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ARTICLE

HOW TO SUE WITHOUT STANDING: THE CONSTITUTIONALITY OF CITIZEN SUITS IN NON-ARTICLE III TRIBUNALS

David Krinsky[†]

ABSTRACT

In recent years, the "injury-in-fact" standing requirement of Article III has frequently impeded attempts by concerned citizens and public interest groups to challenge government actions in federal court.

This article proposes a way in which "citizen suits"—lawsuits brought by plaintiffs who wish to challenge perceived illegalities that affect the public as a whole—can be given a federal forum. It argues that, with some limitations, Congress has authority to authorize pure citizen suits in Article I tribunals and discusses the (surmountable) obstacles that such fora pose.

After discussing the constitutionality of citizen suits in Article I tribunals, the article then turns to precedents that shed light on how such tribunals might function. It highlights two, one in the United States, one abroad. In the United States, the advisory opinions of the U.S. Court of Federal Claims are a little-known example of "cases" without standing in an

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Article I tribunal today. In Australia—which, though it obviously follows a different constitution with different requirements, has a government similar in structure to the United States'—the Administrative Appeals Tribunal is a model for how generalized grievances with government affairs might be aired in a court-like setting.

In short, the U.S. Constitution permits citizen suits—just not in Article III courts.

I. INTRODUCTION

A. The Modern Law of Standing

The past few decades have seen a dramatic tightening of the requirements for standing to sue in federal court.[1] In particular, the Supreme Court's decision in *Lujan v. Defenders of Wildlife* ushered in a new era in which Article III limits the power of Congress to grant members of the general public a right to sue.[2] Perhaps because standing is a concern that is most vexing when an issue affects the public at large, this era has also seen standing arise as a potential problem in a variety of legal disputes that have captured national attention, including challenges to the Bush administration's wiretapping programs,[3] global warming,[4] and the constitutionality of public-school recitations of the Pledge of Allegiance.[5]

Although *Lujan* was not the first Supreme Court case to exhibit a heightened concern for standing requirements,[6] and its effects have

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[1] *See* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (summarizing the history of American standing law and tracing the development of the modern "injury-in-fact" requirement to the 1960s and 1970s).

[2] 504 U.S. 555, 571–73 (1992). Justice Scalia, writing for the Court, held that the Environmental Protection Act's "citizen-suit" provision, 16 U.S.C. § 1540(g), cannot grant "any person" the power to file suit in federal court. The relevant provision of the EPA provides that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."

[3] *See, e.g.*, Dale Carpenter, The Volokh Conspiracy—The NSA Eavesdropping Opinion and Standing, Aug. 17, 2006, http://www.volokh.com/posts/1155856278.shtml.

[4] *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (June 26, 2006). Standing thus promises to be a major issue in one of the most significant decisions of the Supreme Court's 2006 Term.

[5] Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) (dismissing First Amendment challenge to the recitation of the Pledge of Allegiance's "under God" language on the grounds that the affected child's father lacked standing).

[6] *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); *see also* Sunstein, *supra* note 1, at 193–95 (discussing pre-*Lujan* cases that examined standing as a distinct inquiry from the presence of

been mitigated significantly by the Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[7] *Lujan* was the first case to clearly enunciate, as a matter of constitutional import, the current "injury-in-fact" test for standing.[8]

Under this test, plaintiffs wishing to challenge government action must not only have a substantive cause of action under which they are entitled to bring suit, but as a threshold matter, they must have suffered an injury-in-fact: "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[9] Moreover, this injury-in-fact must have been caused by the conduct complained of, and it must be "likely, as opposed to merely speculative, that the injury will be redressed" should the court rule for the plaintiff.[10]

Citizen suit plaintiffs such as those in *Lujan* do not generally meet these requirements. Members of the general public are not concretely or particularly injured simply because they perceive executive action or inaction as contrary to law, nor are they concretely and particularly injured if they believe that a private party is not in compliance with regulation.[11] Even if a personalized injury is threatened, the "actual or imminent" requirement means that only sufficiently likely threats are serious enough to be judicially cognizable. Mere remote possibilities of harm to the plaintiff are insufficient.[12] And even though *Laidlaw* held that this requirement would not preclude injuries based on perceived, rather than actual risks,[13] standing still requires that the perceived injury be to the plaintiffs in particular.[14] The requirement of standing to sue is constitutional in stature: "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . —does not state an Article III case or contro-

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a cause of action).

[7] 528 U.S. 167 (2000). *Laidlaw* held that even though a group of plaintiffs could not demonstrate that they, their land, or their environment had been physically harmed in any way, they had standing because their fears of health risks had diminished their use and enjoyment of the North Tyger River, the alleged pollution of which was at issue. *Id.* at 181–83, 187–88.

[8] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[9] *Id.* (quotations and citations omitted).

[10] *Id.* at 560–61 (quotations and citations omitted).

[11] *See id.* at 562–63.

[12] *See* La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1384 (D.C. Cir. 1996).

[13] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 187–88 (2000).

[14] *Cf.* Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that a plaintiff lacked standing to enjoin enforcement of a police chokehold policy because he could not demonstrate that he personally was likely to be injured by it in the future).

versy."[15] Even an explicit statutory grant to the general public of a right to sue, as was present in *Lujan*, cannot grant standing.[16]

Both *Lujan* and *Laidlaw* arose in the environmental context,[17] and environmental statutes have been the paradigmatic examples of congressional attempts to grant causes of action to the general public.[18] However, in addition to environmental law and to the examples cited above,[19] standing has been a barrier to suits challenging government action or inaction in a wide variety of other fields, including treatment of individuals with disabilities,[20] initiation of child support proceedings,[21] tax policy,[22] and discrimination in local zoning ordinances.[23] A constitutional limitation on congressional power to confer standing therefore poses a general constraint on Congress's power to craft enforcement schemes for its regulatory programs. Although such non-adjudicatory mechanisms as notice-and-comment rulemaking are still available to politically-interested but not injured-in-fact citizens who wish to weigh in on regulatory matters,[24] such mechanisms have their disadvantages.[25] In particular, these non-adjudicatory mechanisms are most capable of providing a forum for citizen input when an executive agency is considering regulations of its own accord, but less so when a citizen wishes to challenge action or inaction under existing, static regulations.[26] What *Lujan* has done is narrow the range of alternative mechanisms that Congress can impose; *Lujan* restricts the

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[15] *Lujan*, 504 U.S. at 573–74.

[16] *See id.* at 571–73; *see also supra* note 2.

[17] *See Lujan*, 504 U.S. at 557–58; *Laidlaw*, 528 U.S. at 175–78; *see also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001).

[18] According to Professor Sunstein, writing shortly after *Lujan* was decided, every major environmental statute then in force except FIFRA contained a citizen suit provision. Sunstein, *supra* note 1, at 165 n.11.

[19] *See supra* notes 3 and 5 and accompanying text.

[20] *See, e.g.*, DeLil v. El Torito Rests., Inc., No. C 94-3900, 1997 U.S. Dist. LEXIS 22788 (N.D. Cal. June 24, 1997) (barring a plaintiff from suing over a restaurant's illegally locked wheelchair lift because suggestion that the plaintiff might return was speculative); *see also* Elizabeth Keadle Markey, Note, *The ADA's Last Stand?: Standing and the Americans with Disabilities Act*, 71 FORDHAM L. REV. 185 (2002).

[21] Linda R. S. v. Richard D., 410 U.S. 614 (1973).

[22] Allen v. Wright, 468 U.S. 737 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

[23] Warth v. Seldin, 422 U.S. 490 (1975).

[24] *See* Administrative Procedure Act, 5 U.S.C. § 553 (2000); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (describing notice-and-comment rulemaking as a mechanism for "assur[ing] due deliberation" in the creation of new or modified regulations).

[25] *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 484 n.109 (2003) (surveying the literature on the "ossification" of the agency rulemaking process that some scholars have blamed on lengthy and cumbersome notice-and-comment procedures).

[26] *See id.* at 481–84 (describing notice-and-comment rulemaking as an "idealized legislative process" intended in part to make the enactment of new regulations more majoritarian).

availability of judicial review in Article III federal courts to those situations where some party with the ability and inclination to sue has suffered a redressable injury-in-fact.[27] Congress, however, may wish to take advantage of the agency-external, plaintiff-initiated legal system as a check on executive action and make this system available at a stage of agency action during which injuries are still hypothetical.[28] For instance, where an environmental statute protects against long-term harm, by the time an individual plaintiff has standing under *Lujan*, it may be too late to mitigate the harm. Congress may also wish to permit citizen enforcement of a statute whose benefits are intended to accrue to society generally. Indeed, if citizen suits in non-Article III tribunals are possible, and Congress is free to establish these tribunals with more flexible procedures than the Article III courts are equipped to provide,[29] such tribunals might provide a suitable forum for the adjudication of complex, "polycentric" regulatory disputes that some scholars have suggested ordinary courts are ill-equipped to handle.[30]

At least one commentator, writing before *Lujan*, has suggested that non-Article III judicial bodies—such as Article I "legislative courts"—might serve as a forum for hearing citizen suits.[31] The purpose of this article is to explore whether Article I courts might indeed provide a way, consistent with *Lujan*, for Congress to provide for these kinds of judicial challenges to government action or inaction.

B. Article I Courts: A Solution?

It is well-established—through long practice if not always coherent theory[32]—that Congress has the power to create Article I courts to

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27 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 564 & n.2 (1992) (discussing "actual or imminent" harm requirement).

28 *See* Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 764–65 (1994) (describing Congress's motivations for augmenting the Clean Air Act with a citizen suit provision, as well as some of the ways in which Congress—by legislative means rather than standing requirements—limited the availability of citizen suits to minimize frivolous litigation).

29 *See infra* Part III (discussing the flexible procedures available in both Court of Federal Claims advisory cases and in the Australian Administrative Appeals Tribunal).

30 *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that the traditional adversarial system is ill-equipped to handle problems, called "polycentric," with complicated effects on a multiplicity of parties).

