ENVIRONMENTAL LAW — CLEAN AIR ACT — D.C. CIRCUIT REJECTS INDUSTRY CHALLENGES TO NEW GREENHOUSE GAS RULES. — *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012).

Since the advent of national environmental regulation, the Article III standing requirement has often vexed the environmental groups that seek substantive judicial review of administrative actions and rules. Such groups often try to enhance environmental protections by showing that agencies and other executive actors have fallen short of their statutory duties.[1] But the Constitution imposes a procedural hurdle in the form of the standing requirement, which requires these plaintiffs to assert concrete injuries that are suitable to the judicial forum.[2] Meanwhile, regulated parties have typically had little trouble gaining standing to challenge the rules that agencies impose on them.[3] Recently, in *Coalition for Responsible Regulation v. EPA*,[4] the D.C. Circuit ruled that regulated parties had no standing to challenge a regulation that limits the initial impact of a program addressing greenhouse gas emissions.[5] Although at first glance the decision appears to contravene precedent on Article III standing, *Coalition* ultimately vindicates the constitutional values on which these precedents are based.

Congress enacted the modern version of the Clean Air Act[6] (CAA) in 1970[7] as one of several extensive, ambitious new statutes responding to the emerging public concern over the effects of pollution on human health.[8] The 1970 amendments required the Environmental Protection Agency (EPA) to establish air quality standards for a number of known pollutants and charged the states with meeting those standards.[9] Since then, Congress has amended the statute several times,[10] including to add the two programs that would form the basis of the *Coalition* lawsuit. The Prevention of Significant Deterioration (PSD)

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1 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 558–59 (1992). Standing doctrine has also prevented environmental groups from suing polluters directly under the citizen standing provisions of environmental statutes. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86, 105 (1998).

2 *See Lujan*, 504 U.S. at 559–60.

3 *See id.* at 561–62 (explaining why parties that are the object of regulation have little difficulty establishing standing).

4 684 F.3d 102 (D.C. Cir. 2012).

5 *See id.* at 148.

6 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011).

7 The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

8 *See generally* Richard J. Lazarus, Essay, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 77–82 (2001).

9 ROY S. BELDEN, CLEAN AIR ACT 6–7 (2d ed. 2011).

10 *See id.* at 7–9.

program applies to new facilities that will emit, depending on the type of source, either more than 100 tons per year or more than 250 tons per year of "any air pollutant,"[11] and that are located in areas that have achieved the air quality standards the EPA has established.[12] The program grants permits to these sources on the condition that they meet certain cleanliness standards that are based on the technology available to like sources.[13] In addition, Title V[14] of the CAA established a general permitting requirement for all new facilities that will emit more than 100 tons per year of "any air pollutant."[15]

Although the health hazards of the original CAA pollutants are still an issue in many areas, the attention of the American public has largely shifted to the threat of climate change.[16] Many molecules that are commonly released into the atmosphere, including carbon dioxide, were once thought to be harmless, but scientists now believe that they trap heat from the sun, causing the Earth's temperature to rise.[17] From their tendency to trap heat, these substances have earned the name "greenhouse gases."[18] In light of Congress's failure to address climate change separately, the environmental community began pushing the EPA to regulate greenhouse gases under the CAA.[19] The EPA at first resisted, and the resulting lawsuit, *Massachusetts v. EPA*,[20] eventually reached the Supreme Court. In that case, the Commonwealth of Massachusetts and several environmental groups sued the EPA, alleging that the language of the CAA encompassed greenhouse gases.[21] The Supreme Court ruled that the plaintiffs had standing to sue the EPA for its failure to investigate whether greenhouse gases en-

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[11] 42 U.S.C. § 7479(1).

[12] *See* BELDEN, *supra* note 9, at 53–55. In areas that have not attained the EPA's air quality standards, a different and more stringent program governs restrictions on new sources. *Id.*

[13] *See id.*

[14] 42 U.S.C. §§ 7661–7661f.

[15] *Id.* § 7602(j); *see also id.* §§ 7661a, 7661(2).

[16] *See, e.g.*, DEMOCRATIC NAT'L CONVENTION, MOVING AMERICA FORWARD: 2012 DEMOCRATIC NAT'L PLATFORM 20–21, *available at* http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf (discussing climate change policy in detail while only briefly mentioning other air pollutants).

