\(^{15}\) *Chevron* details that the court should apply a two-step test when deciding whether to defer to an agency’s interpretation of a statute.\(^{16}\) “First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .”\(^{17}\) If the court determines that Congress has not expressed its will on the issue, the “question for the court is whether the agency’s answer is based on a permissible construction of the statute.”\(^{18}\) *Chevron* intends for courts to broadly interpret “permissible construction” and to refrain from disturbing an agency action “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”\(^{19}\) However, this analysis of whether Congress would sanction the action is secondary to whether Congress has already spoken on the precise issue at hand.\(^{20}\) The Court’s reasoning for its position is that agencies have significant expertise in their respective regulatory

\(^{15}\) *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). “Chevron is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history.” RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 140 (4th ed. 2002); “[T]he decision has become foundational, even a quasi-constitutional text--the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.” Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

\(^{16}\) In addition to the popular two-step test, Cass Sunstein has identified a possible Step Zero in *Chevron* cases. Step Zero is a gatekeeper that would have courts first determine if the issue is a major modification. If so, the “major question” exception to *Chevron* would afford no deference at all agency interpretations, and insist agencies adhere strictly to the statute. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006); see also Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference*, 80 ADMIN. L. REV. 593 (2008).

\(^{17}\) *Chevron*, 467 U.S. at 842.

\(^{18}\) Id. at 843.

\(^{19}\) Id. at 845; citing *United States v. Shimer*, 376 U.S. 374 (1961).

\(^{20}\) *Chevron*, 467 U.S. at 842.
arenas and it would be impertinent for courts to supplant that expertise.\textsuperscript{21} Although \textit{Chevron} has become the standard for reviewing many agency actions, it is particularly applicable when analyzing the Tailoring Rule because \textit{Chevron} was originally decided on a question of whether EPA could deviate from a statutory term in the Act.\textsuperscript{22}

A straightforward and plain text application of \textit{Chevron} to EPA’s Tailoring Rule should find the rule an inappropriate interpretation of the Act. The rule should get dismissed in Step One of a \textit{Chevron} test. Congress has clearly expressed its will on what the applicability thresholds are for PSD and title V permits with respect to air pollutants that EPA has found cause or contribute to endanger the public health and welfare. EPA readily acknowledges this fact, stating in its proposed rule filing that “PSD applies to sources that emit at least 100 or 250 (depending on the source category) tpy of pollutants subject to regulation under the [Act], and title V generally applies to sources that emit at least 100 tpy . . . .”\textsuperscript{23} EPA admits later in the filing that “the applicability provisions for PSD and title V are clear on their face.”\textsuperscript{24} \textit{Chevron} would seem to indicate that “this is the end of the matter” and the rule should fail.\textsuperscript{25} However, this is unlikely to be the case.

The Court intended \textit{Chevron} to examine congressional intent on “the precise question at issue,” which EPA argues is not its actual deviation from the clearly expressed applicability thresholds but instead whether EPA should be given deference to deviate due to “absurd results” and “administrative necessity.” However, EPA is bringing these burdens on itself due to an

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\textsuperscript{22} See note 15, (holding EPA’s expansive interpretation of “stationary source” is a permissible construction). \\
\textsuperscript{23} Tailoring Rule, 74 Fed. Reg. at 55,295. \\
\textsuperscript{24} \textit{Id.} at 55,306. \\
\textsuperscript{25} \textit{Chevron}, 467 U.S. at 842.
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expansive reading of the Act, the endangerment finding and new light-duty vehicle standards. In essence, EPA is asking the court to ignore *Chevron* Step One and instead permit it to argue why its interpretation is a “permissible construction” under Step Two. Whether the reviewing court allows EPA to rearrange the *Chevron* doctrine in this way will likely determine whether the court allows the agency’s regulatory package to stand.