31 James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675, 684–89 (1989).

32 *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990) ("The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined.").

hear certain classes of disputes.[33] The literature of the federal courts is rich with examinations of the degree to which the judicial power can be extended to these non-Article III tribunals.[34] Much of the concern over extending judicial power to non-Article III tribunals stems from the uncertainty surrounding whether, or when, Congress may withdraw from the jurisdiction of Article III courts—and assign to some non-Article III federal decision maker—cases that fall within the jurisdictional heads of Article III, which does place at least some uncertain constraints on the power of Congress to invest judicial power in non-Article III bodies.[35] In the words of Justice O'Connor, Article III "serves both to protect the role of the independent judiciary within the constitutional scheme" and "to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government."[36] At the same time, Article III is not absolute.[37] At a minimum, Congress can assign disputes on specialized topics within the reach of its substantive lawmaking powers to non-Article III administrative decision makers, at least if the decisions are subject to judicial review and/or enforcement and the disputes are related to a comprehensive federal program, even if parts of them arise under state law.[38] It can also assign appropriate cases to territorial courts[39] and military tribunals,[40] and can create courts to adjudicate so-called "public rights" disputes.[41]

However, Article I citizen suit tribunals pose a different problem. They would probably not constitute a withdrawal of Article III jurisdiction in the first place because citizen suits involve, by their very nature, a plaintiff who has no Article III "case."[42] The question, then,

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[33] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–64 (1982); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

[34] *E.g.*, Bator, *supra* note 32; Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990); Judith Resnick, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002).

[35] *See, e.g.*, *N. Pipeline Constr. Co.*, 458 U.S. at 50 (holding that granting broad jurisdiction to non-Article III bankruptcy judges is unconstitutional); *Murray's Lessee*, 59 U.S. (18 How.) at 284 (arguing that Congress cannot "withdraw from judicial [Article III] cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty").

[36] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quotations and citations omitted).

[37] *See id.* ("Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court.").

[38] *See id.* at 851–57 (1986).

[39] *E.g.*, Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

[40] *E.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[41] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982).

[42] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1892).

is not whether Congress can take an Article III case and entrust it to another federal adjudicative body; rather, the question is whether Congress can authorize the adjudication in *any* forum of a "non-case"—in particular, these "non-cases"—*outside* Article III. Congress can grant federal courts and tribunals—within and without Article III—the power, as a matter of supplemental jurisdiction, to hear claims, such as state law claims between citizens of the same state, that fall outside the Article III heads of jurisdiction.[43] And adjudicatory decisions outside the scope of adversarial "cases" are conducted by executive officials daily.[44] Article III does not impose an absolute limit on the ability of Congress to grant judicial powers outside the Article III heads to Article I bodies.[45] However, there are a number of reasons why Congress might be otherwise limited in its power to establish legislative courts to hear citizen suits, and these reasons are the subject of this article.

Part II of this article will explore a number of arguments as to why the constitutionality of citizen suit tribunals—even in non-Article III fora—is a close and vexing question under U.S. case law, at least where binding judgments are to be issued and appellate review is necessary or desirable. Part III of this article will then look at two possible case studies, one domestic, and one foreign: the congressional reference jurisdiction of the U.S. Court of Federal Claims and the Australian Administrative Appeals Tribunal.

This article will neither analyze the correctness of the *Lujan* standing model[46] nor take a position on the wisdom of permitting citizen

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[43] In Article III fora, see 28 U.S.C. § 1367 (2000) (granting supplemental jurisdiction over state law claims to the U.S. district courts); United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966) (granting same and upholding constitutionality, as a matter of common law). In non-Article III fora, see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding supplemental jurisdiction of state-law claims by the administrative Commodity Futures Tradition Commission). Formally, of course, causes of action falling within the supplemental jurisdiction of a court may be seen as part of the same "case" as the main cause of action. More broadly, though, the availability of supplemental jurisdiction—given the right procedural posture—suggests that the power of federal courts can in some circumstances extend somewhat beyond the questions that a direct reading of Article III would imply.

[44] *See* Bator, *supra* note 32, at 264–65 (discussing how executive branch officials must regularly exercise effectively judicial power in applying their understanding of the relevant law to their execution of it).

[45] *But see* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 282–84 (1990) (arguing for a common "case or controversy" standard in state and federal courts). The logical consequence of Fletcher's arguments—that limited Article III justiciability requirements should apply equally in state and federal courts so as to preserve the integrity of judicial power and ensure the availability of Supreme Court review—is that the same standard should apply in non-Article III federal tribunals as well.

[46] *Compare* Sunstein, *supra* note 1, *with* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993).

suits, within Article III courts or without.[47] Its sole focus is the constitutionality of assigning such suits (which Congress has for its own reasons authorized from time to time) to Article I tribunals (which Congress has likewise created, for other purposes). The ultimate conclusion of this article is that granting authority to adjudicate citizen suits to Article I tribunals is constitutional even when the tribunals are given the power to issue binding judgments. Prudential standing concerns mean that non-Article III tribunals should only hear "non-cases" in the presence of a clear congressional command—but Congress is free to give that command.

II. ARE CITIZEN SUITS IN ARTICLE I TRIBUNALS CONSTITUTIONALLY PERMISSIBLE?

Even if standing is formally an Article III doctrine that does not constrain legislative courts and similar non-Article III tribunals directly, a number of other constitutional concerns plague any attempt to grant citizen suit jurisdiction to a non-Article III tribunal.

Preliminarily, it is worth noting that the citizen suits in non-Article III tribunals are particularly suspect if citizen suit jurisdiction is to extend to suits against nongovernmental actors.[48] Citizen suits against nongovernmental defendants implicate the individual rights of those defendants, and thus there is a stronger argument for requiring that they be conducted in a tribunal with Article III protections. Indeed, perhaps the most important aspect of the Article III standing requirement is that it prevents private litigants from being haled into court in the absence of a legal controversy with a particular plaintiff. Defending against lawsuits is burdensome; it is probably inappropriate, if not unconstitutional, to require private parties to shoulder this burden in the absence of a plaintiff who has suffered an alleged injury-in-fact at the hands of the defendant. The same concern does not apply, however, to suits against the federal government and against governmental actors who will be defended by the federal government. Any protection that the United States might have against vexatious litigation is Congress's to waive. Accordingly, this article will focus on the prospect of a citizen suit tribunal whose purpose is to remedy *government* action or inaction.

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[47] For an intriguing article suggesting that, at least some of the time, environmental citizen suit provisions may do more harm than good, see Adler, *supra* note 17.

[48] The suit in *Laidlaw* fell into this category. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 175–76 (2000) (describing Laidlaw as a nongovernmental actor); *see also infra* Part II.E.

Part II.A of this article addresses the foremost among the problems that a non-Article III citizen suit tribunal faces even if it is to adjudicate disputes involving governmental actors: whether it is constitutional for such a tribunal to issue a binding judgment. Although a non-Article III citizen suit might result in a purely advisory, non-binding declaration—in which case its constitutionality is fairly certain[49]—Congress might also want to confer the power to issue binding judgments, backed by the full coercive power of the government.

Part II.B of this article addresses a second important question that arises if citizen suit tribunal decisions are to be binding: whether they can receive appellate review in an Article III court. If so, the constitutional concerns arising from a non-Article III tribunal might be substantially alleviated.[50] Parts II.C and II.D of this article address additional questions that arise as to whether Article II or other separation of powers concerns pose an alternate barrier to hearing citizen suit cases, questions that cut to the core of the United States government's structure.[51] Finally, Part II.E of this article will suggest that where citizen suits are against government officials rather than private parties, they likely fall within the set of "public rights" that may already be granted to non-Article III tribunals.[52] Ultimately, Article I citizen suits are viable, but Part II will examine each of the potential issues in turn.

A. The Enforcement Problem—Can a Non-Article III Court Issue Binding Orders?

The most serious problem facing any proposal to grant jurisdiction over citizen suits to an Article I tribunal is the question of how—or whether—that tribunal's judgments are enforceable. The Supreme Court has repeatedly held that one factor supporting the constitutionality of an Article I adjudication is that the adjudication does not attempt to issue binding judgments.[53] There are two underlying argu-

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[49] *See infra* text accompanying notes 57–59.

[50] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334–35 (1816) (arguing that federal questions must be able to be heard in federal court, but that a hearing on appeal is adequate); *infra* note 73 and accompanying text.

[51] *See* Flast v. Cohen, 392 U.S. 83, 94 (1967) (remarking that the terms "cases" and "controversies" have "an iceberg quality," containing "submerged complexities which go to the very heart of our constitutional form of government").

[52] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (discussing the "public rights" doctrine, which allows matters to be acted upon by the judicial power); *supra* note 41.

[53] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986). Writing for the Court, Justice O'Connor contrasted the constitutionally-permissible Article I adjudications in *Crowell v. Benson*, 285 U.S. 22 (1932), and in *Schor*—both of which involved orders that could only be enforced by action in an Article III district court—with the adjudication held

ments. First, coercive power is dangerous—only Article III courts, with their guarantees of judicial independence, should have the power to, for instance, imprison someone for contempt of court should they disobey an injunction.[54] Second, the power to issue binding orders is an "essential attribute[] of judicial power" that Article III requires be vested in Article III courts.[55] The latter objection is one instance of the limitations on Article I tribunals generally, discussed above.[56] The former, however, poses a new problem: Does the Constitution require that coercive action be undertaken only by the constitutionally independent Article III judiciary?

Conceivably, a citizen suit tribunal might be limited to purely advisory declarations, not backed by force of law but nonetheless useful as an opportunity for litigants to air grievances before a neutral tribunal and perhaps difficult as a political matter for government actors to ignore.[57] A government official losing a citizen suit would probably be under significant political pressure to comply even without a formally binding order; many government officials would probably think

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impermissible in *N. Pipeline Constr. Co.*, 458 U.S. 50, which invalidated a scheme in which non-Article III bankruptcy judges could issue coercive orders directly.

[54] *See* Fed. Mar. Comm'n. v. S.C. State Ports Auth., 535 U.S. 743, 761 (2002) (contrasting the contempt power of courts with the inability of the Federal Maritime Commission (FMC) to issue binding orders). Intriguingly, in this case, the Court found this difference unavailing as to the question presented: whether a state agency should be entitled to sovereign immunity in an administrative proceeding. *Id.* The Court emphasized the similarities between Article III court proceedings and administrative adjudications, noting the procedural safeguards that administrative proceedings, though falling outside of Article III, typically possessed. *Id.* at 756–57 (citing Butz v. Economou, 438 U.S. 478, 513–14 (1978)). One can argue from *FMC* that Article I courts—being similar to Article III courts, and perhaps possessing parallel safeguards against judicial overreaching—should be subject to the same standing restrictions as Article III courts. The inference might point in the opposite direction, however: standing requirements are intended to enforce separation of powers, not the rights of litigants, and where procedural safeguards are statutorily available (as they might be in a bindingly-adjudicating citizen suit tribunal), *FMC* suggests that there is little reason to withhold power from a tribunal just because it has not been created under Article III. For example, the Court noted, with no apparent disfavor, the ability of administrative law judges to issue subpoenas. *Id.* at 756 (citing *Butz*, 438 U.S. at 513).

[55] *See N. Pipeline Constr. Co.*, 458 U.S. at 81 (quotations omitted).

[56] *See* discussion *supra* Part I.B.

