THE TAILORING RULE: MENDING THE CONFLICT BETWEEN PLAIN TEXT AND AGENCY RESOURCE CONSTRAINTS

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In 2010, the Environmental Protection Agency (EPA) promulgated the Tailoring Rule. The Rule "tailors" the numeric triggers for permitting requirements in the Clean Air Act by revising the numbers upward by several orders of magnitude. EPA argued that doing so was necessary to avoid the impossible administrative burden that would result from having to carry out the plain text of the Act as applied to greenhouse gases. At first glance, the Tailoring Rule seems to be a classic case of an agency exceeding its authority and subverting congressional intent. Upon further examination, it becomes clear that EPA is grappling with an important issue that current administrative law doctrine fails to adequately address: What should an agency do when it does not have the resources to carry out all of its required duties? This Note argues that courts should use the rationale of administrative necessity to allow agencies to openly demonstrate that it would be impossible to fully carry out their nondiscretionary statutory duties. Upon that demonstration, courts should allow agencies to promulgate regulations that propose a solution to that impossibility.

INTRODUCTION

In 2010, the Environmental Protection Agency (EPA) promulgated the Tailoring Rule.[1] The rule "tailors" the numeric triggers for permitting requirements in the Clean Air Act[2] (the Act) by revising the numbers upward by several orders of magnitude.[3] EPA argued that doing so was necessary to avoid the impossible administrative burden that would result if it were required to carry out the plain text of the Act as applied to greenhouse gases. For support, EPA pointed

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[1] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70 & 71 (2010)) [hereinafter Final Tailoring Rule].

[2] 42 U.S.C. §§ 7401–7671q (2006).

[3] *See infra* Part I.B (describing the Tailoring Rule).

to a line of cases from the D.C. Circuit that it claimed created an "administrative necessity doctrine" that authorized the Rule.

At first glance, the Tailoring Rule seems to be a classic case of an agency exceeding its authority and subverting congressional intent. However, upon further examination, it becomes clear that EPA is grappling with an important issue that current administrative law doctrine fails to adequately address: What should an agency do when it does not have the resources to carry out all of its required duties?

While EPA's climate change regulations present the clearest case of a conflict between plain text and resource constraints, the problem is not limited to EPA or the Clean Air Act. For example, the Fish and Wildlife Service (FWS) recently asked Congress to cap its funding after it was flooded with petitions to list new species as endangered or threatened under the Endangered Species Act.[4] The Endangered Species Act includes clear deadlines that require FWS to address petitions within one year.[5] FWS took the counterintuitive move of *asking* to be hobbled by Congress because it believed a limited budget could serve as a defense against lawsuits seeking to enforce those deadlines.[6] Under current administrative law doctrine, FWS cannot issue a regulation that demonstrates that it cannot meet the statutory deadlines due to resource constraints and proposes a plan to streamline and prioritize petitions.[7] Agency budgets will decrease significantly in

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[4] *See* Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 21, 2011, at A1 (reporting that the Fish and Wildlife Service (FWS) asked Congress "to impose a cap on the amount of money the agency can spend on processing listing petitions, both to control its workload and as a defense against lawsuits").

[5] 16 U.S.C. § 1533 (2006).

[6] Courts generally do not excuse agencies from failures to meet deadlines on account of resource constraints. *See infra* notes 168–69. FWS asked Congress to cap the amount of its budget specifically dedicated to addressing petitions because it believed such a cap would make its resource constraint argument more compelling, especially when the cap was reached.

[7] Such a regulation might be a more desirable solution than a congressional cap on funding because, even with a cap, the FWS workload would still be driven by litigation based on petitions already filed, even if a court were to give FWS leeway on deadlines for new petitions. *See infra* note 177 and accompanying text.

FWS recently attempted to solve its problem through a settlement with WildEarth Guardians. The settlement agreement initially fell apart when the Center for Biological Diversity (CBD), which is involved in over eighty percent of the petitions against FWS, objected. *See* Press Release, CBD, Judge Halts Settlement over Hundreds of Endangered Species, Orders Parties Back to Negotiations (May 17, 2011), *available at* http://www.biologicaldiversity.org/news/press_releases/2011/839-species-05-17-2011.html (explaining that CBD objected to the proposed agreement as "too weak, too vague and ultimately unenforceable"). CBD later withdrew its objections and the settlement was approved. Press Release, CBD, Court Approves Historic Agreement To Speed Endangered Species Act Protection for 757 Imperiled Species (Sept. 9, 2011), *available at* http://www.biologicaldiversity.org/news/press_releases/2011/757-species-agreement-09-09-2011.html; *see also* Order Granting Joint Motion for Approval of Settlement Agreement and Order of

upcoming years as a result of the current push in Washington for deficit reduction,[8] though their statutory mandates will remain the same.[9] It is therefore likely that more agencies will be unable to carry out the plain text of their enabling statutes.[10]

This Note is concerned with the conflict between the supremacy of plain text and agency resource constraints. Scholars and courts have little trouble acknowledging and, to some degree, accommodating the problems facing resource-strapped agencies.[11] However, even those most concerned with this problem would stop short of allowing administrative realities to trump plain, nondiscretionary statutory commands.[12] Using the Tailoring Rule as a lens through which to understand the problem, I argue that courts should use the rationale

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Dismissal of Center for Biological Diversity's Claims, Ctr. for Biological Diversity v. Salazar, No. 10-cv-230 (D.D.C. Sept. 9, 2011).

Although a settlement was eventually reached, the FWS example demonstrates that even unique legal solutions—such as settlement agreements with the parties who have filed the most petitions—are an inadequate solution to the problem of agency resource constraints. The FWS experience, which involved only two major parties, makes it clear that there is a potential for a holdout problem that would only increase as the number of parties challenging an agency increases.

[8] *See, e.g.*, Robert Pear & Catherine Rampbell, *Lawmakers in Both Parties Fear That New Budget Panel Will Erode Authority*, N.Y. TIMES, Aug. 2, 2011, at A15 (describing the Joint Select Committee on Deficit Reduction and its charge to produce a plan that Congress will vote on before December 23, 2011 to reduce federal budget deficits by least $1.5 trillion over ten years); Gabriel Nelson & Jean Chemnick, *EPA Budget Proposal Focuses on Air and Climate Rules, Cuts Water Grants*, GREENWIRE (Feb. 14, 2011), http://www.eenews.net/public/Greenwire/2011/02/14/2 (noting that "EPA would take a 12.6 percent funding cut" under President Obama's proposed Fiscal Year 2012 budget).

[9] *See infra* note 164 and accompanying text (noting that Congress does not decrease statutory responsibilities when it decreases agency budgets); *cf.* James B. Stewart, *As a Watchdog Starves, Wall St. Is Tossed a Bone*, N.Y. TIMES, July 16, 2011, at A1 ("[Congress has proposed cutting the SEC's] fiscal 2012 budget request by $222.5 million, to $1.19 billion (the same as this year's), even though the S.E.C.'s responsibilities were vastly expanded under the Dodd-Frank Wall Street Reform and Consumer Protection Act.").

[10] The conflict between agency resources and statutory mandates is a problem agencies face regularly. *See, e.g.*, Tennille Tracy, *Offshore-Drilling Agency Overwhelmed, Report Says*, WALL ST. J., Sept. 9, 2010, at A4 (noting that the Bureau of Ocean Energy Management, Regulation and Enforcement does not have enough resources to handle a steep rise in permit applications); *see also infra* note 108 (discussing a Food and Drug Administration regulation deviating from statutory text to address its inability to manage a six-fold increase in medicated feed applications).

[11] *See, e.g.*, Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1676–84 (2004) (noting that the judicial doctrines of standing and nonreviewability of agency action have been justified under the presidential control model, which posits that executive actors, and not courts or private actors, should direct where agency resources are allocated).

[12] *See, e.g.*, Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 39, 49 (2008) (posing the question of whether "statutory duties [should] trump an agency's decision about how to allocate its own resources" but ultimately concluding that courts should "enforce 'clear duties' against agencies").

of the administrative necessity cases to allow agencies to openly demonstrate that it would be impossible to fully carry out their nondiscretionary statutory duties and to give agencies that make that demonstration the flexibility to regulate a solution to that impossibility. My proposal, drawn from the administrative necessity cases and the Tailoring Rule, requires an agency to demonstrate that there are no available alternatives, to quantify impossible administrative burdens, to show that its regulation deviates from the plain text as little as possible, and to commit to reassessing the regulation in order to determine whether continued deviation from the plain text is justified.

The argument proceeds in several steps. Part I describes the history and content of the Tailoring Rule. It first provides a basic understanding of the Clean Air Act and chronicles the events leading up to *Massachusetts v. EPA*,[13] the Supreme Court decision which set off a cascade of EPA regulations addressing greenhouse gas emissions. It then outlines the major provisions of the Tailoring Rule. Part II turns to doctrine. It first sets out EPA's legal justification for the Tailoring Rule. It then examines the cases EPA cites in support of its administrative necessity rationale and concludes that the cases do not provide the support that EPA claims. Part III then turns to theory. It first asks whether current administrative law doctrines can accommodate EPA's concerns and concludes that they cannot. It then assesses the normative desirability of the administrative necessity rationale. When agencies do not have adequate resources to carry out their mandates, the question becomes *how* agencies will fall short of executing the plain text of their enabling statutes, not *whether* they will fall short. Part III therefore concludes that the administrative necessity rationale provides agencies with an accountable and transparent option unavailable under the current doctrine.

I
The Regulation of Climate Change Through the Clean Air Act

The Clean Air Act is an incredibly complex statute that gives EPA the power to address harmful air pollutants by regulating mobile sources, stationary sources, and fuel formulation.[14] Congress designed the Act to quickly mobilize federal and state resources to combat

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[13] 549 U.S. 497 (2007).

[14] This is an oversimplification of the scope of the Clean Air Act (the Act), which also deals with hazardous air pollutants, acid rain, stratospheric ozone depletion, and other air pollution issues. For a comprehensive discussion of the Act, see generally Arnold W. Reitze, Jr., Air Pollution Control and Climate Change Mitigation Law (2d ed. 2010).

what was perceived as a serious but short-term environmental threat.[15] To eliminate the "opportunity for administrative foot-dragging,"[16] the statutory trigger for regulation of an air pollutant is a determination, called an endangerment finding, by the EPA Administrator that an air pollutant causes or contributes to pollution that endangers public health or welfare. This trigger is repeated across sections of the Act dealing with different types of sources,[17] meaning that a decision to regulate a pollutant under one section may trigger a duty to regulate the pollutant under the other sections, as well.[18] And an endangerment finding does not just trigger regulation across the Act; it also triggers a detailed and inflexible regulatory scheme for each type of source.[19] The initial decision to issue an endangerment

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[15] *See* DAVID SCHOENBROD ET AL., BREAKING THE LOGJAM 20–21 (2010) (noting that the Act was passed during a period when environmental problems were dealt with as discrete, short-term threats); *see also* Union Elec. Co. v. EPA, 427 U.S. 246, 256 (1976) (describing the Act as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution"). The Act gives EPA and the States over one thousand nondiscretionary duties. Most duties are backed by deadlines; all are enforceable through citizen suits. SCHOENBROD ET AL., *supra*, at 73, 21.

[16] Natural Res. Def. Council v. Train, 545 F.2d 320, 328 (2d Cir. 1976).

[17] *See* 42 U.S.C. § 7408(a)(1) (2006) (requiring the EPA Administrator to list as a criteria pollutant and regulate stationary source emissions of any air pollutant "which, in his judgment, cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare"); *id.* § 7521(a)(1) (same for mobile sources); *id.* § 7545(c)(1) (same for regulation of fuel formulation); *see also id.* § 7411(b)(1)(A) (requiring the EPA Administrator to list and regulate any category of stationary sources "if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare").

[18] The Second Circuit directly addressed this issue in *Natural Resources Defense Council v. Train*. In that case, EPA argued that it was not required to list lead as a criteria pollutant under section 108 of the Act, which would require EPA to regulate lead under the National Ambient Air Quality Standards (NAAQS) program that deals mainly with stationary source emissions. EPA had already decided to regulate lead under section 211 through fuel additives and believed the Act gave it a choice of regulatory tools. *Train*, 545 F.2d at 324–25. The court rejected EPA's argument, reasoning that regulation of fuel additives was a tool to help attain the NAAQS, rather than to supplant them. Because the Second Circuit conceded that the statute was "ambiguous," *id.* at 327, this case would likely come out differently today under *Chevron U.S.A. v. Natural Resources Defense Council*. Under current doctrine, a court would defer to a reasonable construction of the statute by EPA. *See infra* notes 93–94 and accompanying text (discussing the *Chevron* framework).