**B. The Roberts Court has Largely Declined to Apply Chevron Deference**

Even if the court finds that the precise question is on deviation and not “absurd results” and “administrative necessity,” the court may forego a *Chevron* test. Texas Tech Professor Ann Graham conducted a thorough review of the administrative interpretation cases argued in front of the Roberts Court and found that in ten of the eleven cases decided, “the Court did not invoke the classic administrative law analysis prescribed by the two-step *Chevron* Doctrine . . . [opting instead] for a result-oriented approach to potential *Chevron* cases.”26 Graham instructs that going forward the Roberts Court will likely follow a model that “bypasses any consideration of agency regulations and goes right to the court’s own reading of the statute.”27

The Roberts Court has reviewed two significant cases on EPA interpretation of the Act: *Massachusetts v. EPA* and *Environmental Defense v. Duke Energy.*28 In *Massachusetts*, the Court relied on its own reading of the statute and based its decision against EPA’s interpretation on broad Administrative Procedure Act grounds, not *Chevron.*29 Justice Stevens did invoke *Chevron* in his majority opinion, stating, “[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. See [Chevron] . . . That discretion is at its height when the agency decides not to bring an

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27. *Id.* at 239.
enforcement action.”\textsuperscript{30} Massachusetts was just such a case where EPA decided not to bring an enforcement action. However, although Stevens recognized and cited Chevron’s authority, he did not rely on the two-step test to reach his decision, ultimately denying EPA deference to interpret the statute.\textsuperscript{31}

Alternatively, Justice Scalia focused his dissenting opinion on precisely this judicial departure, twice referencing Chevron in a material way.\textsuperscript{32} Discussing the agency’s understanding of its ability to use its judgment on whether to regulate GHGs, Scalia writes, “EPA’s interpretation of the discretion conferred by the statutory reference to ‘its judgment’ is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under Chevron . . . .”\textsuperscript{33} And again when discussing the majority’s ruling against EPA’s interpretation of statutory silence on the definition of “air pollution,” Scalia writes, “we must accept EPA’s interpretation of that ambiguous term, provided its interpretation is a ‘permissible construction of the statute’ [citing Chevron.]”\textsuperscript{34} The majority’s rejection of EPA’s construction clearly ignores Chevron and instead employs a model that preferences the judiciary’s reading to the agency’s.

In Environmental Defense v. Duke Energy, the Roberts Court grappled with whether EPA can give the term “modification” different meanings in different sections of the Act.\textsuperscript{35} Although this question seems a perfect fit for the two-step Chevron test, Justice Souter omitted Step One analysis in his majority opinion, instead writing, “EPA’s construction need do no more than fall

\textsuperscript{30} Massachusetts, 549 U.S. at 527.
\textsuperscript{31} Id. at 534-35.
\textsuperscript{32} Id. at 549-60.
\textsuperscript{33} Id. at 552-53; see also Graham, supra note 26, at 248.
\textsuperscript{34} Massachusetts, 549 U.S. at 558.
\textsuperscript{35} Environmental Defense, 549 U.S. 561.
within the limits of what is reasonable . . .”36 The reasonability standard aligns most closely with Step Two of the *Chevron* test, although Souter does not seem to mind that Congress explicitly linked the definition of “modification” in the two sections of the Act.37 The reasonability standard also appears much broader than *Chevron’s* second-step standard: a permissible construction that would not offend Congress’s original intent. Conversely, Justice Thomas filed a separate opinion that applied *Chevron* Step One analysis, although Thomas did not cite the case by name. He wrote, the “Congress’ explicit linkage of PSD’s definition of ‘modification’ to NSPS’ prevents the [EPA] from adopting differing regulatory definitions of ‘modification’ for PSD and NSPS.”38 Thomas’s reliance on the “explicit linkage” invokes Step One and undergirds his reasoning for rejecting the majority’s finding on this point. However, as in *Massachusetts*, we see again that it was the minority that based its decision on *Chevron*.