[57] By way of comparison, the U.S. Court of Claims functioned successfully for decades without a guarantee that its judgments would be paid. *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 659–60, 680–82 (1985). As a practical matter, the vast majority of judgments were paid. *Id.* at 659–62. To this day, advisory judgments of the Court of Federal Claims have no independent legal force, and there is no requirement that they be paid—they are but recommendations to Congress—but as a matter of practice, most are. *See infra* Part III.A. Of course, a suit requesting that funds from the treasury be paid out by Congress is not quite analogous to a suit demanding individual executive action: in the Court of Claims' case, the same body that had established the tribunal as a matter of convenience—Congress—was being asked to respect the tribunal's judgments.

twice before publicly proceeding with action adjudicated to be illegal. And if defendant officials ignore a judgment of the tribunal, alternate plaintiffs who do have an Article III injury-in-fact might still come forward with an action of their own in an Article III court, using the tribunal's judgment for its persuasive effect. The risks and costs of such a suit would probably be considerably lower than the risks and costs of bringing an action for the first time.[58] Like advisory judgments of the Court of Federal Claims, the granting of such purely advisory authority to an Article I "court" would probably be comparatively uncontroversial.[59]

However, an Article I court with the power to issue fully binding judgments would be a more complete replacement for the Article III citizen suits that *Lujan* precludes, and such an Article I court may yet be possible. The presumption against letting Article I decision makers issue binding judgments is not absolute. Article I legislative courts have been granted the power to issue binding orders directly and enforce them by fine or imprisonment.[60] Indeed, Congress itself has the ability to punish contempt to avoid the potential for political abuse. This is typically accomplished by means of a criminal proceeding in an Article III court,[61] but Congress retains the inherent power to punish contempt insofar as is necessary to carry out its functions.[62] The judgments of certain administrative agencies also become binding automatically after a certain time.[63] Those that do not are typically

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58 Indeed, the granting of preclusive or nearly-preclusive effect to the decisions of non-Article III adjudicators is well established; administrative factfinders are traditionally given great deference in Article III enforcement proceedings. *See* Martin Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 217 (citing Local 13, Detroit Newspaper Printing & Graphic Commc'n Union v. NLRB, 598 F.2d 267, 272 (D.C. Cir. 1979)). Even if such preclusive effect is not afforded to the judgments of an advisory citizen suit tribunal because it is not adjudicating "cases," the legal conclusions of the advisory tribunal may have persuasive effect, and the fact that the case has been effectively litigated already may reduce litigation costs to a potential plaintiff who does have standing and who wishes to bring suit in an Article III court.

59 *See infra* Part III.A.

60 *See* 28 U.S.C. § 2521(b) (2000) (granting to the Article I Court of Federal Claims the power "to punish by fine or imprisonment, at its discretion, such contempt of its authority as . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command").

61 *E.g.*, 2 U.S.C. § 192 (2000) (making refusal to testify or produce papers in a congressional investigation a misdemeanor); Hutcheson v. United States, 369 U.S. 599 (1962) (upholding conviction for same).

62 *See* Marshall v. Gordon, 243 U.S. 521, 540–45 (1917). The Court distinguished punitive sanctions from those necessary to carry out the functions of Congress. *Id.* at 542. In the case at hand, the petitioner was being held for having been "defamatory and insulting"; the Court determined that punishment for such alleged offenses was beyond the power of Congress to impose directly. *Id.* at 540, 545–46, 548. By way of contrast, the Court suggested that imprisonment of someone until such time as they agreed to testify would be constitutional. *Id.* at 543–44.

63 For example, decisions of the Federal Trade Commission become binding automatically

afforded great deference in subsequent enforcement proceedings, a fact that one commentator has argued renders practically meaningless the distinction between limiting the power of an adjudicator by requiring an Article III enforcement proceeding and simply allowing appeals to be taken to an Article III court.[64] Furthermore, the District of Columbia[65] and territorial courts,[66] though established by Congress outside Article III, are able to issue binding judgments.

Most broadly, that there is no blanket constitutional prohibition on allowing tribunals without Article III protections to exercise coercive authority is evident from the presence of state courts in the constitutional plan.[67] By definition, state courts lack Article III protections—for instance, their judges are often elected.[68] Yet their decisions are fully preclusive on the federal courts,[69] and they have concurrent jurisdiction over most federal causes of action.[70] Indeed, with a brief exception in 1801, it was not until 1875 that federal question jurisdiction was granted to the federal courts—until then, state courts were the exclusive forum for most federal causes of action.[71]

The acceptability of non-Article III state courts leaves open the possibility that there is a unique constitutional problem with *federal* tribunals created outside Article III. However, this possibility—at least at its most absolute—is belied by the apparent acceptance of Article I tribunals in the various other contexts discussed here.[72] More serious remaining challenges to the constitutionality of an Article I citizen suit tribunal come from the issues that the next sections will address: whether such a tribunal's judgments can be reviewable in an

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if the period for filing a petition for review elapses. *See* 15 U.S.C. § 45(g) (2000).

[64] Redish, *supra* note 58, at 216–19. *See infra* Part II.B for a discussion of whether and when orders of a citizen suit tribunal might be appealable to an Article III court.

[65] *See* Swain v. Pressley, 430 U.S. 372, 375–76 & n.4 (1977) (describing the District of Columbia court system and upholding criminal convictions by it).

[66] *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 516 (1828) (upholding judicial powers of the territorial courts of Florida).

[67] *See, e.g.*, THE FEDERALIST NO. 82 (Alexander Hamilton) (arguing for concurrent jurisdiction in the state courts over federal questions).

[68] *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

[69] *See* Allen v. McCurry, 449 U.S. 90, 95–96 (1980).

[70] *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) ("In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction.").

[71] *Compare* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470–71 (1875) (conferring federal question jurisdiction on federal courts), *and* Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801) (same), *with* Act of Mar. 8, 1802, ch. 8, 2 Stat. 182 (1802) (repealing 1801 grant of federal question jurisdiction). *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 145 (1968).

[72] *See supra* Part I.B (discussing types of cases that can be, and are, placed in the jurisdiction of Article I tribunals).

Article III court (which would be a significant, and perhaps necessary, factor weighing in favor of their constitutionality) and whether such a tribunal would raise independent separation of powers problems.

B. The Ability to Appeal from a Citizen Suit Tribunal to an Article III Court

A great deal of authority suggests that an important reason why adjudications by non-Article III decision makers is constitutional is the availability of appeals to Article III courts, particularly where constitutional defenses are implicated.[73] The reviewability of decisions by an Article I citizen suit tribunal thus becomes important to the constitutionality of such a tribunal, particularly if such a court is to issue binding judgments.[74] The question of appealability requires different analyses in each of the two possible outcomes for an adjudication of a claim: (1) a judgment for the citizen-plaintiff challenging government action and ordering a government official to obey the law; and (2) a judgment for the defendant government officials, whereupon the status quo is preserved.

A judgment for the citizen-plaintiff is the situation in which the appealability concerns brought out by coercive judgments are important, because it is only in this situation that anyone is coerced by the judgment of the court. However, one recent Supreme Court case, *ASARCO v. Kadish*, suggests that even where original plaintiffs lack standing in an initial citizen-suit lawsuit, the defendants affected by an adverse judgment will have standing to appeal.[75] Some state court systems permit citizen suits, and in *ASARCO*, the Supreme Court confronted the problem of whether these suits can be appealed to Article III courts (in this case the Supreme Court) despite the plaintiffs' lack of standing.[76] The Court applied its test for standing not to the original plaintiffs, but to the petitioners—state officials who had received an adverse judgment in the state court. The Court observed

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[73] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334–35 (1816) (arguing that cases arising under federal question jurisdiction must be able to be heard in federal court either originally or on appeal); Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Limit the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 70 (1981) (arguing that where constitutional claims are concerned, the Article III federal courts cannot be completely deprived of jurisdiction). *Cf.* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (arguing that due process requires that deprivations of life, liberty, or property be judicially reviewable).

[74] If its judgments are non-binding, then any enforcement would have to be done in an Article III court.

[75] *See* ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989).

[76] *Id.*

that if it "were to agree with petitioners, [its] reversal of the decision below would remove its disabling effects upon them."[77] The Court further held that the lower court decision constituted an actual injury.[78] It thus concluded that the petitioners had standing, and that the Court could hear the appeal.[79] A similar argument would likely apply to defendants in a citizen suit tribunal who attempt to appeal an adverse judgment; *ASARCO* suggests that there would be no constitutional bar to their standing to appeal, and a statutory bar (which would itself pose constitutional difficulties[80]) is avoidable by means of an appropriately drafted jurisdictional statute.[81]

In the second situation, a judgment for the defendants, no appeal would be available; standing is as necessary on appeal as in an original suit.[82] A citizen-plaintiff lacking standing thus would be unable to appeal an adverse ruling from a citizen suit tribunal in an Article III court. Since that same citizen-plaintiff lacks any judicially cognizable injury, the absence of a provision for review (in an Article III court or otherwise) would be unlikely to raise any constitutional problems.[83] If there were constitutional difficulties in denying citizen-plaintiffs an Article III forum in which to air their grievances, it would be anomalous indeed to systematically dismiss such suits for lack of standing from Article III courts.

On the other hand, it is not clear whether *ASARCO* can be extended this far. The *ASARCO* decision rested in part on the importance of deference to and respect for state court judgments; the Supreme Court found itself in the paradoxical situation of having to choose between reviewing a case that, when initially brought, did not meet Article III requirements, and having to vacate a state court judgment rendered within the state court's rightful authority.[84] Citing its respective treatment of lower federal courts and state courts in the

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[77] *Id.* at 618–19.

[78] *Id.*

[79] *Id.* at 619.

[80] *See* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948); discussion *supra* accompanying note 73.

[81] Even without a direct appeal route, however, some of the constitutional difficulties might be resolved by recourse to habeas corpus. Although habeas corpus applies only to deprivations of liberty, *see* 28 U.S.C. § 2241 (2000), *amended by* Acts of Dec. 30, 2005 and Jan. 6, 2006, 28 U.S.C.A. § 2241 (West 2006), "its historical core" is "as a means of reviewing the legality of Executive detention," INS v. St. Cyr, 533 U.S. 289, 301 (2001), which is what a detention imposed as a contempt sanction by a non-Article III tribunal would, in some sense, be.

[82] *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.").

[83] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (dismissing citizen suit for lack of standing).