[19] EPA regulates stationary sources through NAAQS. *See* 42 U.S.C. § 7409(a)(2)-(b)(2) (requiring the EPA Administrator to set NAAQS at levels protective of public health and welfare). States are required to promulgate state implementation plans (SIPs), which EPA must approve. SIPs require the state to run permitting programs for sources within its jurisdiction to ensure the state is on track to attain or maintain the NAAQS. *See id.* § 7410 (listing SIP requirements). EPA regulates mobile sources through emission standards. *See id.* § 7521 (establishing a mobile source regulatory program). EPA regulates fuel formulations through a registration program; the sale of an unregistered, regulated fuel is prohibited. *See id.* § 7545 (establishing a fuel formulation regulatory scheme).

finding is therefore more than a simple declaration that an air pollutant is harmful; it is a commitment to comprehensive, nationwide regulation of that air pollutant.

In 1999, the International Center for Technology Assessment (ICTA)—along with several small environmental groups—filed a rulemaking petition asking EPA to issue an endangerment finding for greenhouse gases emitted from mobile sources, pursuant to section 202 of the Act.[20] Four years later, EPA denied the rulemaking petition. EPA claimed that it did not have the statutory authority to regulate greenhouse gases. In the alternative, EPA argued that even if it could regulate greenhouse gases, there were strong policy reasons that counseled against doing so.[21] The D.C. Circuit upheld the denial, and the Supreme Court granted certiorari in 2006.[22]

A. Massachusetts v. EPA *and the Resulting Cascade of Regulations*

In *Massachusetts v. EPA*, the Supreme Court reversed the D.C. Circuit and held that the Act unambiguously authorized EPA to regulate greenhouse gases under section 202. The Court rejected the reasons EPA offered for refusing to regulate and found that EPA had acted in an arbitrary and capricious manner.[23] Before the Court could reach that result, it had to address an unresolved issue of administrative law: "the rigor with which [courts] review an agency's denial of a petition for rulemaking."[24] Writing for a five-member majority, Justice Stevens stated that nonpromulgation is reviewable by courts, though such review is "highly deferential."[25] However, the actual review given to EPA's denial suggests a more rigorous standard of review.

The Court first dispensed with the statutory interpretation question. It found that greenhouse gases unambiguously fell within the

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[20] Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act, INT'L CENTER FOR TECH. ASSESSMENT (Oct. 20, 1999), http://www.icta.org/doc/ghgpet2.pdf.

[21] Notice of Denial of Petition for Rulemaking: Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003) [hereinafter Rulemaking Petition Denial] ("After careful consideration of petitioners' arguments and the public comments, EPA concludes that it cannot and should not regulate GHG emissions from U.S. motor vehicles under the CAA.").

[22] Massachusetts v. EPA, 415 F.3d 50, 58–59 (D.C. Cir. 2005) (upholding EPA's denial of the rulemaking petition), *rev'd*, 549 U.S. 497 (2007); Massachusetts v. EPA, 548 U.S. 903 (2006) (granting certiorari).

[23] Massachusetts v. EPA, 549 U.S. 497, 534 (2007).

[24] *Id.* at 527.

[25] *Id.* at 527–28 (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989) (internal quotation marks omitted)).

definition of "air pollutant" in the Act.[26] EPA argued that because Congress had enacted other statutes dealing with greenhouse gases, Congress intended to limit or remove EPA's power to regulate under the Act.[27] The Court noted that the statutes EPA pointed to had not imposed "binding [greenhouse gas] emissions limitations" and therefore did not speak to Congress's intent toward greenhouse gas regulation under the Clean Air Act.[28] Thus, it concluded there was no statute that conflicted with or limited EPA's ability to regulate through the Act.[29] EPA also pointed to *FDA v. Brown & Williamson Tobacco Corp.*, which laid out an interpretive principle that courts should be wary when an agency asserts power over an economically significant and politically controversial issue unless Congress has clearly granted the agency such power.[30] But the Court did not see a risk that interpreting the Act to cover greenhouse gases would contravene congressional intent. The Court drew a distinction between outright bans and mere regulation, reasoning that any EPA action on greenhouse gases would fall into the latter category—unlike the proposed cigarette ban at issue in *Brown & Williamson*—and would also begin addressing the serious threat posed by climate change.[31]

The Court then rejected EPA's policy-based justifications for denying the ICTA's rulemaking petition. EPA reasoned that, even assuming it possessed the authority to regulate greenhouse gases under the Act, doing so would be unwise. It then offered three arguments in support of its position: (1) the Act was set up to deal with local pollutants rather than global pollutants,[32] (2) regulation through

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[26] *Id.* at 528–29. The Act defines an air pollutant as "any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g) (2006).

[27] *See Massachusetts*, 549 U.S. at 511–12 (noting that Congress had enacted other solutions to global atmospheric problems).

[28] *Id.* at 529–30.

[29] *Id.*

[30] *See id.* at 512 (noting EPA's reliance on *Brown & Williamson*); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[Courts] must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

[31] *See Massachusetts*, 549 U.S. at 531 (noting that "a ban on tobacco products clashed with the 'common sense' intuition that Congress never meant to remove those products from circulation" but that "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter" (quoting *Brown & Williamson*, 529 U.S. at 133)).

[32] *See* Rulemaking Petition Denial, *supra* note 21, at 52,927 ("[A] basic underlying premise of the CAA regime for implementation of a NAAQS [is] that actions taken by individual states and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS."). A local pollutant is one whose concentration varies by location. A global pollutant has a constant concentration at any location; therefore, efforts to control emissions in one area have only a marginal effect on concentrations in that area.

the Act would interfere with President Bush's comprehensive strategy to address climate change,[33] and (3) agencies should not promulgate regulations in the face of scientific uncertainty.[34] The Court rejected each of these policy arguments. Contrary to its initial description of judicial review of agency nonpromulgation as highly deferential, the Court subjected EPA to "hard look review,"[35] under which agency actions are upheld only if they are not arbitrary or capricious.[36] When denying a rulemaking petition, the Court held that an agency's "reasons for action or inaction must conform to the authorizing statute."[37] To justify a refusal to issue an endangerment finding, EPA therefore had only two options: state that greenhouse gases do not endanger the public health or welfare, or give a reasonable explanation why it could not or would not determine whether greenhouse gases endanger the public health and welfare.[38] Because EPA's concerns all spoke to whether regulation was wise, rather than whether greenhouse gases

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33 *See id.* at 52,930–33 (describing domestic research efforts, voluntary programs to curtail domestic emissions, and international negotiations to address climate change).

34 *See id.* at 52,931 ("[E]stablishing GHG emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies.").

35 The Court did not explicitly state it was applying hard look review, but it framed its decision to remand in those terms. *See Massachusetts*, 549 U.S. at 534–35 (describing EPA's action as "arbitrary, capricious, . . . or otherwise not in accordance with law" (omission in original) (quoting 42 U.S.C. § 7607(d)(9)(A) (2006) (internal quotation marks omitted))). The Court cited to the judicial review provision of the Clean Air Act to justify its remanding the denial on arbitrary and capricious grounds. *See id.* (citing 42 U.S.C. § 7607(d)(9)(A)). The Act, like most statutes, simply incorporates the language of the Administrative Procedure Act, which sets the default rules for agency procedures and judicial review. *See* 5 U.S.C. § 706(2)(A) (2006) (requiring courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion"). This means that all agency nonpromulgation decisions made under statutes that do the same are now presumptively subject to hard look review. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97 ("At least absent a clear statutory command to the contrary, the reviewing court will require the agency to offer a nonarbitrary reason for the decision not to decide [to regulate].").

36 In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* the Court described the arbitrary and capricious standard of review for agency action:

> [Agency action is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

37 *Massachusetts*, 549 U.S. at 533.

38 *Id.*

were a threat,[39] the Court concluded that EPA's denial was arbitrary and capricious.

The Court expressly refrained from requiring EPA to make an endangerment finding on remand.[40] Despite this disclaimer, the Court's narrow limitation of the grounds available to EPA to justify a second denial of the rulemaking petition on remand made it almost inevitable that EPA would have to do so.[41]

An endangerment finding was not issued during President Bush's Administration. Instead, EPA issued an Advance Notice of Proposed Rulemaking to seek comment on a draft of regulatory possibilities and potential complications.[42] While nodding toward the significance of the Court's directive in *Massachusetts v. EPA*, EPA flatly stated that it was unwilling to regulate greenhouse gases through the Act.[43]

After President Obama took office in 2009, EPA fast-tracked the endangerment finding and related regulations.[44] EPA issued a draft

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[39] *See id.* ("[T]hese policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change.").

[40] *Id.* at 534 (stating that the opinion does "not reach the question whether on remand EPA must make an endangerment finding").

[41] *See* Freeman & Vermeule, *supra* note 35, at 99 (describing the ability of EPA to avoid promulgating an endangerment finding as only "notionally possible"); *see also* Linda Greenhouse, *Justices Say E.P.A. Has Power To Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, at A1 ("The ruling does not force the environmental agency to regulate auto emissions, but it would almost certainly face further legal action if it failed to do so.").

[42] *See* Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,362 (proposed July 30, 2008) [hereinafter ANPR] ("We are concerned that attempting to regulate greenhouse gases under the Clean Air Act will harm the U.S. economy while failing to actually reduce global greenhouse gas emissions."). The ANPR, which occupied 168 pages in the Federal Register, is a laundry list of the reasons not to regulate greenhouse gases through the Clean Air Act. Only ten pages are dedicated to the question at issue in *Massachusetts v. EPA* of whether greenhouse gases cause or contribute to the endangerment of public health and welfare. *See id.* at 44,421–32.

[43] *Id.* at 44,355, 44,362. In the ANPR, EPA noted that the text of the Act was flexible. EPA both solicited and proposed interpretations of the Act that would avoid the problems that might result from using the Act to regulate greenhouse gases. *See* Letter from Susan E. Dudley, Adm'r, Office of Info. and Regulatory Affairs, Office of Mgmt. and Budget, to Stephen L. Johnson, Adm'r, EPA (July 10, 2008), *reprinted in* ANPR, *supra* note 42, at 44,356–58 ("To mitigate the far reaching and potentially harmful effects of regulating greenhouse gases under the Clean Air Act, the draft offers several untested legal propositions for 'flexible' interpretations of the Act."). One of EPA's proposals was a nascent version of the Tailoring Rule. *See* ANPR, *supra* note 42, at 44,503–10, 44,512-14 (describing a possible workaround of increasing the threshold for major stationary sources and suggesting legal doctrines that might support doing so).

[44] *See* Darren Samuelsohn, *EPA Document Shows Endangerment Finding on Fast Track*, GREENWIRE (Mar. 10, 2009), http://www.eenews.net/public/Greenwire/2009/03/10/1. In 2009, EPA released an endangerment finding that had been prepared in 2007 and suppressed by the Bush Administration's EPA. Jim Tankersley & Alexander C. Hart, *Bush-Era EPA Document on Climate Change Released*, L.A. TIMES, Oct. 14, 2009, at A14, *available at* http://articles.latimes.com/2009/oct/14/nation/na-epa-climate14. EPA had e-mailed the endangerment finding to the Office of Management and Budget, which then asked

proposal in April 2009,[45] followed by a final endangerment finding in December 2009.[46] Because the endangerment finding was issued under the mobile sources provision, it triggered a nondiscretionary duty to regulate emissions from mobile sources.[47] To carry out that duty, EPA partnered with the Department of Transportation and the State of California to produce joint standards for fuel economy and greenhouse gas emissions. EPA and the Department of Transportation, through the National Highway Traffic Safety Administration, jointly issued the "Tailpipe Rule," regulating light-duty vehicles, in May 2010 and subsequently proposed standards for heavy-duty vehicles in November 2010.[48] Regulating greenhouse gases from stationary sources, however, proved to be more complicated.

