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Of Citizen Suits and Citizen Sunstein

Harold J. Krent
DePaul University College of Law

Ethan G. Shenkman

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*Harold J. Krent**
and *Ethan G. Shenkman***

The Rehnquist Court's assault on standing doctrine took a new twist in *Lujan v. Defenders of Wildlife*,[1] in which the Court invalidated a congressional grant of universal standing to citizens under the Endangered Species Act (ESA). While professing adherence to majoritarian values, the Court trumped a product of the majoritarian process. Justice Scalia predicated the Court's decision both on a restrictive view of the Article III requirement of a "case or controversy" and on a generous reading of the President's authority under Article II to "take Care that the Laws be faithfully enforced."[2]

In a provocative article on *Lujan*,[3] Professor Cass Sunstein locks horns with Justice Scalia's jurisprudence of standing, disputing Justice Scalia's analysis of both Article II and Article III. To Sunstein, *Lujan*'s invalidation of citizen suits finds support neither in history nor in the case or controversy requirement of Article III. Congress can create, and has created, interests whose violation gives rise to cognizable cases and controversies. Sunstein further contends that universal citizen standing in no way interferes with the President's power to "take Care that the Laws be faithfully executed."[4] Insofar as the Take Care Clause imposes a duty to execute the laws as written, he argues, the President's power is not compromised when citizens sue to contest government illegality. If the citizens prevail, the court would merely be enforcing the constitutional obligation of the Executive.[5] He concludes that "the relationship between standing limits and the Take Care Clause is at best ambiguous — and in the end, I believe,

* Visiting Associate Professor, DePaul University College of Law. — Ed.

** J.D. Candidate 1994, University of Virginia School of Law. — Ed. We would like to thank Susan Bandes, Michael Gerrard, Bill Lewis, Jim McElfish, George Rutherglen, Bill Stuntz, and Nick Zeppos for their comments on earlier drafts.

1. 112 S. Ct. 2130 (1992).

2. 112 S. Ct. at 2142-46 (quoting U.S. CONST. art. II, § 3).

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

4. U.S. CONST. art. II, § 3.

5. When citizens bring suit against private defendants to enforce their obligations under a particular statute or regulation, the President's duty to execute the law is not directly implicated. Although such suits undoubtedly may interfere with the exercise of prosecutorial discretion, that interference, as Sunstein points out, *supra* note 3, at 231 n.300, does not rise to the level of a constitutional concern.

nonexistent."[6]

We agree with Sunstein that the President's duty to take care that the laws be faithfully executed does not prevent Congress from limiting the President's discretion to enforce the laws as he sees fit. Congress can confine that discretion directly or empower private parties to contest the President's exercise of discretion in court. But we cannot agree with Sunstein's further premise that Article II imposes no restraint on Congress' choice of enforcement agents.

To the contrary, we believe that the structural imperative in Article II for a unitary executive precludes Congress from delegating outside the Executive's control the power to protect the interests of the public as a whole in the face of external or internal threats. Congress determines what is public policy, but it must entrust to an accountable entity the power to protect that policy — whether through rulemaking or litigation — if the interests of the entire nation are at stake.[7]

The power to enforce law, just like the power to regulate, profoundly affects the public weal. Every violation of federal law can be considered a breach of the public trust and, in some sense, a threat to the public good as defined by the statutory scheme. When Congress either creates a cause of action or establishes a remedial scheme, it thereby recognizes a public interest in utilization of the prescribed remedies. The decisions over when to seek such remedies, what theories to plead, and what relief to seek implicate public policy.[8]

In light of the policymaking inherent in enforcement of federal law, Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation. This is not to ignore the role of private citizens vindicating individuated rights created or recognized by Congress under Article I.[9] But Congress'

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6. *Id.* at 213.

7. Our notion of the protective power of the President is quite different from that advanced by Henry P. Monaghan in his recent article, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993). Our argument rests not on the presidency's inherent power, but on the structural directive that Congress can only delegate policymaking to actors subject to control by the accountable Executive.

8. The Supreme Court asserted in Buckley v. Valeo, 424 U.S. 1 (1976), that executive branch supervision is necessary not only for criminal prosecution, but also for civil suits seeking to vindicate the public interest. The Court held that vesting nonpresidential appointees with the "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . violate[s] Art. II, § 2, cl. 2, of the Constitution." 424 U.S. at 140. Civil law violations, though perhaps less than violations of criminal enactments, threaten the body politic. The savings and loan fiasco and junk bond scandal are two notorious examples.

9. We do not rely on any inherent distinction between private and public interests (or rights) — we agree with Sunstein and others, *see, e.g.*, Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 346 (1989), that injuries to the public at large can readily be reconceptualized as injuries to each citizen comprising the public. We rely rather on the distinc-

Article I prerogative to structure law enforcement — apart from its interest in creating private rights — cannot by itself override the Article II interest in unified law enforcement. Thus, Congress must choose the Executive, individuals who are injured distinctively, or some combination of both to enforce compliance with its dictates.

In short, we find unfortunate Sunstein's acceptance of the private-attorney-general concept, which implies that citizens can step into the shoes of the executive branch and assume the sovereign's responsibility for promoting the public good in litigation.[10] Although we are sympathetic to the aims underlying the private-attorney-general model, the device is neither compatible with the democratic principles underlying the unitary executive nor needed to guarantee compliance with legislative directives. Congress instead may enact private enforcement schemes by creating private, individuated interests, or it can rely on public enforcement subject to its own oversight. Congress may not,

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tion between individuated and unindividuated injuries. The Constitution's structure suggests that the Executive should redress unindividuated injuries because no single citizen should have any greater right than any other to vindicate injuries shared equally by the public as a whole. We believe that an analogy to a nationwide class action is apt — only the Executive can be the class representative to vindicate the collective interests of the nation.

Professor Doernberg, in fact, endorses utilization of a nationwide class action device to permit individuals to challenge unlawful government action in the absence of any individuated harm. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 110-15 (1985). He proposes that courts should certify and monitor such nationwide classes in order to safeguard against self-interested behavior on the part of class representatives. Although Doernberg's suggestion addresses the problem of representativeness that we also identify in this essay, we argue that, in light of Article II's mandate for a unitary executive, only a politically accountable agent has the authority to represent the interests of a nationwide class in enforcing federal law.

10. The private-attorney-general metaphor first received currency in Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). Sunstein is not the first scholar to defend the legitimacy of citizen standing based on the private-attorney-general model. Professor William A. Fletcher, in an article relied on by Sunstein, argued that:

> In the case of a statutory right, Congress is the source both of the legal obligation and of the definition of the class of those entitled to enforce it. . . . So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as "private attorneys general."

William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 251 (1988); *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 499-500 (1965); Scott H. Bice, *Congress' Power to Confer Standing in the Federal Courts*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 291, 300 (Ronald K.L. Collins ed., 1980); Daan Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 54-55 (1980); Caminker, *supra* note 9, at 342-43; Doernberg, *supra* note 9, at 112; Robert A. Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 881-85 (1977).

Few commentators have questioned the constitutionality of enforcement suits by private attorneys general. For one of the few, see William H. Lewis, Jr., Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,101 (Apr. 1986). Our account differs significantly from that of Lewis, however, for we argue that the constitutionality of citizen suits hinges on the individuation of the underlying injury, rather than on the ability of private parties to seek relief benefiting themselves, as opposed to civil penalties payable to the federal treasury.

however, expand the scope of a private interest so broadly that it becomes coextensive with that of the public. Some formal boundary is needed to discourage Congress from incrementally chipping away at the executive branch's control over delegated authority. Recasting citizen suits in terms of private interests therefore both provides the virtue of analytic clarity and imposes some limit on Congress' otherwise unbridled discretion to vest public policymaking in unaccountable hands.

After briefly summarizing *Lujan* and addressing Sunstein's critique, we explore the concept of accountability underlying the creation of a single executive in Article II. We then apply our theory of the unitary executive to several examples of broad grants of statutory standing, concluding that Congress can confer standing on private citizens only if it specifically articulates and individuates the interests whose violation gives rise to a cognizable case. Although we agree with Sunstein's view that broad grants of statutory standing do not necessarily trench upon constitutional values, we ultimately side with Justice Scalia in concluding that universal citizen standing, as in *Lujan* itself, cannot be reconciled with the Constitution — not because of any definition of "injury," but because of Article II's establishment of a unitary executive.

I. *LUJAN* AND THE SUNSTEIN CRITIQUE

In *Lujan,* several environmental organizations challenged the legality of a Department of the Interior regulation issued under the Endangered Species Act. In a reversal of administration policy, the regulation limited the duty of federal agencies to consult with the Secretary over federally funded projects affecting endangered species. Under the regulation, agencies must consult over projects in the United States or on the high seas, but not over projects overseas such as the Aswan Dam in Egypt.

Justice Scalia, speaking for a majority of the Court, first analyzed the plaintiffs' failure to meet traditional, nonstatutory standing requirements. Based on the affidavits of several members who had visited the habitats of endangered species in Egypt and Sri Lanka, plaintiffs claimed that the Secretary's regulation would compromise their interests in returning to the areas and observing endangered species. According to the Court, however, the plaintiffs failed to demonstrate that they suffered the requisite injury-in-fact. Although the Court agreed that injuries to aesthetic interests could be cognizable, plaintiffs' vague plans to return to the affected areas were too remote and speculative to satisfy the injury-in-fact test.

The Court next rejected the plaintiffs' claim of standing based upon a statutory provision entitling "any person [to] 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."[11] The Court recognized that Congress in some contexts may create injuries whose violation gives rise to standing, such as "where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs."[12] But, in the Court's view,

> [v]indicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . . To 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."[13]

Through citizen standing, Congress could make courts the constant monitors of executive action. With each suit, power would flow from the Executive to the comparatively unaccountable judiciary.