[84] *ASARCO*, 490 U.S. at 620–21 & n.1.

mootness context,[85] the Court expressed resistance to the idea that it could reasonably take the latter course and vacate the state court judgment, given that the judgment was legal by the laws of the state and that concurrent jurisdiction over federal questions is within the "proper role" of state courts.[86] *ASARCO* thus rests, at least in part, on federalism concerns that do not apply to an Article I federal citizen suit tribunal: as to federal courts, the Supreme Court's role is "supervisory," and there is no reason for the Court not to interfere by taking an appeal where the case could not have been brought under Article III.[87]

The force of this counterargument is significantly reduced, however, by the different postures of a lower Article III court and a hypothetical citizen suit tribunal. The reason why the Supreme Court takes a "supervisory" role with lower federal courts, and does not hesitate to vacate judgments in cases that fail to meet Article III justiciability requirements, is that lower federal courts are bound by Article III, and the Supreme Court's role is in part to ensure that they correctly apply Article III's requirements.[88] In comparison, for the Supreme Court to enforce Article III justiciability requirements on a non-Article III tribunal on the grounds that federal courts, unlike state courts, are bound by Article III is to beg the question of whether non-Article III tribunals are subject to those justiciability requirements. It is quite possible that Article I courts, if so empowered by Congress, may issue binding judgments in suits that do not qualify as "cases" under Article III. If the only impediment to such judgments is the lack of Article III *appellate* justiciability, it would be paradoxical, or at least awkwardly circular, to rule that such judgments are impermissible because of the lack of appeals, but that appeals are impermissible because of the impermissibility of the judgments. A simpler reading of *ASARCO* might be to interpret the section on federalism as rightly distinguishing state courts from Article III federal courts, but remaining silent as to other federal adjudicators. Under this reading, while the federalism rationale supporting Supreme Court appellate jurisdiction in *ASARCO* does not support appellate jurisdiction in a citizen suit tribunal, neither does it argue against appellate jurisdiction there. The other primary argument that the *ASARCO* Court made in favor of appellate jurisdiction—that a losing defendant in the lower court might suffer

[85] When the controversy has become moot, the Court's standard procedure is to vacate lower federal court judgments and remand with instructions to dismiss, but to dismiss appeals from state high courts and leave the underlying judgment undisturbed. *Id.* at 621 n.1.

[86] *Id.* at 620.

[87] *Id.* at 621 n.1.

[88] *See id.* at 620–21.

an actual injury-in-fact from an adverse binding judgment, even where the plaintiff lacked one[89]—still holds.[90]

A second troubling aspect of extending *ASARCO* is the asymmetry between losing citizen-plaintiffs, who cannot appeal, and losing defendants, who can.[91] However, a number of factors mitigate the effects of this seemingly bizarre result. First, the plaintiffs who are put at a disadvantage are by definition not injured parties; they have suffered no constitutionally cognizable harm, and they may be assumed to have entered the potentially-asymmetrical adjudication aware of their risks. Second, to the extent that the asymmetry gives the citizen suit tribunal an incentive to decide cases in one direction so as to avoid appellate review, this incentive probably points in the less-damaging direction, favoring a presumption of regularity and an assumption that the challenged regulations are legal.[92] Finally, asymmetries in appellate proceedings are not completely alien to American jurisprudence: most notably, when a criminal defendant wins at the trial level, the government generally has no right to appeal.[93] Thus, although *ASARCO* is not as unambiguous as it may first appear, it probably supports a right on the part of a losing citizen suit defendant to appeal an adverse binding ruling, and this in turn puts any binding rulings within the supervision of the Article III courts. The biggest factor weighing in favor of the constitutionality of such judgments—Article III review—is thus likely available.

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[89] *Id.* at 618–19.

[90] *See also* Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 101–08 (1994). Stern argued that the core concern of *ASARCO* was upholding the separation-of-powers requirement that Article III courts adjudicate only real cases between parties, but that this requirement is fulfilled—and the separation of powers concerns addressed—where a party has had its legal interests impinged by a binding adverse judgment, regardless of the standing of the original plaintiff. *Id.* Stern distinguished *Diamond v. Charles*, 476 U.S. 54 (1986), which held that an adverse judgment by itself is not enough to support standing on appeal, on the grounds that in *Diamond* the defendant was an intervenor who suffered no actual legal injury when the side with which he had aligned himself in the lower court litigation lost. *Id.* at 105–06.

[91] *See* Fletcher, *supra* note 45, at 280–82. Professor Fletcher argued against the *ASARCO* decision because it "makes appellate review available in a perversely asymmetrical way." *Id.* at 281.

[92] In contrast, Professor Fletcher's primary argument against the asymmetry in *ASARCO* was that the presumption favored the wrong side in the state court context: state court judgments, he argued, are most in need of Supreme Court review where they have failed to strike down a state law on federal grounds—the state of affairs where a citizen-plaintiff loses and the judgment is unreviewable. *Id.*

[93] *E.g.*, United States v. DiFrancesco, 449 U.S. 117, 126–31 (1980).

C. The Unitary Executive and the Take Care Clause

Another likely source for a limitation on the power of Congress to create Article I citizen suit tribunals is the Take Care Clause of Article II.[94] In addition to the core Article III argument, *Lujan* itself rested partially on an Article II argument.[95] Writing for the Court, Justice Scalia wrote that

> [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[96]

Professor Cass Sunstein has forcefully attacked this holding, arguing that Scalia's insistence on a "'unitary executive' . . . free from interference by others"[97] is undermined by the clear availability of the judiciary to "interfere" with executive action when a plaintiff who does have a cognizable injury-in-fact—and thus standing—brings suit.[98] In Sunstein's view, the Article II critique of citizen standing rests on the premise that "oversight of bureaucratic implementation falls to the President, not to Congress or the courts";[99] the problem with citizen suits under this argument is that they represent an intrusion on the power of the executive to freely execute the law.[100] Sunstein then dismisses the Article II argument, rightly pointing out that there is no more interference with a challenged administrative agency when a citizen plaintiff sues than when a plaintiff with an injury-in-fact—in the case of *Lujan*, perhaps just a plane ticket to go see endangered animals[101]—does so.[102] If Sunstein is correct, the Take Care Clause should have no impact on the ability of a citizen plaintiff to challenge government action, whether in an Article III court or in an Article I tribunal. The ability of courts to "interfere" with executive

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[94] "[The President] shall take Care that the Laws be faithfully executed . . ." U.S. CONST. art. II, § 3, cl. 4.

[95] Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

[96] *Id.*

[97] Sunstein, *supra* note 1, at 212 (citing Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting)).

[98] *Id.* at 213.

[99] *Id.* at 212.

[100] *See id.* at 213.

[101] *See Lujan*, 504 U.S. at 592 (Blackmun, J., dissenting).

[102] *See* Sunstein, *supra* note 1, at 213.

action by ordering relief in ordinary Article III suits is well-established.[103]

There is a more subtle Take Care Clause argument against citizen suits, however, that might still have some bite against them even in a non-Article III tribunal: that they interfere not with the executive as a defendant, but with the executive as a potential plaintiff.[104] According to this view, which is probably at least part of the conception of the Take Care Clause held by Justice Scalia,[105] the problem with citizen suits is that they permit members of the public to serve as "private attorneys-general" vindicating not individuated rights of a minority, but the generalized interests of the majority.[106]

This sort of interference with the executive would pose difficulties for citizen suits in Article I tribunals as much as for Article III tribunals, but it has certain weaknesses. Most notably, there exists a centuries-long history of private enforcement actions, including *qui tam* and relator actions, which historically permitted plaintiffs with no personal injury to sue in place of the government.[107] The Supreme

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[103] *See id.*

[104] *See Lujan*, 504 U.S. at 576 (arguing that "[v]indicating the *public* interest" is the prerogative of Congress and the Chief Executive). That Sunstein's understanding of the Take Care argument is of the former type is evident from his conclusion that the Take Care concern is "entirely inapplicable when the executive is not . . . a party," as when the citizen suit is against a private defendant. Sunstein, *supra* note 1, at 231. Sunstein makes passing mention of the possibility that the Take Care violation occurs when a suit interferes with prosecutorial discretion, but dismisses that argument as "surely" lacking constitutional status. *Id.* at 231 n.300. But the interference with prosecution appears to be the more forceful concern: the argument is that only the executive has the power to take care that laws are enforced by suing *in parens patriae* on behalf of a generalized public interest. *See* Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 138 (1976).

One scholar has approached the relationship between prosecutorial authority and standing from the opposite direction and argued that the ability of the United States to bring suit in criminal prosecutions undermines the claim that plaintiffs must be personally injured to have standing. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2248 (1999). Interestingly, Hartnett's approach suggests an interpretation of the Article II Take Care Clause that both undermines his argument and supports the constitutionality of Article I citizen suits. If standing is indeed an Article III doctrine that requires a plaintiff to have a personal stake in litigation, the Take Care Clause might provide that stake with respect to prosecutions: as the official entrusted to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, cl. 4, the President might under the Take Care Clause have just that personal stake in vindicating the public interest, and only he or she would have the power to prosecute "standing-less" criminal suits in the Article III courts to vindicate public interests. This conception of the Take Care Clause is an affirmative grant of standing rather than an independent limitation on the power of others to sue, and therefore would not adversely affect the constitutionality of citizen suits outside Article III courts.

[105] *See Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting) (arguing that independent prosecutors represent an unconstitutional usurpation of the executive's authority to control criminal prosecutions).

[106] *See* Krent & Shenkman, *supra* note 46, at 1800–01, 1805–08.

[107] For example, in *Steel Co.*, Justice Stevens cited a long American history of private criminal prosecutions in nineteenth-century American state courts. Steel Co. v. Citizens for a

Court has upheld the Article III standing of *qui tam* relators,[108] and although it avoided deciding their constitutionality under the Take Care Clause, it held that this question was not "a jurisdictional issue" that needed to be resolved before deciding the merits.[109] The consensus position on the Court seems to be that despite Justice Scalia's discussion of Article II in *Lujan*,[110] even though standing jurisprudence "may sometimes have an impact on Presidential powers," the jurisdictional question of whether a litigant has standing is decided under "Article III and not Article II."[111] Notably, perhaps, Justice Scalia's scathing attack in *Morrison v. Olson* on the power to vest prosecutorial authority in independent prosecutors came in dissent.[112]

In summary, then, the Article II Take Care Clause might well pose some obstacle to enforcement of the law by means of citizen suits in non-Article I courts, but the scope of any such limitation is at best uncertain.[113] Citizen suits differ from *qui tam* actions in that the citizen-plaintiff lacks a personal stake altogether rather than, at least formally, sharing in the recovery the government is owed.[114] On the other hand, it is unclear whether this matters and whether it hurts or helps the constitutionality of citizen suits; the petitions brought before a citizen suit tribunal need not comprise suits that could also be brought as criminal prosecutions, nor do they—as in the case of *qui tam* actions—need to implicate the possibility of money rightfully owed the government being paid to a private and uninjured complainant.[115] Article II may well prohibit at least some classes of citizen suits in any type of tribunal, but it appears that at least some are permissible,[116] and in any case any prohibition appears to bar certain

Better Environment, 523 U.S. 83, 127–28 n.15 (1998) (Stevens, J., concurring in the judgment). Professor Hartnett has also noted that at least in England, the extraordinary writs of prohibition, mandamus, and certiorari could also be sought by any citizen, even one without a direct stake in litigation. *See* Hartnett, *supra* note 104, at 2241 n.15.

