UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA *ex rel.* DR. CLARISSA ZAFIROV,

Plaintiff/Relator,

v.

PHYSICIAN PARTNERS, LLC; FLORIDA MEDICAL ASSOCIATES, LLC, d/b/a VIPCARE; ANION TECHNOLOGIES, LLC; FREEDOM HEALTH, INC.; and OPTIMUM HEALTHCARE, INC.,

Defendants.

Case No. 8:19-cv-01236-KMM-SPF

RELATOR'S SUPPLEMENTAL BRIEFING ON FOUNDING ERA HISTORICAL EVIDENCE REGARDING FEDERAL QUI TAM ENFORCEMENT (Pursuant to April 23, 2024 Order, Doc. 240)

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I. Introduction.

As Justice Thomas reiterated in a recent decision, "the practice of the First Congress . . . 'provides contemporaneous and weighty evidence of the Constitution's meaning.'" *CFPB v. Community Fin. Servs. Ass'n of Am., Ltd.*, No. 22-448, 2024 U.S. LEXIS 2169, at *23 (May 16, 2024), *quoting Bowsher v. Synar*, 478 U. S. 714, 723 (1986). Justice Thomas, on behalf of the majority of the Court, engaged in a lengthy analysis of the history of the Appropriations Clause to determine whether Congress's statutory authorization for the CFPB's funding mechanism violates the Constitution. *Id.* The Court's retrospection started with the pre-founding history (including the "practice in the Colonies and early state legislatures") and moved through the events surrounding the passage of the Appropriations Clause at the Constitutional Convention, the practice of the First Congress, and post-ratification practice. *CFPB*, 2024 U.S. LEXIS 2169, at *16-28. Finding that the history "confirms [the Court's] interpretation of the Appropriations Clause," the Court held the CFPB's funding mechanism was constitutional. *Id.* at *27.

In a similar manner, a retrospection of the origins of *qui tam* actions, from colonial and state practice through the practice of the first Congresses and early federal courts, confirms that *qui tam* was an enforcement tool well-known and well-accepted by the Framers, for many of the same reasons that the False Claims Act was signed into law by President Lincoln more than 160 years ago. Far from being a thoughtless "holdover" from English law (Doc.180, Defs.' Joint Mot. at 23), *qui tam* was selectively employed in the earliest laws of this country, and the use of *qui tam* provisions can be found in decisions of the early federal courts, including matters in which Hamilton and Jefferson

represented litigants. There is no evidence in any of this historic review that the Framers, any of the early Congresses, the first Presidents, or any court, questioned whether *qui tam* provisions presented any constitutional concern.

II. Founding Era History and Practice Confirms that *Qui Tam* Was a Well Known and Accepted Part of American Practice.

The False Claims Act is no modern interloper—it is strongly rooted in hundreds of years of *qui tam* tradition. This uncontroverted history has long been recognized by the Supreme Court. In *United States ex rel. Marcus v. Hess*, the Court recounted: "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government . . ." 317 U.S. 537, 541 n.4 (1943), *quoting Marvin* v. *Trout*, 199 U.S. 212, 225 (1905).[1] The Court underscored this in *Stevens*: After reviewing the steeped history of *qui tam* going back to the 13th century, it concluded that "*[q]ui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after

[1] In *Marvin v. Trout*, the Court cited older *qui tam* actions while considering the constitutionality of an Ohio gambling statute, which permitted recovery not just against gamblers, but building owners who permitted gambling, by uninjured informers. The Court concluded "[w]e are aware of no provision in the Federal Constitution which prevents this kind of legislation in a State for such a purpose." 199 U.S. 212, 225 (1905). The *Marvin* court observed: "The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer." *Id.* at 225 (citations omitted). "To say that it must be limited to a provision allowing a recovery of the money by the one who lost it, would be in effect to hold invalid all legislation providing for proceedings in the nature of qui tam actions." *Id*. Among the cases cited, the Court referenced *Beadleston v. Sprague*, a *qui tam* involving the Distilled Sprits Act. 6 Johns. 101, 1810 N.Y. LEXIS 81 (1810). In that action, the Supreme Court of New York held that "the person who first commences a *qui tam*, or popular action, attaches a right in himself, which no other common informer, by a subsequent suit, can devest; and he may demur to a plea of a recovery in such subsequent suit." *Id*. at 103.

the framing of the Constitution." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776 (2000).

At oral argument, this Court observed that *Stevens* did not do a detailed parsing of the American history of *qui tam* enforcement actions. Tr. at 13-14, April 22, 2024 Hr'g. Referencing the historical analogies set forth in *New York State Rifle & Pistol Ass'n v. Bruen,*[2] the Court asked counsel whether there was a more fulsome compendia of the historical evidence to deduce the relevant comparators and whether *qui tam* made a deliberate entry into the founding era landscape. *E.g.,* Tr. at 16, 17, 35. In recent years, in direct response to questions raised about the historical roots of private enforcement of public laws, several history scholars have published detailed reviews of the *qui tam* enforcement traditions in place at the time of the framing. *See e.g.,* Randy Beck, *TransUnion, Vermont Agency and Statutory Damages Under Article III* (August 23, 2023), accepted for publication in Florida Law Review ("Beck");[3] Nitisha Baronia, Jared Lucky, Diego Zambrano, *Private Enforcement and Article II* (draft publication May 8, 2024) ("Baronia");[4] James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469 (2023) ("Pfander").[5]

As Professor Beck summarized, "[f]rom the fourteenth through the eighteenth centuries, *qui tam* litigation by uninjured common informers was one of three extremely common methods of statutory enforcement, alongside suits by public officials and suits

[2] 597 U.S. 1, 20 (2022).

[3] We introduce the exhibits through the declaration of Jennifer Verkamp (the "Verkamp Decl."). *See* Verkamp Decl., Ex. 1, and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4549914.

[4] Verkamp Decl., Ex. 2, and available at http://dx.doi.org/10.2139/ssrn.4821934.

[5] Verkamp Decl., Ex. 3, and available at https://ssrn.com/abstract=4424076.

by injured parties." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1254 (2018) ("Beck, *Neglected History*").[6] The use of private *qui tam* informer-initiated actions was widely embedded in the enforcement mechanisms of the American colonies and states. Professor Beck provides a detailed catalog of how early American governments used *qui tam* actions by informers to help ensure a wide range of government functions were implemented. *Id.* at 1269-1291. The *qui tam* mechanism served an important need at a time when government resources were very limited. Beck, at 15.

Ms. Baronia and her co-authors describe that *qui tam* laws were a "well-defined and expansive category of Founding Era lawmaking closely analogous to private enforcement." Baronia, at 4. They describe that many of these laws were also called penal statutes, "not because they defined a crime, but because they permitted private litigants to collect a *penalty*." *Id*. (emphasis in original). While oft-miscited to require exclusive power of the executive, William Blackstone described that the great variety of penal statutes "would be too 'tedious' to enumerate," and "'more usually'" brought by informers in a *qui tam* action.[7] *Id.* at 4, 23; *see also* Beck, at 15-17. As Blackstone recounted, "penalties given by the legislature to 'any person that will sue for the same'

[6] Verkamp Decl., Ex. 4, and available at https://ssrn.com/abstract=2910801.

[7] 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *420; 3 WILLIAM BLACKSTONE, COMMENTARIES *161 ("[M]ore usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam action*, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur* [who prosecutes this suit as well for the lord king… as for himself]."

are 'placed as it were in a state of nature . . . open therefore to the first occupant, who declares his intention to possess them, by obtaining judgement to recover them.'" Baronia, at 34.[8]

Carrying forward this common understanding of such actions, "the colonial assemblies themselves (and the state legislatures that succeeded them) passed reams of statutes which relied on private enforcement." *Id.* at 26. By way of example, Founding Era Massachusetts used private informers to enforce "public policy in nearly every domain of legislative activity: duties on luxury goods, restraints on roving livestock, fishing and hunting regulations, limits on dirty industries like tanning and smithing, quarantine measures for people and livestock, prohibitions on usury and price gouging, qualifications for the skilled trades, states, ship building, fish pickling, meat packing, and more." Baronia, at 27.[9] Massachusetts is viewed as a state that embraced a strict approach to separation of powers,[10] but yet still imbued its laws with *qui tam* provisions. Baronia, at 26-27.[11] This practice also continued post-ratification: "Every state in the union continued to pass penal statutes (with both private damages awards and *qui tam* provisions) in the first twenty-five years of independence." Baronia, at 30.[11]

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[8] *Quoting* 2 WILLIAM BLACKSTONE. COMMENTARIES *437.

[9] *See also* Pfander, at 474-78 (describing Rhode Island's pre-ratification enactment and successful use in the courts of uninjured informer litigation to prevent slave trade). These enforcement proceedings were publicized in the newspapers of the day. *Id.* at 478.