[17] *See generally* Michael D. Mastrandrea & Stephen H. Schneider, *Climate Change Science Overview*, *in* CLIMATE CHANGE SCIENCE AND POLICY 11 (Stephen H. Schneider et al. eds., 2010).

[18] *Id.* at 14, 16.

[19] In 2009, the House of Representatives passed a bill that would have started a cap-and-trade program for greenhouse gases, but the bill failed to pass in the Senate. *See* American Clean Energy and Security Act of 2009 ("Waxman-Markey"), H.R. 2454, 111th Cong. (2009); Tyler McNish, *Carbon Offsets Are a Bridge Too Far in the Tradable Property Rights Revolution*, 36 HARV. ENVTL. L. REV. 387, 389–90 (2012).

[20] 549 U.S. 497 (2007).

[21] *Id.* at 505.

danger public health and welfare;[22] that greenhouses gases are an "air pollutant" within the meaning of the CAA;[23] and that in order to avoid taking regulatory action over greenhouse gas emissions, the EPA had to either determine that greenhouse gases do not contribute to climate change or provide some other "reasoned explanation" for declining to do so.[24]

The landmark decision in *Massachusetts* set off a chain reaction. First, the EPA investigated greenhouse gases, determined that they indeed posed a threat to public welfare due to their predicted effects on the Earth's climate, and released an Endangerment Finding explaining these results.[25] In the Agency's judgment, it was then required to set emission standards for greenhouse gases from motor vehicles, so it promulgated the Tailpipe Rule as part of a joint rulemaking with the National Highway Traffic Safety Administration.[26] Then, the Endangerment Finding triggered the regulation of certain sources of greenhouse gases under the PSD and Title V programs, since both employ the phrase "any air pollutant."[27] Since 1980, the EPA has consistently held that the phrase "any air pollutant" refers to any substance that is regulated under the CAA.[28] When the EPA promulgated the Tailpipe Rule, greenhouse gases became just such a substance, so the EPA reasoned that it now had to start a permitting program for stationary sources of greenhouse gas emissions under PSD and Title V.[29]

But because greenhouse gases are typically released in much larger quantities than are other substances regulated under the CAA, the EPA realized that issuing permits to the millions of sources that emit

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[22] *Id.* at 526 (holding that "the risk of catastrophic harm" from rising sea levels and the "reduc[tion] to some extent" of that risk if the EPA regulated greenhouse gases satisfied the Article III standing requirement).

[23] *Id.* at 532.

[24] *Id.* at 534; *see id.* at 534–35.

[25] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified in 40 C.F.R. ch. 1). The specific substances included in the definition of greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.* at 66,536–37.

[26] *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified in 40 C.F.R. pts. 531, 533, 536–38). The rule established both new fuel efficiency standards and greenhouse gas emission standards for new cars and trucks. *See* Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343, 344 (2011).

[27] 42 U.S.C. §§ 7479(1), 7602(j) (2006 & Supp. V 2011).

[28] *See, e.g.*, Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980) (to be codified in 40 C.F.R. pts. 51, 52, 124).

[29] *Coalition*, 684 F.3d at 115; *see also* David P. Vincent, Comment, *Administrative Absurdity: Why the Judiciary Should Uphold EPA's Use of the Administrative Necessity and Absurd Results Doctrines Within the Tailoring Rule*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 393, 394–97 (2012) (explaining in greater detail the chain of events that led from *Massachusetts* to the regulations at issue in *Coalition*).

more than 100 or 250 tons of greenhouse gases per year would impose an enormous burden on state agencies.[30] To mitigate this burden, the EPA issued the Tailoring Rule, which provided that for the time being, only sources with greenhouse gas emissions exceeding 75,000 or 100,000 tons per year (depending on the program and project) would require permits — the EPA would gradually phase in regulation of smaller sources at a later time.[31] The Agency also promulgated the Timing Rule, which provided that a pollutant becomes subject to CAA regulation for the purpose of PSD and Title V permitting only on the date that the rule requiring its regulation takes effect, so the new greenhouse gas permits would not be required until the Tailpipe Rule became effective.[32]

In spite of the mitigating effects of the Timing and Tailoring Rules, the new rules meant that emitters of large quantities of greenhouse gases — some of which had never been subject to air pollution regulation[33] — would suddenly be required to obtain greenhouse gas permits under the CAA. Industry groups and several states reacted unfavorably and petitioned the D.C. Circuit[34] for review of this new cluster of regulations.