[108] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 (2000).

[109] *Id.* at 778 n.8.

[110] Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

[111] *Steel Co.*, 523 U.S. at 102 n.4.

[112] Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

[113] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (suggesting that citizen suits, even where Article III standing is present, might raise Article II concerns, but refraining from deciding what they might be).

[114] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772 (2000).

[115] *See id.* (describing nature of recovered damages in *qui tam* actions); *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring) (expressing concern with the exaction of public fines by a private litigant).

[116] *See* Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 418 (2001).

(unspecified) relief rather than damaging the jurisdiction of any court, in or out of Article III.[117]

D. Other Separation of Powers Concerns

While Article II raises some concerns about citizen suits that would apply equally to Article III and non-Article III fora, the unique nature of non-Article III fora raises additional concerns that might not apply under Article III, even if citizen suits were possible in Article III courts. In several different contexts, the Supreme Court has struck down clever legislative schemes in which Congress or a body under its control attempted to maintain control over the enforcement of legislation,[118] or alter the way in which legislation can be enacted or repealed.[119] If, in general, it is the province of Congress to "make all Laws . . . necessary and proper" to wield the powers of the federal government,[120] and of the President to "take Care that the Laws be faithfully executed,"[121] separation of powers might dictate that the powers to interpret legislation, to strike legislation down as unconstitutional, and to declare executive action illegal are reserved to the courts.[122]

These traditional powers of the judiciary cannot be exercised by Congress, even as an incident to the Necessary and Proper Clause,[123] because all involve altering the effective scope of a validly enacted[124] statute, an action that is in effect similar to passing an amended law or a repeal.[125] Read strictly, the Constitution might be interpreted to require that the only bodies that can perform these functions without following the Presentment Clause[126] requirements are Article III deci-

[117] *See Vt. Agency of Natural Res.*, 529 U.S. at 778 n.8.

[118] *See* Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) (holding unconstitutional a requirement that an agency board comprise nine members of Congress); INS v. Chadha, 462 U.S. 919 (1983) (holding unconstitutional the one-House legislative veto).

[119] *See* Clinton v. City of New York, 524 U.S. 417 (1998) (holding unconstitutional the Line Item Veto Act).

[120] U.S. CONST. art. I, § 8, cl. 18.

[121] U.S. CONST. art. II, § 3.

[122] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). It is worth noting that many citizen suits against private actors would not implicate these concerns because in many cases they would not involve challenges either to the constitutionality of a statute or the behavior of the executive; rather, the dispositive question would be whether the private actor factually complied with the law.

[123] U.S. CONST. art. I, § 8, cl. 18.

[124] *See Clinton*, 524 U.S. at 438 & n.28.

[125] *See* INS v. Chadha, 462 U.S. 919, 952–54 (1982) (comparing the one-House legislative veto of a decision by the Attorney General to the passage of a statute compelling a different decision on his part).

[126] U.S. CONST. art. I, § 7, cl. 2, (describing procedure by which a bill must be passed by

sion makers whose constitutional role is to "say what the law is,"[127] not tribunals constituted as an exercise of congressional power.[128] But such a strict reading is not accurate, because the executive itself can—and, as a practical matter, must—interpret the scope of the laws it applies and is free to exercise discretion within the limits of their statutory language.[129]

As a legislative body, Congress appears to be more limited in its capacity to interpret the law. For example, even though every branch of government has a duty to obey the Constitution,[130] it seems certain that Congress itself could not decide that a previously-enacted statute is unconstitutional and discontinue its effect, at least without a presidential signature effecting its repeal or a two-thirds vote to override a presidential veto.[131] If the power to declare statutes unconstitutional and deny them future effect is an exclusive incident of the judicial power granted by Article III, then Congress may lack the authority to grant such power to a non-Article III tribunal. Moreover, while the ability of the judiciary to compel or enjoin executive action is well established, at least when the executive's acts fall outside his or her discretion,[132] the Supreme Court has ruled unconstitutional attempts by Congress to interfere directly with the implementation of enacted statutes, such as the one-House legislative veto at issue in *INS v. Chadha*.[133] The majority in *Chadha* held that the one-House legislative veto represented, in effect, the unlawful passage of a law by one

both Houses and signed by the President, or passed by two-thirds majority by both Houses, to become law).

[127] *Marbury*, 5 U.S. (1 Cranch) at 177.

[128] For example, the U.S. Court of Federal Claims, *see infra* Part III.A, was created to provide an efficient substitute for private bills brought before Congress requesting monetary relief. *See also* Shimomura, *supra* note 57, at 648–62 (describing the historical process by which Congress attempted to deal with claims against the United States).

[129] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (describing the procedure for judicial review of administrative actions, in which the agency must act as prescribed by law if the statute is clear, but can decide how to handle ambiguities and open questions itself so long as its answers are "permissible construction[s]" of the statute).

[130] *See Marbury*, 5 U.S. (1 Cranch) at 180 (holding that "[*C*]*ourts*, as well as other departments, are bound by" the Constitution).

[131] *See* U.S. CONST. art. I, § 7; Clinton v. City of New York, 524 U.S. 417, 448–49 (1998). *Cf.* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding that only courts, not Congress, have the power to determine what constitutes a violation of the Fourteenth Amendment).

[132] *See* Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925) (finding that writs of mandamus "can not be used to compel or control a duty in the discharge of which by law [an officer] is given discretion.").

[133] INS v. Chadha, 462 U.S. 919 (1982).

House of Congress, without acquiescence by the other house or approval of the President.[134]

However, the exact role of Article I courts in the constitutional separation of powers is not as clear as that:[135] Article I courts are not Congress. The term "Article I court" is perhaps misleading because the term refers more to the source of authority for the court's creation than to the status of the court itself in the constitutional scheme.[136] After all, Congress creates administrative agencies, empowered both to perform administrative adjudications and execute the laws, under its Article I authority, and yet these are rightly seen as part of the executive.

Rather than assume that an Article I court's powers are coextensive with Congress's, perhaps a better approach would be to analyze, first, the effect of granting power to an Article I court on the balance of political power among the branches,[137] and second, the form, composition, and accountability of such a court compared to the bodies it might supplant.[138] Under such an analysis, Article I courts fare relatively well. The one-House legislative veto that was ruled unconstitutional in *INS v. Chadha* represented an effective transfer of executive power from Article II officials to Congress itself, and consisted of an exercise of power by a component of Congress—a single House—not intended to ordinarily exercise legislative authority at all.[139] Likewise, the line-item veto ruled unconstitutional in *Clinton v. City of New York* represented a significant shift in power from Congress to the President, who for the first time could eliminate individual budget items directly, and involved the ability of the President, a single individual, to interfere with the results of legislative bargaining among representatives.[140] By contrast, Article I courts, at least as typically constituted, are relatively independent bodies, which, like the Arti-

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[134] *Id.* at 952–54.

[135] *See* Bator, *supra* note 32.

[136] *See, e.g.*, Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (finding that the legislatively created courts in the pre-statehood U.S. territory of Florida could not be endowed with the judicial power conferred by the United States Constitution regarding admiralty jurisdiction, but could obtain such power through an act of the territorial legislature of Florida).

[137] *See Chadha*, 462 U.S. at 945 ("Explicit and unambiguous provisions of the Constitution prescribe and define the *respective* functions of the Congress and of the Executive in the legislative process." (emphasis added)).

[138] *See id.* at 948–52 (emphasizing the importance of bicameralism and analyzing the "legislative character of the one-House veto" in light of "the character of the congressional action it supplants.").

[139] *Id.* at 462 U.S. at 948–51 (discussing the Framers' emphasis on bicameralism).

[140] Clinton v. City of New York, 524 U.S. 417 (1998). Note also the careful constitutional reservation of power over budgetary matters to the House of Representatives specifically. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . . .").

cle III judiciary, are not easily influenced by either the President or Congress;[141] though they fail to guarantee the full panoply of Article III protections to litigants, they do not obviously tip the balance of power among the branches in any particular direction. The dangers of interference with executive power are lessened by the fact that Congress's powers are not increased.

Moreover, Article I courts exist today and are given the opportunity to nullify executive action. As a particularly active example, the Tax Court regularly overturns decisions made by the IRS.[142] The reviewability of executive decision making by an Article I tribunal, far from undermining the power of the executive, can be seen as an integral part of a legislative scheme as validly passed by Congress and the Executive according to the "finely wrought and exhaustively considered . . . procedure" through which legislative power is exercised.[143] The presence or absence of standing is unimportant to this analysis; either way, the actions of the executive respecting a statute are, per the statute's own command, evaluated by an independent, apolitical administrator in a forum that is judicial in character. If this structure is acceptable for the Tax Court, it is difficult to see why it would be more problematic for a citizen suit tribunal.[144]

E. The "Public Rights" Doctrine

A final argument in favor of the constitutionality of citizen suit tribunals arises from a way to view them as within the scope of decisions already committed to Article I tribunals: "public rights" cases.[145] Those citizen suits that are against the United States and challenge the validity of executive action or inaction would likely fall within the rubric of "public rights," and would thus be amenable to

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[141] *See, e.g.*, 28 U.S.C. §§ 172, 176 (2000) (guaranteeing statutorily to Court of Federal Claims judges a term of fifteen years, terminable only for "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability," and salary "at the rate of pay, and in the same manner, as judges of the district courts").

[142] *See* WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 21 (13th ed. 2003). Of course, Tax Court decisions, like other Article I decisions that countermand executive action, are reviewable in Article III courts, suggesting that the issue of Article III reviewability may be dispositive in determining whether an Article I citizen suit tribunal is constitutional.

[143] *Chadha*, 462 U.S. at 951.

[144] It is possible that under this view, the power to rule a statute unconstitutional would stretch the limits of what could fairly be considered a part of the execution contemplated by the statute itself. Or, perhaps, ruling on constitutional questions might be the special prerogative of Article III courts. If rulings as to the validity of a statute, as opposed to rulings as to the validity of executive action under a statute, pose unique problems for an Article I tribunal, such jurisdiction can always be withheld from an Article I citizen suit tribunal without undermining the tribunal's utility.