[10] Baronia at 26, *citing* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

[11] The authors describe two Massachusetts *qui tam* cases post-ratification in which two Federalist judges upheld the right of the private *qui tam* claimant to bring suit. Baronia, at 32-33; *see also id.* at 33 n. 196.

[11] The authors also note: "A sweeping revision of Virginia's statutes (proposed by Thomas Jefferson in 1776, and later taken up by James Madison) included twelve informer's actions and many more statutory damages provisions." *Id.* at 30.

As the Court's decision in *CFPB* illustrates, this "practice in the Colonies and early state legislatures" is relevant because it reflects the views that were formed by the Framers "[b]y the time of the Constitutional Convention." *CFPB*, 2024 U.S. LEXIS 2169, at *20, 22. And, at that time, the use of *qui tam* actions by uninjured informers for enforcement of public functions was well understood. "The Framers (including John Adams, Thomas Jefferson, James Madison, and Alexander Hamilton) understood and participated in this broader legal culture of private enforcement—as did pivotal early jurists like Joseph Story and John Marshall." Baronia, at 4-5. "The delegates of the Constitutional Convention, almost without exception, gained their legislative experience in colonial and state assemblies." *Id.* at 26.

III. The Early Congresses Deliberately Employed *Qui Tam* Provisions.

The Court recognized in *Stevens* that the First Congress enacted six statutes authorizing uninjured informers to bring *qui tam* suits. 529 U.S. at 777 n.6. Far from the "thoughtless adoption" advocated by Defendants (Tr. at 17, April 22, 2024), the full enactment history of early Congresses supports a deliberate employment of *qui tam* provisions. *Qui tam* statutes with private rights of action by uninjured informers were enacted not just by the First Congress, but by the first nine Congresses, and in numbers not reported in *Stevens*.[12]

Professor Beck's historical examination of this era reflects that the early Congresses made use of the *qui tam* provisions around the needs served by individual

[12] An appendix listing 47 statutes authorizing *qui tam* actions by uninjured informers is attached at Verkamp Decl., Ex. 5.

statute: He observed that "[p]rovision for popular enforcement was common when Congress sought to regulate decentralized activity—*e.g.*, the slave trade or trade with Native American tribes—that might take place in remote areas outside the view or reach of federal officials." Beck, at 21.[13]

One of the needs identified by Congress was in the area of revenue collection. "When the House of Representatives opened its doors to the public on April 8, 1789, James Madison gave a speech highlighting the widely recognized 'deficiency in our treasury' and urging an impost on imports to establish a national revenue." Beck, *Neglected History,* at 1291-92. This deficiency was left behind by the debts of the Revolutionary War, and the government had to figure out how to "incentivize and monitor" compliance with congressional directives, at a reasonable cost, in a vast territory with widely dispersed federal monitoring. *Id. Qui tam* litigation was an effective tool to accomplish that objective.

Duties on liquor was one of the first areas that Congress targeted for revenue collection. In 1791, the First Congress passed the Distilled Spirits Act, which imposed duties on distilled spirits and permitted uninjured informers to file an action of debt in their name or the name of the United States. These provisions were expanded by the Second and Third Congresses, including to add expanded provisions for informer enforcement.[14] Prior to these amendments, Treasury Secretary Alexander Hamilton

[13] The Slave Trade Act, for example, was passed by the Third Congress with *qui tam* enforcement provisions by uninjured informers with the right to bring actions. Further discussion of the Slave Trade Act can be found in Section III *infra.*

[14] Beck, at 22, *citing* An Act Concerning Duties on Spirits Distilled Within the United States, ch. 32, 1 Stat. 267, §§ 13 (new forfeitures), 17 (incorporating enforcement mechanisms from 1791 act [including

reported to Congress on "the inadequacy of centralized monitoring of a dispersed network of customs officials, combined with a new, more challenging tax collection environment" with federal tax collection efforts widely distributed throughout the country, along with domestic distillers. Beck, *Neglected History,* 1297-98. Expanded *qui tam* provisions helped the government monitor these domestic collection activities.[15]

Conversely, the First Congress also passed the Collection Act in 1789,[16] and congressmen's correspondence at the time reflects debate about whether informers should be used as an enforcement mechanism for collections relating to importing goods. Beck, *Neglected History,* 1292-93. Congress selectively included bounty-only provisions for revenue offenses against private parties, but permitted *qui tam* enforcement actions against collectors who failed to comply with statutory duties. *Id.* at 1293-94.

The enactment history of the early Congresses does not show reactive adoption of English law. Rather, it reflects careful consideration of *qui tam* enforcement because those early Congresses bolstered *qui tam* provisions as needed. For example, the first statute regulating interaction with Native American tribes was passed by the First Congress as a bounty-only statute, but was amended by the Second Congress to add an "expanded regulatory regime" with different divisions of the forfeiture depending on

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allowing an unaggrieved party to seize property and institute an action in debt]) (May 8, 1792).

[15] There is no evidence Hamilton had any constitutional objections to *qui tam* enforcement. In fact, Baronia and her co-authors identified correspondence between Hamilton and an auditor for the Treasury Department discussing the impact of the pardon power on *qui tam* actions. Baronia, at 37. Hamilton and the auditor determined that the *qui tam* claim could not be displaced. *Id.* at 37-38.

[16] An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, 1 Stat. 29 (1789).

whether the informer or the United States initiated suit. Beck, at 23.[17] The Fourth and Fifth Congresses passed statutes replacing or amending the regulatory regime for trade with native tribes, but retained the *qui tam* provisions authorizing informer actions. *Id.* at 23-24.[18] By way of further example, the Second Congress implemented postal service regulations enforced by uninjured informer actions, and subsequent statutes by the Third and Fifth Congresses contained comparable *qui tam* provisions.[19]

This history of enactment throughout the early Congresses demonstrates that there was a consensus around the use of *qui tam* provisions by the Framers of the Constitution. Far from there being evidence that *qui tam* was incompatible with the Constitution, "Congress deployed private enforcement—mostly informer's actions— to implement nearly every one of its constitutionally enumerated powers: to make war; raise and support a military; grant copyrights and patents; regulate immigration; establish post offices; lay and collect taxes; coin money; and regulate commerce between the states and with Indian tribes." Baronia, at 36.

IV. Federal Qui Tam Enforcement Is Evident in Post-Ratification Practice.

The historical evidence confirms that *qui tam* provisions were not just enacted, but used to enforce federal law. In *Adams, qui tam v. Woods*, the Supreme Court applied a

[17] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 12, 1 Stat. 329 (Mar. 1, 1793).

[18] An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 30 § 18, 1 Stat. 469, § 21 (May 19, 1796); An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 46, 1 Stat. 743 (Mar. 3, 1799).

[19] Beck, at 24, *citing* An Act to Establish the Post-Office and Post-Roads Within the United States, ch. 7, 1 Stat. 232, § 25 (Feb. 20, 1792); *See* An Act to Establish the Post-Office and Post-Roads Within the United States, ch. 23, 1 Stat. 354, § 25 (May 8, 1794); An Act to Establish the Post-Office of the United States, ch. 43, 1 Stat. 733, § 24 (Mar. 2, 1799).

statute of limitations in a *qui tam* action under the Slave Trade Act. 6 U.S. (2 Cranch) 336, 342, 1805 U.S. Dist. LEXIS 279 (Feb. 19, 1805). There is no indication the Court raised concerns about the constitutionality of the Act. And certainly this was at a time when the Court carefully considered such issues, as this *qui tam* matter was decided after the Court's 1803 decision on mandamus in *Marbury v. Madison*, delivered by Chief Justice Marshall. 5 U.S. (1 Cranch) 137, 153 (1803).