In a per curiam opinion, a D.C. Circuit panel made up of Chief Judge Sentelle and Judges Rogers and Tatel dismissed all of the plaintiffs' claims.[35] The plaintiffs challenged many substantive and procedural facets of the EPA's new rules. They argued, for instance, that in issuing the Endangerment Finding, the EPA should have considered the possible policy consequences and absurd results of beginning to regulate greenhouse gases under the CAA.[36] The plaintiffs also challenged the adequacy of the scientific record underlying the Endangerment Finding.[37] They accused the Agency of "improperly delegat[ing] its judgment" to outside organizations by relying on secondary studies.[38] Furthermore, they contended that the EPA should have declined to promulgate the Tailpipe Rule due to the absurd result of requiring new permits for a massive number of small stationary sources.[39] The

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30 *Coalition*, 684 F.3d at 115–16.

31 *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (to be codified in 40 C.F.R. pts. 51, 52, 70, 71).

32 *See* Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,006–07 (Apr. 2, 2010) (to be codified in 40 C.F.R. pts. 50, 51, 70, 71).

33 *Coalition*, 684 F.3d at 130.

34 For many EPA actions under the CAA, the statute provides for direct review exclusively to the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1) (2006 & Supp. V 2011).

35 *Coalition*, 684 F.3d at 113–14.

36 *See id.* at 117–19.

37 *Id.* at 119.

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

39 *Id.* at 126.

D.C. Circuit rejected all of these challenges, ruling that the EPA had a sufficient scientific basis for its judgment that greenhouse gases contribute to climate change[40] and that the Supreme Court's decision in *Massachusetts* foreclosed the operation of policy considerations in deciding whether to regulate once the Agency had determined that greenhouse gases indeed posed a threat to public welfare.[41]

The plaintiffs' next target was the EPA's determination that its promulgation of the Tailpipe Rule automatically triggered regulation of greenhouse gases under the PSD and Title V programs.[42] At the outset, the EPA contended that because this interpretation was contained in a decades-old regulation, and the CAA requires parties to challenge rules within sixty days of their promulgation, the plaintiffs' challenge was untimely.[43] However, the plaintiffs argued and the court agreed that before the EPA promulgated the Tailpipe Rule some of the plaintiffs would not have had standing to challenge any regulation under the CAA, since these plaintiffs had never before had to obtain CAA permits.[44] But on the merits of this challenge to the EPA's automatic triggering interpretation the court found for the EPA. The issue hinged on the EPA's determination that "any air pollutant" in the PSD and Title V sections of the CAA refers to any air pollutant that the statute regulated. The court applied the doctrine in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[45] to this question of statutory interpretation and found that the EPA's interpretation was compelled by the statute.[46] In reaching this conclusion, the court emphasized the expansive meaning of the word "any" and cited the Supreme Court's similar interpretive move in its finding in *Massachusetts* that the phrase "any air pollutant" encompassed greenhouse gases, thereby bringing them within the ambit of the CAA.[47]

Finally, the court turned to the Tailoring Rule.[48] Although it briefly outlined the plaintiffs' arguments against the Rule,[49] the court never had to evaluate these arguments, as it ruled that the plaintiffs did not have standing to challenge the Tailoring Rule. The plaintiffs had failed to allege an injury in fact, the first of three requirements in the

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[40] *Id.* at 120–21.
[41] *Id.* at 117–18, 126–27.
[42] *See id.* at 129.
[43] *Id.*
[44] *Id.* at 130–31.
[45] 467 U.S. 837 (1984).
[46] *Coalition*, 684 F.3d at 134.
[47] *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007)).
[48] *Id.* at 144. The court briefly dismissed the plaintiffs' challenges to the Timing Rule. *See id.*
[49] *See id.* at 144–46.