[145] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–76 (1982) (defining the "public rights" doctrine and applying it to the Bankruptcy Reform Act).

adjudication by an Article I tribunal. Although the Supreme Court has never clearly defined a "public rights" dispute, a very rough definition would be a non-criminal matter between the government and a citizen concerning the exercise of government authority.[146] The canonical example is a suit for money damages against the United States,[147] but the category also includes disputes involving customs,[148] federal land grants,[149] and immigration.[150] The legality of non-Article III tribunals for public rights disputes is related to both sovereign immunity and separation of powers; the category corresponds roughly with areas where the choice of how to administer the law, and whether to grant relief, was a prerogative of the political branches of government.[151]

While suits for injunctive relief against executive officials have not traditionally required a waiver of sovereign immunity,[152] there is no reason why such suits could not be styled as suits against the government in the presence of an appropriate waiver, and if they were, would seem to fit within the "public rights" definition suggested by *Crowell v. Benson.*[153] Furthermore, although the Constitution may require the availability of Article III adjudication of suits alleging government misconduct where constitutional concerns are implicated,[154] it is almost definitional that a plaintiff without an "injury-in-

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[146] *See id.* at 67–68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[147] *See Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929).

[148] *See id.* at 458.

[149] *See id.* at 456.

[150] *See* Fallon, *supra* note 34, at 967. Immigration cases are, however, also subject to habeas review, at least when they involve detention. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

[151] *See N. Pipeline Constr. Co.*, 458 U.S. at 67–68.

[152] *See* United States v. Lee, 106 U.S. 196 (1882).

[153] "[T]he distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Crowell v. Benson, 285 U.S. 22, 50 (1932).

There is some tension between the public rights doctrine and the heightened importance of judicial independence in suits against the government, and this tension argues against expanding public rights beyond their historically supported, if illogical, contours. *See N. Pipeline Constr. Co.*, 458 U.S. at 68 n.20 ("Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact."). That said, even though the forum and thus the application of the public rights doctrine are novel here, there is a strong argument that citizen suits fit within the doctrine: they are effectively petitions requesting, as a matter of "sovereign grace," that the political branches correct the error of their ways. Such a petition, like a request for money damages paid from the public treasury, is a "matter[] that historically could have been determined exclusively by [the executive and legislative] departments." *Id.* at 68. For additional discussion of the tension inherent in the public rights doctrine, see Redish, *supra* note 58 (criticizing the doctrine).

[154] *See* Webster v. Doe, 486 U.S. 592, 603 (1988).

fact" would lack an injury of constitutional magnitude.[155] In any case, it does not follow that a suit brought before a non-Article III tribunal would be impermissible where the plaintiff chooses to bring it there.[156]

III. CASE STUDIES

A. Advisory Opinions in the Court of Federal Claims: A U.S. Precedent for Adjudicating "Non-Cases"

The claim that adjudication of disputes not falling within the Article III definition of "case or controversy" is constitutional when done by non-Article III tribunals is bolstered by precedents demonstrating that it has been done before. Trivial examples abound; because the line between executive action and adjudication is of necessity a fuzzy one, and administrative agencies must regularly make decisions that are judicial in character, the power of non-Article III federal government bodies to wield judicial power outside the confines of "cases or controversies" is clear, at least at the margins.[157] There also exists at least one clearer precedent in the U.S. court system: the explicit jurisdictional grant to the U.S. Court of Federal Claims to issue advisory opinions at the behest of Congress.[158]

The U.S. Court of Federal Claims is an Article I court[159] whose primary purpose is to hear claims for money damages against the United States government.[160] Such claims qualify as "cases or controversies" under Article III, as they are brought by a plaintiff who has been injured in some way and is demanding money damages. Indeed, in this core role, the Court of Federal Claims can *only* hear cases de-

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[155] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (defining an "injury-in-fact" as "an invasion of a legally protected interest").

[156] By way of comparison, the ability of plaintiffs to choose to litigate federal constitutional claims in state courts—non-Article III fora—is well established. *E.g.*, Nevada v. Hicks, 533 U.S. 353, 366–67 (2001) ("Under our system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. That this would be the case was assumed by the Framers.") (quotations and citations omitted).

[157] *See supra* note 44 and accompanying text; *see also* Resnick, *supra* note 34, at 619–20 (estimating that the life-tenured Article III judiciary is vastly outnumbered by administrative law judges, "hearing officers," "examiners," and similar civil servants who carry on judicial functions outside the formal and independent context of lawsuits as they are known in Article III).

[158] 28 U.S.C. § 1492 (2000) provides that "[a]ny bill, except a bill for a pension may be referred by either House of Congress" to the court "for a report in conformity with" procedures set forth in 28 U.S.C. § 2509.

[159] 28 U.S.C. § 171(a) (2000) ("The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States.").

[160] *See The History of the United States Court of Federal Claims*, http://www.uscfc.uscourts.gov/USCFChistory.htm (last modified June 4, 2001).

manding monetary relief.[161] When hearing such cases, the court adheres to Article III standing requirements, apparently on the statutory interpretation ground that its appeals are intended to go to the Article III Court of Appeals for the Federal Circuit, which is barred from ruling one way or another on a purely advisory lower-court judgment.[162] However, the court has also been granted specialized jurisdiction to issue advisory opinions upon congressional reference.[163]

In the court's advisory capacity, bills—typically private bills for monetary relief outside a preexisting statutory entitlement—are referred to the court by a resolution of either house of Congress.[164] The court conducts what amounts to a full trial to determine the factual merits of the claim for relief.[165] The procedures for holding such a trial are incompletely specified and, at times, have been quite informal,[166] but typically follow more closely the pattern of any other litigation before the court.[167] Appeals, of course, cannot be made to an Article III court; instead, the statute calls for the selection of a three-judge review panel from among the judges of the Court of Federal Claims.[168] This panel reviews the findings of the trial judge designated as the hearing officer for the case, much as an appellate court would review the determinations of a trial court.[169] The report of the court is then returned to Congress, which is free to accept or ignore the court's recommendations.[170] In practice, however, it almost always accepts the court's recommendations, even when there has been

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[161] The Tucker Act, 28 U.S.C. § 1491 (2000), grants the Court of Federal Claims jurisdiction over "any claim against the United States . . . for liquidated or unliquidated damages in cases not sounding in tort." Certain collateral orders are permitted, for example directing restoration of a claimant to a position of federal employment, but no general grant to hear suits demanding injunctive relief is given. *See id.* § 1491(a)(2).

[162] *See* Welsh v. United States, 2 Cl. Ct. 417, 420–21 (1983); *see also* Muskrat v. United States, 219 U.S. 346, 361–63 (1911) (holding that Article III courts could not render advisory opinions); Landmark Land Co. v. FDIC, 256 F.3d 1365 (Fed. Cir. 2001) (holding that the case-or-controversy requirement must be met in a suit in the Court of Federal Claims, without discussing the Article I status of that court).

[163] *See* 28 U.S.C. § 1492 (2000).

[164] *See id.* § 2509(a); *see also* Jeffrey M. Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 AM. U. L. REV. 595, 596–98 (1976).

[165] *See* 28 U.S.C. § 2509 (2000).

[166] *See, e.g.*, *In re* Dep't. of Def. Cable Television Franchise Agreements, Nat'l Def. Authorization Act for Fiscal Year 1996, Section 823, 36 Fed. Cl. 171, 173 (1996) (holding a "non-adversarial" hearing "in a fashion similar to a congressional hearing or agency rulemaking proceeding").

[167] *See* Glosser, *supra* note 164, at 605–06.

[168] 28 U.S.C. § 2509(a) (2000).

[169] Land v. United States, 37 Fed. Cl. 231, 233 (1997). As in a typical trial court-appellate court relationship, the legal conclusions of the hearing officer are reviewed *de novo*; the factual findings are reviewed for clear error. *Id.* at 233–34; *see also* R. CT. FED. CL. app. D, para. 8.

[170] *See* Kanehl v. United States, 38 Fed. Cl. 89, 96–97 (1997).

an intervening election and the current Congress openly admits that it would not have referred the matter to the court.[171]

In evaluating the feasibility of an Article I citizen suit tribunal, several facets of this existing Court of Federal Claims process are illuminating. First, and most broadly, the advisory opinions process is a well-established example of "non-case" jurisdiction being granted to an Article I court. The advisory jurisdiction of the court was first granted over a hundred years ago.[172] Although the Court determined in *Glidden Co. v. Zdanok* that the Court of Claims, the Court of Federal Claims' predecessor court, was an Article III court whose ability to render advisory opinions was thus in doubt,[173] Congress soon updated the congressional reference statutes to refer cases not to Article III judges, but solely to Article I commissioners under their supervision.[174] Consensus since then has been that this rendered the reference jurisdiction constitutional,[175] and today's arrangement—in which the former commissioners of the Court of Claims have been reconstituted as the Court of Federal Claims, and what had been the Article III division was folded into a new Court of Appeals for the Federal Circuit[176]—has been ratified by the Supreme Court, at least implicitly.[177]

A second facet worthy of mention is the apparent reasoning behind the grant of advisory jurisdiction to a court-like, non-Article III tribunal: to bring many of the advantages of judicial resolution to a federal "case" falling outside the scope of Article III heads of jurisdiction. As the post-*Glidden* legislative history of the congressional reference jurisdiction indicates, Congress wished to maintain a forum in which

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[171] Glosser, *supra* note 164, at 627 (citing as an example S. REP. NO. 1274, 93d Cong., 2d Sess. 5 (1974)).

[172] *See* Bowman Act, 22 Stat. 485, 485–86 (1883) (granting Court of Claims reference jurisdiction from either house of Congress or from any executive department) (current equivalent at 28 U.S.C. § 1492 (2000)); *see also* Alleman v. United States, 43 Ct. Cl. 144, 150–51 (1908).

[173] 370 U.S. 530, 582 (1962) (noting that because the Court of Claims as then constituted was an Article III court, its ability to render advisory opinions was in doubt, but not deciding the constitutionality of doing so). *See id.* at 587 (Clark, J., concurring) (arguing that the Court of Claims, if given further advisory references, should decline jurisdiction over them as incompatible with Article III).

[174] Act of Oct. 15, 1966, 80 Stat. 958 (codified at 28 U.S.C. §§ 1492, 2509 (1970)).

[175] *See* Shimomura, *supra* note 57, at 689 & n.533 (citing 2 W. COWEN, P. NICHOLS & M. BENNETT, THE UNITED STATES COURT OF CLAIMS 63 (1978) for the proposition that giving congressional reference cases to the non-Article III commissioners rendered the arrangement constitutional).

[176] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C. (1983)). *See generally* Shimomura, *supra* note 57, at 696–99 (discussing the post-1982 arrangement of the Court of Federal Claims and the Court of Appeals for the Federal Circuit).