In this same time frame, Justice Marshall delivered an opinion of the Court regarding jurisdiction over a *qui tam* action under penal provisions governing the District of Columbia. *United States v. Simms*, 5 U.S. 252, 259 (U.S. February 23, 1803) ("an action of debt in the name of the United States and of the informer, would seem to be the remedy given by the act"). Just years before, in 1788, Marshall was also personally involved in Virginia's ratification of the Constitution.[20]

Justice Story was also no stranger to *qui tam* actions. "Justice Story helped compile the first complete edition of the colonial session laws of Massachusetts, which included dozens of informer's actions." Baronia, at 34-35. "He also voted to enact *qui tam* laws, both as a federal Congressman and as a Representative in the Massachusetts state legislature." *Id.* For example, in *Brown v. United States* (1814), Justice Story specifically dismissed the suggestion that there was anything improper about the co-mingling of the interests of the United States and the informer. 12 U.S. (8 Cranch) 110, 130-131 (1814) ("I do not think this exception is entitled to much consideration"). Justice

[20] *See Biographies of the Secretaries of State: John Marshall (1755-1835)*, available at https://history.state.gov/departmenthistory/people/marshall-john

Story's experience would have been similar to other Founding Era jurists. For example, in his lectures on law, Justice Wilson (1789-1798) referenced *qui tam* as an ordinary component of criminal prosecutions and civil suits.[21]

Qui tam actions were not just selectively employed by Congress, and heard by the courts, but resulted in recorded revenue to the Treasury. In a "Message from the President of the United States" dated January 26, 1829, President Adams reported, among other things, on the recovery of fines, forfeitures, and other collections.[22] The table included $8,400 in penalties imposed upon slave traders via *qui tam* suits between 1802 and 1803. *Id.* at 12, 14. It showed $658.36 fines assessed via *qui tam* for violation of internal revenue laws taxing distilled spirits. *Id.* In a similar example, an 1816 report from the Secretary of the Treasury noted $10 recovered in Connecticut in 1814 via the *qui tam* suit *Fosdick v. Rotham*.[23]

The Slave Trade Act, passed by the Third Congress, has perhaps the most detailed survey to date of the history of its specific enactment and enforcement through *qui tam* provisions. Professor Pfander's detailed examination reveals that the statute originated from a proposal in the First Congress to ban slavery, with James Madison urging Congress to enact a middle ground regulating international commerce. Pfander, at 479. By 1789, that middle ground was enacted, in a law deemed to "facilitate federal

[21] Verkamp Decl., Ex. 6, 3 James Wilson and Bird Wilson, *The Works of the Honourable James Wilson*, L.L.D. 144 (Philadelphia: Lorenzo Press 1804) ("A second mode of prosecuting crimes and offences is by information. Some informations are brought . . . at the suit of a citizen. These are a species of qui tam actions . . .).

[22] Verkamp Decl., Ex. 7.

[23] Verkamp Decl., Ex. 8.

enforcement at the waterfront." *Id.* at 480.[24] Signed into law by President Washington, "the 1794 Act reflects a remarkable consensus as to the legitimacy of no-injury informer litigation." *Id.* at 481. Pfander's evaluation of Founding Era evidence identified many *qui tam* actions brought by informers to enforce the Slave Trade Act. *Id.* at 481-487.[25]

Notwithstanding the heavy lift it would be to trace every *qui tam* statute and early enforcement decision (and in the case of original handwritten records, a proverbial needle-in the-haystack search), the available records strongly reflect deliberateness on the part of Congress and the use of these *qui tam* provisions going back to the earliest days of our country. Attached at Ex. 9 to the Verkamp Decl. is a list of early *qui tam* decisions involving informer actions identified by news articles and other means.[26] These decisions are by no means exhaustive, but in addition to the Pfander analysis, significantly

[24] To the extent Defendants attempt to exclude enforcement mechanisms like the Slave Trade Act as peculiar only to admiralty, such an argument does not bear weight. Not only was *qui tam* enforcement used in other necessary activities of the government, but, at that time, admiralty and customs was a large part of the federal docket. For example, in the year 1814, the First Circuit, U.S. Court of Appeals reported on ninety-six cases. Almost all of them were decided by Justice Joseph Story, as Supreme Court justices then "rode circuit," hearing cases at the appellate level. Seventy-one of these cases (74%) were related to admiralty, customs, or the embargo. 1 John Gallison, *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (1815) ("the many admiralty and maritime cases").

[25] Relator's counsel identified evidence of other Slave Trade Act *qui tam* actions decisions in other districts outside the scope of Professor Pfander's article. Because of their age, some district court archives are in original hard copy or in microfiche available at the National Archives. Indeed, Professor Pfander focused on Rhode Island because he was able to use digital archives for portions of those records. Pfander, at 472. Examples include *Sherman qui tam v. The Schooner Exchange*, U.S.D.C. New York (1803), in which Hamilton represented the vessel owner in a *qui tam* action (Verkamp Decl., Ex. 10, attaching decision and excerpt from 2 Julius Goebel, Jr., *The Law Practice of Alexander H*amilton, 857 (1969)), and *Samuel Adams qui tam vs. John Edwards*, (September Term 1802) and *Samuel Adams qui tam vs. Thomas Brown* (December Term 1803) reflecting *qui tam* enforcement actions in D. Mass. (Verkamp Decl, Ex. 11, attaching decisions from National Archives).

[26] Through archived news reports, legal research, and inquiry into the works of legal historians, Relator identified a body of caselaw demonstrating the use of *qui tam* statutes from the founding era through the passage of the FCA. Relator cross-referenced caselaw, historic publications, congressional records, and statutory provisions to distill this information into a convenient format, with citations, for the Court's review.

represent the use of *qui tam* statutes. Not one of these decisions or news reports reflect constitutional concern.

Other pieces of historical evidence emphasize this point. For instance, in 1844, with the support of the postmaster, Lucius W. Stockton of Uniontown, Pennsylvania initiated 169 federal *qui tam* suits to recover penalties from state toll collectors on the Cumberland Road. Stockton was not a government official; he was the manager of the National Stage Coach lines, under contract with the postal service to carry the mail. His suits contended that the Commonwealth of Pennsylvania had no right to tax mail carriers under the 1825 postal act.[27]

V. The False Claims Act is Well-Supported by Founding Era History and Practice.

In *The Laura*, the Supreme Court considered the constitutionality of a penal statute applicable to the number of passengers on steam vessels, in which the vessel owner challenged under Article II the right of an informer to enforce a lien for penalties under the statute when he obtained a pardon from the Secretary of the Treasury. 114 U.S. 411 (1885). The Court rejected that the pardon power was exclusive, because to hold such would mean rejecting practice "which has been observed and acquiesced in for nearly a century." *Id.* at 414. The Court recognized that "none of the cases in this court or in the Circuit and District Courts of the United States, involving the operation or effect of such warrants of remission, was it ever suggested or intimated that the legislation was an encroachment upon the President's power of pardon…" *Id.* at 415. The Court's decision

[27] Verkamp Decl., Ex. 12, *Presidential Message Transmitting Opinions of Attorneys General*, pt. 2: 1838-51 (1851), 2054-2056; James Hadden, *A History of Uniontown: The County Seat of Fayette County, Pennsylvania* 194-195 (1913).

rested on the principle that:

> The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is conclusive.

114 U.S. at 416 (*citing Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)). *The Laura* – decided twenty years after the passage of the FCA – is instructive as to the conclusion that a type of law, in this case *qui tam* statutes, passed by "men who were contemporary with [the Constitution's formation]" is "conclusive[ly]" constitutional.

So too, here. The FCA's *qui tam* provisions were enacted by Congress and signed into law by President Lincoln, based on Congress's identification of specific needs for *qui tam* enforcement – much like the selective enactment of the early Congresses along specific needs.[28] "So far as we know, the [Founding Era] statutes were signed without objection by early Presidents and applied in judicial proceedings without anyone raising a constitutional issue under Article II." Beck, at 40. Rather, the historical evidence reflects that those contemporary with the Constitution's formation raised no constitutional concern with such provisions, but instead enacted such laws when necessary—on both the federal and state level—and construed them with far less executive control than in place for the FCA. The Court should find, consistent with the analysis in *Bruen* and *CFPB*, that this evidence confirms that the FCA is constitutional.

[28] *E.g.,* Sylvia, Claire M., (2010). *The False Claims Act: Fraud Against the Government*, 2nd ed., Thomson West, Rochester, N.Y, §2:6, pp.41-48. Congress continued to strengthen the FCA for the same specific reasons. S. Rep. 99-345, 1986 U.S.S.C.A.N. 5266, 5267-68 (It was "in the face of [] sophisticated and widespread fraud" that Congress sought "a coordinated effort of both the Government and citizenry [to] decrease this wave of defrauding public funds").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2024, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic service to all counsel of record.

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TransUnion, *Vermont Agency* and Statutory Damages Under Article III

(forthcoming *Florida Law Review*)
(Draft: April 30, 2024)

Randy Beck*

The Supreme Court concluded in TransUnion LLC v. Ramirez that a plaintiff may not sue to collect statutory damages under a statute like the Fair Credit Reporting Act (FCRA) simply because the defendant violated a right Congress conferred on the plaintiff. Article III instead requires the plaintiff to show that the statutory violation resulted in a "concrete" injury with "a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." Under the majority's reading of Article III, "an injury in law is not an injury in fact."

The TransUnion Court made no effort to explain how its conclusion could be reconciled with Vermont Agency of Natural Resources v. United States ex rel. Stevens. The Vermont Agency Court unanimously ruled that Congress may authorize a private qui tam informer to sue for statutory penalties based on a violation of duties owed to the public, even though the informer has not suffered any particularized injury attributable to the defendant's unlawful conduct. The Court closely examined statutes of the first Congress in light of Anglo-American legal history to find qui tam actions compatible with Article III. Early legislators understood qui tam actions to present "cases" or "controversies" traditionally resolved through the judicial process.