Under the Court's analysis, therefore, Congress' grant of citizen standing in the Endangered Species Act suffered from two interrelated flaws. First, citizens could not meet Article III's concrete injury requirement if all they suffered was the intangible harm flowing from the Executive's failure to follow the law; second, such suits would invade the Executive's province to "take Care that the Laws be faithfully executed."[14]

Sunstein disputes both of Justice Scalia's propositions. With respect to the requirement of a concrete injury, Sunstein first argues that the injury-in-fact requirement is only of relatively recent origin and is unwarranted given any common sense understanding of a "case or controversy" in Article III. Indeed, Sunstein points out that there have long been mandamus and qui tam suits in federal court that could not survive under the Court's current test.[15]

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11. 16 U.S.C. § 1540(g)(1) (1988).

12. 112 S. Ct. at 2142.

13. 112 S. Ct. at 2145 (quoting U.S. CONST. art. II, § 3).

14. In his article, Sunstein demonstrates how the opinion in *Lujan* should be considered the logical outgrowth of Justice Scalia's writings on the separation-of-powers aspects of standing. Sunstein, *supra* note 3, at 209-220. For an example of Justice Scalia's writings, see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

15. Sunstein, *supra* note 3, at 173-77.

Second, Sunstein shows that there is no objective way to determine what is a "concrete" injury. Congress should be the entity to determine the sufficiency of injuries, whether the injured party is an object or a beneficiary of governmental regulation. Beneficiaries of federal regulation can be injured by a failure to enforce laws just as objects of regulation can be harmed by enforcement itself. To Sunstein, the Court's injury-in-fact requirement is akin to *Lochner*izing — the Court has permitted Congress to create only interests analogous to those recognized at common law. Sunstein concludes that Justice Scalia's standing analysis is thus fundamentally undemocratic in frustrating Congress' power to articulate nontraditional injuries.[16]

With respect to the Take Care Clause, Sunstein turns Justice Scalia's argument on its head. According to Sunstein, the President's power to take care to enforce the law does not extend beyond the duties prescribed by Congress — suits to enforce his compliance with those laws ensure fidelity to the legislature's commands. In the absence of such suits, the Executive might act undemocratically in either underenforcing or improperly enforcing the terms of the legislative mandate. Sunstein concludes that private attorneys general in no way threaten the Executive's enforcement of the law.[17] Thus, Sunstein embraces universal citizen standing, and, in the final part of his article, he urges Congress to consider ways to grant citizen standing without directly violating *Lujan*.[18] Although we are not as sanguine as Sunstein about the efficacy of citizen suits, we have a more fundamental objection — granting universal citizen standing undermines the principle of accountability implicit in Article II's creation of a unitary executive.

II. The Relevance of a Unitary Executive

Like Professor Sunstein[19] and Justice Scalia,[20] we assume as back-

16. *Id.* at 183-92. We find Sunstein's argument that Article III imposes no substantive limits on Congress' ability to define injuries, *id.* at 183-93, wholly convincing. *See also* Fletcher, *supra* note 10.

17. *See* Sunstein, *supra* note 3, at 209-15. Even though we agree with Sunstein that congressional authorization for private parties to challenge executive action in most contexts has no constitutional dimension, such suits as a practical matter may interfere with executive branch enforcement of the laws. Agency officials may waste valuable resources in litigation, and the need to justify all of their actions to judges might force them to change the way they execute the law to ensure judicial branch approval. With the relatively narrow exception we discuss, *infra* text accompanying notes 94-96, however, the decision of whether to subject the executive branch to such suits should be left to Congress.

18. Sunstein, *supra* note 3, at 223-36.

19. *See* Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421, 453 (1987); Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 Ariz. L. Rev. 1267 (1981).

20. *See* Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting).

ground a theory of the unitary executive, which accords a single executive the responsibility to manifest "energy" in execution of the laws passed by Congress.[21] As the *Federalist Papers* summarized, "[e]nergy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws."[22] Consolidating power in an energetic executive provides the best hope for protecting the public from external threats to the nation's sovereignty as well as from internal threats of violence or expropriation. A single executive can implement the laws with greater dispatch and, at the same time, stand accountable for all implementation efforts.

Recent Supreme Court decisions,[23] as well as academic commentary,[24] presuppose some variant of the theory. All policymaking and enforcement authority delegated to administrative agencies must be discharged subject to general supervision by the Executive who, through the power of appointment and removal in particular, influences his subordinates' exercise of such responsibilities. For example, Congress cannot direct the Attorney General to disregard the Presi-

21. The Founders' rejection of several proposals to split the Executive was no accident. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1179-81 (1992); Lee S. Liberman, Morrison v. Olson: *A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 314-17 (1989); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL. 196 (1991); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993).

The theory of a unitary executive derives not only from history, but also from the structure of Article II. A single executive enjoys the prerogatives to appoint (and by inference, to remove) officers of the United States, to request the opinions in writing of the principal officer in each department, to command the military, and to receive ambassadors, as well as to take care that the laws are faithfully enforced.

22. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

23. *See* Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991) (invalidating congressional retention of role in administering state compact); Public Citizen v. United States, 491 U.S. 440 (1989) (construing the Federal Advisory Committee Act narrowly to preserve the Executive's Appointment Power); Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent counsel statute on the ground that independent counsel was subject to general presidential control); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating delegation of budget-cutting duties to the Comptroller General, an agent of Congress); INS v. Chadha, 462 U.S. 919 (1983) (invalidating congressional interference through one-house veto with delegation of authority to Attorney General).

24. JEREMY A. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989); Calabresi & Rhodes, *supra* note 21; David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19; Liberman, *supra* note 21; Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Monaghan, *supra* note 7; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing An Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989); Strauss, *supra* note 21.

dent's orders in litigation any more than it can instruct the Ambassador to Russia to report exclusively to its members in negotiating an aid package.[25] A centralized executive counteracts legislative hegemony and promotes accountability by ensuring an avenue of political redress for ineffective or foolish governance: by comparison, a plural executive "tends to conceal faults and destroy responsibility."[26]

Article II's establishment of a unitary executive, however, is not absolute. Rather, Congress' general interest under Article I in structuring law enforcement must be balanced against the interest in accountability underlying creation of a unitary executive in Article II.[27] Although constructing a sensible balance between Articles I and II in other contexts may be quite difficult,[28] achieving an appropriate accommodation in the context of private law enforcement should be less daunting. Congress should continue to enjoy plenary authority to vest in private parties the right to vindicate their own distinctive interests in court. But when Congress utilizes private attorneys general solely to combat the risk of presidential error or underenforcement, the Arti-

25. The scope of Article II is far from academic; questions of presidential prerogative surface in every administration. In the waning months of the Bush administration, President Bush threatened to fire a member of the Postal Service Board of Governors for refusing to withdraw a brief, *see* Bill McAllister, *Bush Steps into Postal Rate Fight: Agency Told to Drop Appeal*, WASH. POST, Dec. 16, 1992, at A25 (Bush directed Postmaster General to withdraw appeal of rate decision which it filed without permission of Department of Justice); criticized the independent counsel's criminal investigations of his former subordinates, whom he then pardoned, *cf.* Adam Clymer, *Bush Criticizes Press Treatment of His Pardons*, N.Y. TIMES, Dec. 31, 1992, at A16; and threatened to attack qui tam statutes as unconstitutional. Gail D. Cox, *Qui Tam Suit is Heavy on Technicalities*, NATL. L.J., Mar. 15, 1993, at 8. Although congressional creation of "standing" was only directly involved in the last example, all three situations involved a struggle between Congress' power under Article I of the Constitution to prescribe the way in which its laws are to be enforced and the President's Article II interest in superintending law enforcement.

26. THE FEDERALIST, *supra* note 22, at 427. Hamilton continued by noting that

> [i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. . . . The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

Id. at 428.

27. The existence of independent agencies, for instance, reflects that balance. The Supreme Court in Morrison v. Olson, 487 U.S. 654, 685-97 (1988), noted the potential tension between Articles I and II and adopted a balancing-type test to accommodate the diverging interests involved in creation of an independent counsel subject to limited presidential oversight. *See also* Buckley v. Valeo, 424 U.S. 1, 135 (1976) ("Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority," override other provisions in the Constitution.).

28. *See, e.g.*, Public Citizen v. United States, 491 U.S. 440 (1989) (balancing Congress' interest in open government against the Executive's Article II appointment power); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (weighing Congress' interest in providing for the retention of presidential papers against a claim of presidential privilege); *Ex parte* Garland, 71 U.S. (1 Wall.) 333 (1867) (accommodating Congress' interest in ensuring loyalty to the reunified nation with the President's Article II pardon power).

cle II interest in accountability should prevail — a congressional aim to displace the Executive cannot outweigh Article II's creation of a unitary executive. In sum, we advocate in this essay establishing a bright-line boundary: Congress may provide for private law enforcement whenever it predicates such enforcement on an individuated interest, but it must permit the Executive to control enforcement when only the interests of the nation as a whole are at stake.[29]

A. *The Executive's Political Accountability for Redress of Public Harms*

The contemporary advantages of a unitary executive for redressing harms to the public, whether the threat stems from conduct within or without the republic, should be apparent.[30] First, presidential involvement ensures that the political process is open to any concerned citizen who disagrees with steps taken to combat public threats.[31] Decisions as to criminal law enforcement or negotiations with foreign nations affect most of us; it would be odd if such significant decisions could be pursued by anyone who is not politically accountable. Second, political accountability both to Congress and the electorate minimizes the potential for self-interested behavior. Those checks are obviously not always sufficient, but Presidents recognize that they will have to answer to Congress and the public for enforcement choices, whether in dealing with Iraq or prosecuting those who benefited from the savings and loan scandal. Third, lodging control over such decisions with the President may bring significant advantages in terms of coordination and centralization. The Executive often is best situated best to implement strategies to protect the public weal. The greater the impact of

29. Although there may well be different ways to strike the balance between Articles I and II, Sunstein has eschewed any such effort. In his view, Congress has plenary power to vest enforcement authority outside the Executive's control. Sunstein, *supra* note 3, at 223-36.

