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CORRESPONDENCE

Article II Revisionism

*Cass R. Sunstein**

One of the most striking developments of the last decade has been the new use of Article II in public law adjudication. Article II is a prominent feature not only of cases involving the creation of federal institutions that are independent of the President,¹ but also of new disputes involving reviewability, scope of review, and standing.² It is especially interesting that some key standing cases, nominally decided under Article III, have an unambiguous root in a distinctive understanding of Article II.³ Thus it is suggested that certain grants of standing — to citizens, taxpayers, or others without an individuated injury — would compromise the vesting of executive power in the President and the grant of power to the President, rather than to courts or to citizens, to “take Care that the Laws be faithfully executed.”⁴ Article II appears to be doing much of the crucial work in the key Article III cases, and Justice Scalia’s powerful dissenting opinion in *Morrison v. Olson*⁵ may be enjoying a surprising rebirth in the law of standing.

All this suggests that Professor Krent and Mr. Shenkman have performed a valuable service in spelling out the argument that Article II, rather than Article III, justifies constitutional limits on legislative

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1. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding appointment of independent counsel by judiciary under Ethics in Government Act); *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down delegation of executive power to agency subject to Congressional control).

2. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (denying standing in part because it is the Chief Executive’s, not a citizen’s, duty to take care that the laws are faithfully executed); *Heckler v. Chaney*, 470 U.S. 821 (1985) (noting the similarity between agency’s decision not to enforce rule and nonreviewable prosecutorial discretion under Article II); *Allen v. Wright*, 468 U.S. 737 (1984) (denying standing in order to prevent judicial usurpation of Article II executive duties); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (stating that, when agency’s interpretation of law involves weighing of policy preferences rather than determination of agency powers, courts should defer to the agency to avoid encroaching upon Article II powers).

3. See *Lujan*, 112 S. Ct. at 2142-46; *Allen*, 468 U.S. at 760-61.

4. U.S. CONST. art. II, § 3.

5. 487 U.S. 654, 697-733 (1988) (Scalia, J., dissenting).

grants of standing.⁶ Indeed, on several important matters, we are very much in agreement. We agree that Article III forbids courts from hearing cases in which the plaintiff has no cause of action, but that, under Article I, Congress can create causes of action whenever it chooses.⁷ We agree that the citizen suit, while consistent with Article III, has a mixed record as a matter of simple policy.⁸ We agree that Article II poses no barrier to suits in cases involving individuated injuries, even when a beneficiary of a regulatory program is seeking greater enforcement of the law.⁹ I also want to emphasize that Krent and Shenkman have put their finger on a key but underanalyzed feature of the recent standing decisions.

In this brief space, I will be unable fully to come to terms with

6. Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993).

7. *Id.* at 1794-95.

8. *Id.* at 1803-04.

9. *Id.* at 1805-06. On this score it is illuminating to compare *Lujan* to the striking decision in Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville, 61 U.S.L.W. 4626 (U.S. June 14, 1993). Jacksonville had enacted an ordinance requiring that 10% of the money spent on city contracts be "set aside" for minority business enterprises. A contractors' association, consisting mostly of members who would not qualify as minority enterprises, brought suit, claiming that the set-aside violated the Equal Protection Clause. The lower court denied standing on the ground that no member of the association had demonstrated that, "but for the program, any AGC member would have bid successfully for any of these contracts." 61 U.S.L.W. at 4627 (quoting Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville, 951 F.2d 1217, 1219 (11th Cir. 1992)). There was therefore no injury in fact.

The Supreme Court responded:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.

61 U.S.L.W. at 4629 (citations omitted). In an intriguing footnote, the Court added, "[i]t follows from our definition of 'injury in fact' that petitioner has sufficiently alleged both that the city's ordinance is the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury." 61 U.S.L.W. at 4629 n.5.