A comparable examination of late eighteenth century federal legislation undermines the majority's decision in TransUnion. Statutory damages are a modern version of statutory forfeitures available under framing era penal statutes. Blackstone explains that a defendant who violates a penal statute must pay a statutory forfeiture to whoever the legislature specifies, whether an aggrieved party, a public official or a qui tam informer. Just as Congress awarded forfeitures to uninjured qui tam informers in early federal legislation, Congress likewise directed forfeitures to aggrieved parties who suffered no injury beyond the defendant's violation of an individual right protected by statute. By claiming judicial authority to determine whether a plaintiff has suffered a "concrete" injury warranting recovery of statutory damages, the TransUnion Court inverted the framing era relationship between legislatures and courts.

The Supreme Court has refined its Article III jurisprudence over the past three decades in ways that substantially limit congressional control over standing to sue. A central premise has been that Article III only allows private litigants to seek judicial redress for individualized injuries

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caused by unlawful conduct.[1] An individual may not sue to vindicate rights of the public, a task constitutionally assigned to the Executive Branch.[2] *Lujan v. Defenders of Wildlife* emphasized that Article III requires a plaintiff to demonstrate a "particularized" injury in fact, meaning that the defendant's unlawful conduct "must affect the plaintiff in a personal and individual way."[3] *Spokeo, Inc. v. Robins* stressed that even a particularized injury will not support federal court litigation unless that injury is also "concrete."[4] *TransUnion LLC v. Ramirez* built on *Spokeo*, concluding that the concreteness limitation requires a court to assess "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[5] Along the way, the *TransUnion* majority rejected Justice Thomas' position that violation of an individual legal right is by itself an injury permitting judicial vindication.[6] What began as a quest to prevent private litigation of public rights thus evolved to prevent private litigation of some private rights, at least if those rights are conferred by Congress and seem novel to federal judges. The Supreme Court has justified these Article III standing restrictions as "rooted in the traditional understanding of a case or controversy" and "grounded in historical practice."[7]

In contrast to the stark historical division between litigation of public rights and litigation of individual rights depicted in recent standing cases, the Court acknowledged a more complex Anglo-American legal history in *Vermont Agency of Natural Resources v. United State ex rel. Stevens*.[8] There the Court raised *sua sponte* the question of whether an individual suing under the *qui tam* provisions of the False Claims Act (FCA) had standing to assert a claim that his employer had defrauded the United States government.[9] Recognizing that the individual pressing the FCA claims had not suffered any particularized injury from the alleged fraud, the Court nevertheless found Article III standing based on the long history of popular enforcement under English and American penal statutes.[10] Numerous statutes of the First Congress followed the then-ubiquitous Anglo-American practice of allowing private informers (often called "relators" in FCA litigation) to sue for a share of a forfeiture imposed for violating statutory requirements.[11] The Court thought this history "well nigh conclusive with respect to the question

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[1] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-77 (1992).

[2] *Id*.

[3] *Id*. at 560 & n.1.

[4] 578 U.S. 330, 341 (2016).

[5] 141 S. Ct. 2190, 2205 (2021).

[6] *Id*. at 2204 ("an injury in law is not an injury in fact" satisfying Article III), 2207 n.3 (rejecting dissent's proposed analysis).

[7] *Spokeo*, 578 U.S. at 338, 340-41; *see also TransUnion*, 141 S. Ct. at 2204 ("'history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider'") (quoting Spring Communications Co. v. APCC Services, Inc., 554 U.S. 269, 274 (2008)).

[8] 529 U.S. 765 (2000).

[9] *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 528 U.S. 1015 (1999) (directing parties to file supplemental briefs on the question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?").

[10] *Vermont Agency*, 529 U.S. at 772-78.

[11] *Id*. at 776-77 & nn. 5-7.

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before us here: whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[12] The Court theorized that such legislation could be understood to effect a partial assignment of the government's claim to the private litigant, so that the focus for Article III should be on injury to the government as assignor, rather than injury to the private assignee.[13]

Considered together, these precedents create a puzzle about congressional power to authorize litigation consistent with Article III. Both *Spokeo* and *TransUnion* were decided under the Fair Credit Reporting Act (FCRA), which allows a consumer who demonstrates a willful violation of the statute to collect either actual damages or statutory damages ranging from $100 to $1,000.[14] Why treat such a provision for statutory damages differently than a statutory forfeiture of the sort validated in *Vermont Agency*? If Congress can authorize a *qui tam* informer with no injury to litigate the public's claim for a statutory forfeiture, shouldn't it follow that Congress can confer standing to pursue a statutory-damages claim on a consumer whose legal rights were violated?

Section I of the article will consider the historical understanding of the "case or controversy" requirement embraced in *Lujan* and its progeny, as well as the implications the Court has drawn for congressional power to confer standing.[15] Section II will then discuss the more complex (but more accurate) legal history the Court acknowledged in *Vermont Agency*.[16] Special attention will be paid to late eighteenth century congressional enactments, including those cited in *Vermont Agency* and others in the decade following ratification of the Constitution.[17] The examination will show that legislators in the framing generation understood Congress to have power to authorize forms of litigation impossible to square with *TransUnion*'s restrictive reading of Article III.

Early federal statutes recognized the modern Court's distinction between rights of the public and rights of individuals, but Congress exercised broad legislative authority to decide who could vindicate rights in either category and whether the litigant needed to show a particularized injury caused by the defendant's statutory violation. Sir William Blackstone explained that a legislature enacting a penal statute could authorize collection of a statutory forfeiture by an aggrieved party, a public official or a "common informer," meaning "any such person or persons as will sue for the same."[18] Early Congresses chose among these options on policy grounds, sometimes providing different methods of enforcement for distinct forfeitures in the same legislation. Framing era penal statutes frequently authorized uninjured *qui tam* informers to enforce rights of the public and sometimes permitted uninjured informers to litigate based on legal rights of other individuals. Congress also created forfeitures that could be collected by aggrieved parties, but did not require any showing of concrete injury apart from the defendant's violation of a statutory duty owed to the plaintiff.

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[12] *Id*. at 777-78 (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998)).
[13] *Id*. at 773-74.
[14] 15 U.S.C. § 1681n(a)(1)(A).
[15] *See infra* notes 25-120 and accompanying text.
[16] *See infra* notes 121-265 and accompanying text.
[17] *See infra* notes 162-265 and accompanying text.
[18] *See infra* text accompanying notes 144-54.

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Section III.A contends that just as Congress has power to confer Article III standing on uninjured *qui tam* informers, Congress also has power to authorize statutory damage claims like those rejected in *TransUnion*.[19] Following the Court's reasoning in *Vermont Agency*, the best evidence of Article III's implications for congressional power comes from early federal legislation like that surveyed in Section II. Statutory damage provisions are just a modern version of the forfeitures imposed under eighteenth century penal statutes. In each case, the legislature declares specified conduct unlawful, imposes a financial penalty for violation and authorizes a private or public litigant to sue for the penalty. Just as early federal legislation demonstrates congressional power to confer standing on *qui tam* informers who suffer no particularized injury, early federal statutes also show that Congress can authorize statutory damage claims by private plaintiffs whose rights are violated, whether or not a particular plaintiff can show concrete harm beyond the fact of the statutory violation.

Section III.B briefly addresses a question left open in *Vermont Agency*: whether *qui tam* statutes violate Article II of the Constitution by allowing private informers to pursue public claims that can only be litigated by Executive Branch officials subordinate to the President.[20] Three Justices recently expressed interest in taking up this issue in *United States ex rel. Polansky v. Executive Health Resources*.[21] A comparable Article II argument was rejected by the Court in its 1885 decision in *The Laura*.[22] The first Justice Harlan concluded for the Court that a practice embraced by the First Congress and followed in later legislation had placed a definitive construction on the Constitution that could not be rejected a century later based on a re-reading of the President's pardon power.[23] It would be startling for an originalist Court to decide that the Constitution requires rejection of an Anglo-American legal practice firmly established since the 14th century, extensively employed in framing era statutes and relied upon by Congress throughout the 234 years since the Constitution was ratified. In any event, whatever one concludes about the compatibility of *qui tam* legislation with Article II, any Article II concerns seem much weaker in a case like *TransUnion*, where the statutory forfeiture was tied to violation of individual rights rather than public rights.

Section III.C contends that *TransUnion*'s limits on congressional power seem ironic given the separation of powers justification offered for modern standing rules and for the originalist theory from which they are said to derive.[24] Justice Scalia defended originalism based on the premise that it constrains judicial decision making, offering relatively objective historical grounds to resolve constitutional questions in place of the judge's own policy preferences. The Court's application of originalist methodology in a case like *Vermont Agency* illustrates that virtue. Framing era historical evidence persuaded Justice Scalia to find standing in a case that diverged from his previously expressed views on Article III and that created tension with his position on executive power. The *TransUnion* Court, on the other hand, invoked originalist values, but made

[19] *See infra* notes 275-334 and accompanying text.
[20] *See infra* notes 335-404 and accompanying text.
[21] 143 S. Ct. 1720, 1737 (2023) (Kavanaugh, J., joined by Barrett, J., concurring); *id*. at 1741 (Thomas, J., dissenting).
[22] 114 U.S. 411, 413-16 (1885).
[23] *Id*. at 416.
[24] *See infra* notes 405-56 and accompanying text.