constitutional standing analysis.[50] The court reasoned that the rule had the effect of scaling back regulation on industry rather than increasing it.[51] The burden on those stationary sources that emitted more than 75,000 or 100,000 tons of greenhouse gases per year would be identical to their burden without the Tailoring Rule, except that the Tailoring Rule might actually make it easier for these sources to obtain permits because state agencies would be less overtasked.[52] The court rejected the plaintiffs' argument that the "astronomical costs" that would result from striking down the Tailoring Rule would force Congress to act on behalf of regulated parties; it found this claim far too speculative.[53] To drive home this point, the court even referenced the "Schoolhouse Rock" song "I'm Just a Bill," an ode to the unpredictability of the legislative process.[54]

Coalition is notable for its practical implications — namely, enabling regulation of greenhouse gases on a national level for the first time ever — as well as for its holding on constitutional standing. Since the 1970s, constitutional standing has often limited the access of public interest groups to judicial review of agency actions, but not that of regulated parties.[55] But in *Coalition*, groups that were themselves subject to regulation were unable to establish standing. *Coalition* represents a counterintuitive application of Article III standing that, at first glance, appears to buck the modern standing paradigm. Yet it was the unusual circumstances of this case, rather than a disregard for precedent, that led to its outcome. These circumstances caused a role reversal that showcases some of the more nuanced, balanced aspects of a doctrine that has so often been used to keep public interest groups out of court.

The doctrine of constitutional standing requires that litigants have a sufficient stake in a case and its outcome to render it justiciable in the federal courts. This requirement is based on the "cases" and "controversies" language of Article III of the Constitution.[56] Although the Supreme Court expanded the scope of constitutional standing for several decades in the middle of the twentieth century,[57] the Court re-

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[50] *Id.* at 146. To establish standing, plaintiffs must allege injury in fact, causation, and likelihood of redress. *Id.*

[51] *Id.*

[52] *See id.*

[53] *Id.*; *see id.* at 146–47.

[54] *Id.* at 147.

[55] *See, e.g.*, Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 552, 556–57 (2012) (explaining how the doctrine of standing has worked more and more to the disadvantage of public interest groups).

[56] *See* U.S. CONST. art. III, § 2, cl. 1.

[57] *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (holding that it was within Congress's power to grant standing to challenge government action).

treated from a more liberal application of standing law in the mid-1970s.[58] At the doctrinal level, the standing inquiry is now separated into three prongs. Courts require litigants to allege: first, that they have suffered an actual injury; second, that the conduct the plaintiffs challenge caused the injury; and third, that the relief the plaintiffs seek would provide some degree of redress for the injury they allege.[59] Courts have frequently invoked this modern, stricter form of constitutional standing to prevent public interest organizations, including environmental groups, from asserting rights on behalf of the public against federal agencies and the parties they regulate.[60] Regulated parties themselves, meanwhile, have typically had little trouble establishing standing to challenge regulations that affect them, even under the current, more demanding version of standing.[61]

One way to explain the disparate results public interest groups have obtained in standing decisions is that in spite of the three-prong test, standing often appears to hinge largely on the nature of the litigant's interest in the proceedings. Where the plaintiff's interest in the case is primarily economic, courts typically treat standing as a nonissue.[62] In contrast, where plaintiffs pursue a claim primarily for ideological reasons, courts are far more skeptical of the claim's suitability to the judicial forum, often requiring plaintiffs to reframe their injuries as aesthetic or recreational in character.[63] The justification for this distinction rests on separation of powers principles: opening the courts to debates among ideological opponents would improperly intrude upon the prerogatives of the executive and legislative branches.[64] Nevertheless, the greater burden the standing inquiry imposes on environ-

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[58] *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1174–82 (2009) (describing in detail the narrowing of standing doctrine in the 1970s).

[59] *See, e.g.*, Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000).

[60] *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 491 (2008) (describing the asymmetric application of standing doctrine in favor of regulated entities and against beneficiaries). For a comprehensive explanation of how the doctrine of standing operates within the dynamics of administrative lawsuits, see generally James E. Pfander, *Triangulating Standing*, 53 ST. LOUIS U. L.J. 829 (2009).

[61] *See* Elliot, *supra* note 60, at 491.

[62] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (explaining why plaintiffs who are subject to regulation generally have an easier time establishing standing than do groups that advocate for greater regulation); Sierra Club v. EPA, 292 F.3d 895, 899–900 (D.C. Cir. 2002) (drawing a distinction between ease of establishing standing for regulated parties and beneficiaries).