B. The Tailoring Rule

Under EPA's interpretation of its existing regulations, once it began regulating greenhouse gas emissions from mobile sources, it acquired a nondiscretionary duty under its own longstanding regulations to regulate greenhouse gas emissions from stationary sources through two permitting programs: the Prevention of Significant Deterioration (PSD) program and the Title V program. The Tailoring Rule is a product of EPA's attempt to address the overwhelming

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EPA to recant the e-mail to avoid triggering public disclosure requirements. *See* Darren Samuelsohn, *Bush Admin Rejects Bid To Unseal EPA Endangerment Finding*, GREENWIRE (Jan. 5, 2009), http://www.eenews.net/public/Greenwire/2009/01/05/4 (reporting on the testimony of former–EPA Deputy Associate Administrator Jason Burnett before Congress).

[45] *See* Editorial, *A Danger to Public Health and Welfare*, N.Y. TIMES, Apr. 18, 2009, at A22.

[46] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I) [hereinafter Endangerment Finding] ("Pursuant to CAA section 202(a), the Administrator finds that greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.").

[47] *See* 42 U.S.C. § 7521(a)(1) (2006) (requiring EPA to issue regulations containing "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles" for which EPA has issued an endangerment finding).

[48] *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86 & 600, and 49 C.F.R. pts. 531, 533, 536, 537 & 538); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152 (proposed Nov. 30, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066 & 1068, and 49 C.F.R. pts. 523, 534 & 535); Press Release, White House, President Obama Announces National Fuel Efficiency Policy (May 19, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ (describing a plan for coordination). The innovative approach was necessary to avoid subjecting manufacturers to three potentially conflicting standards: emission standards under the Clean Air Act, emission standards set by California, and fuel economy standards under the Energy Policy and Conservation Act.

administrative burdens that would result if it were required to apply the plain text of these two programs to greenhouse gas emissions.[49]

As its name indicates, Congress designed the PSD permitting program to ensure that areas with air cleaner than the national standard did not degrade their air quality below that standard.[50] New major stationary sources that seek to locate into these cleaner areas, and existing major emitting facilities that intend to make modifications to their plants, must obtain preconstruction permits.[51] A "major stationary source" is defined as a stationary source that "emit[s], or ha[s] the potential to emit, one hundred tons per year or more of any air pollutant" and is one of twenty-eight listed source types, or "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant."[52] EPA has also interpreted "any pollutant" to mean "any regulated NSR pollutant,"[53] which is further defined to include "*any pollutant that otherwise is subject to regulation under the Act*."[54] PSD permits require, among other things, that the source install "the best available control technology for each pollutant subject to regulation" and that an analysis of the projected air quality impacts of the source be completed.[55] Best available control technology (BACT) is defined as the maximum degree of emissions reduction achievable for the source and must be determined on a source-by-source basis.[56] The permitting authority—either a state environmental agency or EPA—is required to hold a public hearing on the permit application[57] and act on a completed application within one year.[58]

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[49] *See infra* notes 66–72 and accompanying text (describing the burden of greenhouse gas regulation).

[50] *See* RICHARD L. REVESZ, ENVIRONMENTAL LAW AND POLICY 368–79 (2008) (describing the history and basics of the Prevention of Significant Deterioration (PSD) program).

[51] 42 U.S.C. § 7475(a)(1).

[52] *Id.* § 7479(1).

[53] 40 C.F.R. § 52.21(b)(1)(i) (2009) (defining major stationary source). NSR refers to the New Source Review permitting program under the Act, which covers new and modified sources. *See* 42 U.S.C. § 7502(c)(5) ("Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources . . . .").

[54] 40 C.F.R. § 52.21(b)(49) (emphasis added).

[55] 42 U.S.C. § 7475(a) (listing PSD permit requirements).

[56] *See id.* § 7479(3) (defining best alternative control technology (BACT) and allowing the permitting agency to take into account "energy, environmental, and economic impacts and other costs"). EPA implements this definition through a "top-down" procedure, which starts with the most stringent technology and moves to the next most stringent technology only if technical, environmental, economic, or energy considerations indicate that the most stringent technology is not achievable. *See* REVESZ, *supra* note 50, at 374 (citing EPA, NEW SOURCE REVIEW WORKSHOP MANUAL, at B.2 (Draft Oct. 1990)).

[57] 42 U.S.C. § 7475(a)(2).

[58] *Id.* § 7475(c).

The Title V permitting program was added in 1990 to ease both compliance with, and enforcement of, the Act. The program prohibits major sources from operating without a Title V permit,[59] which is a "source-specific bible for Clean Air Act compliance" that collects all of the requirements of the Act applicable to a source into one comprehensive document.[60] A "major source" is defined as a stationary source "which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant."[61] EPA has interpreted this definition as referring only to "*air pollutant*[*s*] *subject to regulation*."[62] A source must apply for a Title V permit within one year of becoming subject to the requirements of Title V,[63] and Title V permits must be approved or disapproved within eighteen months of receipt of the application.[64] Until the application has been acted on, however, a timely and complete permit application acts as a shield against a charge that the source is not in compliance with Title V.[65]

Under EPA's interpretation of these programs, once the Tailpipe Rule went into effect on January 2, 2011, greenhouse gases became "subject to regulation" under the Act.[66] New and modified[67] stationary sources that emit more than the one hundred or two hundred fifty tons per year (100/250-tpy) threshold of greenhouse gases are now subject to the PSD permitting requirements. Sources that emit more than 100-tpy of greenhouse gases are subject to the Title V permitting requirements.

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[59] *Id.* § 7661a(a).

[60] Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996). Compliance with the Title V permit requirements can be deemed to constitute compliance with the substantive obligations covered by the permit. *See* 42 U.S.C. § 7661c(f) (allowing compliance with Title V to operate as a shield to enforcement); *see also* 40 C.F.R. § 70.6(f) (2010) (requiring a clear statement before a permit can operate as shield).

[61] 42 U.S.C. § 7661(2)(B).

[62] 40 C.F.R. § 70.2 (emphasis added).

[63] 42 U.S.C. § 7661b(c).

[64] *Id.* When a new permitting program is established, at least one-third of new applications must be acted on annually, and the permitting authority must begin meeting the eighteen-month deadline within three years of the program's start date. *Id.*

[65] *Id.* § 7661b(d).

[66] *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,006 (Apr. 2, 2010) [hereinafter Timing Rule] ("PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant 'takes effect' . . . .").

[67] By regulation, EPA has limited modifications that trigger PSD requirements to "major modifications," *see* 40 C.F.R. § 52.21(a)(2)(ii)-(iv) (2009) (setting forth PSD applicability procedures), which it defines as causing both a significant increase in the emissions of one pollutant and a significant net increase in pollutants overall, *see id.* § 52.21(a)(2)(iv)(a). However, EPA has not established a significance level for greenhouse gases, meaning any increase in greenhouse gases will trigger PSD requirements.

Greenhouse gases are emitted in far greater quantities than the other pollutants currently regulated under the Act.[68] Currently, there are 15,000 major stationary sources for PSD purposes, meaning each source emits at least one regulated pollutant above the 100/250-tpy threshold, and EPA estimates that there are 668 PSD permit applications annually for new construction and modifications. Without the Tailoring Rule, over six million sources would be newly classified as major stationary sources for PSD purposes. EPA estimates that over 80,000 sources would be required to apply for PSD permits each year for new construction and modifications.[69] Each of the over six million newly major stationary sources would also be required to apply for a Title V permit.[70] The estimated cost of the PSD and Title V permitting programs would increase from $74 million annually to $22.5 billion annually. The annual number of work hours needed to run the permitting programs would increase from close to 1.5 million hours to nearly 480 million hours, which would require an additional 200,000 employees to be hired, trained, and managed.[71] EPA believes that the applicability thresholds for PSD and Title V permitting, "if applied to [sources of greenhouse gas emissions] in accordance with their literal meaning, would be impossible to administer."[72]

In place of the thresholds provided in the Act, EPA promulgated the Tailoring Rule, which lowers the number of sources required to obtain permits. The Tailoring Rule phases in the 100/250-tpy threshold in three steps. During the first step, from January 2, 2011 until July 1, 2011, EPA would require only new sources already subject to PSD regulation (without considering greenhouse gas emissions) or modifications resulting in an increase in 75,000-tpy CO_2e[73] to obtain PSD permits for greenhouse gas emissions. EPA would not require newly

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[68] Greenhouse gases differ from the set of criteria pollutants already regulated under the Act. First, greenhouse gases are emitted in greater quantities than currently regulated pollutants. Second, there is more than one greenhouse gas. However, different pollutants have different global warming potentials, a measure of the heating effect and lifetime in the atmosphere of a pollutant. *See* Final Tailoring Rule, *supra* note 1, at 31,519 ("Different GHGs have different heat-trapping capacities. The concept of [global warming potential] was developed to compare the heat-trapping capacity and atmospheric lifetime of one [greenhouse gas] to another."). The Endangerment Finding and Tailoring Rule define a set of six greenhouse gases as one air pollutant for the purpose of the Act. *Id.* at 31,522; Endangerment Finding, *supra* note 46, at 66,536–37.

[69] Final Tailoring Rule, *supra* note 1, at 31,540 & tbl.V-1.

[70] *Id.* at 31,536.

[71] *Id.* at 31,540 tbl.V-1.

[72] *Id.* at 31,548.

[73] CO_2e is a unit of measurement that allows various greenhouse gases to be measured in the aggregate. Based on the global warming potential of a greenhouse gas, the amount of any given gas is converted into the amount of carbon dioxide that would have the same warming potential. *See id.* ("When quantities of the different [gases] are multiplied by their

major sources to obtain Title V permits, but sources already required to submit a Title V application and sources currently holding Title V permits would have to address greenhouse gas emissions.[74]

The second step, which began July 1, 2011, tailors the applicability thresholds for PSD and Title V permitting. For PSD permitting, the Tailoring Rule maintains the 100/250-tpy threshold for new sources and adds a requirement that the source emits or has the potential to emit greenhouse gas at a level equal to or exceeding 100,000-tpy CO_2e. The Tailoring Rule maintains the threshold of any increase in emissions for modifications and adds an additional requirement that the increase of greenhouse gas equal or exceed 75,000-tpy CO_2e. The applicability threshold for Title V permits is 100,000-tpy CO_2e.[75]

The third step includes enforceable commitments by EPA to address the major stationary sources exempted from permitting requirements by the Tailoring Rule. EPA must solicit comments and promulgate a regulation with respect to lowering the 75,000/100,000-tpy CO_2e threshold by July 1, 2012.[76] EPA also committed itself to producing a study of methods to decrease the administrative burdens associated with permitting under the 100/250-tpy threshold in the Act by 2015 and proposing a rule that would address the inclusion of those sources within the PSD and Title V permitting programs by 2016.[77]

II
The Shaky Legal Justification for the Tailoring Rule

To justify the Tailoring Rule's blatant departure from the plain text of the Clean Air Act, EPA turned to what it called "the long-established judicial doctrines of 'absurd results' and 'administrative necessity.'"[78] The absurdity doctrine "permits a court to adjust a clear statute in the rare case in which the court finds that the statutory text

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[global warming potentials], the different [gases] can be summed and compared on a CO_2e basis.").

74 *Id.* at 31,523.

75 *Id.* at 31,523–24.

76 *See id.* at 31,516 (making a commitment to propose or solicit comment on the inclusion of more sources). During this revision, EPA may not set the thresholds below 50,000 tons per year (tpy) CO_2e. *Id.* at 31,524–25.

77 *Id.* at 31,516.

78 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,291, 55,294–95 (proposed Oct. 27, 2008) [hereinafter Proposed Tailoring Rule]. In this Part, I cite to the Proposed and Final Rules interchangeably because the Final Rule "incorporate[s] [the Proposed Rule's discussion of administrative necessity] by reference." Final Tailoring Rule, *supra* note 1, at 31,543.

diverges from the legislature's true intent."[79] What EPA terms the "administrative necessity doctrine" assumes that the legislature intended the clear text of a statute to be implemented but nonetheless recognizes that "[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute."[80]

In this Note, I focus on EPA's administrative necessity rationale to the exclusion of the absurdity doctrine for three reasons. First, the justifications for and implications of the absurdity doctrine have received ample treatment in the legal literature.[81] Second, the absurdity doctrine focuses on divining congressional intent,[82] a familiar judicial exercise.[83] In contrast, the concept of administrative necessity has received almost no attention. Only four cases, all decided by the D.C. Circuit, discuss it.[84] Furthermore, the academic pieces that discuss administrative necessity fail to question whether it is a defensible solution to the problem of agency resource constraints.[85] Comments submitted during the notice-and-comment

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[79] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

[80] Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979).