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only cursory efforts to engage with the historical record that in theory should shape its understanding of Article III. The result was a decision that inverts the framing era relationship between legislatures and courts, empowering judges to make decisions about cognizable injuries that historically would have been left for policy resolution by Congress.

I. Limits on Congressional Power Under *Lujan* and Its Progeny

William Baude highlights two themes in the Article III case law that exist in tension and can be difficult to reconcile.[25] The Court often emphasizes, on the one hand, that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[26] For example, when a black "tester," because of her race, was given false information about the availability of housing in particular complexes, the Court found in *Havens Realty Corp. v. Coleman* that she had established an injury for Article III purposes, even though she had no intention of renting or buying when she made her inquiry.[27] Congress had by statute "conferred on all 'persons' a legal right to truthful information about available housing" and the violation of that statutory right was a sufficient injury by itself to satisfy Article III.[28] On the other hand, the Court has also insisted that some congressional attempts to create rights or confer standing violate minimum Article III requirements. In *Sierra Club v. Morton*, the Court noted that Congress could not by statute authorize a federal court to issue an advisory opinion.[29] In *Raines v. Byrd*, the Court rejected a challenge to the Line Item Veto Act by members of Congress, finding it "settled" that Congress cannot grant a right to sue to someone "who would not otherwise have standing" and thus "erase Article III's standing requirements."[30]

The Supreme Court in recent years has augmented the tension between the principle that Congress can create rights that serve as a basis for standing and the caveat that Article III restricts congressional power to authorize federal litigation. A series of decisions starting with *Lujan v. Defenders of Wildlife* has gradually expanded the Court's understanding of the minimum constitutional requirements imposed by Article III. Those decisions have correspondingly created new limits on congressional power to confer legal rights that establish a basis for litigation in federal court.

A. Lujan v. Defenders of Wildlife

Lujan v. Defenders of Wildlife involved a lawsuit by environmental organizations challenging an Interior Department regulation promulgated under the Endangered Species Act (ESA).[31] The ESA requires federal agencies to consult with the Secretary of the Interior to ensure that actions undertaken or funded by the federal government do not jeopardize endangered or threatened

[25] William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2016).
[26] Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).
[27] 455 U.S. 363, 373-74 (1982).
[28] *Id*.
[29] 405 U.S. 727, 732 n.3 (1972).
[30] 521 U.S. 811, 820 n.3 (1997).
[31] *Lujan*, 504 U.S. at 557-58.

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species or destroy critical habitat.[32] This ESA consultation provision was originally interpreted to apply to U.S.-funded projects anywhere in the world, but revised regulations later limited its application to projects in the United States or on the high seas.[33] The plaintiff environmental organizations filed suit to force a return to the original interpretation that applied the consultation requirement worldwide.[34] The case was brought under the ESA's "citizen suit" provision, which authorizes "any person" to file a civil suit "to enjoin any person, including the United States" alleged to be in violation of any ESA provision.[35]

Justice Scalia's opinion for the *Lujan* Court found that the plaintiff environmental organizations lacked Article III standing, notwithstanding the statutory authorization to sue.[36] The majority began by laying out a familiar three-part standing test from prior cases, which it described as "the irreducible constitutional minimum" of standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[37]

The plaintiff environmental organizations, according to the majority, failed to demonstrate an imminent, particularized injury to any of their members as a result of the alleged misinterpretation of the ESA. Certain members of the plaintiff organizations professed an intent to travel to places where endangered species were threatened by U.S.-funded projects, but none could show any concrete travel plans describing when those visits would take place.[38]

The most significant portion of the *Lujan* opinion for our purposes is the section rejecting the Court of Appeals' theory that the plaintiffs had standing by virtue of the ESA citizen suit provision allowing "any person" to sue based on "any [ESA] violation."[39] The majority disagreed with the appellate court's view that Congress could confer on everyone a "right" to Executive Branch observance of ESA procedures, so that violation of the right would create a procedural injury supporting standing.[40] The Court reviewed a long line of cases concluding that individuals lack standing to litigate generalized grievances, where the plaintiff asserts injury only to the communal interest in proper application of the law and seeks relief "that no more directly

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[32] *Id*. at 558 (quoting 16 U.S.C. § 1536(a)(2)).
[33] *Id*. at 558-59.
[34] *Id*. at 559.
[35] *Id*. at 571-72 (quoting 16 U.S.C. § 1540(g)).
[36] *Id*. at 562-78.
[37] *Id*. at 560-61 (citations omitted).
[38] *Id*. at 563-64. A plurality of the Court also found a redressability problem with the plaintiffs' case for standing. *Id.* at 568-71.
[39] *Id*. at 571-78.
[40] *Id*. at 573.

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and tangibly benefits him than it does the public at large."[41] While most of the generalized grievance cases concerned constitutional claims, the majority did not think the source of the asserted right determinative under Article III.[42] The requirement of an individual injury was essential to identifying "those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches."[43]

> 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," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[44]

The majority acknowledged that Congress can create new rights that, when violated, constitute an Article III injury.[45] Congress may "elevate . . . concrete, *de facto* injuries that were previously inadequate in law" so they become the basis for justiciable controversies.[46] But while Congress can broaden the categories of injury that support standing, the person seeking review must still show a particularized injury.[47]

Justice Kennedy authored a concurrence, joined by Justice Souter, in which he qualified *Lujan*'s implications with respect to congressional recognition of new rights. He agreed with the majority that Article III does not allow citizen suits "to vindicate the public's nonconcrete interest in the proper administration of the laws."[48] At the same time, he thought the Court should be sensitive to the articulation of new rights that did not have any "clear analogs in our common-law tradition."[49] He saw nothing in the Court's opinion inconsistent with his view that Congress could "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[50] In exercising this power, though, Congress "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit," something it had not done in the ESA's broad citizen suit provision.[51]

B. Spokeo v. Robins

The Court continued the process of narrowing congressional power over standing in *Spokeo v. Robins*. Thomas Robins filed suit under the Fair Credit Reporting Act (FCRA) against Spokeo,

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[41] *Id*. at 573-74.
[42] *Id*. at 576.
[43] *Id*.
[44] *Id*. at 577 (citations omitted).
[45] *Id*.
[46] *Id*. (citing Trafficante v. Metropolitan Life Ins. Co., 490 U.S. 205, 208-12 (1972)).
[47] *Id*.
[48] *Id*. at 580-81.
[49] *Id*. at 580 (Kennedy, J., concurring).
[50] *Id*.
[51] *Id*.

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Inc., an online search engine that combs databases for information about a specified person.[52] A consumer reporting agency subject to the FCRA must, among other statutory duties, "follow reasonable procedures to assure maximum possible accuracy" of consumer reports.[53] A consumer reporting agency found in willful violation of the statute can be liable for actual damages or for statutory damages between $100 and $1000, along with attorneys' fees and punitive damages.[54] Robins alleged that Spokeo produced a profile about him that contained inaccurate information, including "that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree."[55] The District Court dismissed Robins' complaint, finding that Robins had not properly pled an injury in fact under Article III.[56] The Ninth Circuit reversed, concluding that Robins had standing because he alleged that "'Spokeo violated *his* statutory rights, not just the statutory rights of other people,' and because his 'personal interests in the handling of his credit information are individualized rather than collective.'"[57]

Justice Alito authored the 6-2 majority opinion in *Spokeo* finding the Ninth Circuit's standing analysis incomplete.[58] Echoing themes from *Lujan* and other cases, the Court explained that standing doctrine "is rooted in the traditional understanding of a case or controversy" and that it reinforces separation of powers because it prevents use of the judicial process "to usurp the powers of the political branches."[59] The Court echoed *Raines*' conclusion that Congress cannot override Article III by granting a right to sue to "a plaintiff who would not otherwise have standing."[60]

Turning to the Ninth Circuit's opinion, the majority explained that an allegation that the plaintiff suffered a particularized injury is necessary for standing, but not sufficient.[61] In addition to being particularized, the injury must also be "concrete."[62] The Ninth Circuit's observation that Robins alleged violations of his own FCRA rights went to the issue of particularization, but overlooked the concreteness inquiry.[63] To be "concrete" means that the injury "must be '*de facto*,'" "must actually exist," must be "real" and not "abstract."[64]

Justice Alito acknowledged that an injury need not be tangible to be concrete.[65] In deciding whether an intangible injury will suffice for standing, the majority considered it "instructive" whether an asserted intangible harm "has a close relationship to a harm that has traditionally

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[52] *Spokeo*, 578 U.S. at 333.
[53] *Id*. at 335 (quoting 15 U.S.C. § 1681e(b)).
[54] *Id*. (quoting 15 U.S.C. § 1681n(a)).
[55] *Id*. at 336.
[56] *Id*.
[57] *Id*. at 337 (quoting 742 F.3d 409, 413 (2014)).
[58] Justice Scalia participated in the oral argument in *Spokeo*, but passed away before the opinion was released. *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 214 (2016).
[59] *Spokeo*, 578 U.S. at 337-38 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)).
[60] *Id*. at 339 (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)).
[61] *Id*.
[62] *Id*.
[63] *Id*. at 339-40.
[64] *Id*. at 340.
[65] *Id*. at 340-41.