30. Our constitutional argument presents a structural and functional defense of lodging the power in the Executive to oversee efforts to redress civil injuries shared equally by all members of the public. We do not rely on originalist notions or on historical practice for our analysis. Although this is not the place to justify a constitutional theory at odds to some extent with historical practice, we note that practice counter to our thesis has become less common with succeeding generations. Indeed, the realities of organized crime, international terrorism, a global economy, and nuclear war have arguably made a unified executive more critical to the nation's security. Given the structural imperative for a unified executive, the changing historical practice, and the contemporary advantages of unity, we argue that the Executive under Article II — despite some historical experience to the contrary — must superintend all efforts to redress unindividuated injuries.

31. Concerned citizens would undoubtedly prefer to vindicate their own interests through litigation; but, on the other hand, they may well prefer executive involvement in law enforcement to that of unrelated citizens who are not accountable for their enforcement efforts. *See infra* text accompanying notes 57-61, 73-81.

enforcement choices on the public, the greater the public interest in centralization of authority and in political accountability.

In recognition of such advantages, the President stands largely accountable today for implementing Congress' foreign policy goals, enforcing federal criminal law, and overseeing compliance with many civil regulations. The need for executive superintendence today is perhaps even greater than it was at the time of the Founding.

Most prominently, the President's status as Commander-in-Chief of the Armed Forces reflects his unique role in responding to external threats to the public safety, even if Congress largely prescribes the ambit of permissible action.[32] Although Congress may constrain the President's options in addressing foreign crises,[33] we would not lightly accept any congressional effort to delegate responsibility over foreign affairs to private parties or states, despite apparent authorization in the Constitution.[34] Citizens of Virginia would not trust Texas to conclude a trade pact with Mexico, and citizens of both states would not likely accept a congressional decision to send Ramsey Clark to the Mideast with authority to conclude a peace agreement. Not only is a centralized executive better able to conduct foreign affairs, but any missteps can be challenged through the political process.[35]

Similarly, most people today acknowledge the Executive's near exclusive authority to enforce criminal laws protecting against internal

32. Congress, for instance, not only has control over funding decisions, but also sets the framework for appropriate executive responses to foreign aggression. The Supreme Court's decision in Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), established the principle that the President cannot act counter to legislative instructions even in an emergency. During naval skirmishes with France, an American warship seized a French vessel contrary to terms of a legislative enactment. Because Congress had "prescribed . . . the manner in which this law shall be carried into execution," Chief Justice Marshall concluded that the President lacked authority to approve the seizure. 6 U.S. at 177-79.

33. *See, e.g.*, War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1988) (detailing consultation requirements); Boland Amendment IV, Department of the Interior and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-37 (1984) (limiting aid to the Contras in Nicaragua).

34. The Constitution authorizes Congress in Article I, § 8 to "grant Letters of Marque and Reprisal," subject to presidential veto. Congress can also approve state-initiated alliances with foreign powers or state-directed hostilities against foreign powers under Article I, § 10, cl. 3. The Supreme Court in Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 561 (1840), adverted to the possibility that Congress could consent to an agreement entered into by Vermont with Canadian authorities to extradite fugitives.

35. Some foreign affairs decisions undoubtedly affect particular individuals more than others because of family or business ties. Some individuals subjectively care more than others about the Balkans conflict or the Somalian Civil War. Nonetheless, whether or not Congress could constitutionally vest such individuals with significant authority in foreign relations, we would likely prefer executive control as opposed to private, individual statesmanship. From a contemporary vantage point, the advantages of consolidation of authority to conduct foreign affairs overrides any historical recognition of Congress' power to entrust some authority to entities not subject to presidential control.

threats to public safety. Executive branch control over federal criminal law enforcement permits greater discretionary enforcement and greater accountability. In a world of limited resources, prosecutorial discretion allows the government to gauge the relative seriousness of particular crimes and the relative threat posed by individual criminals. Few would equate sound policy with the maximum enforcement authorized by law, even if sufficient funds existed.[36] A decision not to enforce may represent as significant a policy determination as one to enforce. Moreover, accountability concerns suggest that the individual making such determinations be subject to the political process. Accountability benefits not only the public as a whole, but the criminally accused whose very liberty is at stake.[37]

This is not to deny that, as a historical matter, private individuals played a far more prominent role in enforcing the criminal laws than they do today.[38] Individuals may be well situated to enforce criminal laws against murder or fraud. Private enforcement in such contexts, subject to judicial supervision, might be salutary.

The shortcomings of exclusive private enforcement — which have always existed — have, however, become more glaring with the growth of the country and of federal criminal law. For instance, there is little reason to entrust private citizens with the prosecution of victimless crimes like drug use or gambling. Even for crimes with identified victims such as murder or theft, centralized enforcement may well generate benefits. The potential for harassment is minimized through the process of publicly controlled prosecutions. Furthermore, public prosecutors can temper justice with mercy, and only a centralized executive can modulate enforcement of the laws as social conditions change. If the President devotes too few resources to combatting drug use or insider trading, he or she is responsible at election time for decisions to enforce as well as not to enforce.

In light of the historical evolution, the Supreme Court stated in *Morrison v. Olson*[39] that all federal prosecutorial efforts must be under

36. Congress may confine the prosecutor's discretion in various ways, but removing discretion totally is probably impossible, as consideration of any scheme to enforce traffic violations attests. Prosecutors must routinely determine which violations to prosecute, what resources to devote to particular prosecutions, and which cases to settle.

37. Because only the sovereign can deprive a citizen of liberty, the need for accountability in criminal prosecution is probably greater than in the civil context. The concern for accountability might explain in part the evolution toward public prosecution. Overenforcement of criminal laws may well threaten social stability more than overenforcement of civil requirements.

38. *See* Sunstein, *supra* note 3, at 170-79. Indeed, one of us has noted that the Executive's control over criminal law enforcement in the early years of the nation's history was far from complete. Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989).

39. 487 U.S. 654 (1988).

the President's general control.[40] Congress must rely on the President to coordinate all criminal law enforcement initiatives just as Congress must rely on the President to negotiate with foreign powers. Our point is not whether such exclusivity is now constitutionally mandated,[41] but rather that the structural advantages of consolidation plausibly override Congress' ability to recognize individuals' potential interest in the enforcement of the criminal laws. The Supreme Court today would not likely permit Congress to vest in bystanders the right to trigger and control criminal prosecution.[42]

Moreover, and of critical importance to our thesis, centralized civil law enforcement offers advantages similar to those in the criminal context. First, consolidating control in the Executive both allows for the exercise of discretion to enforce or not to enforce and permits flexibility in enforcement efforts as conditions change. Second, because of the important policy decisions implicit in civil law enforcement, an accountable executive provides an avenue of redress for both targets and beneficiaries of federal regulation. As Sunstein persuasively demonstrates,[43] regulatory efforts can injure both groups, and thus both should have a political outlet to vent objections. The desideratum of accountability thus militates for executive involvement in enforcing all laws passed by Congress.

B. *Accommodating the Unitary Executive with Congress' Power to Create Private Rights*

Unlike in the foreign affairs and criminal law enforcement contexts, however, the advantages of centralizing authority over civil law enforcement have at times been overshadowed by Congress' countervailing interest in conferring enforcement authority on individuals injured by breaches of civil law. Congress, through Article I, unquestionably may authorize individuals to redress violations of federal law when they are injured more distinctively than the public in general, whether the injury arises from deprivation of a common law

40. The need for executive control is understandable given that private enforcement of criminal laws would be binding on the Executive due to the operation of the doctrine of double jeopardy. Private prosecution, therefore, precludes future executive branch prosecution. As we discuss *infra* notes 78-80 and text accompanying note 101, private prosecution of civil suits may or may not bar the Executive subsequently from filing its own suit.

41. *But cf.* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987) (upholding private prosecution in unique criminal contempt context).

42. For instance, the Court presumably would not have upheld the constitutionality of the independent counsel statute if the counsel were outside the government. Morrison v. Olson, 487 U.S. 654 (1988). Indeed, the Court stressed in *Morrison* that the President's control over the independent counsel saved the statute from invalidation. 487 U.S. at 692-93.

43. Sunstein, *supra* note 3, at 198-199.

or statutory interest.[44] Congress thus relies on both public and private enforcement to ensure compliance with its dictates.

By authorizing private enforcement, Congress may accomplish at least two objectives. First, Congress may encourage individuals to participate in lawsuits affecting their future under a system of private rights. Principles of self-determination and autonomy support that role. Second, Congress may determine that the Executive cannot be trusted to represent adequately the interests of those individuals injured more distinctively than the nation as a whole.[45] Thus, even though individuals affect the public interest when vindicating their own rights, whether in the antitrust or environmental field, the accountability concerns underlying the unitary executive give way to the private rights created by Congress.

Congressional creation of injuries whose violation gives rise to a case or controversy, such as with "testers" in civil rights statutes,[46] reflects a similar objective to provide for effective law enforcement.[47] Due to special interest group pressure or due to myopia, Congress may prescribe an ineffectual enforcement system, but Sunstein correctly observes that there is generally no constitutional dimension to that deter-

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44. Although the limits of Congress' ability to delegate policymaking outside the government remain unclear, *compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating grant of power to miners and producers under Bituminous Coal Act to establish minimum wages) *with* United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (sustaining delegation to private beef producers under Beef Promotion and Research Act of 1989), *cert. denied,* 493 U.S. 1094 (1990), Congress may at a minimum empower private parties to vindicate their own interests through lawsuits, even if the public as a whole is affected by the suit. The delegation of enforcement authority likely poses less of a threat to accountable governance than does delegation of general policymaking authority. For instance, Congress' decision to vest private individuals with the authority to enforce compliance with the Endangered Species Act is less problematic than if Congress instead were to appoint the Sierra Club to write regulations under the Act. Nonetheless, enforcement choices reflect significant policy judgments, as the Supreme Court has often noted. *See, e.g.,* Heckler v. Chaney, 470 U.S. 821, 821 (1985); Buckley v. Valeo, 424 U.S. 1, 140 (1976).