[81] *Compare* Manning, *supra* note 79, at 2486 ("[T]he Court should acknowledge that negating perceived absurdities that arise from clear statutory texts in fact entails the exercise of judicial authority to displace the outcomes of the legislative process."), *with* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1065 (2006) ("Congress has broad authority to enact laws that promote the common good, but our legal system also has a responsibility to avoid causing needless harm to the extent fairly possible. The existing version of the absurdity doctrine does an admirable job of striking the appropriate balance.").

[82] *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of . . . the absurd results . . . from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.").

[83] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("It is nothing new in the law for a court to imagine what a hypothetically 'reasonable' legislator would have wanted (given the statute's objective) as an interpretive method of understanding a statutory term . . . .").

[84] *See infra* Part II.B.

[85] *See* Craig N. Oren, *Detail and Delegation: A Study in Statutory Specificity*, 15 COLUM. J. ENVTL. L. 143, 204–05 (1990) (discussing the *Alabama Power* decision and concluding that the high bar set by the court for an agency to prove administrative necessity makes the doctrine a "dead letter"); Travis L. Garrison, Comment, *The EPA's Greenhouse Gas Regulation Tailoring Rule: Administrative Necessity Avoiding or Pursuing Absurd Results?*, 56 LOY. L. REV. 685 (2010) (evaluating cases EPA cited in support of its Tailoring Rule and concluding the Rule will likely be overturned by the D.C. Circuit); *see also* Meredith Wilensky, Note, *The Tailoring Rule: Exemplifying the Vital Role of Regulatory Agencies in Environmental Protection*, 38 ECOLOGY L.Q. 449, 460–64 (2011) (arguing that the Tailoring Rule is an example of how agencies act to address complicated problems when Congress stalls and accepting without discussion the doctrines offered by EPA in support of the rule's legality).

period for the Tailoring Rule similarly failed to question the premise of the administrative necessity cases; they simply apply them to the Tailoring Rule.[86] Third, absurdity and administrative necessity seem to rest on opposite presumptions. Absurdity is a canon of construction used to avoid specific, truly extraordinary results that would be at odds with congressional intent. Conversely, administrative necessity presumes that Congress *would* want the plain text of the statute to be achieved and addresses the scenario in which an agency cannot carry out the letter of the statute due to its finite resources.[87]

This Part addresses the lack of attention paid to the administrative necessity rationale. First, it summarizes EPA's use of administrative necessity as a legal basis for the Tailoring Rule. Second, it examines the line of administrative necessity cases and concludes that EPA overstated its case. What EPA terms a "doctrine" of administrative necessity is really a collection of statements, mostly dicta, cobbled together from four cases. In fact, no agency action has been upheld on the basis of administrative necessity. The lack of precedent does not doom EPA's interpretation; rather, it demonstrates that the question of how to address an agency's inability to implement the plain text of its enabling statute remains unanswered. This Part concludes by arguing that further examination of the administrative necessity rationale is necessary—particularly in light of the new potential for judicial review of agency decisions not to regulate established in *Massachusetts v. EPA*.

A. The Administrative Necessity Justification for the Tailoring Rule

It seems intuitive that an agency cannot be required to do the impossible;[88] indeed, courts have used administrative burdens to tip

[86] *See, e.g.*, Comments of the Center for the Rule of Law, to EPA, on Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule (Dec. 28, 2009) (arguing that the Tailoring Rule is flawed for the same reasons the D.C. Circuit relied on in declining to uphold earlier regulations on administrative necessity grounds).

[87] *Compare* Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute's drafters . . . ."), *with* Ala. Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979) (noting administrative necessity rationale allows an agency "to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute"). As I discuss in Part III.B.2, it is not an extraordinary event when Congress claims to have addressed an issue by passing a law but fails to give agencies adequate resources to implement that legislation.

[88] At this point, it is worth noting the possibility that the administrative burdens EPA describes are partially of its own making. The need for PSD and Title V permits for greenhouse gas emissions is a result of prior regulatory choices made by EPA, described in Part I, each of which is under legal challenge. *See infra* note 154 (describing the challenges to

the scales in favor of a certain interpretation of a statute when the statute is ambiguous.[89] To date, no court or commentator has seriously attempted to address the question of whether an agency should have the flexibility to regulate its way out of impossibility even if the plain text does not authorize such an approach.

In its Tailoring Rule, EPA answers this question in the affirmative and bolsters that claim with a detailed discussion of the statutory backdrop and relevant case law.[90] EPA uses a line of cases in the D.C. Circuit for support, arguing that the cases create an "administrative necessity doctrine"[91] that provides a strong legal justification for the Tailoring Rule.[92] EPA first explained its views on the relationship between administrative necessity and the *Chevron* canon of interpretation. It then put forth a three-part test for administrative necessity and explained why the Tailoring Rule met the test.

EPA views the administrative necessity doctrine as fitting within the framework for statutory interpretation laid out in *Chevron v. Natural Resources Defense Council*. When deploying the *Chevron* canon, courts first ask "whether Congress has directly spoken to the precise question at issue."[93] If Congress's intent is clear from the text of the statute, then that intent must be enforced. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

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EPA's greenhouse gas regulations). Furthermore, EPA could have revised the language in its current regulations to avoid triggering a requirement to regulate greenhouse gases. *See supra* notes 49–65 and accompanying text (describing the current regulatory scheme). For the purposes of this Note, I assume that EPA's decisions at each of those junctures were correct and therefore that EPA does in fact face unavoidable administrative burdens.

89 *See, e.g.*, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 132–33 (1977) (preferring an interpretation of the Clean Water Act that would not impose an "impossible burden" on EPA because the Court did not "believe that Congress would have failed so conspicuously to provide EPA with the authority needed to achieve the statutory goals"); Potomac Elec. Power Co. v. EPA, 650 F.2d 509, 513–14 (4th Cir. 1981) (accepting EPA interpretation of its own regulation based on administrative convenience of bright-line rules).

90 It would be easy to assume here that EPA's decision to thoroughly discuss issues of statutory interpretation indicates an awareness of how lawless the Tailoring Rule appears at first glance. While that may be true, EPA commonly engages in this interpretive practice when promulgating regulations. *See* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 532 (2005) (noting EPA frequently engages in statutory interpretation during rulemaking by applying the *Chevron* framework, citing Supreme Court precedent on statutory interpretation, and discussing statutory purpose).

91 Final Tailoring Rule, *supra* note 1, at 31,516 (internal quotation marks omitted).

92 Because I discuss these cases in Part II.B, I focus on EPA's interpretation in this Section without reference to the individual cases.

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

permissible construction of the statute."[94] To find ambiguity at the first step, EPA gleans a principle from the administrative necessity cases that Congress *always* intends for statutes to be administrable.[95] Any statute, even a clear statute, therefore becomes ambiguous when it is not administrable by its implementing agency.

In the face of this ambiguity, EPA argues the "administrative necessity doctrine" provides the test at the second step of the *Chevron* analysis for whether the agency reasonably interpreted the statute.[96] The three-step test for administrative necessity put forth by EPA requires an agency to demonstrate the unavailability of alternatives, to quantify the impossible administrative burdens, and to ensure its regulation deviates from the plain text as little as possible. At the first step, an agency must examine any available streamlining measures that would not conflict with the statutory text and explain why those measures do not adequately mitigate the administrative burdens.[97] EPA considered three tools that would either decrease the number of sources subject to PSD and Title V permit requirements or would decrease the administrative costs of permitting these sources. These three options were: (1) revising its interpretation of the term "potential to emit" to mean the amount of pollution a source actually emits,[98] (2) general permits,[99] and (3) implementing presumptive BACT for categories of sources with many individual sources within the category.[100] EPA concluded that each option, though promising, would take more than two years to develop, propose, and finalize and would therefore not be available by January 2, 2011, the date PSD and Title V permitting requirements would be triggered.[101]

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[94] *Id.* at 843.

[95] *See* Final Tailoring Rule, *supra* note 1, at 31,577 ("[A]s a general matter, statutory directives should be considered to incorporate Congress's intent that they be administrable . . . . [T]his proposition is implicit in the 'administrative necessity' doctrine that the DC Circuit has established . . . ." (citing Ala. Power Co. v. Costle, 636 F.2d 323, 356–57 (D.C. Cir. 1979))).

[96] *See id.* ("[The administrative necessity] doctrine authorizes EPA to undertake a process for rendering the PSD and Title V requirements administrable.").

[97] Proposed Tailoring Rule, *supra* note 78, at 55,315.

[98] EPA regulations currently interpret the term, which is used in the definition of major emitting facility as discussed in Part I.B, to mean the amount of pollution a source would emit if it operated continuously. *See* 40 C.F.R. § 52.21(b)(4) (2010) (defining potential to emit as the maximum capacity of a stationary source to emit a pollutant under its physical and operational design and limiting downward adjustment of the potential to emit to only those physical and operational limitations which are federally enforceable).

[99] General permits would allow large numbers of similar sources to be permitted in one proceeding.

[100] Proposed Tailoring Rule, *supra* note 78, at 55,315.

[101] Final Tailoring Rule, *supra* note 1, at 31,577.

At the second step, an agency must demonstrate that, accounting for any streamlining options developed in the first step, it is still impossible for the agency to carry out its remaining administrative tasks.[102] EPA provided data to support its claim that implementing the 100/250-tpy threshold in the Act would, at least initially, be "an impossible administrative task."[103]

At the third step, an agency must demonstrate that its regulatory approach adheres to the statute as closely as possible and represents the most that the agency can do given its resource constraints.[104] EPA offered two reasons why the Tailoring Rule fulfills this step. First, as described in Part I.C, the Tailoring Rule claims to phase in implementation of the plain text over time as EPA develops streamlining techniques.[105] Second, EPA calculated the administrative costs at different thresholds between 25,000-tpy to 100,000-tpy before settling on the 75,000/100,000-tpy cutoff as the threshold closest to the statutory text and still within its administrative capacity.[106]

B. A Survey of the Administrative Necessity Cases

A close survey of the administrative necessity cases reveals two important points. First, it is clear that EPA overstated its case. EPA's three-part test for administrative necessity is cobbled together from errors that the D.C. Circuit found in prior agency attempts to invoke administrative necessity. In each of these cases, the D.C. Circuit declined to uphold the regulation at issue and found that the invocation of administrative necessity was inappropriate. Simply stating that the Tailoring Rule cannot be squared with the relevant language in the administrative necessity cases, as challenges to the Tailoring Rule have so far,[107] leaves the Tailoring Rule on shaky legal ground. How-

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[102] Proposed Tailoring Rule, *supra* note 78, at 55,315.

[103] Final Tailoring Rule, *supra* note 1, at 31,577; *see also supra* notes 68–72 and accompanying text (detailing the substantial costs and delays avoided by the Tailoring Rule).

[104] Final Tailoring Rule, *supra* note 1, at 31,578.

[105] *Id.*

[106] *See id.* at 31,540 tbl.V-1 (estimating the number of sources, number of permitting actions, and amount of administrative burden at thresholds between 25,000-tpy and 100,000-tpy).

[107] *See, e.g.*, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 40–42, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. June 20, 2011), ECF No. 1314204 (arguing that the administrative necessity rationale does not support the Tailoring Rule because Congress did not intend for EPA to regulate greenhouse gas emissions from thousands of small sources under the PSD program); *see also* Motion for Stay at 54, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. Sept. 15, 2010), ECF No. 1266048 ("EPA's regulation of GHGs differs little from that found defective in *Alabama Power*."); Petitioners' Motion for Partial Stay at 42, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. Sept. 15, 2010), ECF No. 1266110 (arguing that

ever, in each of the administrative necessity cases, the agency had not relied on the administrative necessity rationale ex ante. Instead, the rationale was first raised as a justification during the litigation challenging the regulation.[108] This second insight counsels against a conclusion that there is no sound basis for upholding the Tailoring Rule; rather, it is evidence that the D.C. Circuit has not been presented with a compelling or well-articulated case of administrative necessity that would require it to address the conflict between plain text and an agency's limited resources. To reject the premise of administrative necessity on the basis of the sparse case law alone leaves unanswered the pressing, and perhaps growing, question of what agencies should do when their resources do not allow them to fully implement the duties that the plain text of their enabling statutes requires them to carry out.