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been regarded as providing a basis for a lawsuit in English or American courts."[66] Such an analysis is valuable because the case or controversy requirement "is grounded in historical practice."[67] The majority also considered the judgment of Congress important in resolving whether an individual has a concrete injury, because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."[68]

Applying these principles to Robins' case, the majority recognized that the FCRA imposed procedural requirements for consumer reporting agencies to reduce the risk of disseminating false information about a consumer.[69] But the mere fact that Spokeo violated some FCRA procedural requirements would not establish standing unless Robins could show a resulting concrete harm.[70] The Court remanded for the Ninth Circuit to consider "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement."[71]

Justice Thomas joined the majority opinion in *Spokeo*, but staked out a distinct position on standing in his concurring opinion.[72] He relied in part on an article by Professors Ann Woolhandler and Caleb Nelson detailing aspects of English and early American law that support modern standing jurisprudence.[73] Reminiscent of *Lujan*, Justice Thomas contended that Anglo-American legal history drew a fundamental distinction between litigation of individual rights and litigation of public rights.[74] When an individual sought to vindicate an individual right, Justice Thomas argued, the mere violation of the right was often a sufficient injury to permit litigation.[75] In cases involving trespass, intellectual property or unjust enrichment, for example, the plaintiff did not need to claim damage beyond the mere violation of his legal rights.[76] On the other hand, as a general rule, only the government could seek to vindicate injuries to the public at large.[77] In those instances where an individual could litigate based on public rights, as in the law of public nuisance, the plaintiff was required to show some individualized damage beyond that suffered by the community at large.[78]

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[66] *Id*.
[67] *Id*.
[68] *Id*. at 341.
[69] *Id*. at 342.
[70] *Id*.
[71] *Id*. at 342-43.
[72] *Id*. at 343 (Thomas, J., concurring). Justice Ginsburg, joined by Justice Sotomayor, agreed with much of the Court's opinion. *Id*. at 350 (Ginsburg, J., dissenting). However, she saw no need for a remand to determine whether Robins had alleged "concrete" injury, because the complaint indicated that Spokeo disseminated "misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market." *Id*. at 353.
[73] *Id*. at 344 (Thomas, J., concurring) (citing Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004)).
[74] *Id*. ("Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate.").
[75] *Id*.
[76] *Id*.
[77] *Id*. at 345.
[78] *Id*.

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Justice Thomas thought modern standing doctrine should embrace this traditional distinction between claims based on public and private rights by insisting on concrete injury in cases involving individual assertion of public rights and relaxing the requirement when a plaintiff asserted individual rights.[79] Applied to the facts of *Spokeo*, Justice Thomas believed the court on remand should start by determining which sort of right Robins was suing to vindicate: "If Congress has created a private duty owed personally to Robins to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact."[80]

C. TransUnion, LLC v. Ramirez

The Court narrowed congressional power to authorize federal litigation still further in *TransUnion LLC v. Ramirez*. The *TransUnion* decision arose from a class action filed under the FCRA, the same statute at issue in *Spokeo*.[81] After accessing a credit report from TransUnion, a Nissan salesman refused to sell a car to the named plaintiff, Sergio Ramirez, telling the plaintiff his name was on a "terrorist list."[82] TransUnion had included an alert in Ramirez' credit report indicating that his name was a potential match for a name on a list maintained by the Treasury Department's Office of Foreign Assets Control (OFAC).[83] Businesses are generally prohibited from transacting business with the terrorists, drug traffickers and other criminals who appear on the OFAC list.[84] As it turned out, the person named on the OFAC list was someone other than the plaintiff, but TransUnion had not cross-referenced information like birthdates that could have shown that they were different people.[85]

Ramirez' principal FCRA claim was that TransUnion failed to use reasonable procedures to ensure the accuracy of information in his credit file.[86] He also included claims that a pair of mailings from TransUnion failed to satisfy FCRA requirements regarding provision of information to consumers.[87] Ramirez successfully sought class certification on behalf of 8185 individuals who received a mailing from TransUnion during a 7 month period in 2011 similar to the mailing notifying Ramirez that his name was a potential match for a name on the OFAC list.[88] After trial, a jury awarded each class member $984.22 under the FCRA provision authorizing statutory damages for willful failure to comply with FCRA requirements.[89] The jury also awarded $6353.08 per class member in punitive damages.[90] At the Supreme Court, a 5-4

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[79] *Id*. at 346-47.
[80] *Id*. at 349.
[81] *TransUnion*, 141 S. Ct. at 2200.
[82] *Id*. at 2201.
[83] *Id*.
[84] *Id*. (citing 31 C.F.R. pt. 501, App. A (2020)).
[85] *Id*. at 2202 (TransUnion eventually removed OFAC alert from Ramirez' credit file); *id*. at 2215 (Thomas, J., dissenting).
[86] *Id*. at 2202 (citing 15 U.S.C. § 1681e(b)).
[87] *Id*. (citing 15 U.S.C. §§ 1681g(a)(1) & (c)(2)). Ramirez complained that TransUnion did not send him all the information in his credit file in a single mailing. Instead, the information concerning the OFAC alert was sent in a second mailing. He also complained that the second letter did not include a required statement of his rights, though it had been sent with the first letter. *Id*.
[88] *Id*.
[89] *Id*. at 2201-02.
[90] *Id*. at 2202.

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majority opinion by Justice Kavanaugh found standing for 1853 class members whose credit reports were sent to third-party businesses.[91] The other 6332 class members did not have standing, according to the majority, because the OFAC alerts with respect to those consumers remained in their credit files and were not disseminated to businesses performing credit checks.[92]

The *TransUnion* majority revisited themes highlighted in *Lujan* and *Spokeo*. Requiring a plaintiff to demonstrate a concrete and particularized injury confines courts to their proper role of deciding "the rights of individuals" and helps them avoid resolution of hypothetical or abstract disputes.[93] In deciding whether a plaintiff has demonstrated a concrete harm, "'history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."[94] Therefore, drawing from language in the *Spokeo* opinion, the majority held that "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts.'"[95] The fact that Congress has authorized suit to vindicate a statutory right does not suffice for Article III standing in the absence of a concrete injury in fact.[96] For purposes of Article III, "an injury in law is not an injury in fact," so only a plaintiff concretely harmed by a defendant's statutory violation may bring suit in federal court.[97]

The *TransUnion* majority contended that the concrete harm requirement is "essential" to maintain the constitutional separation of powers.[98] If the Court did not require concrete harm, Congress could "authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law."[99] Allowing Congress to authorize suit by "*unharmed* plaintiffs" would violate Article III and undermine Executive authority under Article II.[100] Decisions about law enforcement priorities and how aggressively to enforce statutes should be made by Executive Branch officials, not by private plaintiffs and attorneys who have no accountability to the people and no obligation to pursue the public interest.[101]

Applying these principles to the case at hand, the majority decided that the 1853 class members whose credit reports had been circulated with an OFAC alert had demonstrated a concrete injury. The evidence showed that they experienced a harm with a "close relationship" to the reputational injury caused by defamation.[102] The remaining class members did not suffer a concrete harm because they could show nothing akin to "publication," which has been essential to defamation

[91] *Id*. at 2208-09.
[92] *Id*. at 2209-10.
[93] *Id*. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).
[94] *Id*. at 2204 (quoting Spring Communications Co. v. APCC Services, Inc., 554 U.S. 269, 274 (2008)).
[95] *Id*. (citing *Spokeo*, 578 U.S. at 341).
[96] *Id*. at 2205 (citing *Spokeo*, 578 U.S. at 341).
[97] *Id*.
[98] *Id*. at 2207.
[99] *Id*. at 2206.
[100] *Id*. at 2207.
[101] *Id*.
[102] *Id*. at 2209.