45. Resource concerns, for instance, might counsel against bringing suit, as might the opposing interests of a more powerful element of the electorate.

46. *See, e.g.,* Fair Housing Act of 1968, 42 U.S.C. §§ 3604(d), 3612(a) (1988); Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (violation of congressionally created interest in receiving truthful housing information gave rise to cognizable injury).

47. Congress under Article I enjoys wide latitude in establishing the mix between public and private enforcement of its directives. In some instances, as under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988) (creating a federal statutory tort for unfair competitive practices, including false or misleading advertising), Congress relies primarily upon private parties for enforcement of the law. Private enforcement may be preferred in many settings, particularly when questions of causation and remediation are readily ascertainable and the systemic impact of the injury is minimal. In other contexts, such as under sections 203 and 205 of the International Emergency Economic Powers Act, 50 U.S.C. § 1702, 1704 (1988), Congress relies exclusively upon the executive branch. For a classic discussion of the optimal mix of private and public enforcement, see William M. Landes & Richard A. Posner, *The Private Enforcement of Law,* 4 J. LEGAL STUD. 1 (1975).

mination.[48] Every vindication of a private interest recognized by Congress carries with it some vindication of the public interest as well.

But if only the government or public at large has been injured, the President should be accountable for legislative directives to protect the public welfare, despite the historical experience to the contrary.[49] Congress' interest in effective law enforcement cannot by itself override the Article II interest in accountability; otherwise Congress could bypass the executive branch whenever "necessary and proper."[50] Just as Congress presumably cannot delegate to private individuals the authority to regulate workplace safety or environmental hazards nationwide,[51] so it cannot, consistent with Article II's establishment of a unitary executive, delegate to a disinterested citizen the power to prosecute violations of safety or environmental regulations. A private attorney general has no greater interest in law enforcement than he or she has in law administration generally. The Constitution's preference for democratic decisionmaking demands that decisions about how best to redress injuries to the general public should be left to actors who are politically accountable.

This view of the unitary executive reveals where we part company with Sunstein. Although private citizens in circumscribed contexts may benefit from rights granted by Congress, Congress should not be able to confer upon private citizens the general power to vindicate rights shared by the public as a whole. That responsibility is vested in the President and is thus subject to the checks of the political process. If there were no constraints upon Congress, the Executive would become too easily divided, and accountability for vindicating the public interest too diffuse.

To be sure, the line we suggest between individuated and nonindividuated injuries may seem arbitrary. Because Congress through careful drafting can recognize individuated interests in almost every conceivable context, our insistence that it not be permitted the

48. Sunstein, *supra* note 3, at 186-93.

49. See notes 34 & 38 *supra*.

50. *See supra* note 27. Thus, we do not advocate a case-by-case assessment of the competing executive and legislative branch interests at stake in a particular enactment. Rather, we believe a categorical accommodation to be more appropriate.

51. In Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), the Court held that the delegation of policymaking authority to private parties was "legislative delegation in its most obnoxious form." *See also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (criticizing delegation of policymaking authority to private groups). Although the Court has not addressed the issue recently, it would not likely have sanctioned congressional delegation of the budget-cutting authority it prohibited the Comptroller General from exercising in Bowsher v. Synar, 478 U.S. 714 (1986), to a private individual. Nor would the Court likely have upheld as constitutional the creation of a sentencing commission outside the government altogether. *See* Mistretta v. United States, 488 U.S. 361 (1989).

further step of authorizing private enforcement of unindividuated interests may seem quite formalistic. We agree, for instance, that Congress can create or recognize interests that are shared by much of the populace. Just as Congress may conclude that the President would not adequately represent in litigation the interests of a private individual suffering a discrete injury, so it might determine that the President would not adequately represent the interests of a diffuse majority injured by either private or governmental conduct.[52]

But we believe that line drawing is absolutely essential in accommodating Congress' power to provide for private law enforcement with the establishment of a unitary executive in Article II.[53] Without an enforceable limit, Congress could circumvent the executive branch in providing for enforcement of criminal statutes as well. Indeed, if Congress can vest private individuals with the power to represent the public in litigation, it is but a small step to permit Congress to vest in private individuals the authority to bind the public through regulation or other aspects of law administration. The requirement of individuation, therefore, merely demarcates the outer boundary of Congress' power to delegate enforcement authority to private individuals. Congress must select the Executive to represent the entire public in litigation, just as it must do so for rulemaking or general policymaking.

Moreover, requiring Congress to be explicit about the interests it creates will force the legislature to pay greater heed to issues of accountability and representativeness, encouraging Congress to think twice about the hazards of authorizing unaccountable citizens to represent broad-based interests in civil law enforcement. The more explicit Congress must be in defining the injury, the more likely that the decision will be thoroughly debated and considered in the democratic process. Forcing Congress to define those injured with greater specificity should minimize both representativeness problems, by alerting

52. We therefore disagree with Justice Scalia's position, *see* Scalia, *supra* note 14, at 894-97, that courts should refuse to permit those vindicating majoritarian interests to obtain judicial redress. The judiciary is ill equipped either to ascertain what is a majoritarian interest or to determine when individuals sharing such interests should be relegated to the political branches for relief. Both objects and beneficiaries of regulation, for example, may at times constitute a majority of the populace. But when no individuated interest exists, Congress lacks the power to vest enforcement authority outside the Executive.

In contrast, courts conceivably should have more say in determining if majoritarian processes can redress constitutional injuries — whether individuated or not — depending on the nature of the constitutional right at stake. We do not address in this essay the Executive's role in redressing constitutional violations.

53. As we discussed earlier, *supra* note 9 and accompanying text, principles of self-determination and autonomy do not support private rights of action when the private interests to be protected are shared equally by the entire populace. If the injury is individuated, however, Congress should have discretion to determine whether majority or minority interests are best represented through a private, public, or mixed enforcement scheme.

all affected individuals of their rights, and collective action problems,[54] by circumscribing the class of those injured.

C. *The Danger of Executive Underenforcement of the Laws*

Our proposed accommodation of Article I with the unitary executive would admittedly remove one check upon the Executive's underenforcement of the law. The President, for instance, might decline to enforce laws protecting endangered species. Congress has turned to citizen suits in part to combat that risk of underenforcement. Unlike Justice Scalia,[55] we do not believe that the President is constitutionally privileged to refuse on policy grounds to enforce the laws passed by Congress.

But the remedy of citizen standing is neither necessary nor foolproof. Congress hardly lacks the capacity to force the President to take more vigorous action. Congress can call agency officials to account for inaction before oversight committees, threaten funding cutoffs in other areas, or hold up executive appointments. Moreover, Congress in most instances can create individuated interests to enable private citizens to sue when a lack of governmental enforcement infringes upon such interests.[56] Although universal citizen standing to challenge threats to endangered species, in our view, would not be consistent with Article II, creating an injury in all those who have visited habitats to observe such species should pass constitutional muster.

Employing private attorneys general to combat the risk of underenforcement also creates the risks of overenforcement and arbitrary rule. First, private parties may have self-interested reasons for bringing suit. Business representatives may file False Claims Act suits[57] against competitors, or private groups might sue for their own pecuniary gain, irrespective of the public importance of the suit. Such citizen suits may well preclude other citizens from subsequently suing on

54. The larger the class represented, and the smaller the interest of each class member, the more that collective action problems prevent members from exercising any control over their agents in litigation. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 20 (1991) ("[C]ollective action and free-rider effects allow the plaintiffs' attorney in class and derivative cases to operate with nearly total freedom from traditional forms of client monitoring."); *see also* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

55. *See* Scalia, *supra* note 14, at 897.

56. *See supra* text accompanying notes 44-45.

57. 31 U.S.C. §§ 3729-3733 (1988 & Supp. III 1991); *see also infra* text accompanying notes 98-104.

their own behalf.[58] No one has elected private attorneys general to represent the rest of us, and there are no political checks on their exercise of power. Their interpretations of controlling federal law and their strategic decisions in litigation may not redound to the public benefit.[59]

Second, even if the private attorneys general are as enlightened as Cass Sunstein may be, they lack the information and experience of the Executive in determining which violations to target and which remedies to pursue. Maximum enforcement may not be the best strategy to achieve the overarching legislative goals. Further, private attorneys general cannot modulate enforcement as conditions change — even if one group decides *not* to bring a particular action, another group may nonetheless file suit.[60]

Third, if universal citizen standing is permitted, then Congress could presumably select which individuals or groups it trusts to vindicate the public interest. Whether Congress selects the National Rifle Association, Public Citizen, or individual members of Congress as enforcement agents,[61] other citizens are excluded, and Congress may too easily control the exercise of delegated authority. Combining in Congress the authority to make binding policy with the discretion to apply it on a case-by-case basis threatens the basic scheme of separated powers, circumventing one of the critical checks on legislative power in the Constitution — that Congress cannot enforce the law. Thus, by creating citizen standing, Congress may in effect choose specific groups to serve as a substitute executive, and those groups' decisions as to whom

58. Plaintiffs under the Clean Water and False Claims Acts have extracted from businesses favorable settlement terms that did not necessarily serve the public interest. *See infra* notes 74 & 101. Judges may not be able to police such self-interest, depending upon the terms of the statutory mechanism. Congress may authorize courts to exercise discretion in approving settlements, but it has rarely if ever directed judges to scrutinize a private attorney general's motives for bringing suit.

59. Indeed, under the False Claims Act, private relators shape doctrine in an area of continuing importance to taxpayers, unconstrained by concern for future litigation. Relators may raise issues that harm the government in subsequent cases, or they may insufficiently perceive the importance of doctrinal twists. *See, e.g.*, Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 810 (D. Utah 1988) (government knowledge of false claims bars suit). Moreover, taxpayers indirectly subsidize all such losing efforts because some defendants can recapture the expense of defending suit by including such costs in the overhead they charge to their governmental contracting partner. *See False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 27 (1990) (statement of Assistant Attorney General Gerson).