The D.C. Circuit first set out the concept of administrative necessity in *Alabama Power Co. v. Costle*[109] in the context of a challenge to the first attempt to regulate an exemption to the 100/250-tpy threshold

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EPA "flout[ed] the limitations that keep the doctrine narrow," making "EPA's assertion that its total revision of the PSD thresholds satisfies the doctrine . . . simply incredible").

108 A search of the Federal Register revealed only one regulation, other than the climate change regulations, relying on administrative necessity during rulemaking. The FDA invoked the administrative necessity doctrine to justify excluding certain classes of medicated feeds from application requirements under section 512(m) of the Food, Drug, and Cosmetic Act. *See* New Animal Drugs for Use in Animal Feeds; Definitions and General Considerations; Revised Procedures re Medicated Feed Applications, 48 Fed. Reg. 34,574, 34,581 (July 29, 1983) (citing *Alabama Power* and noting that without exemptions the FDA would need forty-nine additional employees to handle a six-fold increase in applications). This regulation was not challenged.

EPA has declined to use administrative necessity two times; neither regulation was challenged on that ground. *See* Regulations for Implementing Revised Particulate Matter Standards, 52 Fed. Reg. 24,672, 24,695 (July 1, 1987) (declining to set a significance level for particulate matter emissions resulting from source modifications because "the additional number of reviews . . . would [not] cause an administrative burden worthy of consideration for special relief"); National Emission Standards for Hazardous Air Pollutants, 50 Fed. Reg. 46,284, 46,288 (Nov. 7, 1985) (declining to set a significance level for the Clean Air Act Hazardous Air Pollutant Program because the Program's "categorically applicable emission standards" did not create overwhelming permitting burdens).

EPA has stated that it believes the administrative necessity doctrine applies to states implementing Clean Air Act permitting programs; however, it has not approved or denied any state action under the Act on that basis. *See, e.g.*, Approval and Promulgation of State Implementation Plans; Michigan, 64 Fed. Reg. 61,046, 61,047 (proposed Nov. 9, 1999) ("[A] state may exempt from public review certain categories of changes based upon de minimis or administrative necessity grounds, in accordance with the criteria set out in *Alabama Power*.").

109 636 F.2d 323 (D.C. Cir. 1979). *Alabama Power* was a massive consolidated litigation challenging the first set of regulations promulgated by EPA to implement the Clean Air Act Amendments of 1977. The case "required extraordinary judicial procedures, including the issuance by the D.C. Circuit of what amounted to a proposed decision and the bifurcation of the final decision into three opinions." Oren, *supra* note 85, at 149.

for PSD permits.[110] After the PSD program was created in 1977, EPA defined "potential to emit" to mean uncontrolled emissions without consideration of any pollution control equipment a source planned to install.[111] EPA expected 4000 annual PSD permit applications as a result.[112] To lower the number of applications, EPA created an exemption for sources that actually emitted less than 50-tpy. These sources were required to apply for PSD permits but were not required to install BACT or model projected emissions,[113] the costliest portions of the PSD permitting process. The exemption reduced the expected number of full PSD permit applications to 1600 annually.[114] In its final rule, EPA emphasized the exemption would avoid imposing costs "up to $21 million on approximately 2,400 controlled sources of relatively insignificant air quality impact."[115] EPA mentioned conservation of agency resources as an incidental benefit,[116] but it did not claim that it would be impossible to process 4000 permits. The briefs in *Alabama Power* likewise are bare of any reference to EPA's inability to administer the statute without the exemption; rather, EPA's brief framed the issue in terms of reaching a cost-beneficial result.[117]

The court rejected EPA's interpretation of "potential to emit," holding that the term means the amount of emissions *after* accounting for any pollution reduction from control equipment that the source planned to install.[118] This definition rendered the challenge to the 50-

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110 *Ala. Power*, 636 F.2d at 357–60.

111 *See* 40 C.F.R. § 52.21(b)(3) (1978) (defining potential to emit).

112 *See* 1977 Clean Air Act Amendments To Prevent Significant Deterioration, 43 Fed. Reg. 26,388, 26,392 (June 19, 1978) ("[T]he new requirements would cover approximately 4,000 sources and modifications per year. The old PSD regulations, by contrast, covered only 165 sources per year.").

113 *See* 40 C.F.R. § 52.21(j)–(k) (exempting sources emitting fewer than fifty tons per year of pollutants from BACT review and emissions impact analysis). This exemption was added under pressure from industry, other agencies, and the White House. EPA initially preferred a more expansive interpretation to prevent cleaner parts of the nation from becoming polluted. *See* Oren, *supra* note 85, at 190 (describing the final regulation as a compromise between groups favoring a total exemption and EPA officials).

114 1977 Clean Air Act Amendments To Prevent Significant Deterioration, 43 Fed. Reg. at 26,393.

115 *Id.*

116 *See id.* (arguing that the exemption would limit the increase in time spent reviewing permit applications to 112 man-years and would conserve EPA's resources and state permitting agencies' "resources for other, more important air pollution control tasks").

117 Brief for Respondents at 108–20, Ala. Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) (No. 78-1006) (estimating full review would cost exempted applicants around $30 million each and prevent "less than a 2 percent increase" in pollution). The briefs do mention in passing that the exemption would save "permitting authorities at least 279 man-years of effort." *Id.* at 113.

118 *See Ala. Power*, 636 F.2d at 353 (requiring EPA, when determining a source's "potential to emit," to look to both the "facility's maximum productive capacity" and "the anticipated functioning of the air pollution control equipment designed into the facility").

tpy exception moot—any source actually emitting 50-tpy by definition also has the potential to emit 50-tpy—and the court remanded the regulation back to EPA. Instead of ending the discussion there, the court went on to identify "the principles pertinent to an agency's authority to adopt general exemptions to statutory requirements."[119] The court's decision to discuss the exemption authority of agencies is puzzling, given that doing so was not necessary to explain the remand. The most plausible explanation is that the court wanted to clearly rebut EPA's mistaken belief that an agency could enact "regulatory exemptions based upon [its] assessment of costs and benefits."[120]

To that end, the court began its discussion of administrative necessity with a clear statement of what the doctrine did not encompass: cost-benefit analysis not authorized by statute.[121] The court then stated that "administrative necessity may be a basis for finding *implied* authority" to create exemptions not explicitly authorized by the statute.[122] Factors an agency may consider when creating exemptions include available funds, time constraints, and personnel shortages.[123] After seeming to create some room for flexibility, the court explained the requirement for an agency to invoke administrative necessity: "the existence of an impossibility."[124]

The court worried that if agencies were allowed to prospectively create exemptions on the basis of administrative necessity, then a "remedy made available for extreme illness . . . [might turn] into the daily bread of convenience."[125] To avoid that outcome, the court stressed that when an agency seeks prospective relief from its statutory duties, courts should closely scrutinize the statute to determine whether the legislature has already authorized approaches that provide the agency with flexibility, thereby removing the need for the

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[119] *Id.* at 357.

[120] *Id.* The brief discussion of the exemption in the "draft" version of the *Alabama Power* decision bolsters this conclusion:

> EPA does not have broad authority in this statute to create exemptions on the basis of an analysis of cost-effectiveness. It has an obligation to regulate the subject matter delegated to it by Congress. The agency does possess . . . an implied authority to provide for exemptions when compelled by administrative necessity.

Ala. Power Co. v. Costle, 606 F.2d 1068, 1076 (D.C. Cir. 1979) (per curiam), *amended by Ala. Power*, 636 F.2d 323.

[121] *Ala. Power*, 636 F.2d at 357 ("[T]here exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits.").

[122] *Id.* at 358 (emphasis added).

[123] *Id.* at 359.

[124] *Id.*

[125] *Id.* (quoting Natural Res. Def. Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974) (internal quotation marks omitted)).

agency to create its own.[126] The court ended its discussion by emphasizing that the "exemption authority is narrow in reach and tightly bounded by the need to show that the situation is genuinely . . . one of administrative necessity."[127]

Subsequent cases have reinforced the skeletal outline offered in *Alabama Power* for approaching the problem of administrative necessity while also rejecting each agency attempt to rely on the rationale. In *Environmental Defense Fund v. EPA*,[128] the D.C. Circuit remanded another EPA attempt to regulate an exception, this time under the Toxic Substances Control Act (TSCA). The TSCA bans the use, manufacture, and distribution of polychlorinated biphenyls (PCBs), unless the PCBs are totally enclosed and cannot enter the environment.[129]

Congress authorized EPA to create limited exemptions to these provisions if doing so would not create an unreasonable risk of injury to health and the environment.[130] Instead, EPA promulgated a regulation creating an exemption for materials containing PCBs in concentrations less than 50 parts per million.[131] During the rulemaking, EPA focused on the benefits to industry, though it did also mention that the exemption would allow it to direct enforcement resources toward the greatest contamination risks.[132] In its brief, EPA offered multiple justifications for the regulation, including a passing reference to *Alabama Power* and administrative necessity.[133] The court, after acknowledging

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126 *Id.* at 360.

127 *Id.* at 361.

128 636 F.2d 1267 (D.C. Cir. 1980).

129 15 U.S.C. § 2605(e) (2006).

130 *See id.* § 2605(e)(2)–(3) (authorizing the Administrator to promulgate regulations authorizing certain uses despite the risk of polychlorinated biphenyl (PCB) contamination or exempting some manufacturing and distribution from the ban).

131 *See* 40 C.F.R. § 761.2(x) (1979) (limiting the definition of "PCB Item" to articles, containers, and equipment with a PCB concentration of at least 50 parts per million (ppm)).

132 *See* Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 44 Fed. Reg. 31,514, 31,516 (May 31, 1979) (arguing that exeptions lower than 50 ppm would have serious economic impacts on the country and technological impacts on the organic chemical industry, and would divert EPA's limited surveillance and enforcement capacity from larger sources of PCB contamination).

133 *See* Brief for Respondents at 35 n.20, *Envtl. Def. Fund*, 636 F.2d 1267 (Nos. 79-1580, 79-1811, 79-1816) ("Some weight was given to those considerations [of administrative necessity] in this case; the Administrator recognized that . . . administration and enforcement of the regulation within the means provided by Congress weighed heavily in favor of not attempting to regulate all substances with PCB contamination . . . ."). A more detailed defense of EPA's regulations based on administrative necessity was provided by a group of manufacturers as intervenors:

> Given that PCBs are chemical substances capable of persistence in minute quantities and are spread throughout the environment, the literal statutory mandate is impossible to execute . . . [, e]ven if EPA had unlimited resources

that concerns about "the availability of enforcement resources" were relevant to an evaluation of administrative necessity, rebuked EPA for failing to explain why the exemption authority provided in the TSCA did not alleviate those concerns.[134]

Sierra Club v. EPA[135] addressed an EPA regulation that implemented section 123 of the Clean Air Act. Congress added section 123 to the 1977 Clean Air Act Amendments to address a previously unanticipated problem. Because emissions limitations are fixed on the basis of ground-level pollutant concentrations, rather than on the concentration where pollutants exit a source, various sources raised their stack heights to disperse their emissions over a greater area.[136] Section 123 limited the ability of sources to claim lower emission levels based on stack heights that exceeded good engineering practices or "any other dispersion technique."[137] EPA initially proposed defining the term to mean design elements installed for the purpose of increasing dispersion.[138] The final rule defined the term even more narrowly to include only three specific techniques.[139] The rule was challenged as not capturing the full range of evasive techniques currently in use or that might be used in the future.[140] EPA did not claim that it could not implement a broader regulation, one based on the motive behind installation of the design element, although there was evidence in the record to suggest that broader regulation would not have been possible.[141] Instead, EPA defended its regulation as consistent with the statutory text.

> for the enforcement of this provision . . . . Administrative necessity, therefore, justifies EPA's decision to prescribe a suitable regulatory cutoff point.

Brief for Intervenors Edison Electric Institute et al. at 14–15, *Envtl. Def. Fund*, 636 F.2d 1267 (Nos. 79-1580, 79-1811, 79-1816). In comparison to the discussion of administrative necessity, the Intervenors provided a much more thorough defense of the regulations on de minimis grounds. *See id.* at 15–26.