[63] *See, e.g.*, *Lujan*, 504 U.S. at 564 (ruling plaintiffs did not have standing to challenge an agency's failure to protect a certain species, in part because the plaintiffs did not have concrete plans to visit the animals in question); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 4 (2010) ("Indeed, the standing inquiry has frequently degenerated into a lawyer's game that depends on a complaint's formal wording rather than its substance . . . .").

[64] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–97 (1983).

mental and other public interest plaintiffs, as compared to their regulated counterparts, has led some scholars to conclude that standing decisions are motivated by political, rather than constitutional, concerns.[65]

Yet if this assessment of modern standing doctrine is accurate, it is puzzling that the industry groups in *Coalition* would be turned away in their efforts to challenge the Tailoring Rule. After all, the plaintiffs' interest in the *Coalition* proceeding was tangible, rather than strictly philosophical or ideological. The EPA's new set of regulations will impose real costs on sources of greenhouse gases, including many sources that would not be subject to any CAA permitting requirements in their absence.[66] Indeed, in their opening briefs, the plaintiffs in *Coalition* seem to have taken for granted that they had standing to challenge each of the regulations at issue, including the Tailoring Rule.[67]

The *Coalition* court's standing decision seems premised on the idea that the tangible costs of the new permitting requirement for greenhouse gas emissions to be borne by the industry petitioners flowed from the rules and decisions that preceded it; the Tailoring Rule itself served only to relax the burden of these earlier actions.[68] Although perhaps true as a formal matter, in practical terms, this assumption misses the central importance of the Tailoring Rule to the operation of the new regulatory scheme. As the EPA itself argued, it would be *impossible* for state agencies to issue permits to all the sources that emit carbon dioxide at the 100- or 250-tons-per-year thresholds.[69] Implicit in this admission was the reality that without some mechanism for circumscribing the number of sources subject to greenhouse gas regulations, the likely result would be regulatory chaos, and possibly no real regulation at all.[70] Arguably, this outcome was exactly what the *Coalition* plaintiffs wanted: to throw a wrench in the EPA's plans such that for any given source emitting greater than 75,000 or 100,000 tons of greenhouse gases per year, the probability that the new permitting requirement would actually be enforced against it would decrease due to the overwhelming number of facilities needing permits.

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[65] *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 69 (1984); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999); Pushaw, *supra* note 63, at 4 ("[Conservative Justices] have strictly enforced standing rules to keep out ACLU types but have loosened the reins for businesses and other favored plaintiffs.").

[66] *See Coalition*, 684 F.3d at 130–31.

[67] *See, e.g.*, Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 12, *Coalition*, 684 F.3d 102 (No. 09-1322), 2011 WL 1935458, at *12 (describing petitioners' standing as "self-evident").

[68] *See Coalition*, 684 F.3d at 146.

[69] *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,543–44 (June 3, 2010) (to be codified in 40 C.F.R. pts. 51, 52, 70, 71).

[70] *See* Vincent, *supra* note 29, at 396 (predicting that an attempt to apply PSD and Title V to greenhouse gases without the Tailoring Rule "would . . . overwhelm the limited resources of permitting authorities, and severely impair the functioning of the permitting programs").

The problem with this objection is that the constitutional standing inquiry does not, in reality, hinge solely on the nature of the plaintiff's interest in the proceeding. And in spite of the D.C. Circuit's unfortunately brisk treatment of the novel standing issue *Coalition* presented, the case can be read as reanimating the deeper values that may be overlooked in a simplified gloss on standing doctrine. Supporters of the strict version of Article III standing assert that it fulfills an important role in the institutional self-definition of the judiciary.[71] Here, the formalistic flavor of the court's standing ruling arguably does just that. By declining to consider the economic burdens that sources of greenhouse gases could avoid should the EPA become overwhelmed by the prospect of adhering strictly to the text of the CAA, the court at once expressed its trust in the executive branch and its deference toward Congress.[72] It refused to base its standing holding on the prospect of executive failure or the possibility of legislative overreach. This deferential posture is consistent with the Supreme Court's law on standing, which often adheres to seemingly unrealistic formalisms in order to preserve a certain vision of separation of powers.[73]