[177] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.23 (1982); Shimomura, *supra* note 57, at 698 (discussing *N. Pipeline*).

complex factual issues could be evaluated in an evidentiary, frequently adversarial proceeding by an independent and impartial tribunal.[178] These are values traditionally associated with Article III courts;[179] in this instance where Article III courts are constitutionally unavailable, Congress has turned to an Article I substitute.

A final facet, though, provides a potentially difficult contrast for our proposed model of a citizen suit tribunal capable of issuing binding judgments: by definition, congressional reference cases are advisory and do not involve a binding judgment.[180] Indeed, even though hearing officers in reference cases can order discovery, issue subpoenas, and the like, such subpoenas are not enforceable by compulsory judicial power, although comparable orders in non-advisory Court of Federal Claims cases are enforceable. Instead, Congress has provided that any failures to comply with court orders should be noted in the final report to Congress.[181] However, unlike ordinary claims cases, congressional references are not subject to Article III review in the Court of Appeals for the Federal Circuit,[182] and the non-self-enforcing character of orders in reference cases avoids the constitutional difficulties that might arise from granting coercive powers to a non-Article III body, without possibility of appeal to an Article III court.[183] Moreover, there is no potential problem with interference with the executive because no executive action is ever compelled. All that is at issue is a possible outlay from the public fisc, which is unquestionably within Congress's authority,[184] and even that is not fully delegated in reference cases, only in ordinary claims actions.

Congressional reference cases, then, provide a suggestive model of how a dispute falling outside the scope of Article III can constitutionally and practically be tried by an Article I tribunal, but do not resolve all of the issues implicated by a proposal to try citizen suits challenging executive action in such a tribunal. The experience of other nations provides another model for citizen suit tribunals. The next Part will discuss one of these examples, and will draw parallels to possible experience in the United States.

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[178] *See* H.R. REP., NO. 89-306 at 3–4 (1965); Glosser, *supra* note 164, at 605.

[179] *See* Resnick, *supra* note 34.

[180] *See* 28 U.S.C. § 2509(e) (2000).

[181] *Id.* § 2509(f).

[182] *Compare id.* § 2509 (sending reference cases, after consideration by the review panel, directly back to Congress) *with id.* § 1295 (the jurisdictional statute of the Court of Appeals for the Federal Circuit).

[183] *See* discussion *supra* Part II.A.

[184] *See* U.S. CONST. art. I, §§ 7, 9.

B. Standing in Citizen Suits in Australia

Although standing in United States federal courts is principally treated as arising from Article III,[185] the concept is a broader one that, in various comparable forms, has found application in other common law jurisdictions,[186] and even in some civil law ones.[187] The U.S. has comparatively strict standing laws;[188] where standing exists as a limitation in other common law jurisdictions, it is frequently closely tied to the grant of a substantive right of action.[189]

Despite these differences, however, the problem of how to best accommodate challenges to regulatory action in the modern administra-

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[185] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[186] *E.g.*, Croome v. Tasmania, (1997) 191 CLR 119 (Australia); Thorson v. Attorney Gen. of Canada, [1975] 1 S.C.R. 138 (Canada); R. v. Paddington Valuation Officer (1966), 1 Q.B. 380 (England).

[187] *See* P. VAN DIJK, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE 130–52 (Sijthoff and Noorahoff) (1980) (discussing the interest to sue requirements in *recours pour excès de pouvoir* suits, a method for challenging *ultra vires* administrative action in France).

[188] In the extreme, a number of countries place essentially no limits on who may bring suit to correct allegedly illegal actions. India, for example, permits any concerned citizen to bring to the Supreme Court's attention constitutional injustices in need of correction by letter as well as by more formal suit:

> This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the Court.

M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086, ¶ 2. Some African countries permit suits by any citizen to challenge the constitutionality of a statute. *See* Okey Ilofulunwa, *Locus Standi in Nigeria*, http://www.hurilaws.org/HURI/locus_standi_art.htm (last visited Mar. 8, 2007) (discussing ability to do this in Gambia and Ghana). Even England has occasionally permitted suits by public interest organizations with no particularized injury to proceed in the discretion of the court where the organization is better equipped to litigate than any of the parties actually harmed. *See* R. v. Inspectorate of Pollution *ex parte* Greenpeace Ltd., [1994] 4 All E.R. 329 (EWCA Q.B.) (permitting Greenpeace to bring a challenge to the operation of a nuclear waste processing plant because Greenpeace had the "expertise" to mount a "well-informed" legal challenge).

[189] *See, e.g.*, VAN DIJK, *supra* note 187, at 71 (describing *locus standi* in English statutory law as permitting suit only by those entitled to a statutory remedy). *Cf.* Sunstein, *supra* note 1, at 173–79 (describing pre-New Deal standing law in the United States as following a similar model).

Despite this standard approach in which those with a legal right would have standing to uphold it, however, it was also apparently possible in the English tradition for unaffected third parties to request the extraordinary writ of prohibition, so as to quash the purported jurisdiction of tribunals that did not legally have jurisdiction. The theory was that anyone could sue to vindicate this interest of the King's, and formally the suit was in the King's name; its granting was discretionary. VAN DIJK, *supra* note 187, at 48–49. *Cf.* discussion *supra* note 107 (discussing private actions in both America and England).

tive state while not overburdening the court system is common to most jurisdictions today, and certain illuminating parallels can be drawn. This Part will briefly examine the law of standing and a few resulting legal developments in another English-speaking, federal, common-law jurisdiction whose experiences shed particular light on the citizen suit tribunal problem: Australia. Australia has a constitutionally imposed standing requirement parallel to (and derivative from) that of the United States.[190] It also has a specialized tribunal for mounting challenges to government action outside of the normal federal court system, the Administrative Appeals Tribunal, that provides a ready model for how an Article I citizen tribunal might function.

It should be noted, by way of disclaimer, that this is not an attempt to argue that the law of standing in the United States should or does "conform to the laws of the rest of the world";[191] rather, the point is that, because a citizen-suit tribunal would be constitutional under American law, it is instructive to observe whether, as a structural matter, such tribunals have been instituted abroad. The existence and apparent success of the Australian system suggests that the U.S. Congress might find an Administrative Appeals Tribunal—with an expansive, non-Article III conception of standing—useful here.

1. Standing in Australia

Chapter III of the Australian Constitution sets out the constitutional basis for the Australian federal judiciary, which like Article III of the U.S. Constitution provides for a high court and leaves to the legislature the power to create lower courts.[192] Also like the U.S. Constitution, it provides for a number of heads of jurisdiction, including what amount to diversity and federal question jurisdiction, in which the federal courts may adjudicate.[193] These heads of jurisdiction refer to "matters" that the courts have jurisdiction to adjudicate,[194] which have been interpreted at various points to be identical[195]

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[190] *See* Leslie Zines, *Federal, Associated, and Accrued Jurisdiction, in* THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM 265, 265 (Brian Opeskin & Fiona Wheeler eds., Melbourne University Press 2000) (discussing role of the U.S. Constitution in shaping the Australian Constitution).

[191] Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (arguing against the application of foreign law to decide questions of U.S. constitutional law).

[192] *See* AUSTRALIAN CONST. ch. III, § 71. In Australia, the high court is known simply as the High Court. *Id.*

[193] *See id.* §§ 73, 75–77.

[194] For example, the head of jurisdiction that best approximates what in the United States is federal question jurisdiction provides as follows:

> Additional original jurisdiction. 76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—
>
> (i.) Arising under this Constitution, or involving its interpretation:

or at least analogous to[196] "Cases" and "Controversies."[197] As in the United States, the matter requirement in Australia serves to bar advisory opinions.[198]

However, particularly in recent years, this latter bar has been weakened significantly by the Australian High Court's increasingly "relaxed approach" towards constitutional standing requirements.[199] For instance, suits by Australian states challenging the constitutionality of Commonwealth laws have been upheld, whether or not specific state interests are alleged.[200] Indeed, in *Truth About Motorways v. Macquarie*, the High Court specifically distinguished the standing rules arising from the "matter" requirement from those arising from the "case and controversy" requirement according to *Lujan*, refusing to hold invalid a citizen suit provision in a federal antitrust statute.[201] The Court did not, however, decide whether the plaintiff had standing[202] nor did it clearly delineate the content of the "matter" requirement. Instead, the Court appeared to adopt a simplified viewpoint in which the conferral of a legal right by the legislature—including to the public at large—was sufficient to grant standing.[203] Despite this, the "matter" requirement is apparently not completely devoid of content.[204]

> (ii.) Arising under any laws made by the Parliament:
> (iii.) Of Admiralty and maritime jurisdiction:
> (iv.) Relating to the same subject-matter claimed under the laws of different States.
>
> Power to define jurisdiction. 77. With respect to any of the matters mentioned [in sections including the above, § 76] the Parliament may make laws—
>
> (i.) Defining the jurisdiction of any federal court other than the High Court:
>
> . . .

Id. §§ 76–77.

[195] *See* Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd., (1981) 33 A.L.R. 465 (Mason, J.) ("Th[e] formulation [of "matter"] does not depart from the American conception of 'cases' and 'controversies', notably that expressed by Field J in *Re Pacific Railway Commission* and *Smith v Adams* . . .").

[196] *See* Henry Burmester, *Limitations on Federal Adjudication*, *in* THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM 227, *supra* note 190, at 230–35.

[197] U.S. CONST. art. III, § 2.

[198] *See In re* Judiciary and Navigation Acts, (1921) 29 C.L.R. 257; Burmester, *supra* note 196, at 235–45.

[199] Burmester, *supra* note 196, at 248–49; *see also* WHO CAN SUE? A REVIEW OF THE LAW OF STANDING, Aust. Law Reform Comm., Disc. Paper 61, Oct. 1995.

[200] Burmester, *supra* note 196, at 248.

[201] Truth About Motorways Pty. Ltd. v. Macquarie Infrastructure Inv. Mgmt. Ltd., (2000) 200 C.L.R. 591, 603.

[202] The procedural posture of the case meant that if the citizen suit provision was not unconstitutional, the case would be remanded without resolution of other issues. *Id.* at 601–603.