60. *See infra* text accompanying note 77 & 93.

61. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (noting that Congress in the Federal Election Campaign Act delimited the groups that could challenge the constitutionality of the Act). Indeed, some have counseled Congress to take a more active role in enforcing the law through lawsuits, at least when the Executive's actions arguably affect Congress' rights. *See, e.g.*, Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweights?*, 54 U. PITT. L. REV. 63, 119-27 (1992).

to target for enforcement, and what penalties to seek, are not subject to sufficient political checks.

III. APPLICATION OF THE UNITARY EXECUTIVE THEORY TO CITIZEN SUITS

To examine the ramifications of the unitary executive on citizen standing, we address three contexts in which Congress has conferred, and will likely continue to confer, broad statutory standing: (1) environmental citizen suits against private, regulated entities; (2) mandamus-type citizen suits to compel executive agency compliance with the law, as in *Lujan;* and (3) qui tam suits in which private relators redress governmental injuries. These contexts illustrate how Congress, by enacting universal citizen suit provisions, not only may undermine accountability in the enforcement of public-regarding legislation, but also may compromise private rights by delegating to private individuals the ability to bind their peers.

First, consider environmental citizen suits against private "polluters" to enforce their permit requirements. The Clean Air Act (CAA), for instance, authorizes "any person [to] commence a civil action on his own behalf" against any entity "who is alleged . . . to be in violation of" certain regulatory requirements, including any emissions limitation contained in its permit.[62] By authorizing enforcement suits by "any person," Congress has apparently granted standing to any plaintiff who can make a good faith allegation of the defendant's viola-

62. 42 U.S.C. § 7604(a) (1988 & Supp. II 1990). Sixty days after notifying the defendant and state and federal agencies of their intent to sue, see 42 U.S.C. § 7604(b) (1988 & Supp. II 1990), any person may bring a suit in federal district court for the district in which the source of the pollution is located. 42 U.S.C. § 7604(c)(1) (1988 & Supp. II 1990). The plaintiff may seek injunctive relief, the imposition of civil penalties, or both. 42 U.S.C. § 7604(a) (1988 & Supp. II 1990). In addition, the 1990 amendments inserted language authorizing citizen suits for wholly past violations. As of November 15, 1992, any person may bring suit against entities who are "alleged to have violated" their permits, "if there is evidence that the alleged violation has been repeated." 42 U.S.C. § 7604 (a)(1), (3) (1988 & Supp. II 1990). *But cf.* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987) (holding that the Clean Water Act did not authorize "citizen suits for wholly past violations").

Many other environmental statutes contain similar citizen suit provisions that authorize "any person" to bring enforcement actions against private defendants. *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. § 2619(a) (1988); Endangered Species Act, 16 U.S.C. § 1540(g) (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 1,1046(a)(1) (1988). Statutes not in the environmental area that contain similar broad grants of standing include the Consumer Product Safety Act of 1972, 15 U.S.C. § 2060(a) (1988) (granting standing to "any person adversely affected . . . *or* any consumer or consumer organization") (emphasis added); the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a(e)(1)(A) (1988) (conferring standing on "any interested person (including a consumer or consumer organization)"); and the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(f)(1) (1982) (conferring standing on "[a]ny interested party") (no longer in effect as of Sept. 30, 1983).

tion.[63] Plaintiffs would not have to demonstrate that they suffered a distinctive injury-in-fact to challenge the violation.[64]

The Supreme Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* [65] seemed to endorse the view that Congress can confer universal standing. In *SCRAP,* the Court held that plaintiffs had standing[66] to redress an injury to the public's general interest in clean air, and that such a suit could be brought by "all who breathe [the] air."[67] Professor Sunstein adopts a similar notion in one of his "proposals" for a legislative response to *Lujan.* He recommends that Congress explicitly create a universally held property interest — a "tenancy in common" — in some environmental asset,[68] such as the conservation of clean air, pristine areas, or endangered species.[69] Yet, in property law, one owner of collective property cannot unilaterally take legal action binding others' interests in that same property; either unanimity or a prior governance agreement is required.[70] If we are correct about the structural and functional values

63. *See, e.g.,* Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976) (Clean Air Act citizen suit provision eliminated need to demonstrate independent standing), *cert. denied,* 434 U.S. 902 (1977); Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C. Cir. 1975) (holding that when Congress determines that "any person" is the appropriate party to bring suit, citizens group had standing without showing an injury-in-fact); *see also* Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1005-08 (D.C. Cir. 1977) (holding that citizen suit provision of Marine Mammal Protection Act obviated need to consider traditional tests of standing), *cert. denied,* 434 U.S. 1013 (1978); National Wildlife Fedn. v. Coleman, 400 F. Supp. 705, 710 (D. Miss. 1975) (reading Endangered Species Act's citizen suit provision to confer "automatic standing on any person claiming a violation" of the Act), *revd. on other grounds,* 529 F.2d 359 (5th Cir.), *cert. denied,* 429 U.S. 979 (1976).

64. Some courts have read stricter standing requirements into statutes that on their face seem to confer standing on an unlimited class of persons. *See, e.g.,* Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 909 (9th Cir. 1974) ("[I]nexorable interrelationship between standing and . . . Article III" precludes interpreting the Clean Air Act to allow "standing without a prior showing of 'injury in fact.' ") (citing Flast v. Cohen, 392 U.S. 83, 98 (1981)); *see also* Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1045 (8th Cir. 1988) (Bowman, J., dissenting) ("Surely Congress did not intend [the Endangered Species Act's citizen suit provision] to be read in a vacuum, without regard to constitutional [Article III] limitations."). This raises the issue of whether the courts must demand a clear statement of the injury Congress is creating, or whether the courts may narrow the class of persons with standing to those who can demonstrate individuated injuries. *See infra* text accompanying note 111.

65. 412 U.S. 669 (1973).

66. Plaintiffs brought suit pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. III 1993), and the National Environmental Policy Act, 42 U.S.C. § 4321-4370a (1988).

67. 412 U.S. at 687. Most commentators and courts now view *SCRAP* as an aberration from the Court's standing jurisprudence and limit the holding to its facts.

68. *See* Sunstein, *supra* note 3, at 234-35.

69. Alternatively, environmental citizen suit provisions may be conceptualized as conferring a more abstract collective interest in the proper enforcement or administration of the law. *See generally* Bice, *supra* note 10, at 293; Sedler, *supra* note 10, at 878-80. For our analysis, see discussion of mandamus-type citizens suits, *infra* notes 94-96 and accompanying text.

70. Indeed, some governing structure is needed to avoid the collective action problems plaguing any large-scale system of jointly held property. *See, e.g.,* Harold Demsetz, *Toward a Theory*

inherent in the unitary executive, the Executive must be the agent of the national community to redress collectively held harms.[71]

Experience with citizen suits under another environmental statute, the Clean Water Act (CWA),[72] illustrates the potential drawbacks of authorizing private, unaccountable citizens to enforce the law on behalf of the public. Private enforcers lack the information and ability to foster optimal compliance with a regulatory scheme as complex and far reaching as the National Pollutant Discharge Elimination System (NPDES).[73] Centralized agencies (state or federal) can determine which violators to target and, by carefully choosing among enforcement options and remedies, can employ an enforcement strategy that will achieve the greatest overall gains in water quality.[74] In fact, the

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of Property Rights, 79 AM. ECON. ASSN. PAPERS & PROC. 347, 354-59 (1967); *cf.* Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711, 719 (1986).

71. *See generally* RABKIN, *supra* note 24; *see also supra* text accompanying note 49-50.

72. We draw upon the CWA for illustration because of the far greater number of actions against private defendants that citizens have brought under the CWA, as compared with the CAA. *See* Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,407, 10,424 (1984). Public access to industry self-monitoring reports made CWA suits extremely cost efficient for environmental groups. *See* Adeeb Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENVTL. L. REV. 23, 66-69 (1985).

We should note that the CWA qualifies its citizen suit provision by authorizing only those who have "an interest which is or may be adversely affected" to bring suit. 33 U.S.C. § 1365(g) (1988 & Supp. 1990). By including this language, Congress probably intended the CWA to incorporate the standing requirements enunciated in Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that a special interest in environmental policies is not sufficient to constitute injury under the Administrative Procedure Act; plaintiffs must allege a specific injury). *See* Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 16 (1981). This qualification has not significantly limited the ability of environmental groups to bring actions, however, as the courts have been extremely lenient in recognizing injuries-in-fact in CWA cases. *See, e.g.*, Gonzales v. Gorsuch, 688 F.2d 1263, 1266 (9th Cir. 1982) (Section 505 of the Federal Water Pollution Control Act Amendments of 1975, U.S.C. § 1365(a)(2) (1988), was "intended to grant standing to a nationwide class, comprised of citizens who alleged an interest in clean water.").

This raises the interesting question of whether, under our account of Article II and the unitary executive, Congress can salvage the constitutionality of universal citizen suit provisions simply by limiting standing to "any person whose interests are adversely affected." This generic language could suffice, as long as the statute made clear that the phrase was referring only to individuated interests. The drawback to this approach is that it relinquishes control over plaintiffs' standing to the Court, which has been steadily shrinking the contours of injury-in-fact; *Lujan* represents the latest shrinkage. This objection, however, begs the central question of this essay: How far beyond the Court's delineation of "injury-in-fact" may Congress expand standing for private enforcers?

73. 33 U.S.C.A. § 1342 (1988 & Supp. 1993).