*Chevron* appears to be drifting further from its old position as the main standard for judicial review of agency interpretations and, at least recently on the Roberts Court, has become a framework used in the minority’s dissenting excoriation of a creative majority decision.39 If recent history holds true, courts will not use *Chevron* to review the Tailoring Rule. Instead they may apply a more lax view of the original statute, eyeing a reasonability standard or even the court’s own view of how the statute should be interpreted.

IV. If not *Chevron*, then what? EPA Claims Absurd Results and Administrative Necessity

A. EPA Relies on the Doctrine of Absurd Results

EPA contends the legal justification for its ability to set applicability thresholds as it sees fit is based, in part, on the doctrine of “absurd results.”\(^\text{40}\) EPA relies on the 1989 case *United States v. Ron Pair Enterprises* to assert that the plain meaning of the statute should not control when it produces a result that is “demonstrably at odds with the intentions of the drafters . . . [i]n such cases, the intention of the drafters, rather than the strict language, controls.”\(^\text{41}\) EPA expounds on its purported authority by listing a series of Supreme Court cases that stress creative interpretations of statutory terms.\(^\text{42}\) While this list of authorities does grapple with the application and definition of words and phrases, none of the cases deal with numbers, a conveyance of congressional intent much less given to a finding of ambiguity and subsequently a liberal judicial or agency interpretation. The judicial approach that surfaces from this body of case law is that if an agency claims it cannot execute a statute as written because it would produce absurd results, courts must try to impute congressional intent.

In its proposed rule, EPA insists that it was never Congress’s intent for EPA to regulate as many sources as would be covered by an endangerment finding for GHGs under a literal reading of the statute.\(^\text{43}\) EPA correctly identifies that without the Tailoring Rule, regulating

\(^{40}\) Tailoring Rule, 74 Fed. Reg. at 55,306.


\(^{43}\) Tailoring Rule, 74 Fed. Reg. at 55,303.
GHGs under the Act would indeed produce “absurd results.”\textsuperscript{44} EPA offers four types of results that would run counter to Congress’ intent of the Act. (1) “[A] literal application would render it impossible for permitting authorities to meet the requirement in [the Act] section 165(c) to process permit applications within 12 months.”\textsuperscript{45} (2) The impending avalanche of permits from a non-tailored rule would confound congressional intent by “impeding economic growth by precluding any type of source—whether it emits GHGs or not—from constructing or modifying for years . . . .”\textsuperscript{46} (3) “A literal application of the 100/250 tpy thresholds would sweep into the PSD program tens of thousands of smaller sources that Congress did not intend to include . . . .”\textsuperscript{47} Oddly, EPA immediately follows this third argument by suggesting that given time it would streamline the permitting process and later expand the program to include many of these smaller sources.\textsuperscript{48} However, if Congress never intended for the smaller sources to be covered, why would the GHG program for PSD need to be expanded later to include them?\textsuperscript{49} Finally, EPA acknowledges that covered sources would be subject to best available control technologies (BACT) on a source-specific basis.\textsuperscript{50} However, there are currently no EPA-approved BACT to

\textsuperscript{44} See generally, Mills, supra note 6.
\textsuperscript{45} Tailoring Rule, 74 Fed. Reg. at 55,304.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.; see also Marlo Lewis, EPA’s Tailoring Rule: Temporary, Dubious, Incomplete Antidote To Massachusetts v. EPA’s Legacy of Absurd Results (Part 2), Section V, MASTERRESOURCE.ORG (Jan. 8, 2009) http://www.masterresource.org/2010/01/epas-tailoring-rule-temporary-dubious-incomplete-antidote-to-massachusetts-v-epas-legacy-of-absurd-results/.
\textsuperscript{49} “EPA is entirely correct: Congress did not intend to apply PSD and Title V to small entities, did not intend for those programs to implode under their own weight, did not intend for PSD to stop development, and did not intend for Title V to undermine compliance with the Act. However, those are the inexorable consequences of an endangerment finding for [GHGs] under [the Act] Sec. 202, which in turn is powerful evidence that Congress did not intend for EPA to regulate GHGs under that provision.” (emphasis original) Marlo Lewis, EPA’s Tailoring Rule: Temporary, Dubious, Incomplete Antidote To Massachusetts v. EPA’s Legacy of Absurd Results (Part 1), MASTERRESOURCE.ORG (Jan. 7, 2009) http://www.masterresource.org/2010/01/epas-tailoring-rule-temporary-dubious-incomplete-antidote-to-massachusetts-v-epas-legacy-of-absurd-results/.
\textsuperscript{50} Tailoring Rule, 74 Fed. Reg. at 55,304.
mitigate GHG emissions.\textsuperscript{51} This will make it expensive and perhaps prohibitive for newly covered entities to comply with section 169(3) of the Act, which states covered entities must employ BACT that achieve “the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority . . . determines is achievable for such facility . . .”\textsuperscript{52} In other words, entities would need to adopt technologies that do not yet exist and which EPA has not approved.