[203] *Id.* Interestingly, this holding, and the modern English approach to standing where statutory cases are concerned, *see supra* note 189, bolster the argument that standing in the com-

2. *The Administrative Appeals Tribunal*

Like the U.S., Australia also possesses an extensive administrative state, including a system of federal tribunals established outside the scope of Chapter III and its authorization to create federal courts.[205] Australia has one especially noteworthy tribunal with no direct United States analog, however: the Administrative Appeals Tribunal (AAT).[206] The AAT is a general tribunal intended to review the decisions of administrative officials and has jurisdiction over decisions under hundreds of independent Commonwealth statutes that specifically provide for AAT review.[207] The tribunal's procedures are relatively informal; citizens who wish to complain can petition by letter as well as by formal application.[208] Its constitutionality is uncontroversial.[209] Appeals from the AAT to the (Chapter III) Federal Court

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mon-law tradition flows from the existence of a cause of action, and that the American separation of injury-in-fact from the cause of action is misguided and ahistorical. *See* Sunstein, *supra* note 1, at 166; *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 238–39 (1988) (arguing that the question of standing should collapse to the question of whether the plaintiff can state a cause of action). If this theory is correct, then *Lujan* was incorrectly decided, and raw citizen suits should be seen as constitutional even in Article III courts so long as Congress confers a substantive cause of action to the citizens at large. This debate is beyond the scope of this article. As an interesting aside, the primary clause used by the *Macquarie* Court to distinguish the American Article III from the Australian Chapter III was AUSTRALIAN CONST. ch. 3, § 75(v), which provides original jurisdiction for the High Court to issue extraordinary writs and injunctions against federal officials. This was seen by the *Macquarie* Court as evidence of the Australian Constitution's concern for granting the judiciary power to curb unlawful executive action, and according to the Court the clause was inserted into the Australian Constitution specifically to avoid a result analogous to that in *Marbury v. Madison*. 200 C.L.R. at 633 (Gummow, J.). The Court also cited the availability of extraordinary writs to all citizens. *See* discussion *supra* note 189. What this analysis seems to miss—with curious logical consequences—is that *Marbury* represented only the Supreme Court's lack of original jurisdiction to issue a writ of mandamus, not the exclusion of such authority from the American conception of Article III judicial power as vested in the lower courts. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803).

[204] At a minimum, suits still need to attempt to vindicate the legal right of some party; unless the legislature explicitly grants a legal right to the entire populace, citizen standing is still precluded. *See Macquarie*, at 169 A.L.R. 619–20.

[205] *See* Margaret Allars, *Federal Courts and Federal Tribunals: Pluralism and Democratic Values*, *in* THE AUSTRALIAN FEDERAL SYSTEM 191, *supra* note 190, at 204–09.

[206] *See* Administrative Appeals Tribunal Act 1975 (Austl.).

[207] *See Administrative Appeals Tribunal Jurisdiction List*, *available at* http://www.aat.gov.au/LegislationAndJurisdiction/JurisdictionList.htm (last visited Mar. 8, 2007).

[208] *See* Applying to the AAT, http://www.aat.gov.au/ApplyingToTheAAT/WhenCanTheAATHelp.htm (last visited Mar. 21, 2004).

[209] *See* Allan v. Transurban City Link Ltd., (2001) 183 A.L.R. 380, 383 (Austl.).

are permissible on issues of law,[210] and the tribunal has the power to issue at least some binding orders.[211]

Of particular concern to this article is the role of standing at the AAT. When other legislation provides for it, the AAT may give advisory opinions.[212] However, the AAT's core purpose is to assist those aggrieved by an adverse decision of some kind, and its jurisdictional statute reflects this assumption, permitting review of specified decisions upon application to the AAT by anyone "whose interests are affected by the decision."[213] The import of this phrase is a matter of some controversy. In *Allan v. Transurban City Link*, the High Court faced the appeal of a pure citizen suit from the tribunal. Allan, a citizen who no longer lived in an area affected by a highway construction project, had attempted to challenge the legality of its licensing.[214] The majority opinion did not directly confront the question of constitutional or statutory standing in the AAT. Rather, the Court held that the substantive cause of action was unavailable to the plaintiff under the particular statute in question, and thereby ultimately affirmed the AAT's decision that Allan lacked standing to bring the challenge.[215] However, Judge Kirby wrote an intriguing dissent—most of which was not in contradiction to anything the majority held—analyzing the Administrative Appeals Tribunal Act and standing requirements in detail.[216] On the issue of how the "matter" requirement affects standing in the AAT, he wrote:

> Once one moves from the commencement of proceedings in a federal court, where the constitutional necessity of demonstrating the existence of a "matter" imposes some constraints on the law of standing, substantial scope for permitting the initiation of tribunal proceedings by a broader range of persons in a wider range of circumstances, is available to the federal lawmaker. The tendency of federal legislation is to move away from authorising only particular persons (such as ministers, statutory agencies or officers) or persons limited by a controlling adjective ("aggrieved", "interested"), to "any person" (as now appears in several federal laws). This tendency

[210] *See* Administrative Appeals Tribunal Act 1975 § 44 (Austl.). The question of whether an appellant might have standing at the Tribunal, but not standing in the Federal Court, has apparently not been addressed.

[211] *See id.*

[212] *See id.* § 59.

[213] *See id.* § 27.

[214] *Allan*, 183 A.L.R. at 382–83.

[215] *Id.* at 388–89.

[216] *Id.* at 392–96 (Kirby, J., dissenting).

> adds to the need for caution about approaching the issue of "standing" as if it always presents a generic problem. In one sense it does. But the solution to the problem in a particular case must always take as its starting point the language and structure of the legislative prescription in question.[217]

Judge Kirby thus concluded that there are no constitutional limits on standing in the AAT, and that only the implementing legislation matters.[218] He then advocated a generally liberal approach to interpreting that legislation, taking into account the potential inconveniences to regulatory objects from liberalized standing rules, common sense, and the danger of "intermeddlers."[219] In addition, Judge Kirby emphasized the need for flexibility in the modern administrative state and the fact that, should standing rules prove too expansive, Parliament could always take some or all jurisdiction away from the tribunal.[220]

3. Lessons for the United States

In short—despite its still-incompletely-defined status as a forum for citizen suits—the AAT provides a model of what a citizen suit tribunal in the United States might look like. Although Australia's more-liberal approach to standing and overt rejection of *Lujan* does minimize the High Court's concerns with the effects of broadly construing AAT jurisdiction, the essential constitutional position of the AAT is comparable to an Article I court. Like an Article I court, the AAT is not a creature of the ordinary federal judicial power and is probably not bound by its limitations, but it is acceptable nonetheless because of the needs and structures of the modern administrative state. The possibility of review of matters of law, whether to the Federal Court or to a U.S. Court of Appeals, mitigates the independence concerns that one might have with vesting such power outside Article/Chapter III.[221]

Judge Kirby's analysis of how some notion of standing might still be incorporated into citizen suits by a tribunal might also find an analog in the United States. Above and beyond constitutional standing requirements, U.S. courts have adhered to concepts of prudential

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[217] *Id.* at 393 (Kirby, J., dissenting).

[218] *Id.* at 395–96 (Kirby, J., dissenting).

[219] *Id.*

[220] *Id.*

[221] *Compare* Administrative Appeals Tribunal Act (Austl.) 1975 § 44 (permitting appeals from the AAT to the Federal Court on matters of law only) *with* Crowell v. Benson, 285 U.S. 22 (1932) (permitting apparently final determination of non-jurisdictional facts by an administrative tribunal, without review by an Article III court).

standing.[222] In the context of an Article I tribunal, such rules would be presumptive; the Supreme Court has indicated that, as doctrines of federal common law, they can be freely overridden by Congress.[223] But as background rules, they echo some of the elements of Judge Kirby's balancing tests: both sets of rules include, for example, an analysis of the intended beneficiaries of a statutory cause of action,[224] a concern with intermeddlers,[225] and a sensitivity to the competences of the tribunal.[226]

IV. CONCLUSION

Australia provides a remarkable opportunity for comparative law studies in the area of federal courts because the structure of its federal court system so closely approximates our own and because its judges so often use United States law as a reference. Through the prism of Australian experience, we can see the possibility for an American judicial experiment: a tribunal freed from the constraints of Article III to adjudicate regulatory disputes of public concern, and empowered to develop procedures that admit aggrieved private litigants, but also better equipped to adjudicate complex regulatory disputes than an ordinary court.[227] Such an experiment need not be broad in scope. One advantage of the AAT model is that though it has become a court of generalized jurisdiction, its jurisdiction is still granted on a statute-by-statute basis, and the nature of the disputes it adjudicates is such that jurisdiction can be withdrawn completely if necessary.[228] Such would be the case here, too.

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222 Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

223 Warth v. Seldin, 422 U.S. 490, 501 (1975).

224 *Compare Valley Forge Christian Coll.*, 454 U.S. at 475 (requiring that plaintiffs fall within the zone of interests created by statute), *with Allan*, 183 A.L.R. at 392–93 (Kirby, J., dissenting) (advocating a close reading of the enacting statute).

225 *Compare Valley Forge Christian Coll.*, 454 U.S. at 475 (denying standing to those whose claims are based on the legal rights of private third parties), *with Allan*, 183 A.L.R. at 391 (Kirby, J., dissenting) (discussing "intermeddlers").

226 *Compare Warth*, 422 U.S. at 499–500 (discussing competence of courts to adjudicate generalized public issues), *with Allan*, 183 A.L.R. at 395–96 (Kirby, J., dissenting) (discussing flexibility of legislative solutions and procedures to accommodate the modern regulatory state).

227 *See* Fuller, *supra* note 30, at 394–404 (arguing that the traditional adversarial system is ill-equipped to handle problems, called "polycentric," with complicated effects on a multiplicity of parties). *See also supra* Part III.A (discussing the ability of the Court of Federal Claims, in advisory cases, to hold informal hearings in which a number of non-adversarial parties can present evidence); *supra* note 208 and accompanying text (discussing the ability of the AAT to initiate informal proceedings by letter).

228 However, the large number of statutes that confer AAT jurisdiction suggest that the experiment has been working, or at least has been perceived to work, in Australia. *See Administrative Appeals Tribunal Jurisdiction List*, *supra* note 207. Also promising is the fact that the tribunal has been mimicked in Australia at a more local level. *See* Administrative Appeals

Although the U.S. Supreme Court might well balk on separation of powers grounds, Article III appears to create no barrier to the establishment of such a tribunal under Article I, and the problems of enforceable judgments and appealability appear to be solvable. We already have one Article I tribunal hearing disputes that are not cases or controversies under Article III, albeit in a purely advisory capacity.[229] In sum, an Article I citizen suit tribunal may or may not be helpful or prudent, but it is constitutionally permissible, and so whether it is helpful or prudent is for Congress to decide.

Tribunal Act of 1989 (Austl.) (creating an administrative appeals tribunal for the Australian Capital Territory).

[229] *See* discussion of the Court of Federal Claims' advisory opinion jurisdiction, *supra* Part III.A. Indeed, the Court of Federal Claims might well be a reasonable forum for an initial grant of citizen suit jurisdiction.