74. Certainly, government agencies are in the best position to use limited enforcement resources most efficiently. But even in a world of unlimited enforcement resources, maximum compliance may not be optimal in all situations, and agencies can adjust enforcement to attain the Act's ultimate objectives more effectively. The agency has the ability to pursue less severe options, such as negotiating informally or issuing administrative orders, before seeking injunctive relief or civil penalties in court. When faced with certain de minimis violations, the agency may choose to abstain from enforcement altogether. In exchange for flexibility and consistency in enforcement policies, the agency can expect greater voluntary cooperation from industry.

Active private enforcement, while supplying additional enforcement resources, can also lead

NPDES regulatory scheme encourages citizens to bring inefficient suits. Citizen suits do not necessarily target the worst actors or the most severe environmental problems.[75]

The Clean Water Act experience also highlights the risk of self-interested behavior by private parties in bringing suits. Several studies document the widespread practice of environmental groups seeking contributions to private causes in lieu of payments to the federal treasury in settling citizen suits.[76] While some groups may seek funding for environmentally sound projects, there are no assurances that all such projects in fact will be socially beneficial. Other individuals bringing suit may lack even the pretence of serving the public interest. Thus, a private enforcement scheme compromises the public good by both eliminating the gains of centralized enforcement and removing a check on self-serving actions.

The greater the preclusive effect of such citizen suits, the greater the problems with unaccountable representation. Although the extent to which citizen actions are preclusive on other citizens is unclear, the first plaintiff to file suit will at least partially impede actions by future plaintiffs. If the first plaintiff loses on the issue of liability, for instance, that judgment is likely to affect through stare decisis any future action based on the same alleged violation. On the other hand, if the first plaintiff wins and the court imposes civil penalties, the court is unlikely to allow another citizen suit for the same violation, even if the second plaintiff believes that the penalties imposed in the first case

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to counterproductive results. For instance, if industry cannot expect flexible responses to de minimis violations, the costs of setting initial permit requirements will rise. In general, the less industry can rely on agency oversight, the less the agency can informally bargain for greater cooperation and voluntary compliance. *See* Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values,* 22 GA. L. REV. 337, 400-02 (1988); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws,* 34 BUFF. L. REV. 833 (1985); Theodore L. Garrett, Pros and Cons of Citizen Enforcement, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10162 (1986).

75. Because the Act holds violators strictly liable and accrues penalties based upon the number of permit violations per day, *see* 42 U.S.C. § 7413(b) (1988 & Supp. II 1990), environmental groups have an incentive to sue defendants with the highest number of violations, regardless of the seriousness of the violation. Furthermore, since citizens can rely on agency compliance data in court, they have no incentive to perform their own monitoring or investigation in order to discover undetected violations, which may be the most important cases to prosecute. *See* Blomquist, *supra* note 73, at 402.

76. *See* Boyer & Meidinger, *supra* note 74; Michael S. Greve, *The Private Enforcement of Environmental Law,* 65 TUL. L. REV. 339 (1990); David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?,* 21 ENVTL. L. 175 (1991). Congress further legitimated the practice of diverting penalties to private, environmental causes with a special provision in the 1990 Clean Air Act Amendments. *See* 42 U.S.C. § 7604(g)(2) (Supp. II 1990) (authorizing payments of up to $100,000 for "beneficial mitigation projects" in lieu of civil penalties).

were insufficient.[77]

The problems with preclusion are exacerbated by the possibility of a "sweetheart" settlement, particularly under the Clean Air Act, in which a citizen suit for a wholly past violation[78] results in a consent decree requiring payment to a "socially beneficial" project. The payment may constitute only a fraction of the potential civil penalties. To the extent that the consent decree bars[79] future citizen suits based on the same set of facts through res judicata, the public would have no recourse. The first citizen to sue would have the ability to bind the rest of us to his or her resolution of our collective injury. Admittedly, the preclusive effects of sweetheart settlements are mitigated by the fact that the CAA preserves the government's right to bring its own suit.[80] One could imagine, however, a citizen suit provision that had a preclusive effect on the government as well — the worst case scenario for the preservation of Article II's accountability principle.[81]

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77. *See generally* JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 92-94 (1987) (suggesting that citizen suits should preclude all future suits for same violation).

78. Under the 1990 Amendments, citizens may bring suit for wholly past violations if there is evidence that the alleged violations had been repeated. *See* 42 U.S.C. § 7604(a) (1988 & Supp. II 1990). Citizen suits for ongoing violations would not preclude future suits because the statute considers each day of violation to be a separate and distinct violation of the Act. *See* 42 U.S.C. § 7413(e) (Supp. II 1990).

79. Citizen suits could have a res judicata effect under the theory that plaintiffs acting in the capacity of private attorneys general are in privity with other plaintiffs acting in the same capacity. Otherwise, defendants might be subject to an unlimited number of citizen suits for the same violations, at least until the maximum liability for each violation was exhausted. While we could find no cases in which a court found that citizen suits precluded other citizen suits, several cases involve the preclusion through res judicata of citizen suits by government actions. In one case, EPA v. City of Green Forest, Ark., 921 F.2d 1394, 1403-05 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 414 (1991), the government brought an action more than 60 days after a citizens group filed suit. The government, therefore, had exceeded the period during which it could have automatically preempted the citizen suit by bringing a "diligent" prosecution of its own. *See* 42 U.S.C. § 7604(b) (1988 & Supp. II 1990). Nonetheless, the court held that EPA's consent decree with defendant, entered before the culmination of the citizens' litigation, barred the citizens' claim under the doctrine of res judicata. The court reasoned that, as private attorneys general, the plaintiffs had only an abstract interest in enforcement — an interest that was shared with and adequately vindicated by the government. 921 F.2d at 1403-05. Courts could apply similar reasoning to hold that the first suit brought by a private attorney general bars any subsequent suit by citizens acting in the same capacity.

80. The Act provides that the government is not bound by the outcome of any suit to which it is not a party. *See* 42 U.S.C. § 7604(c)(2) (Supp. II 1990). Some, however, have argued that the government should logically be bound if it had notice of the suit. MILLER, *supra* note 77, at 92-93.

81. Even if there is no requirement of individuated injury in the Clean Air and Clean Water Acts, the statutes nonetheless may provide the EPA and DOJ with enough supervisory control over citizen suits to satisfy Article II's demand for accountability. Both Acts permit the government to preempt citizen suits by diligently pursuing its own civil action. *See* 33 U.S.C. § 1365(b) (1988); 42 U.S.C. § 7604(b) (1988 & Supp. II 1990). Both authorize the EPA to intervene at any stage in the litigation. *See* 33 U.S.C. § 1365(c)(2) (1988); 42 U.S.C. § 7604(c)(2) (Supp. II 1990). Finally, both require the courts to consult with the Department of Justice and the EPA before issuing consent decrees. *See* 33 U.S.C. § 1365(c)(3) (1988); 42 U.S.C. § 7604(c)(3) (Supp. II

To illuminate the difficulties raised by environmental citizen suits, consider a hypothetical statute, the "Ozone Depletion Act," strictly regulating the manufacture and use of all ozone-depleting chemicals. Assume that the nation collectively shares the protection afforded by the ozone shield. On whom does Congress have the authority to confer standing to enforce the statute?

Congress could not create universal citizen standing consistent with Article II — that is, standing for "any person" — either by creating a collectively held legal interest in the ozone layer or by defining "injury-in-fact" as an increased risk of skin cancer.[82] But what if, in an attempt to satisfy the individuated injury requirement, Congress granted standing exclusively to the following parties: (1) anyone whose last name is Smith; (2) Friends of the Ozone, an environmental "public interest" organization; (3) anyone who has an above average susceptibility to skin cancer from solar radiation; or (4) "any person," but only to sue on behalf of persons who suffer individuated injuries?

In the first example, by specifying that the "Smiths" have standing, Congress is differentiating the class of plaintiffs who can sue, but not the underlying injury to be redressed. Because there is no logical connection between one's surname and one's level of exposure to radiation or risk of cancer, Congress essentially would be delegating responsibility to one particular group to vindicate the undifferentiated public interest in being free from *any* increased risk of cancer. While all persons named Smith are no more or less representative of the public than any other randomly selected class of persons, the Smiths who come forward with suits may be more likely to press some idiosyncratic view.[83] The Smiths in the world, however, are in no way accountable to the rest of us for their efforts to protect the ozone layer.

A similar analysis applies to the Friends of the Ozone example, except that here, Congress has authorized a special interest group to litigate on behalf of the public at large. While Friends of the Ozone may have an unique interest in and a high level of expertise about

1990). On the other hand, the government cannot prevent a suit from being brought in the first place. Nor does the government have the resources to intervene in every case that warrants government supervision. Our purpose, however, is not to suggest how much supervisory control is constitutionally sufficient, but rather to demonstrate when Article II requires executive supervision.

82. Assuming all persons would experience at least some increase in cancer risk from ozone depletion, the injury produced by a violation of the Act would not be differentiated among the population at-large. Although an increased risk of cancer may constitute a cognizable injury, the problem is that the injury is shared equally by the whole nation.

83. See generally the analysis of public interest litigation in Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis, in* PUBLIC INTEREST LAW 4 (Burton A. Weisbrod et al. eds., 1978); *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

pollution in the biosphere, its members are no more representative of the public than are the Smiths. The public did not elect Friends of the Ozone,[84] and there is no assurance that the group's interests match those of the general public. Indeed, Congress may have selected Friends of the Ozone because of campaign contributions or because of Congress' belief that it can influence that group's enforcement choices.[85]

The third example, creating an interest in being free from an above average risk of skin cancer, falls comfortably within Congress' power. Congress has created an interest that would give rise to a clearly individuated injury: by definition, no more than half the population could claim to have their legal interests invaded by a violation of the Act.[86] These citizens would have standing to vindicate their individual interests.[87]

To be sure, any scheme of private enforcement involving broad grants of standing, even if based on individuated injuries, will face the

84. Even though Congress may in a sense be responsible for its choice of enforcement agents, it does not remain directly accountable for the authority exercised by these agents. Such authority cannot be readily linked, in the public eye, to Congress and will not be subject to the same internal checks of bicameralism and presentment. The checks and balances applicable to legislation or to the executive branch's exercise of delegated authority are simply not present. For similar reasons, most academics have decried the demise of the nondelegation doctrine. *See generally* Symposium, *The Uneasy Constitutional Status of the Administrative Agencies,* 36 AM. U. L. REV. 277 (1987). Thus, a policy decision to use private enforcement agents does not assure that the subsequent exercise of that delegated authority is itself sufficiently constrained.