There is serious tension between *Lujan* and *Associated General Contractors*. In *Lujan*, the injury could have been recharacterized in opportunity-like terms, and, in that event, there would have been no problem with injury in fact, causation, or redressability. Indeed, there is real tension between *Associated General Contractors* and many of the cases denying standing, including *Allen v. Wright*, 468 U.S. 737 (1984), *Simon v. EKWRO*, 426 U.S. 26 (1976), and *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). For a general discussion, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193-95 (1992). A prime goal of standing doctrine for the next few years should be to explain when injuries can be characterized narrowly and when broadly. In my view, the question should turn on legislative instructions. See *id.* at 234-35. See also Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. (forthcoming).

their understanding of Article II. I will try, however, to indicate why that understanding seems to be quite adventurous as a matter of constitutional history and structure. In the end, I suggest that their conception of Article II amounts to a form of constitutional revisionism, in the interest of judgments of policy and fact that are plausible but that lack sufficiently clear constitutional roots to be invoked by courts.

Let me begin with a brief outline of the basic argument. Krent and Shenkman contend that Article II reflects a commitment to a unitary executive, and that the grant of citizen standing fatally compromises that commitment.¹⁰ In their view, it is the President who is entrusted with the authority to oversee all implementation of federal law.¹¹ This idea stems from the constitutional judgment that there should be political accountability for the redress of “public harms,” that is, harms shared by the public as a whole.¹² The political process is the appropriate, and indeed the exclusive, check on inadequate redress of these harms.¹³

To be sure, people with individuated interests can bring suit against executive illegality, even if the illegality amounts to insufficient enforcement of the law. “Privately accountable relators,” however, are altogether different. Under Article II, they should not be allowed to bring suit against either private defendants acting in violation of the law¹⁴ or against the executive itself. This principle applies even if Congress creates bounties for citizens.¹⁵ If citizens lacking individuated interests were permitted to bring suit, they would undermine the forms of political accountability that are guaranteed by the system of unitariness in execution of the laws. It is for this reason that Article II bans the citizen suit.

This reasoning is indeed an understanding of Article II; but is it an understanding with real roots in the Constitution, one that federal judges should invoke in order to invalidate federal statutes? I am skeptical. First, a conceptual point: Krent and Shenkman lean very hard on the distinction between individuated and nonindividuated harms. This distinction seems quite problematic to me, not because there are hard line-drawing problems — although there are¹⁶ — but

10. Krent & Shenkman, *supra* note 6, at 1794-96.

11. *Id.* at 1794.

12. See *infra* notes 14-16 and accompanying text on this distinction.

13. Krent & Shenkman, *supra* note 6, at 1801-04.

14. In this respect, Krent and Shenkman answer a question not resolved in *Lujan*, a question that I believe the Court would resolve the other way. See Sunstein, *supra* note 9, at 231-33.

15. The same comment made *supra* in note 14 applies here. See *id.* at 232-33.

16. Part of the reason lies in the difficulty of deciding how to characterize the harms. See *supra* note 9.

because the distinction may not be workable for the purposes to which Krent and Shenkman seek to use it. The key point is that we cannot decide whether an injury is individuated in the abstract; this determination depends on whether the law has defined it as individuated. If Congress can enact law to decide whether injuries are individuated, it may ensure that injuries that were once nonindividuated are now in fact individually held, and it may grant standing to individuals to vindicate those interests.

The point may seem exotic and abstract, but it is perfectly familiar. In a system without private property, for example, property is publicly owned, and no one can claim that "his" property is at stake. There are no individuated ownership rights and hence no individuated harms. It is only when the law creates property rights that individuated injuries begin to exist. So, too, there is no individuated right to many regulatory benefits, such as clean air, when the law has allowed the benefit to be unowned. But once government has (1) created private ownership rights or a joint tenancy in the relevant benefit and (2) said that these rights may be vindicated in court, the case is quite different. Once the government has created ownership rights, the interest has become individuated in the legally relevant sense.

Of course there are differences between public and nonpublic goods. Perhaps Krent and Shenkman mean to argue that some public goods — things owned by all or many — cannot give rise to standing. But to some extent the very difference between public and nonpublic goods is an artifact of law. Whether a good is public depends at least partly on whether the government has said that it can be owned privately. In any case, I do not think that the differences between public and nonpublic goods have constitutional status for purposes of standing. It is not clear why Congress should be disabled from granting each of us a kind of property right in a certain state of affairs — even if many or all of us share that right — and from saying that each of us is entitled to vindicate that right in court.