Moreover, the *Coalition* plaintiffs' claim for relief depended either on sabotaging one of the democratic branches of government — that is, forcing the EPA and state agencies to take on an impossible regulatory burden — or on inciting the other to action — that is, inspiring Congress to relieve this burden through legislation. Although court decisions may sometimes inadvertently cause such results, precedent suggests that they are unsuitable as remedies in themselves. Typically, courts define their role as requiring faithful statutory interpretation coupled with agnosticism toward future congressional action.[74] Likewise, the plaintiffs' challenge to the Tailoring Rule may have seemed a disingenuous attempt to escape executive enforcement of a duly enacted statute, which courts generally disfavor.[75] Although the *Coalition*

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[71] *See* Scalia, *supra* note 64, at 881.

[72] *Cf.* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) (justifying textualist statutory interpretation as a manner of deferring to congressional intent).

[73] In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992), for instance, wildlife conservation and other environmental groups sought to enforce several requirements of the Endangered Species Act on government actors. Although the environmental groups' interest was plainly in the political and moral cause of species preservation, the Supreme Court required the plaintiffs to have concrete plans to actually visit the species in question so that they would have an aesthetic interest in the species's survival. *See id.* at 564. In his tiebreaking concurrence, Justice Kennedy conceded that "it may seem trivial to require that [the plaintiffs] acquire airline tickets" to see the animals, but insisted that the Constitution required it. *Id.* at 579 (Kennedy, J., concurring).

[74] *See, e.g.*, Herb's Welding, Inc. v. Gray, 470 U.S. 414, 427 (1985) ("[I]f Congress' . . . decisions are mistaken as a matter of policy, it is for Congress to change them.").

[75] On a number of occasions, courts have expressed skepticism toward private parties' attempts to evade the substance of laws by exploiting technicalities. *See, e.g.*, Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2287 (2012) (viewing with a "critical eye" respondent's attempt to

opinion did not explicitly discuss these considerations, perhaps the judges were subconsciously influenced by the idea that the redress the plaintiffs urged would have required a kind of interbranch meddling that is unbecoming of the judiciary.[76] Thus, while perhaps any standing inquiry in an administrative lawsuit implicates concerns about the separation of powers, the *Coalition* court effectively averted the special set of concerns that the plaintiffs' challenge to the Tailoring Rule posed. In so doing, it reaffirmed that standing doctrine is at heart a self-conscious recognition of institutional limitations, rather than a rule that works systematically to the disadvantage of certain litigants.

It was the unusual circumstances resulting in the promulgation of the Tailoring Rule, rather than a disregard for precedent, that led to *Coalition*'s initially counterintuitive outcome. The case concluded a process set in motion by the Supreme Court's decision in *Massachusetts v. EPA* — a decision that put the EPA in the strange position of having to use a statute that was designed for traditional air pollutants to regulate a completely different substance.[77] That mismatch led directly to the Tailoring Rule. Thus, without this type of expansion in statutory coverage, circumstances preventing industry groups from challenging a regulation that affects their tangible interests will likely remain unusual. However, even as the anomaly that it will likely prove to be, *Coalition* serves to illustrate the redeeming value of standing doctrine to those observers who may have become disillusioned by the many instances of its cooptation by regulated industry.[78] By rejecting shorthand characterizations of standing doctrine in favor of its important constitutional nuances, the case could serve to recapture the doctrine's legitimacy as a jurisprudential rather than a political tool. Thus, *Coalition* may have been a bad day for industry, but it was a good day for standing.

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moot case after the Court had granted certiorari); Knetsch v. United States, 364 U.S. 361, 365–66 (1960) (disallowing tax deduction for transaction that had no economic purpose beyond producing tax savings). Similarly, plaintiffs are not permitted to feign interest in a claim solely to obtain judgment on a legal question. *See, e.g.*, Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850).

[76] *See* Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 95–96 (2012) (describing standing as a doctrine of comity, in that it prevents courts from exercising their full range of authority in order to avoid interfering with the political branches).

[77] *See* Regulating Greenhouse Gases Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (proposed July 30, 2008) (to be codified in 40 C.F.R. ch. 1) ("[T]he Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases.").

[78] *See* Elliott, *supra* note 55, at 553 (suggesting that cases in which conservative ideological groups were denied standing to challenge progressive laws "support a liberal argument for the current restrictive standing doctrine").