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liability.[103] Inaccurate information in an internal credit file does not create a concrete harm when it has never been disseminated to a third party checking the consumer's credit.[104]

One issue the Court had raised in remanding the *Spokeo* case was whether the alleged violations of FCRA procedures created a sufficient risk of harm to the plaintiff to qualify as a concrete injury.[105] The *TransUnion* Court rejected the argument that inclusion of inaccurate OFAC information in credit files created a risk of harm that should afford standing. The majority thought such a risk of harm might suffice to support a claim for forward-looking injunctive relief.[106] But the majority was persuaded that conduct causing a risk of harm will not support a backward-looking award of damages unless the risk materializes or creates some other concrete harm affecting the plaintiff.[107] The Court also found no evidence showing concrete harm to any class member (other than the named plaintiff Ramirez) based on the alleged FCRA violations relating to TransUnion's mailings.[108]

TransUnion was a 5-4 decision, with Justice Thomas writing a dissent joined only in part by the other three dissenters.[109] Justice Thomas reiterated the position taken in his *Spokeo* concurrence: "At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community."[110] The view that an individual may sue to vindicate an individual right without showing actual damages "accords proper respect for the power of Congress and other legislatures to define legal rights."[111] In cases involving public rights, like *Lujan*, the Court had required more than just a statutory cause of action, but Justice Thomas believed that a statute creating a private right and a cause of action to vindicate that right should suffice to establish standing under the Court's cases.[112] In support of this position, he discussed early federal copyright and patent statutes.[113] Rather than an "injury in fact," an "injury in law to a private right" was sufficient to establish a justiciable controversy.[114] All of the class members in the *TransUnion* case had standing because all of them established that TransUnion violated duties owed to them individually, not to the community as a whole.[115] The majority's position, "[i]n the name of protecting the separation of powers," had "relieved the legislature of its power to create and define rights."[116] Justice Thomas also offered a variety of

[103] *Id*. at 2209-10.
[104] *Id*. at 2210.
[105] *See supra* note 71 and accompanying text.
[106] *TransUnion*, 141 S.Ct. at 2210 (discussing Clapper v. Amnesty Int'l, USA, 568 U.S. 398 (2013)).
[107] *Id*. at 2210-11.
[108] *Id*. at 2213-14.
[109] *Id*. at 2214 (Thomas, J., dissenting).
[110] *Id*. at 2217.
[111] *Id*. at 2218.
[112] *Id*. at 2220.
[113] *Id*. at 2217.
[114] *Id*. ("While the Court today discusses the supposed failure to show 'injury in fact,' courts for centuries held that injury in law to a private right was enough to create a case or controversy.").
[115] *Id*. at 2218.
[116] *Id*. at 2221.

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arguments for finding a concrete harm, or risk of harm, even under the majority's view of the law of standing.[117]

While Justices Kagan, Breyer and Sotomayor all "joined" Justice Thomas' dissent, they also joined a separate dissent by Justice Kagan disagreeing with Justice Thomas' position that violation of an individual right created by Congress automatically confers standing.[118] They characterized this as a minor disagreement with limited consequences, and otherwise embraced Justice Thomas' conclusion that there were multiple grounds upon which the Court should find concrete harm to all of the *TransUnion* class members.[119] They thought courts should generally defer to congressional efforts to confer standing, because Congress "is better suited than courts to determine when something causes a harm or risk of harm in the real world."[120]

II. Private Enforcement of Statutory Forfeitures in Early Federal Legislation

Lujan and its lineal descendants restrict legislative power based on an understanding of what made for a justiciable "case" or "controversy" in the eighteenth century Anglo-American legal systems that provide the historical context for interpreting Article III.[121] In this view, courts were not established to answer abstract legal questions, but rather to remedy injuries that arose from unlawful conduct.[122] An individual could litigate when unlawful conduct produced concrete and particularized harm to that person.[123] When unlawful conduct affected only interests shared by the community collectively, however, the proper litigant was a public official.[124]

Evidence supporting the Court's understanding of Anglo-American legal history can be found in the Woolhandler and Nelson article mentioned in Justice Thomas' *Spokeo* concurrence.[125] The

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[117] *Id*. at 2221-24.
[118] *Id*. at 2226 (Kagan, J., dissenting).
[119] *Id*. at 2224-26.
[120] *Id*. at 2226.
[121] *See Lujan*, 504 U.S. at 559-60 (doctrine of standing identifies, per Madison in Federalist No. 48, one of the "landmarks" that identify disputes appropriate for judicial resolution), 576 (concrete injury requirement "fundamental to the separate and distinct constitutional role of the Third Branch" consistent with "province" of courts described in Marbury v Madison); *Spokeo*, 579 U.S. at 340-41 (history plays important role in resolving standing issues because case or controversy requirements "is grounded in historical practice"); *TransUnion*, 141 S. Ct. at 2204 (history and tradition offer a meaningful guide to types of cases Article III empowers courts to resolve); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983) (standing offers "an accurate description of the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution").
[122] *See Lujan*, 504 U.S. at 560-61 (standing doctrine requires concrete injury, caused by unlawful conduct, likely redressed by favorable decision); *Spokeo*, 578 U.S. at 340 (injury must be concrete, rather than abstract); *id*. at 347 (Thomas, J., concurring) ("standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action"); *TransUnion*, 141 S. Ct. at 2203 (federal courts do not resolve hypothetical or abstract disputes; only resolve "a real controversy with real impact on real persons").
[123] *See Lujan*, 504 U.S. at 560 (elements of standing), 564 (affidavits show no imminent injury to individual group members), 576 (province of courts is to resolve rights of individuals); *TransUnion*, 141 S. Ct. at 2203 ("[r]equiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only 'the rights of individuals'").
[124] *See Lujan*, 504 U.S. at 577 (Article II gives President the duty to ensure faithful execution of the laws); *TransUnion*, 141 S. Ct. at 2207 (suits by unharmed plaintiffs would Executive Branch authority under Article II).
[125] *See* Woolhandler & Nelson, *supra* note 73.

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authors point, for example, to the law of public nuisance, relied upon by Justice Thomas in his separate writings in *Spokeo* and *TransUnion*.[126] Courts traditionally would not allow individuals to litigate public nuisance claims unless they could show some special injury, different from the injury suffered by the community as a whole.[127] This special injury requirement resembles modern standing doctrine's requirement of a particularized injury and its denial to individuals of standing to litigate generalized grievances. Apart from the law of public nuisance, Woolhandler and Nelson highlight other early English and American cases in which courts made decisions concerning who could litigate particular issues that seemingly point the way toward something like modern standing doctrine.[128]

At the same time, the historical claims made in the *Lujan* line of cases seem to significantly outstrip the evidence provided by either the Court or the academic literature. When the Court indicates that standing doctrine is "rooted in the traditional understanding of a case or controversy,"[129] it makes a sweeping claim about Anglo-American litigation in the late eighteenth century. Identifying discrete areas of law where courts imposed something like a particularized injury requirement falls short of establishing the broader proposition that a lawsuit by an individual lacking a concrete and particularized injury would not be recognized as a "case" or "controversy" by eighteenth-century lawyers and judges.

A number of scholars have argued that the Court's historical understanding of standing to sue in public actions fails to account for important aspects of eighteenth century Anglo-American legal practice.[130] One line of evidence concerns English case law allowing individuals to pursue prerogative writs like mandamus or prohibition to compel performance of public duties.[131] The Georgia Supreme Court, applying originalist principles, recently relied on this body of evidence to reject application of federal standing rules in Georgia courts.[132] Reviewing the eighteenth century English law concerning prerogative writs and finding it consistent with subsequent Georgia case law, the court concluded that "people with a meaningful stake in their community are injured when their local governments violate the legal duty to follow the law."[133] When local officials act unlawfully, the injury that supports litigation in Georgia state courts "can be a generalized one that affects the public at large and is not unique to the plaintiff."[134]

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[126] *Id*. at 700-03; *Spokeo*, 578 U.S. at 345 (Thomas, J., concurring).
[127] Woolhandler & Nelson, *supra* note 73, at 702-03 (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 626 (1862) (bridge obstructing river caused "special damage" to plaintiff) and Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 99 (1838) ("in case of public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity; unless he avers and proves some special injury").
[128] Woolhandler & Nelson, *supra* note 73, at 703-06.
[129] *Spokeo*, 578 U.S. at 338.
[130] Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-1409 (1988).
[131] Louis L. Jaffe, *Standing to Secure Judicial Review in Public Actions*, 74 HARV. L. REV. 1265, 1269-70 (1961).
[132] Sons of Confederate Veterans v. Henry County Board of Commissioners, 315 Ga. 39, 46-49, 880 S.E.2d 168 (2022).
[133] *Id*. at 54.
[134] *Id*.

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The historical argument for federal standing doctrine has also been criticized because it fails to adequately account for the extended history of Anglo-American legislation authorizing *qui tam* actions and related forms of popular enforcement.[135] This history led the Supreme Court in *Vermont Agency* to find *qui tam* litigation compatible with Article III.[136] However, the Court failed to consider broader implications of its analysis for standing doctrine and quickly returned to reciting standing principles difficult to square with the extensive early American tradition of public litigation by uninjured informers.[137] To see how the case or controversy limitation was understood in the framing generation, this section will examine methods of enforcing statutory forfeitures in federal legislation enacted in the decade following ratification of the Constitution.