The Supreme Court in \textit{Massachusetts} explicitly held that they “need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s action in event that it makes such a finding . . . We only hold that EPA must ground its reasons for action or inaction in the statute.”\textsuperscript{53} EPA’s four types of absurd results are powerful policy concerns that are actually strong arguments for why Congress did \textit{not} intend for the Act to regulate GHGs, not why EPA should be given deference to rewrite applicability thresholds as it sees fit.

\textbf{B. EPA Also Asserts the Doctrine of Administrative Necessity}

In addition to absurd results, EPA also claims that “administrative necessity” precludes it from applying PSD and title V permitting thresholds as written.\textsuperscript{54} This doctrine holds that an agency may avoid \textit{Chevron} scrutiny, even amidst clear congressional intent, if it is impossible

\textsuperscript{51} “[R]ight now we don’t have any precedent for what constitutes BACT for [GHGs] . . . The whole issue of what constitutes BACT will itself be litigated. There will be people arguing that [carbon capture and sequestering] is not commercially available and therefore can’t constitute BACT . . . BACT is supposed to be a case-by-case review, where you’re looking at the best technology at that point in time. Even if we decide today that something doesn’t yet meet the threshold, someone will argue tomorrow, well, now we do.” Interview by David Roberts with Jason Burnett, former attorney, Environmental Protection Agency, on GRIST.ORG (Sept. 15, 2009) \url{http://www.grist.org/article/2009-09-15-an-interview-with-jason-burnett-who-worked-on-epa-greenhouse-gas/}.

\textsuperscript{52} 42 U.S.C. § 169(3) (2004).

\textsuperscript{53} \textit{Massachusetts}, 549 U.S. at 534-35.

\textsuperscript{54} Tailoring Rule, 74 Fed. Reg. at 55,311.
for the agency to apply the statutory language as written.55 “Courts frequently uphold streamlined agency approaches or procedures where the conventional course . . . [would] prevent the agency from carrying out the mission assigned to it by Congress.”56 However, the D.C. Circuit has been clear that the agency bears a heavy burden when claiming this exception and “there exists no general administrative power to create exemptions to statutory requirements based upon the agency’s perceptions of costs and benefits.”57

EPA appears to have carefully studied the judicial language on administrative necessity and has crafted its proposed rule to highlight the administrative burdens the endangerment finding and light-duty vehicle rules would produce.58 Also in line with terminology in cited case law, EPA intends to mitigate those burdens with “streamlining approaches” housed in the Tailoring Rule.59 However, EPA’s preemptive streamlining strategy raises the bar even higher for a claim of administrative necessity. In the foundational administrative necessity case, Alabama Power v. Costle, the D.C. Circuit Court of Appeals held:

We acknowledge the principle that an agency official required “to do an impossibility,” should be relieved from sanction. But we emphasize that the agency [bears] a heavy burden to demonstrate the existence of an impossibility: “An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.”60

EPA points to permit processing as the major administrative burden that should free it from loyalty to the Act’s express PSD and title V applicability thresholds. The proposed rule states that unless the thresholds are tailored, the endangerment finding “would result in a volume