85. Michael Greve contends that citizen suit provisions in effect create an off-budget subsidy for national environmental advocacy groups, who are, practically speaking, the only "citizens" with the capacity to bring enforcement actions. *See* Greve, *supra* note 76. Such an arrangement may create an uncomfortably close relationship between the legislature and law enforcement. The imperative to segregate lawmaking from law enforcement explains why Congress may not delegate enforcement powers to its own members. *See, e.g.,* Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991); Buckley v. Valeo, 424 U.S. 1 (1976); *see also* McClure v. Carter, 513 F. Supp. 265 (D. Idaho) (striking down statute that conferred standing to members of Congress to contest the appointment of Judge Mikva), *affd. sub nom.,* McClure v. Reagan, 454 U.S. 1025 (1981).

86. Here we differ from Justice Scalia, who believes that all "majoritarian" harms should be redressed by the political branches and that responsibility for vindicating "minority" interests should be left to the courts. *See* Scalia, *supra* note 14, at 895. In contrast, we believe that Congress can better determine which interests need political resolution, within the confines of Article II's mandate for a unitary executive. See *supra* note 52 for how our account of statutory standing differs from that discussed in Scalia's article.

87. So long as the statute identifies the individuated interests at stake, Congress can specify some of the classes of plaintiffs who have standing to sue. For instance, in the Ozone Act, Congress may want to provide a nonexclusive list of plaintiffs deemed to have an "above-average" risk of skin cancer from ozone depletion — for example, former skin cancer patients; people who live in high altitudes or other regions identified as high risk; or workers who are constantly exposed to the sun. Selecting specific classes of plaintiffs may create due process problems, however, if the effect is to exclude other persons who may be injured in the same way. *See supra* text accompanying note 61. Courts should therefore ensure a relatively close fit between the injury recognized and the class of those authorized to bring suit: otherwise Congress, by defining the class of those entitled to sue, could evade the individuation requirement.

potential problems of self-interested or inefficient enforcement discussed above.[88] Moreover, if these Ozone Act citizen suits precluded other suits, the ability of the first plaintiff to bind everyone else who shares his or her injury might threaten basic principles of fairness and due process.[89] Our point is not that private enforcement becomes wise policy when Congress creates individuated interests. Rather, when plaintiffs seek to redress individuated injuries, the pitfalls of private enforcement simply do not implicate Article II.[90]

In the fourth example, Congress attempts to create broad statutory standing not by widening the scope of the interests protected, but by authorizing uninjured third parties to vindicate the rights of others. Because the interests at stake in example three are individuated, citizen suits do not violate the Article II accountability principle. Nonetheless, citizen suits in the last example threaten to compromise fundamental values of fairness and due process. There is clearly a private right at stake; the only question is whether one plaintiff has a sufficiently close relationship to the injured party to represent that party in litigation.

The courts have treated the general bar against third party standing as a "prudential" matter. That is, the courts only reluctantly allow plaintiffs to vindicate the rights of absent third parties, even though they recognize Congress' authority to expand jus tertii to some extent.[91] We do not think, however, that Congress may go so far as to create a blanket rule under which *all* citizens have the right to sue on behalf of individuals injured more distinctively by ozone depletion.

Professor Lea Brilmayer has pointed out that serious due process and autonomy concerns arise when ideological plaintiffs — challeng-

88. See discussion of citizen suits under the Clean Water Act, *supra* notes 74-81 and accompanying text.

89. An analogy may be drawn to class action suits. Class actions bind the members of a class, but *only* if certain due process safeguards are in place. For instance, the class must be defined narrowly to ensure that the members are similarly situated and the representative party must be capable of "fairly and adequately protect[ing] the interests of the class." FED. R. CIV. P. 23(a). Additionally, for classes certified under Rule 23(b)(3), the court must ensure that all class members receive adequate notice and be given the opportunity to opt out. FED. R. CIV. P. 23(c)(2).

90. Congress can employ a variety of procedural safeguards to mitigate the due process problems involved in any scheme of citizen enforcement, especially where such suits have a preclusive effect on other citizens. For instance, the statute may provide for protections similar to those found in the class action context, *see supra* note 89, for the opportunity of any injured party to intervene as a matter or right, *see* Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11046(h)(2) (1988) (providing the right to intervene whenever a citizen suit impedes the ability of a nonparty to protect its distinct interests), and for encouraging the submission of amicus presentations. *See also* Susan Bandes, *The Idea of a Case,* 42 STAN. L. REV. 227 (1990) (arguing that a departure from the private rights model of adjudication does not have to intrude on individual rights).

91. *See* Warth v. Seldin, 422 U.S. 490, 509 (1975).

ers who are not members of the injured class — have standing to litigate constitutional claims that may affect third parties through stare decisis.[92] Similarly, in our fourth example, citizens who are not themselves injured would be able to initiate litigation that may create unfavorable precedent for injured persons, even though the injured parties may have wished subsequently to bring their own actions. The injured parties would also be subject to the decision to bring the action in the first place, a decision that they may not have desired. To the extent that these Ozone Act citizen suits could not only adversely affect, but could also actually preclude others from vindicating their own rights,[93] the suits would clearly violate basic due process values.

To summarize, our analysis of environmental citizen suits provides Congress with a choice between placing enforcement control in the hands of the accountable Executive or in the hands of private parties who are vindicating their own distinct injuries. Although we believe that Congress should have near plenary power to determine what is a cognizable interest, Congress may not give the authority to redress unindividuated interests to some or all private citizens.

In addition to citizen suits against private parties, Congress has also authorized citizen suits to compel the Executive to carry out its duties under the law. Most environmental statutes authorize this type of mandamus action.[94] In *Lujan,* for instance, the plaintiffs sought to compel the Secretary of the Interior to rescind a regulation that they argued was contrary to the Endangered Species Act. Our analysis of standing in *Lujan* is essentially the same as our analysis of environmental citizen suits against private defendants: Congress cannot confer standing merely by fashioning a commonly held interest in lawful governance by the Executive.

Indeed, in one sense, citizen suits against the Executive pose an even greater risk of unaccountable governance than do suits against private defendants under the environmental statutes. Unlike in the

92. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement,* 93 HARV. L. REV. 297, 306-310 (1979).

93. *See supra* notes 78-81 and accompanying text.

94. As with suits against private defendants, many environmental statutes authorize "any person" to challenge the legality of various types of executive agency actions. *See, e.g.,* Endangered Species Act, 16 U.S.C. § 1540(g)(1)(A) (1988) (permitting any person to bring suit to enjoin any government agency that is alleged to be in violation of any provision of the Act); Clean Air Act, 42 U.S.C. § 7604(a) (1988 & Supp. II 1990) (authorizing any person to compel the Administrator to perform nondiscretionary duties under the Act); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C § 1,1046(a)(1) (1988) (same). Some statutes also specifically authorize "any person" to invoke judicial review of agency rulemaking. *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1) (1988). As with suits against private defendants, some statutes limit citizen standing to persons whose interests may be "adversely affected." *See, e.g.,* Clean Water Act, 33 U.S.C. §§ 1365(a), (g) (1988).

Clean Water Act context discussed above, decisions on behalf of the entire public are made exclusively by private plaintiffs without the safeguard of a subsequent suit by the executive branch. Since the Executive is itself bound by the results of the suit, the rest of the public cannot count on a subsequent lawsuit by a democratically accountable agent to ensure that the public interest is served. Mandamus actions therefore plausibly pose more of a threat to the principles of accountability and representativeness.

Sunstein might retort that it would make little sense to give the Executive a special role in vindicating the public interest in the Executive's own lawful governance.[95] Although there may be an inherent conflict of interest in this context, the conflict cannot justify empowering unaccountable private citizens, with no personal interest at stake, to decide for the rest of us how the executive branch should interpret its duties under the law.[96] Otherwise, Congress could in effect empower private individuals to act as shadow executives in representing the entire nation in litigation, fragmenting the unitary executive. Both the plaintiffs and the defendant would claim to represent the public interest, and the judiciary would then need to choose which version of the public interest to accept — that proffered by the Executive or that proffered by the private plaintiff. As long as no individual rights are at stake, the principle of accountability is far better served by retaining control over executive enforcement in the hands of the politically accountable Chief Executive, subject to congressional oversight.

Furthermore, just as in the Clean Water Act, Congress may create individuated injuries to encourage suit against the Executive. Congress clearly could amend the ESA to confer a cognizable interest in the survival of an endangered species on any person who within the past ten years has visited the habitat of that species. Any threat to that species' survival would create a discrete injury in those persons and thus give rise to standing, without any further need of proof of causality or immediacy. In the absence of individuated harm, however, universal citizen suits to enforce the Executive's compliance with the law cannot be reconciled with a unitary executive.

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95. Indeed, Sunstein notes that the Executive has little to fear from judicial oversight in light of the doctrine of deference articulated in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Sunstein *supra* note 3, at 217. But, irrespective of the extent to which *Chevron* protects the Executive, *see* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992), we believe that only citizens seeking to redress individuated injuries, as opposed to perceived breaches of the public trust, should be able to challenge executive action. Political accountability demands at least that much.

96. A similar conflict of interest arose in Morrison v. Olson, 487 U.S. 654 (1988). The Court held that criminal prosecution of executive branch officials must nonetheless remain subject to general executive branch control.