Let me put the conceptual issues to one side and return to the Constitution. As Krent and Shenkman are aware,¹⁷ their understanding of Article II has no support in the history of Article II. In fact, early constitutional practice strongly argues against this understanding.¹⁸ Citizen suits were authorized before, during, and shortly after the founding, and there is no evidence that anyone thought that they

17. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 302 (1989); Krent & Shenkman, *supra* note 6, at 1803 & n.38.

18. Sunstein, *supra* note 9, at 168-79.

raised the slightest question under Article II. Criminal law enforcement by citizens is a well-established device in Anglo-American law.¹⁹ Even if some forms of citizen enforcement of the criminal law might be constitutionally troublesome, we are dealing here with civil actions, where the historical evidence cuts very hard against the invocation of Article II.

More broadly, I think that the notion of a “unitary executive” needs a good deal more elaboration, certainly in terms of its complex history. The Framers did believe in a unitary executive; but they did not think that this belief entailed the further view that the President is in charge of all implementation of the laws. In fact, they allowed Congress considerable power to structure implementation as it saw fit.²⁰ We know, for example, that in the period after the Founding, much prosecution under federal law took place without presidential control.²¹ Neither the President nor the Attorney General controlled the district attorneys. Citizens could enforce federal law in state court. Moreover, both the Comptroller General and the Postmaster were immunized from the general control of the President.

In these circumstances, the alleged constitutional commitment to a strongly unitary executive — a president who was to be in charge of all of what we now call implementation of the law — seems to me to have been greatly oversold. If judges are to be bound by history, or to give history a good deal of weight, it is necessary to reject the Article II argument against citizen standing.

I do not contend that the historical evidence is decisive. Perhaps it would be possible to develop a structural argument for an exclusive presidential role in law implementation.²² Let us suppose that such an argument can be made. Even if it can, it does not support the view that Article II bans suits brought by people without individuated interests. The key point is that there is no difference between the interference with that exclusive role in cases in which the plaintiff has an individuated interest and the interference with that role when the plaintiff has no such interest.

19. *Id.* at 175.

20. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 234-45 (1989) (discussing Congress' power in establishing executive departments); Larry Lessig & Cass R. Sunstein, *The President and the Administration*, 93 COLUM. L. REV. (forthcoming 1993).

21. In the next few sentences I summarize the argument in Lessig & Sunstein, *supra* note 20.

22. Krent and Shenkman use this strategy. Krent & Shenkman, *supra* note 6, at 1799-1801. Lessig & Sunstein, *supra* note 20, make a structural argument stressing changed circumstances, but the argument is too narrow to jeopardize the citizen suit.

Imagine, for example, that the plaintiffs in *Lujan*²³ had purchased airline tickets to the areas in which endangered species were at risk. In that event, they would unquestionably have had a sufficient "injury in fact" to challenge the failure to apply the Endangered Species Act extraterritorially. But if they had airline tickets, would they compromise Article II concerns any less? I do not believe so. Along the Article II dimension, there is no difference between citizen suits and suits by people with individuated interests. If suits against the executive by people with individuated interests do not violate Article II — as everyone agrees — it is hard to see why the same suits violate Article II merely because of the absence of an individuated interest.

In any case, it is far from clear that citizen suits really compromise any constitutional commitment to presidential exclusivity in implementing the law.²⁴ We should distinguish here between citizen suits against private defendants and citizen suits against the government itself. If the government is not implicated, we have a civil supplement to public enforcement efforts, corresponding to the ordinary and time-honored parallel systems of public and private law. Tort law and criminal law usually work hand in hand, allowing private and public suits founded on similar complaints, such as assault, battery, theft, and so forth. The creation of a citizen suit against private violators builds on this most conventional of models. I do not see how the Constitution's structural commitments forbid this model.

Perhaps the citizen suit will interfere a bit with the government's overall enforcement scheme by, for example, allowing an action when the executive has exercised prosecutorial discretion so as to exempt a violator.²⁵ It is not simple, however, to explain how this interference would violate Article II, any more than civil actions in state court violate state constitutions because such actions interfere with the criminal prosecutor's power to enforce the criminal law. Because the government is not a party, I cannot see why the citizen suit against private defendants creates a problem under Article II, especially if, as noted, an identical suit from someone with an individuated interest does not create any such problem. The disruption of the President's law enforcement authority is the same in either case. This point suggests that we are back to Article III and that Article II is irrelevant after all.

23. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

24. See Frank H. Easterbrook *Unitary Executive Interpretation: A Comment*, 15 *CARDOZO L. REV.* (forthcoming 1993) ("Litigation on behalf of the polity is shared with private citizens in the United Kingdom and many states (which even today allow private prosecution), and the survival of *qui tam* actions, veterans of the eighteenth century, shows that litigation has never been a prerogative confined to executive officials.")

25. See Krent & Shenkman, *supra* note 6, at 1803.

The issue is somewhat different in suits brought by citizens against the government. Perhaps there is an Article II problem if a court says that the executive must act in a certain class of cases. To come to terms with this claim, it is necessary to see what exactly the court will decide and what will be at stake. If the citizen suit is to go forward, the question for judicial decision is whether the relevant agency has violated federal law in circumstances in which the law dictates action of a certain kind. The court has no authority to issue a judgment because of a policy disagreement; it must find illegality.²⁶ If the agency has violated the law, the court will so hold and issue an appropriate decree. The question is this: Why, precisely, do such suits raise an Article II issue?

The problem does not arise under the "Take Care" Clause. By hypothesis, the President will win in court if he has "taken care" and lose only if he violated that duty. It is not so easy to see why the "Take Care" Clause forbids courts from ordering the President to carry out the law. Indeed, Krent and Shenkman do not really believe that the clause forbids courts from doing this. They believe that, when an individuated injury is at stake, a decree to this effect raises no Article II problem.²⁷ Again: if Article II allows courts to interfere with law implementation by ordering the President to "take care" at the behest of a plaintiff with an individuated injury, why does Article II offer a freestanding objection to such an order at the behest of a citizen? No good reason comes to mind.

If this reasoning is right, the vesting of executive power in the President seems to add nothing to the problem raised by citizen suits. This clause does not bar the courts from issuing decrees calling for the legally required enforcement of the law at the behest of people with individuated injuries. If it does not, it is unclear how the clause supplies a barrier when citizens bring suit. Of course, the distinction between individuated and nonindividuated injuries grows out of Article III cases, in which it is understandable if misguided (as Krent and Shenkman agree²⁸). The unanswered question remains why that distinction is crucial for purposes of Article II. Perhaps the response is that the President should be accountable only to the public as a whole when individuals are not peculiarly affected, and when any particular litigant stands basically for everyone. This position is fully under-

26. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the agency receives the benefit of all reasonable doubts.

27. Krent & Shenkman, *supra* note 6, at 1816-17.

28. *See id.* at 1806-07.

standable as a matter of policy, but it does not seem to be more than that.

In the end, the structural claim at issue here amounts to a proposition that the abstract interest in political accountability, grounded in Article II, forbids Congress from allowing citizens to sue either private people acting in violation of the law or executive officials who are defaulting on their legal obligations. This claim raises many puzzles. If we are concerned about political accountability, the argument seems strained. It is after all Congress, the national lawmaker, that has by hypothesis decided in favor of citizen suits, and Congress is accountable for its actions. Moreover, there is at the very least an apparent democratic failure whenever a bureaucracy fails to do what Congress has prescribed. Surely Congress could conclude that the citizen suit provides both an *ex ante* deterrent and an *ex post* corrective to this unfortunate result. For these reasons, it seems a bit mysterious to say that the interest in political accountability forbids Congress from granting citizens standing to supplement or to correct agency illegality in enforcement.

One final point. As the last generation of constitutional law has made clear, there is a thin line between structural arguments having a genuine constitutional source and policy judgments belonging in the political process. If judges are going to strike down enactments of Congress on constitutional grounds, they should be reasonably confident that a real constitutional commitment underlies this result, and that the commitment does not mask instead a controversial set of policy recommendations. The aggressive use of Article II to prevent Congress from creating citizen suits seems to run afoul of this principle. It is not as if the claim has absolutely no connection to something in the Constitution; but the connection is much too attenuated to justify invalidation of federal statutes. This is my basic reaction to the imaginative recent use of Article II in the law reviews and the Supreme Court.