56. Alabama Power, 636 F.2d at 358.
57. Id. at 357.
60. Alabama Power, 636 F.2d at 359, (citation omitted).
of permit applications that is so high that . . . [it] would become impossible for State and Federal authorities to administer. The PSD and title V permitting process would become overwhelmed and essentially paralyzed."\(^{61}\)

C. State Permitting Authorities Find the Tailoring Rule Unworkable

The absurd results and administrative burden that EPA is attempting to guard against will ultimately be borne by state permitting authorities, as the bulk of PSD and title V permits are largely administered by states.\(^{62}\) EPA’s addition of GHGs to the Act thus amounts to an unfunded mandate on already strained state budgets.\(^{63}\) EPA does offer some permit streamlining options but asserts that “absent a corresponding increase in resources, [even a tailored rule] would continue to render the PSD and title V programs impossible to administer.”\(^{64}\) Several states have already spoken out regarding the dangers of GHGs regulation under the Act, regardless of whether the PSD and title V provisions are tailored.\(^{65}\)

1. South Carolina: SIPs will not Allow States to Tailor their Thresholds

South Carolina Attorney General Henry McMaster filed an official comment on the Tailoring Rule that reads in relevant part:

The proposed Tailoring Rule for stationary sources conflicts with triggers in state laws that remain in place. State statutory regulations, required by the EPA, have already been written to comply with the current 100 to 250 ton threshold for triggering the

\(^{61}\) Tailoring Rule, 74 Fed. Reg. at 55,311.

\(^{62}\) “EPA intends to evaluate ways to streamline the process for identifying GHG emissions control requirements and issuing permits. This will reduce costs and increase efficiency for both sources and for state permitting agencies, which in most cases are responsible for issuing the permits.” EPA New Source Review Fact Sheet, EPA.GOV, (Sept. 30, 2009), http://www.epa.gov/NSR/fs20090930action.html.


\(^{64}\) Tailoring Rule, 74 Fed. Reg. at 55,311.

States also lack the ability to correct or rewrite the thresholds in the SIPs to be consistent with the proposed Tailoring Rule. The [Act] contains an “anti-backsliding” provision to ensure that states are not easing the burden on emissions. Once approved, SIPs are binding on the state. This does not allow for states to attempt to adjust their thresholds in order to comply with new mandates. This Tailoring Rule . . . will be inconsistent with the clearly defined SIP revisions process in the [Act] . . . To adjust to federal rule changes, states would be forced to act contrary to federal legislation. It is illegal for states to bring anything before the state legislature that violates federal law.

2. Texas: Congress Never Intended to Stifle Economy

Texas Governor Rick Perry penned a letter to the EPA outlining his concerns about the impact of regulations and EPA’s legal authority to implement them. Perry wrote:

[T]he regulation of carbon dioxide emissions will impose a massive and devastating cost on U.S. jobs and our economy, particularly harming energy-producing states like Texas . . . [T]he EPA admitted in the Tailoring Rule that Congress never intended for carbon dioxide to be regulated through the [Act], hence the necessity of the questionable legal gymnastics performed in the justification for that rule.

3. California: Tailoring Rule will not Save States from Gridlock

The California Energy Commission, although largely supportive of EPA’s efforts, stated the Tailoring Rule would not accomplish its purported task of alleviating the administrative burden the endangerment finding creates. The Commission stated:

[W]e are gravely concerned that EPA’s current proposal will likely create a huge administrative burden for the agencies that must implement expanded federal permit programs during a period of scarce agency resources . . . it is likely the proposed rule, even at the [tailored] 25,000 ton threshold, will cause gridlock of the air permit process.