Our analysis also suggests the potential invalidity of qui tam provisions, which allow private relators to bring civil enforcement actions on behalf of the United States and share in any ultimate recovery. Qui tam suits pose no insuperable Article III obstacle, for the government has suffered injury at the hands of the defendant. A concrete injury and adverse parties exist. The question is whether Congress can assign the government's injury to a private relator without impinging upon the Article II principle of accountability.[97]

For instance, under the False Claims Act,[98] which contains the most significant qui tam provision in effect today,[99] private individuals may prosecute cases of fraud against government contractors.[100] Once resolved, the suit precludes both the government and other private parties from suing to redress the same injuries. The injury to the federal government equally affects all who are subject to its jurisdiction.[101] Under our theory, the Executive must therefore retain control over all False Claims Act suits to ensure accountability for efforts to redress injuries suffered by the government.[102] In the absence of exec-

97. Prior to enactment of citizen suit provisions in the Clean Air and Water Acts, individuals attempted unsuccessfully to restrain violation of environmental laws through qui tam suits. *See generally* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). Like citizen suits, qui tam actions provide a means through which citizens can help enforce the laws irrespective of the executive branch's position.

98. 31 U.S.C. §§ 3729-3733 (1988 & Supp. III 1991).

99. The first Congress created numerous qui tam statutes to help enforce postal laws, liquor laws, and the like, and subsequent Congresses followed suit. These provisions typically did not allow for control by the Executive.

100. Under 31 U.S.C. § 3730 (Supp. III 1991), private relators must notify the government of their intent to sue, and the government may elect to intervene and take over the action within 60 days of notification. If the government declines to intervene, private parties may control the litigation and are generally entitled to between 25 and 30% of the proceeds if they prevail. The government can intervene at a later date in the litigation by showing good cause. If the government intervenes, then the relator can recover between 15 and 25% of the proceeds, and the government has the right to direct the litigation, though the relator remains a party. For other qui tam provisions still on the books, in which less governmental control is assured, see 25 U.S.C. § 201 (1988) (enforcing Indian protection laws); 35 U.S.C. § 292(b) (1988) (false marketing of patented goods).

101. Admittedly, Congress might be able to create competitor standing, which would be individuated, on the theory that overcharges by companies against the government give those companies an unfair competitive edge.

102. Similarly, Congress cannot delegate to private individuals the right to bring suit based on legislative restrictions on the Executive's constitutional authority, including both the appointment and removal power. *Cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (authorizing such suits). Congressional authorization for *any* person to sue on behalf of the executive branch is even more problematic than qui tam statutes, for it threatens the Executive's control over its own Article II powers. Even if the executive branch could intervene in any lawsuit, its discretion *not* to challenge particular intrusions on its power is lost. Moreover, the Executive might not be able to settle a suit according to the principles it favors. Full control over litigation surrounding its own prerogatives would be lost.

Congressional delegation of the executive branch's injury to the public represents a special case of jus tertii standing. Just as Congress cannot assign citizen *A* the right to bring suit on behalf of citizen *B* in the absence of a special connection between the two, so Congress cannot

utive supervision, private relators may readily manipulate qui tam suits to benefit themselves financially at the public's expense.[103] Given the protections afforded the Executive under the Act,[104] however, Congress arguably left sufficient control with the Executive.

Sunstein nonetheless proposes that Congress grant bounties to successful citizen plaintiffs without allowing for participation by the Executive. Sunstein argues that "a system of bounties would fully overcome the post-*Lujan* doubts about the citizen suit."[105] We certainly agree to the extent that such suits would be consistent with the requirement of a case or controversy, but only because a case or controversy exists independent of the bounty. Under the False Claims Act, the underlying injury giving rise to the case or controversy is suffered by the government, not the relator. A bounty therefore does not alter the nature of the injuries to be redressed in litigation, but rather creates a stake in its outcome, much like an attorney hoping for a contingency fee might enjoy. Just as Congress cannot create an individuated injury merely by differentiating the class of those who can

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assign citizen *A* the right to bring suit on behalf of the executive branch or the government as a whole. Although private citizens in circumscribed contexts benefit from the structural protections in the Constitution, Congress should not be able to confer upon disinterested private citizens the general power to vindicate the executive branch's rights. Otherwise, Congress can in effect bypass the executive branch and entrust litigation over governmental injuries to private parties, directly threatening the unitary executive.

103. *See, e.g.*, United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 811 F. Supp. 346 (E.D. Tenn. 1992) (holding that, once the United States declines to intervene in False Claims Act action, it can no longer object to the terms of any subsequent settlement, even if the settlement specifies no recovery to be allocated to the United States); Brief for Appellant United States as Represented by the Department of Justice, at 5-7, United States *ex rel.* Gibeault v. Texas Instruments Corp., No. 92-55760 (9th Cir. filed June 10, 1992) (relator reached private monetary settlement of suit contingent on dismissal of qui tam suit with prejudice, with no money to be paid to the Treasury); Brief for Appellant United States as Represented by the Department of Justice, at 6-10, United States *ex rel.* Killingsworth v. Northrop Corp., No. 92-55863 (9th Cir. filed July 2, 1992) (relator attributed most of his recovery from settlement to wrongful discharge claim as opposed to false claims allegation, minimizing amount to be paid to Treasury). False Claims Act suits have also been initiated by business competitors, *see, e.g.*, Irvin Industries, Inc. v. Goodyear Aerospace Corp., No. 87 Civ. 4444 (S.D.N.Y. May 20, 1992), and even by disgruntled members of the same family. Precision Co. v. Koch Indus., Inc. 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993).

104. *See supra* note 100. Our purpose is not to address precisely how much control is constitutionally sufficient, but rather to suggest when Article II requires that such controls — however ultimately defined — be exercised by the Executive. *See also* Caminker, *supra* note 9 (defending the constitutionality of qui tam provision in False Claims Act).

105. *See* Sunstein, *supra* note 3, at 232. Interestingly enough, Justice Scalia has adverted to the possible constitutionality of such bounty schemes. *Lujan*, 112 S. Ct. at 2143. According to Justice Scalia, a monetary reward apparently converts a generalized grievance into an individuated stake in the controversy. Presumably then, Congress could offer a $1.00 bounty to legitimate citizen suits in all contexts — whether in enforcing environmental requirements, challenging executive illegality, or redressing fraud against the public treasury. We do not think the Article II interest in accountability can be circumvented by so simple an expedient. Surely, a unitary executive, and not a bounty hunter, is the proper representative when the public's rights as a whole are at stake.

redress injuries suffered by the public as a whole,[106] so it cannot create individuated injury by assigning the right to sue on behalf of the public to the highest bidder or to the first bounty hunter on the scene. Thus, Sunstein's proposed system of bounties — like the qui tam mechanism — fails to create individuated injury, and the absence of any means to ensure coordination by the Executive undermines the principle of accountability implicit in Article II.

CONCLUSION

In our view, the constitutional linchpin of statutory standing is individuated injury, whether based on common law or contemporary notions of injury. The Article II principle of accountability prevents Congress from utilizing private attorneys general to vindicate interests shared by the public at large.

Our analysis may shed new light on Justice Kennedy's concurring opinion in *Lujan.* Unlike Justice Scalia, Justice Kennedy was not willing to reject broad statutory standing. Rather, he voted to deny standing because Congress had refused to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit,"[107] even though he readily conceded that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[108] Justice Kennedy noted, however, that "there is an outer limit to the power of Congress" to confer statutory standing, such as with "citizen-suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way."[109]

Justice Kennedy's approach, though analytically divergent from ours,[110] may similarly preserve Article II values of accountability. Far

106. *See supra* text accompanying note 83.

107. 112 S. Ct. at 2147 (Kennedy, J., concurring).

108. 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

109. 112 S. Ct. at 2147 (Kennedy, J., concurring).

110. Justice Kennedy rests his analysis on the concrete injury requirement in cases or controversies. That requirement would apparently be met if Congress explicitly created an interest in the future survival of an endangered species in Egypt. 112 S. Ct. at 2147 (Kennedy, J., concurring). But Justice Kennedy does not believe that Congress can grant standing merely by creating an interest in the proper enforcement of the laws, even if the class of individuals benefited is discrete. We do not understand why the latter interest is any less concrete than the former. In contrast to Justice Kennedy, we believe that an injury need not satisfy a test of "concreteness," but of individuation. And that requirement in our view flows from Article II and not Article III.

from merely demanding specificity, as Sunstein suggests,[111] Kennedy's approach demands individuation, which is also central to our analysis. Requiring Congress to "identify the injury it seeks to vindicate" with particularity, as well as requiring it to "relate the injury to the class of persons entitled to bring suit," serves two purposes. First, much like a clear statement rule, Justice Kennedy's approach requires Congress to consider more fully the underlying Article II value of accountability before creating standing in a large group of citizens. Congress must determine on a case-by-case basis whether societal vindication of private rights outweighs the advantages that might otherwise flow from centralized enforcement. If Congress concludes that private enforcement is warranted, it must then structure the grant of standing in a way that identifies an interest particular to a discrete segment of the population.[112] Second, delimiting standing to a class of citizens who share a particularized injury minimizes the risk of unaccountable governance. The more discrete the group, the less the collective action problem, and the greater the potential that each plaintiff will have some say in the litigation.

In sum, we argue for a middle ground between the positions staked out by Sunstein and Justice Scalia. At one end of the spectrum, Sunstein would sanction universal citizen standing, irrespective of the lack of individuated injury. He denies any special role to the Executive in redressing harms suffered by the public at large. At the other end, Justice Scalia would apparently prohibit Congress from recognizing nontraditional injuries, whether in enjoyment of animal life or in the failure to enforce laws affecting the opportunity to enjoy animal life. Our view of Article II suggests instead that statutory standing should be proscribed only when Congress delegates unindividuated injuries to citizens Sunstein, the unaccountable guardians of the public weal.

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111. *See* Sunstein, *supra* note 3, at 230-31.

112. If Congress designates the class of those who may sue to vindicate such injuries, courts must ensure that the class is sufficiently related to the specified injury. *See supra* note 87.