134 *Envtl. Def. Fund*, 636 F.2d at 1283. The court was also troubled by EPA's inability to identify the amount of PCBs left unregulated. *Id.* After several rounds of rulemaking, EPA promulgated a rule using its statutorily provided exemption authority that left the 50 ppm exemption largely intact. *See* 40 C.F.R. § 761 (2010).

135 719 F.2d 436 (D.C. Cir. 1983).

136 *Id.* at 439.

137 42 U.S.C. § 7423(a) (2006).

138 *See* Stack Height Regulations, 46 Fed. Reg. 49,814, 49,816 (proposed Oct. 7, 1981) (reassuring commenters that certain techniques would not be considered dispersion techniques unless installed for the purpose of enhancing plume rise and soliciting comments on the proposed rule).

139 *See* 40 C.F.R. § 51.1(hh) (1982) (defining dispersion technique).

140 *Sierra Club*, 719 F.2d at 461–62.

141 *See id.* at 463 (quoting from comments of state and local permitting agencies expressing concern over the workability of a standard that would require the agencies to conduct an inquiry into the subjective intent of regulated entities).

The court, stating that EPA "vaguely invoked"[142] administrative necessity, characterized the rule as creating a de facto exception for any technique not listed in the definition.[143] The court proceeded to apply *Alabama Power* and rejected EPA's use of administrative necessity for two reasons. First, EPA had not demonstrated "that attainment of the statutory objectives [was] impossible" because it had offered "mere predictions, rather than conclusions drawn from good faith efforts at enforcement."[144] Second, even assuming impossibility, EPA had not considered alternatives to its regulation, such as quantifying a plume rise that would be presumed to have an engineering purpose or exempting broad categories of techniques for which there was only a theoretical possibility of abuse.[145] The court criticized EPA for "cav[ing] in" without "adequately explor[ing] these regulatory alternatives."[146]

Public Citizen v. FTC[147] is the only post-*Chevron* discussion of administrative necessity. The Smokeless Tobacco Act required manufacturers to include health warnings on *all* advertisements for smokeless tobacco products. FTC exempted utilitarian items—such as pens, clothing, and sporting goods—from the warning requirements. The exemption therefore contradicted the plain text.[148] Contrary to EPA's interpretation in the Tailoring Rule, the D.C. Circuit discussed the administrative necessity question outside of the two-step *Chevron* framework. After finding the statute unambiguous at *Chevron*'s first

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[142] *Id.* at 462. In fact, EPA did not invoke administrative necessity or cite *Alabama Power* in its briefs with respect to the stack height regulations. EPA did claim that *Alabama Power*'s caution against requiring agencies to do the impossible applied to its regulation and allowed it to extend the deadline in the Clean Air Act by nine months to allow states to develop their own regulations. *See* Brief of Respondents at 63–64, *Sierra Club*, 719 F.2d 436 (No. 82-1334 and consolidated cases). The court reversed EPA's extension of the clear statutory deadline, finding that EPA had offered no evidence to support the claim of impossibility. *Sierra Club*, 719 F.2d at 469.

[143] *See Sierra Club*, 719 F.2d at 462 ("EPA has created an exemption from the statute based upon its perceptions of the costs and benefits of enforcing the law."). The court described EPA's argument as premised on the assumption that a case-by-case inquiry into the intent behind each individual source's decision to install equipment would require difficult, subjective judgments, and therefore treated it as an administrative necessity argument. *See id.*

[144] *Id.* at 463.

[145] *Id.* at 463–64.

[146] *Id.* at 464. The court did not explain on what basis those proposed alternatives would survive judicial review.

[147] 869 F.2d 1541 (D.C. Cir. 1989).

[148] *Id.* at 1542.

step,[149] the court indicated that a regulation creating an exception might still be upheld under the administrative necessity rationale.[150]

The court's discussion of administrative necessity is curious because FTC briefed the issue by arguing that utilitarian items were de minimis, meaning regulating them would yield no benefit. FTC did not argue the case on administrative necessity grounds.[151] Nonetheless, the court stated that FTC could not justify the regulation on the basis of administrative necessity because it was motivated by a cost-benefit analysis,[152] which *Alabama Power* made impermissible.[153]

Two conclusions can be drawn from this survey of the administrative necessity cases. First, while EPA's three-part test for administrative necessity does find support in the cases, it is merely a list of deficiencies in prior agency attempts to claim administrative necessity. At best, EPA has identified what is *necessary* for an agency to prove administrative necessity. But what is *sufficient* remains unclear: What exactly is impossibility, what showing must an agency make to demonstrate its exception is as narrow as possible, and how should an agency prove that alternative approaches are not viable? The vagueness of the administrative necessity cases leaves the Tailoring Rule vulnerable. Second, none of the cases presented the D.C. Circuit with a compelling or well-argued case of administrative necessity. The court therefore has not been forced to deal with the question of whether allowing agencies to claim administrative necessity is the right solution to the problem of agency resource constraints, and, if so, what a well-argued claim should look like.

The challenges to the Tailoring Rule provide an opportunity to do just that.[154] Because the case law and literature on administrative

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[149] *See id.* at 1553 (finding that the statute was unambiguous at *Chevron* step one because the court believed Congress had already clearly spoken to the issue).

[150] *See id.* at 1556 ("The only issue that remains to be discussed is whether there exists some reason to conclude that the Commission nevertheless had the authority to grant an exception to the statute.").

[151] *See* Brief for Appellant at 10–20, *Pub. Citizen*, 869 F.2d 1541 (No. 88-5209) (arguing that the placement of warnings on items such as golf balls would be difficult for tobacco companies and that such placement would subject warnings to ridicule, thereby decreasing their effectiveness).

[152] *See Pub. Citizen*, 869 F.2d at 1556 (citing language in *Alabama Power* stating that agencies do not have the power to create exemptions based on a cost-benefit analysis).

[153] *See supra* note 121 and accompanying text (discussing the prohibition against creating exceptions to statutory requirements based on a cost-benefit analysis under *Alabama Power*).

[154] The challenges to the Tailoring Rule are only one part of a more complex set of challenges to the entire program of greenhouse gas regulation by EPA. The D.C. Circuit has coordinated the challenges to the greenhouse gas regulations described in Part I and has designated the cases "complex." Order at 3, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. Nov. 11, 2010), ECF No. 1277729. That litigation includes twenty-six

necessity is so thin, it would be easy for courts, in resolving challenges to the Tailoring Rule, to hold that EPA did not meet its burden in establishing impossibility, that EPA could have hewed closer to the statutory text, or that EPA did not adequately examine alternatives to its Rule. For example, EPA could have revised the regulations that it interprets as triggering its duty to regulate.[155] While these statements may be true, ending the inquiry without fleshing out the administrative necessity rationale would be a lost opportunity.

The Supreme Court's decision in *Massachusetts v. EPA*[156] creates a real risk that agencies will be forced to regulate even when they do not have the resources to do so.[157] While earlier case law made judicial review of agency refusals to initiate discretionary rulemaking "akin to non-reviewability,"[158] the Court in *Massachusetts* broadened

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cases challenging the Endangerment Finding, seventeen cases challenging the Timing Rule, twenty-five cases challenging the Tailoring Rule, and seventeen cases challenging the Tailpipe Rule. *See* Non-State Petitioners' Joint Briefing Proposal at 2–3, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. Jan. 11, 2011), ECF No. 1287189. In order to reach the merits of the Tailoring Rule challenge, the court will have to resolve the challenges to the Endangerment Finding and Timing Rule in EPA's favor, meaning it is possible that the court might not have the opportunity to reach the issue. At the time of publication, briefing in the case was still ongoing. *See* Order at 1–2, Coal. for Responsible Regulation v. EPA, No. 10-1073 (D.C. Cir. Mar. 21, 2011), ECF No. 1299257 (setting a briefing schedule with final briefs due December 14, 2011).

155 *See supra* notes 53–54, 66 and accompanying text (describing EPA's conclusion that regulation of greenhouse gases emissions from mobile sources under the Act triggered a requirement to regulate emissions from stationary sources). EPA was asked to reconsider its interpretation of its regulations on December 31, 2008. On April 2, 2010, EPA declined to do so. *See* Timing Rule, *supra* note 66, at 17,006 ("EPA is reaffirming the PSD Interpretive Memo and its establishment of the actual control interpretation as EPA's definitive interpretation of the phrase 'subject to regulation' under the PSD provisions in the CAA and EPA regulations."). EPA discussed the implementation concerns associated with greenhouse gas regulation under the PSD and Title V programs in the Timing Rule, but stated that the Tailoring Rule would address those concerns. *See id.* at 17,020. I do not mean to imply that EPA's decision in the Timing Rule was incorrect. This discussion simply points out that EPA had an opportunity to interpret its regulations in a way that would have rendered the Tailoring Rule unnecessary.

156 *See supra* Part I.A (describing *Massachusetts v. EPA*).

157 *See* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming*, 102 Nw. U. L. Rev. 1029, 1044 (2008) (noting that the Court left open the question of whether on remand EPA could recognize that greenhouse gases endanger public health and welfare but decline to regulate because of resource constraints). Watts and Wildermuth admirably note that this open question leaves the doctrine "between the proverbial rock and a hard place." *Id.* They point out that, depending on how the question is answered, agencies may either be forced to do too much or may be allowed to rely on resource constraints too often. However, their analysis does not go beyond that statement. *Id.*

158 Cellnet Commc'ns, Inc. v. FTC, 965 F.2d 1106, 1111 (D.C. Cir. 1992); *see also* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987) (describing the standard of review for agency refusals to initiate rulemaking proceedings as highly deferential and limited to plain errors of law when an agency ignores the source of its delegated power).

the scope of review and limited agency discretion. The Court held that an agency denying a rulemaking petition must justify its denial with reasoning derived from the statutory text,[159] to the exclusion of other policy factors.[160] The reach of the Court's decision in *Massachusetts* is an open question. It is plausible that the Supreme Court was simply responding to what it saw as an extremely politicized EPA decision, one contrary to the purpose of the Clean Air Act,[161] or to the pressing need to address climate change. Regardless, there is clear tension between judicial review of nonpromulgation and the finite nature of agency resources; this tension is likely to be exacerbated if lower courts extend the logic of *Massachusetts*.[162] The Tailoring Rule is a clear example of this tension and provides a lens through which to

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[159] As the Court explained:

> The alternative basis for EPA's decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does . . . [require EPA to form a] 'judgment,' . . . the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

Massachusetts v. EPA, 549 U.S. 497, 532–33 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)).

[160] *See supra* Part I.A (discussing *Massachusetts v. EPA*).

[161] *See* Freeman & Vermeule, *supra* note 35, at 93–96, 98–101 (reading *Massachusetts v. EPA* as motivated by a suspicion of political decisions trumping decisions meant to be made on the basis of expertise); *see also* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 803 (2007) (reading *Massachusetts v. EPA* as standing for the principle "of withholding deference when an agency acts undemocratically").

[162] Early decisions in the wake of *Massachusetts v. EPA* seem to indicate that lower courts are still reviewing nonpromulgation decisions with a high degree of deference. *See, e.g.*, Preminger v. Sec'y of Veterans Affairs, 623 F.3d 1345 (Fed. Cir. 2011) (upholding the Department of Veterans Affairs's denial of a rulemaking petition because the Agency's explanation that current regulations sufficiently addressed petitioner's concerns was satisfactory); New York v. U.S. Nuclear Regulatory Comm'n, 589 F.3d 551, 552–55 (2d Cir. 2009) (upholding the Nuclear Regulatory Commission's denial of a rulemaking petition because the Commission considered relevant factors); WildEarth Guardians v. Salazar, 741 F. Supp. 2d 89, 105 (D.D.C. 2010) (finding FWS's decision not to repeal the 1991 Rule allowing some takes of prairie dogs was "'reasoned,' thereby satisfying the Court's highly deferential review" because the species was threatened rather than endangered, thereby not violating the Endangered Species Act (quoting *Am. Horse Prot. Ass'n*, 812 F.2d at 5)); Fund for Animals v. Norton, 512 F. Supp. 2d 49 (D.D.C. 2007) (upholding the Department of the Interior's denial of a rulemaking petition that asked it to regulate snowmobiles in national parks because the Agency offered a reasoned explanation of why its actions complied with its obligations under the National Park Service Organic Act). These decisions do not resolve the issue of resource constraints because the agencies did not rest their decisions not to regulate on those grounds. In the only case that mentioned conservation of resources, the National Marine Fisheries Service was already addressing the subject of the rulemaking petition in a larger regulatory effort. It therefore denied the petition not to avoid the statutory responsibilities that would result but because it did not want to "duplicate agency efforts and reduce agency resources for a more comprehensive strategy." *See* Defenders of Wildlife v. Gutierrez, 484 F. Supp. 2d 44, 51 (D.D.C. 2007) (applying "highly deferential" review).

examine the need for, and desirability of, the administrative necessity rationale.[163]

Part III therefore evaluates whether current administrative law doctrine adequately addresses agency resource constraints and, after concluding that it does not, makes the case for administrative necessity as a partial solution.