67. Letter from Rick Perry, Governor, Texas, to Lisa Jackson, Administrator, EPA, 2, 3 (Dec. 9, 2009) (available from the Texas Office of the Governor).
4. Florida: If Federal Courts Vacate Tailoring Rule, States will be Trapped

The Air Resources Division of the Florida Department of Environmental Protection also weighed in, insisting that EPA did not fully comprehend the burden it would be exacting on state agencies. The Division’s comments read, in relevant part:

The Division is concerned that EPA’s proposed [GHG] stationary source permitting approach, while laudable in its effort to avoid absurd results, is still unmanageable . . . The Division is concerned that EPA underestimates the permitting workload even under the Tailoring Rule’s increased 25,000 [tpy] potential emissions threshold . . . such that permit authorities will still be overwhelmed by paperwork. Furthermore, should the Tailoring Rule by stayed or immediately vacated by the federal courts, permitting authorities could be left implementing a stationary source [GHG] permitting program at the Act’s existing thresholds despite EPA’s best efforts to minimize this permitting burden.69

This list of comments by state permitting authorities shows that EPA’s proposal to tailor the Act will likely not be able to avoid absurd results and administrative burden. If this is the case, it undermines the legal rational for allowing EPA to deviate from the statute. Instead, the court should find that absurd results and administrative necessity lend credence to the argument that the Act is not the appropriate vehicle for GHG regulation.

V. Noninterference and Congressional Motivation

As was mentioned above in the section placing the Tailoring Rule in a broader context with the endangerment finding and the light-duty vehicle rule, the Tailoring Rule is a facilitating rule, one that eases implementation of the other two agency actions. However, it bears questioning whether it is appropriate for EPA to regulate GHG under the Act at all. It has already been shown that a strict Chevron two-step test would likely defeat the Tailoring

69. Letter from Joseph Kahn, Director, Division of Air Resource Management, Florida Department of Environmental Protection, to Whom it May Concern, EPA, Federal Docket ID No. EPA-HQ-OAR-2009-0517-2504.1, 1, 2 (Dec. 11, 2009).
Rule and that is unlikely the court will apply *Chevron*. But what other standards could the court apply when reviewing the trio of new GHG regulations?

A. The Noninterference Doctrine

Harvard Law School Academic Fellow Abigail Moncrieff offers the doctrine of noninterference as a plausible alternative to Sunstein’s “major questions” exception as a *Chevron* Step Zero.\(^70\) This gatekeeping doctrine encourages courts to reject new agency regulations or major modifications to existing regulations if Congress is actively debating an issue.\(^71\) Moncrieff explains the value of the doctrine:

> [I]n the context of Step Zero noninterference, the point of the noninterference principle is not merely to prevent agencies from beating Congress in a race to regulate. The point is to prevent agencies from moving the target around which Congress is bargaining. The noninterference rule simply recognizes that lawmaking becomes more costly if a regulatory regime changes independently of congressional action in the middle of the congressional bargaining process. The nightmare story is not that the agency’s decision will prevent Congress from acting; it is that the agency’s decision will fundamentally alter legislators’ and stakeholders’ incentives, requiring the public choice game to start afresh.\(^72\)

Moncrieff insists the noninterference doctrine is not a new concept; instead, that it is entirely consistent with federalism and the separation of powers, sharing these institutions’ concerns of intermeddling and overlapping authority.\(^73\)

> It is incontrovertible that Congress has been actively involved in debates over global warming and GHG regulation.\(^74\) However, instead of respecting Congress’s deliberations, the Executive Branch is attempting to use EPA’s three-piece proposal to pressure Congress into

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70. Moncrieff, *supra* note 16; Sunstein, *supra* note 15.
72. *Id.* at 640-41.
73. *Id.* at 630.
74. *Id.* at 635-37 (summarizing the history of congressional debate and activities on climate legislation).
action. Noninterference insists that executive agencies not manipulate lawmakers’ incentives to act, or not to act. However, EPA’s GHG efforts do just that.