III
The Case for the Administrative Necessity Rationale

The Tailoring Rule is both extraordinary and ordinary. The problem motivating the Rule is utterly ordinary: No agency has the resources to regulate to the full extent of its delegated power.[164] The Tailoring Rule is extraordinary because EPA openly addressed the conflict between its resource constraints and the plain text of the Clean Air Act instead of issuing a regulation that accorded with the plain text of the Act but could never be implemented. The Tailoring Rule therefore provides an opportunity to "confront explicitly the doctrinal implications of the increasing systemic gap between the resources required to implement agencies' assigned missions . . . and the resources made available to agencies to perform those missions."[165]

In this Part, I argue that administrative law doctrine must accommodate agency resource constraints through the administrative necessity rationale. Part III.A explains why current administrative law doctrines provide an inadequate and undesirable solution to agency resource constraints. Part III.B then builds on the administrative necessity cases to provide a justification for agencies' use of the administrative necessity rationale.

A. Current Doctrine Forces Resource-Strapped Agencies into Nontransparent Avenues

EPA resorted to the bold step of creating an exception to the plain text of the Clean Air Act because current administrative law doctrines inadequately address the problem of agency resource constraints. Through the doctrines that address agency delay and agency

163 The Tailoring Rule was a direct result of the Court's decision to review EPA's nonpromulgation decision. *See supra* Part I (describing the regulatory cascade functionally required by the decision in *Massachusetts v. EPA*).

164 *See* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 Admin. L. Rev. 61, 64–70 (1997) (noting the trend of decreasing agency resources while holding constant or increasing agency mandates).

165 *Id.* at 64.

nonenforcement, administrative law currently recognizes agencies' resource constraints. However, these doctrines—from both a pragmatic and doctrinal perspective—inadequately accommodate those constraints.

1. Judicial Review of Agency Delay

The Administrative Procedure Act (APA) authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed."[166] Recognizing that statutes "almost necessarily place competing demands upon the agency's time and resources,"[167] courts generally refrain from doing so absent a clear statutory deadline.[168] However, when a statute includes a clear deadline—such as the requirement in the Clean Air Act that EPA act on a PSD permit application within one year—courts will enforce the nondiscretionary duty even when an agency claims it cannot meet that deadline. When fashioning a remedy, courts will create a new deadline rather than quixotically demanding immediate compliance.[169] Courts generally enforce deadlines strictly because any given court sees only the one challenge in front of it, not the entire set of all current and expected petitions for agency action. Each isolated challenge seems achievable by an agency in the context of the agency's overall budget, even when the aggregate burden on the agency might not be manageable.[170]

The strict enforcement of statutory deadlines leads to two undesirable outcomes: poor decision making by agencies and a de facto delegation of agency authority to private litigants. When courts strictly enforce statutory deadlines, agencies must prioritize meeting the deadline over the quality of the substantive decision being made.[171]

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166 5 U.S.C. § 706(1) (2006).

167 Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987).

168 *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 951–54 (2008) (noting that courts generally find jurisdiction to review agency delay only when agencies violate deadlines imposed by statutes).

169 *See id.* at 965 n.151 (listing cases in which courts enforced statutory deadlines despite agency claims that meeting the deadline was impossible). When a court finds that an agency has violated a statutory deadline, the enforcement mechanism varies among judicially mandating a new deadline, allowing agencies to propose a new deadline, and requiring agencies to act as soon as possible. *See id.* at 965–66 (describing methods used by courts to enforce statutory deadlines).

170 *See* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 258 (1992) ("Courts are particularly likely to make these conflicting demands because they are so decentralized, their exposure to policymaking is so episodic, and the opportunities for forum-shopping are so apparent to interest groups.").

171 *See* Pierce, *supra* note 164, at 72–75 (describing the risk of poor agency decision making when agencies lack resources); *see also Promoting Economic Recovery and Job Creation: The Road Forward: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 101 (2011) (written testimony of Hal S. Scott, Nomura Professor of International Financial

Lower-quality agency decisions then run the risk of being struck down by courts as arbitrary and capricious,[172] a result that sends the agency back to the drawing board and further consumes limited agency resources.

Along with the ability to seek judicial review under the APA, many statutes also contain citizen suit provisions, which allow citizens to sue agencies that fail to perform nondiscretionary duties, whether backed by deadlines or not.[173] These provisions create what Professors Schoenbrod and Sandler call "democracy by decree," in which private parties set agency priorities through litigation.[174] Democracy by decree shifts the power to enforce the law from the politically accountable executive branch to private parties.[175]

Depriving agencies of the ability to set internal priorities also results in a cost-inefficient outcome: Agencies allocate resources to

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Systems, Harvard Law School) [hereinafter Scott Testimony] (testifying that, in the context of implementing the Dodd-Frank Act, "the current rulemaking process is sacrificing quality and fairness for apparent speed" (quoting Letter from the Comm. on Capital Mkts. Regulation to Christopher Dodd, Chairman, Richard Shelby, Ranking Member, S. Comm. on Banking, Hous. & Urban Affairs and Barney Frank, Chairman, Spencer Bachus, Ranking Member, H. Comm. on Fin. Servs. 1 (Dec. 15, 2010) (internal quotation marks omitted))).

172 *See* Gersen & O'Connell, *supra* note 168, at 973 (noting that strict enforcement of deadlines "results in lower-quality agency actions that are more likely to be struck down, creating more administrative delay rather than less"); *see also* Scott Testimony, *supra* note 171 at 102, 104 (testifying that, in the context of the implementation of the Dodd-Frank Act, "[a]gencies are abandoning their responsible, deliberative rulemaking processes in favor of a faster process" and "[a]n inadequate process will also make successful challenges in federal court more likely").

173 Cass Sunstein has described the types of and purposes underlying citizen suit provisions:

> Congress created a wide range of citizens' suits . . . available against (a) private defendants operating in violation of statute and (b) administrators failing to enforce the law as Congress required. Congress was especially enthusiastic about such suits in the environmental area . . . . Congress hoped to overcome administrative laxity and unenthusiasm, and also to counteract the relatively weak political influence of beneficiaries.

Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992).

174 *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 139–61 (2003) (arguing that litigation results in plaintiffs controlling agency agendas and punishes both intransigent agencies and routine failures due to resource constraints and unrealistic mandates); Gersen & O'Connell, *supra* note 168, at 974 ("In a world of limited agency resources, a statutory command to formulate regulations in a new policy area will inevitably reduce resources allocated to other areas . . . .").

175 *See* Bressman, *supra* note 11, at 1705 (noting that litigation gives parties who lost in the legislative process "a second bite at the apple, this time before an audience itself unfettered by the political checks that administrators face"); *see also* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 334 (1987) ("[S]hifting power to judges and litigants is hardly a promising recipe for enhancing political responsibility.").

programs implicated by the most recent suit rather than the program that would yield the most social benefit relative to administrative costs.[176] In extreme cases, there is a risk that litigants will overwhelm the agencies with suits and thus cause resources to be directed toward legal defense rather than statutory implementation.[177] The point of this discussion is not to denigrate citizen suits or judicial review of agency delay; they play a valuable role in avoiding the inertia and capture that plagues government action.[178] Rather, this discussion demonstrates the irony that, at the margins, safeguards against agency delay in the form of strict enforcement of statutory deadlines can exacerbate agency resource constraints to the point of threatening an agency's ability to carry out its substantive duties.

2. *Judicial Review of Agency Nonenforcement Decisions*

The standard of review applied to agency nonenforcement is markedly more lenient. It gives agencies an incentive to comport with the plain text of their enabling statutes and then to address resource constraints through under-enforcement or nonenforcement of its regulations. In *Heckler v. Chaney*,[179] the Supreme Court established a presumption that agency nonenforcement decisions were unreviewable, based in part on the need to allow agencies to control internal allocation of their resources.[180] For example, if a source operated without a required PSD permit, EPA's decision not to bring an enforcement action against that source is not subject to judicial review. It is possible that a nonenforcement pattern replicating the Tailoring Rule might violate one of the exceptions laid out in *Heckler*'s footnote four. In *Heckler*, the Court clearly stated that it was not addressing a case in which an agency had "'consciously and

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[176] *See* SANDLER & SCHOENBROD, *supra* note 174, at 139–61 (arguing that judicial decrees to enforce agency obligations distort agency priorities and harm the public interest); Gersen & O'Connell, *supra* note 168, at 974 ("[N]ew-risk bias produces an inefficient allocation of resources because older, more serious risks are not given their appropriate share of time, money, and attention.").

[177] One FWS official recently described this problem after FWS received a flood of petitions to list species under the Endangered Species Act, *see supra* notes 4–7 and accompanying text, saying, "If all our resources are used responding to petitions, we don't have resources to put species on the endangered species list." Woody, *supra* note 4.

[178] *See* Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 383–92 (2004) (arguing that, on balance, the accountability benefits of citizen suits outweigh the negative impacts of encroachment on agency autonomy).

[179] 470 U.S. 821 (1985).

[180] *See id.* at 828–35 (laying out the nonreviewability doctrine and concluding "that an agency's decision not to take enforcement action should be presumed immune from judicial review").

expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[181] However, the enforcement practices of the Bush Administration EPA provide an example of the scope of discretion an agency has when choosing not to enforce a statute. The Bush Administration attempted to revise the regulations governing the New Source Review permitting program beginning in 2001,[182] and EPA pursued a policy of enforcing only violations of its new and proposed rules.[183] The courts later overturned some of those rules;[184] however, even after those decisions, there were indications that the rules were still being implemented through enforcement policy.[185]

Even if EPA could accommodate the impossible PSD burdens and Title V permits for greenhouse gases through nonenforcement, such a solution would be undesirable. Nonenforcement is an opaque form of agency action. Agencies are not required to seek input from the public on nonenforcement decisions, to report those decisions, or—because of the presumption of unreviewability—to provide reasons for those decisions.[186] The lack of "reason-giving" means that agencies acting through nonenforcement are more likely to give in to capture by interest groups, since the political costs of doing so are low due to the low risk of detection.[187]

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[181] *Id.* at 833 n.4 (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam)).

[182] *See* Darren Samuelsohn, *NSR Enforcement Still Limited to Bush's Views on Clean Air Act*, GREENWIRE (Sept. 29, 2006), http://www.eenews.net/Greenwire/2006/09/29/archive/2 (identifying the new regulations as "seek[ing] to give industry wiggle room" before enforcing certain pollution controls).

[183] *See* Letter from Granta Y. Nakayama, Assistant Adm'r for Enforcement and Compliance Assurance, EPA, to Sen. James M. Inhofe, Chairman, Comm. on Env't and Pub. Works 1–2 (Sept. 15, 2006) (confirming that a 2005 memorandum from Deputy Administrator Marcus Peacock was still in force and quoting language from that memorandum stating: "In deciding which additional cases to pursue, it is appropriate to focus on those that would violate our NSR reform rules and our latest NSR utility proposal, which the Agency [is releasing] today." (quoting Memorandum from Marcus Peacock, Deputy Adm'r, EPA, to Reg'l Adm'rs, State Envtl. Comm'rs (Oct. 13, 2005))).

[184] *See* Robin Bravender, *Obama Admin Lawsuit Heralds Shift on NSR Enforcement*, GREENWIRE (Feb. 5, 2009), http://www.eenews.net/public/Greenwire/2009/02/05/1.

[185] *See* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1678–79 (2007) (noting that EPA indicated that it might use a failed rule as a filter for enforcement decisions, giving the overturned rule "de facto effect").

[186] *See* Bressman, *supra* note 11, at 1691 (noting that the nonreviewability doctrine "relieve[s] agencies of the obligation to engage in reason-giving and standard-setting," "immunize[s] agency inaction from judicial review," and "actually provides a disincentive for agencies to issue enforcement standards").