B. Leveraging Agency Actions

Although I will show that EPA’s proposal was intended to pressure lawmakers to pass climate legislation, it is actually having the opposite effect. Advocates of cap-and-trade legislation have embraced EPA’s efforts, using them as a hammer to bang away on reticent lawmakers. In March 2009, Sen. Barbara Boxer (D-Calif.) attempted to leverage EPA’s proposed regulations to motivate the upper chamber, saying, “My message to my colleagues is, we could sit here and let EPA do it, with the president’s support, we could allow the states and cities and the world to do it, or we can move forward [with legislation].”75 Later in the year, Sen. John Kerry (D-Mass.) likewise leaned on EPA’s new regulations to encourage his colleagues to act, saying:

The message to Congress is crystal clear: get moving. If Congress does not pass legislation dealing with climate change, the administration is more than justified to use the EPA to impose new regulations . . . Given the potential for agency regulation, those who now aim to grind the legislative process to a halt would later come running to Congress to secure the kinds of incentives we can pass today.76

U.S. House Speaker Nancy Pelosi (D-Calif.) also responded to EPA’s endangerment finding by trying to change the legislative landscape, saying, “those who fear EPA regulation of global warming pollution will find the answer in the American Clean Energy and Security Act passed by the House this year. This legislation will give businesses both certainty and flexibility . . . “77

The Obama Administration has also employed the same strategy. On the eve of EPA

Administrator Lisa Jackson’s endangerment announcement, a top White House economic official, who spoke on the condition of anonymity, said:

If you don’t pass [cap-and-trade], then . . . the EPA is going to have to regulate in this area . . . And it is not going to be able to regulate on a market-based way, so it’s going to have to regulate in a command-and-control way, which will probably generate even more uncertainty.\textsuperscript{78}

These quotes from lawmakers and administration officials show that the concepts underlying the noninterference doctrine are the last thing on their mind. These officials intend to exploit EPA’s proposed regulations to motivate Congress. This is exactly the type of behavior the doctrine aims to curtail: “The purpose of the noninterference rule is . . . to prevent the Executive from interfering with ongoing and serious congressional policymaking.”\textsuperscript{79}

While dangling proposed regulations over lawmakers may be an effective and shrewd political strategy it may have failed, forcing EPA to make good on its threats and to regulate.\textsuperscript{80}

If, however, the court ultimately reviews EPA’s interpretations of the Act through a lens of noninterference, the actions by the administration and elected officials will make it less likely that the proposed rules will survive judicial review.

\textbf{VI. Conclusion}

Federal action to control the nation’s greenhouse gas emissions remains a contentious topic. All three branches of government are in a pitched battle to see whose jurisdiction on the issue will rein supreme. The checks and balances that are built into our federal government are


\textsuperscript{79} Moncrieff, \textit{supra} note 16, at 642.

\textsuperscript{80} “From the start, the Obama team has wielded the EPA action as a club, warning Congress that if it did not come up with cap-and-trade legislation the EPA would act on its own—and in a far more blunt fashion than Congress preferred . . . The thing about threats, though, is that at some point you have to act on them.” Kimberley A. Strassel, Op-Ed., \textit{The EPA’s Carbon Bomb Fizzles}, \textit{Wall St. J.}, Dec. 11, 2009, http://online.wsj.com/article/SB10001424052748703514404574588120572016720.html.
being tested. The Executive has proposed a drastic measure in an effort to jumpstart Congressional action. However, despite EPA’s best effort, the Clean Air Act remains a blunt instrument that is most likely not capable of contorting itself to regulate greenhouse gases.

The Tailoring Rule is a clear violation of Congress’s expressed intent on applicability thresholds for air pollutants that EPA has deemed endanger the public health and welfare. However, whether the proposed rule survives the inevitable legal challenges will hinge on the standard of review the court applies. It appears unlikely that the court will select a traditional two-step *Chevron* test from the judicial toolbox. EPA’s preferred standards, “absurd results” and “administrative necessity,” both seem unlikely to actually relieve the problems the agency is creating, which lowers the probability of their selection. However, a Step Zero application of the noninterference doctrine would be both appropriate, and likely to find the court vacate EPA’s Tailoring Rule.