[187] *See id.* at 1692 (arguing that nonreviewability of nonenforcement "make[s] it more likely that agencies will respond to private or political pressure rather than public welfare

Viewing administrative law doctrines through the lens of the Tailoring Rule, it becomes clear that the law as it stands inadequately addresses the realities of EPA's resource constraints. First, EPA cannot accomplish a reduction in the administrative burdens associated with permitting requirements without the Tailoring Rule. Courts will strictly enforce the one-year statutory deadline and require EPA to prioritize responses to permit applicants who have sued, rather than to those who emit the greatest amount of greenhouse gases.[188] Second, even if EPA could accomplish the same result by simply not enforcing permit requirements against sources emitting below the 75,000/100,000-tpy cutoff, the lack of transparency associated with that solution would exacerbate the public choice problem that results from an overdelegation of authority to resource-strapped agencies. The problem is as follows: Congress enacts statutes that set unattainable goals, knowing the agencies responsible for meeting those goals will fail.[189] The President, in turn, blames Congress for a lack of resources allocated to agencies to carry out the statute.[190] The public has no actor to hold accountable for the failure to meet the goals of the statutes, and the agencies are left to sort out the mess. Administrative law is therefore not currently up to the task of accommodating the realities that resource-strapped agencies face. To address the practical and theoretical problems of the law as it stands, courts should allow agencies to openly make decisions based on resource constraints by invoking the administrative necessity rationale.

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by giving those typically harmed by agency action (i.e., regulated entities) more power to protest than those typically harmed by agency inaction (i.e., regulatory beneficiaries)").

188 *See supra* note 169 and accompanying text (noting that courts will enforce a clear statutory deadline despite a claim by an agency that it cannot fulfill its duty).

189 *See* Biber, *supra* note 12, at 42 ("Legislatures are notorious for enacting broadly worded regulatory statutes that provide glowing rhetoric about the benefits that the statute will provide to the broader citizenry—statutes for which there is little if any chance that the goals announced will ever be achieved."); *see also* ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 171 (1993) (noting that congressional statutes "allow the [EPA] to be second-guessed by outside groups" and "set . . . numerous and unrealistic statutory deadlines, making the EPA an 'easy mark' for litigation"). Once those statutes prove impossible to attain, Congress does not revise statutes to reflect a more realistically attainable goal. *See* Pierce, *supra* note 164, at 68 ("[Congress is] averse to statutory amendments that reflect recognition of the reality that rhetorical absolutes are unattainable . . . .").

190 *See* Biber, *supra* note 12, at 44. I do not mean to paint the executive as immune from criticism during this oversimplified discussion. The executive can, and often does, de-prioritize programs for political reasons. *See id.* (explaining that the executive branch may instruct agencies to de-prioritize implementation of some statutory goals in order to benefit particular groups); *see also* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 805–07 (2010) (describing examples of presidents using nonreviewability as a shield for what is effectively deregulation).

B. Allowing Agencies To Claim Administrative Necessity

To address the deficit of administrative law doctrine available to accommodate agency resource constraints, courts should build on the administrative necessity cases to apply a deferential standard of review to agency invocations of administrative necessity. Stripped bare of terms like "impossibility"[191] and "heavy burden,"[192] the administrative necessity cases, along with the unstated logic behind them, stand for a simple proposition: When an agency has been required to do more than it can, it should be able to state what level of that authority it can and will exercise through notice-and-comment rulemaking. Current administrative law doctrines do not adequately accommodate an agency's inability to fully carry out an excess of delegated, nondiscretionary power, and Congress has proven unwilling to adjust delegated authority in light of strained agency budgets. Administrative necessity provides a transparent, accountable solution to the problem.

While all agencies face some degree of resource constraints, this proposal is meant to have effect only at the margins. The facts of the Tailoring Rule present an extraordinary case that resulted from a combination of strict statutory deadlines, citizen suit provisions, and newly acquired statutory authority. This Note therefore leaves one important issue unresolved: There are not enough examples to draw a clear line as to what constitutes impossibility. Other cases will be closer, and each attempt by an agency to claim administrative necessity will allow the courts to define more clearly the rationale's parameters.

When evaluating claims of administrative necessity, I propose courts look to four factors. Though the discussion in the administrative necessity cases seems to speak to the *substance* of the agencies' actions, the cases really focus on *procedure* and resemble arbitrary and capricious review under *State Farm*.[193] The first three steps an agency should undertake to credibly claim that the administrative necessity rationale justifies a regulation can be gleaned from the administrative necessity cases discussed in Part II.B: demonstrate the

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191 Ala. Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979).

192 Envtl. Def. Fund v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980).

193 *See supra* note 36 (describing arbitrary and capricious review under *State Farm*). By this I mean that courts use the *State Farm* standard, which asks whether the agency's decision-making process, as evidenced by the reasons given for the decision, was sufficient in order to weed out cases where an agency was motivated by an impermissible factor, such as politics. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2270 (2001) ("[Courts require] that agency action bear the indicia of essentially apolitical, 'expert' process and judgment.").

unavailability of alternatives,[194] quantify the impossible administrative burdens,[195] and ensure the regulation deviates from the plain text as little as possible.[196] These three factors should be supplemented by a fourth that EPA provided in the Tailoring Rule: commit to reassessing the regulation.[197] Such a commitment will help ensure that the agency reassesses what is feasible as it develops more efficient methods of regulation and as the level of resources at the agency's disposal changes.

In this Section, I examine the potential benefits and drawbacks of allowing agencies to claim administrative necessity to justify avoiding the plain text of their enabling statutes. I conclude that, although there are significant, warranted objections to the argument in this Note, this proposal is an improvement over the status quo. The status quo gives agencies an incentive to address resource constraints through nontransparent means. The administrative necessity rationale allows agencies to publicize their inability to carry out their statutory mandates, and, in doing so, affords agencies an opportunity to pressure Congress to address the issue.

1. Potential Benefits

An administrative necessity rationale that is policed by procedural review yields two main benefits. First, allowing agencies to explain, through regulation, the level of delegated authority that they can feasibly carry out brings agency actions that would occur behind the scenes through attempted delay or nonenforcement into the sunlight of rulemaking, which requires notice to and comment by the public.[198] As discussed in Part III.A, an agency unable to carry out its statutory mandate, such as EPA, currently has an incentive to regulate

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[194] This requirement is taken from *Alabama Power*, *see supra* notes 125–27 and accompanying text, and *Environmental Defense Fund*, *see supra* notes 130–34 and accompanying text.

[195] This requirement is taken from *Environmental Defense Fund*, *see supra* note 134, and *Sierra Club*, *see supra* note 144 and accompanying text.

[196] This requirement is taken from *Alabama Power*, *see supra* note 127, and *Sierra Club*, *see supra* notes 145–46 and accompanying text.

[197] *See supra* notes 76–77 and accompanying text (outlining EPA's reassessment responsibilities under the Tailoring Rule, which include soliciting comments from interested parties and conducting a study on reducing the administrative burdens of the permitting regulation). This commitment to reassess is analogous to the periodic reports required of defendants subject to structural injunctions in the civil rights litigation context. The Department of Justice, courts, and citizens use these reports to monitor the defendants' compliance with the injunctive decree. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 22–23 (1978) (describing the purpose of reports and the comparative ability of various stakeholders to monitor reports). Here, the reassessment will allow citizens and Congress to monitor the continued need for relief from the plain text.

[198] As Richard Stewart writes:

as if it will do so and then underenforce the statute. Allowing agencies to claim administrative necessity gives the public valuable data on the extent to which statutes are being enforced. In the environmental arena, that data translates into information on air quality, public health risks, and the need for statutory reform.

Second, allowing agencies to claim administrative necessity increases the chances that the issue of resource constraints will be dealt with between the agency and Congress,[199] rather than simply between the agency and the courts.[200] This is a desirable shift because Congress is in the best position to address an agency's resource constraints either by increasing funding or by decreasing delegated authority.[201] While the legislative process does make it difficult for Congress to take such remedial actions, at the very least this proposal allows the agency to shift some of the blame for its inability to fulfill statutory promises to Congress, alleviating, albeit only slighty, the public choice problem described above.

2. *Potential Drawbacks*

It is true that allowing agencies to use the administrative necessity rationale to lessen their workload or avoid certain statutory duties creates a risk that an agency will claim to lack resources when it in fact simply disagrees with the policy it is required to implement.[202] There are two reasons why this risk is overstated. First, and most obvious,

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> Substituting general rules for ad hoc decision also tends to ensure that officials will act on the basis of societal considerations embodied in those rules rather than on their own preferences or prejudices, and increases the likelihood that the contents of the policies applied will be consistent with the preferences of a greater number of citizens.

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1698 (1975).

[199] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435 (1999) (noting that rulemaking increases executive and legislative oversight and public participation compared to ad hoc decision making).

[200] *See supra* notes 166–70 and accompanying text (describing the interaction between courts and agencies when agencies cite resource constraints as an excuse for delay).

[201] *See* WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 57 (1967) (arguing it is better to have decisions made by Congress, which must act through a public and transparent legislative process, than by agencies, which operate in a less formal and less transparent manner and are more prone to capture).

[202] *Cf. supra* note 157 (noting the risk of false positives when agencies are empowered to claim that resource constraints prevent them from acting). There is also a risk that an agency might try to use administrative necessity as a means to achieve backdoor cost-benefit analysis. This risk seems marginal because, when claiming administrative necessity, an agency can only consider its own costs in carrying out its statutory duties. If an agency considers the burden on regulated parties, that will be immediately evident to a court as impermissible cost-benefit analysis.

the current doctrinal structure incentivizes agencies simply to not enforce policies with which the political leadership disagrees, meaning an agency bent on deregulation or half-hearted regulation would take advantage of the nontransparent avenues current doctrine already provides.[203] Second, courts have proven capable of weeding out meritless claims of administrative necessity, though this conclusion is admittedly drawn from a small set of cases.[204]

Allowing agencies the discretion to deviate from the plain text of a statute creates concerns analogous to those motivating the nondelegation doctrine. The nondelegation doctrine prevents "agency lawmaking on the cheap"[205] by requiring the legislative power to be exercised through the Article I, Section 7 requirement of bicameralism and presentment.[206] By delegating broad power, the argument goes, Congress can avoid hard political choices, such as legislating the scope and requirements of regulations.[207] The administrative necessity rationale presents an analogous problem. By allowing agencies to cure the implementation issues that aspirational statutes create, the administrative necessity rationale arguably allows Congress to avoid making the hard choice of where to direct scarce administrative resources.

This is a serious concern, though it should not prevent a court from allowing an agency to claim administrative necessity. As mentioned earlier, claims of administrative necessity occur through notice-and-comment rulemaking, thereby providing agencies with a transparent means to implement a feasible level of delegated authority. These claims therefore could serve as a "fire alarm,"[208] which sends a signal to interest groups to lobby Congress to amend the statute, increase agency resources, or enact a new statute that addresses the regulatory problem more efficiently. This public pronouncement is an improvement over the status quo, which allows overambitious statutory enactments to go silently unenforced.

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[203] *See supra* Part III.A (explaining how current doctrine forces resource-strapped agencies into nontransparent avenues).

[204] *See supra* Part II.B (surveying the administrative necessity cases).

[205] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 240.

[206] U.S. CONST. art. I, § 7.

[207] *See* Manning, *supra* note 205, at 247–60 (arguing that allowing courts to narrow the scope of laws delegating power to agencies in order to bring the laws into compliance with the nondelegation doctrine would undermine the doctrine's objective of requiring Congress to craft policy).

[208] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing the model of "fire alarm" oversight, which relies on interest groups and the public to track agency action and to bring important issues and problems to the attention of Congress).

Conclusion

As Justice Holmes once cautioned, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."[209] This Note has used the Tailoring Rule as a lens through which to examine the tension beween the plain text demands of statutes and agency resource constraints. It has argued that when an agency is faced with nondiscretionary statutory duties that it does not have the resources to implement fully, the agency should be allowed to use the administrative necessity rationale to promulgate a regulation that limits its duties to its maximum capacity. The agency must also commit to reassessing those limits as resources, expertise, and technologies change. The administrative necessity rationale allows an agency to openly acknowledge its inability to carry out its statutory mandates, and, in doing so, increases the likelihood that Congress will address the issue.

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[209] Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).