A. The Theory and Practice of Popular Enforcement

Beginning in the fourteenth century, Parliament regularly enacted legislation permitting any member of the public to collect forfeitures imposed for violation of statutory requirements.[138] As the Supreme Court explained in its 1905 decision in *Marvin v. Trout*:

> Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.[139]

Legislation providing for popular enforcement allowed the successful informer to keep part or all of the forfeiture recovered from the defendant.[140] This statutory bounty provided an incentive for private enforcement of legislation at a time when government enforcement resources were far more limited.[141] Legislatures in the American colonies and the early states, facing the same statutory enforcement challenge as the English Parliament, routinely enacted comparable statutes on this side of the Atlantic.[142] As we will see, in a time before the establishment of massive federal bureaucracies, Congress likewise turned repeatedly to popular enforcement to implement statutes that might otherwise go underenforced.[143]

The *Marvin* Court cited two passages from Blackstone's *Commentaries on the Laws of England* discussing legislation authorizing suit by common informers.[144] The first passage, from Book III

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[135] *See* Berger, *supra* note 130, at 825-27; Winter, *supra* note 130, at 1406-09; Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1305-06 (2018).
[136] *Vermont Agency*, 529 U.S. at 774-77.
[137] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1257-59.
[138] *Id*. at 1259-68; Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 567-601 (2000) [hereinafter Beck, *English Eradication*].
[139] 199 U.S. 212, 225 (1905).
[140] Beck, *English Eradication*, *supra* note 138, at 551.
[141] *Id*. at 565-66.
[142] Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1269-91.
[143] *See infra* notes 192-264 and accompanying text.
[144] *Marvin*, 199 U.S. at 225.

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on "Private Wrongs," described "penal statutes," acts of Parliament that inflicted forfeitures "for transgressing the provisions therein enacted."[145] The person violating a penal statute was "bound by the fundamental contract of society" to pay the forfeiture "to such persons as the law requires."[146] Blackstone explains that the person authorized to collect the forfeiture would usually be either "the party grieved" or "any of the king's subjects in general."[147] Blackstone suggests that the latter option—popular enforcement—was more common:

> [M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &'c, quam pro seipso in hac parte sequitur*." If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a *qui tam*, or *popular*, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others and conclusive even to the king himself.[148]

This passage from the *Commentaries* highlights a range of recognized eighteenth century legislative options for enforcing penal statutes.[149] The conduct forbidden by the statute might affect some individual in a particularized way, and the legislature could give the cause of action and the resulting forfeiture to an aggrieved party.[150] Under other statutes, "the king himself" might institute an action to collect the forfeiture, presumably through some public official.[151] But the legislature also had a third option it relied on frequently; it could award the statutory forfeiture to "any such person as will sue for the same."[152] When a statute incorporated this option, the resulting litigation was called a "popular action" because Parliament had created statutory rights enforceable by "the people in general."[153] "*Qui tam*" actions were a subset of the broader category of "popular actions." In a *qui tam* action, the informer sued for the king and for himself, and the statute required a successful informer to share any recovery with the king or with individuals responsible to further some communal purpose.[154]

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[145] 3 Blackstone, Commentaries *159.
[146] *Id*.
[147] *Id.* at *159-60.
[148] *Id*. at *160.
[149] Beck, *English Eradication*, *supra* note 138, at 550.
[150] 3 Blackstone, *Commentaries*, at *160.
[151] *Id*. Technically, Blackstone is here discussing "the king" bringing suit under a statute authorizing a popular action. However, eighteenth century statutes sometimes imposed forfeitures without making provision for popular enforcement, presumably leaving the initiation of enforcement actions to public officials. *See*, *e.g.*, 4 Geo.3, ch.34, § 3 (1764) (forfeiture imposed if a governors or commander in chief in an American colony gave assent to legislation providing for creating or issuing paper bills of credit; no provision for suit by common informer).
[152] 3 Blackstone, *Commentaries*, at *160.
[153] *Id*.
[154] *Id*.

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The *Marvin* Court also cited a passage from Blackstone's Book II on "Things."[155] In discussing ways one might come to own property, Blackstone explains that a person could acquire property rights by litigating under a penal statute that gave the statutory penalty to "him or them that will sue for the same":

> He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest.[156]

A statutory forfeiture given to a common informer is "placed as it were in a state of nature, accessible by all the king's subjects."[157] Such forfeitures can thus be analogized to animals in the wild, "open . . . to the first occupant, who declares his intention to possess them by bringing his action."[158]

A third relevant passage of the *Commentaries*, from Book IV on "Public Wrongs," was not cited by the *Marvin* Court, but rounds out Blackstone's discussion of popular enforcement. In a chapter on "the Several Modes of Prosecution," after discussing presentments and indictments, Blackstone discusses proceedings by "information":

> INFORMATIONS are of two sorts: first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, (the nature of which was explained in a former volume) only carried on by a criminal instead of a civil process[.][159]

It was common for English penal statutes to offer the informer a variety of procedural options for collecting a statutory forfeiture, including a civil action of debt and a criminal information.[160] Chief Justice Marshall noted that "[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information" and concluded that the same statute of limitations should apply, no matter which procedure an informer selected.[161]

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[155] *Marvin*, 199 U.S. at 225.
[156] 2 Blackstone, *Commentaries*, at *437.
[157] *Id*. at *438.
[158] *Id*.
[159] 4 Blackstone, *Commentaries* *308.
[160] Beck, *English Eradication*, *supra* note 138, at 552.
[161] Adams v. Woods, 6 U.S. (2 Cranch.) 336, 341 (1805).

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B. *Vermont Agency* and Popular Enforcement of Early Federal Legislation

The most significant remaining federal *qui tam* provision appears in the False Claims Act (FCA).[162] The statute was enacted during the Civil War to address fraud affecting Union army procurement.[163] Congress scaled back *qui tam* enforcement of the FCA during World War II, and considered eliminating popular enforcement altogether.[164] However, new procurement scandals in the 1980's led Congress to substantially increase the potential financial rewards available to those filing *qui tam* actions under the statute.[165] Congress decided to expand *qui tam* litigation to incentivize disclosure of fraudulent conduct, supplement federal enforcement resources and counter Justice Department resistance to vigorous implementation of the statute.[166]

Nearly a decade after Congress revived popular enforcement of the FCA, Jonathan Stevens filed a *qui tam* action in the name of the United States against his former employer, the Vermont Agency of Natural Resources (VANR).[167] The complaint alleged that VANR had defrauded the United States by submitting falsified time and attendance records for employees whose work was funded by Environmental Protection Agency (EPA) grants.[168] The Supreme Court granted *certiorari* to address whether a state agency is a "person" who can be sued under the FCA and whether sovereign immunity protects the state against a popular action by a private relator.[169] However, the Supreme Court also asked the parties to file supplemental briefs on the question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?"[170]

The *Vermont Agency* Court ultimately concluded 7-2 that a state agency was not a "person" subject to a *qui tam* action under the FCA, but the Court was unanimous in finding that Stevens, as a *qui tam* relator, satisfied Article III standing requirements.[171] The majority laid out the "irreducible constitutional minimum" of standing from *Lujan*—the three-part injury-causation-redressability test—but with one major alteration: Justice Scalia's opinion omitted the word "particularized" in describing the constitutionally-required attributes of an Article III injury in fact.[172] Stevens argued that his action would "remedy an injury in fact suffered by the United States."[173] The majority readily concluded that the complaint disclosed sufficient allegations of injury to the United States, "both the injury to its sovereignty arising from violation of its

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[162] *See* Beck, *English Eradication*, *supra* note 138, at 554-55.
[163] *Id*. at 555-56.
[164] *Id*. at 556-61.
[165] *Id*. at 561-65.
[166] *Id*. at 562-65.
[167] U.S. ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998).
[168] *Id*. at 198; *Vermont Agency*, 529 U.S. at 770.
[169] Petition for Writ of Certiorari, State of Vermont Agency of Natural Resources v. United States of America *ex rel.* Stevens, at i (May 12, 1999) (Questions Presented); Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 537 U.S. 1034 (1999) (granting certiorari).
[170] *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 528 U.S. 1015 (1999).
[171] *See Vermont Agency*, 529 U.S. at 771-78 (majority opinion), 788 (Ginsburg, J., concurring in the judgment), 801 (Stevens, J., dissenting).
[172] *Id*. at 771.
[173] *Id*.

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laws . . . and the proprietary injury resulting from the alleged fraud."[174] This did not answer the standing question, however, because "Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*."[175]

The majority first considered the possibility that one could characterize Stevens as an agent for the United States, and that the statutory bounty amounted to a fee paid to the agent out of the government's recovery.[176] This analysis failed to do justice to the statutory scheme, in the majority's view, because the FCA gives the relator an individual interest in the lawsuit.[177] The statute allows an individual to file an action "for the person and for the United States Government."[178] The relator may continue participating in the litigation, even if the Department of Justice intervenes and assumes primary responsibility for the lawsuit.[179] The relator is also entitled to a hearing if the Department of Justice voluntarily dismisses the case and to a judicial determination of the fairness of any settlement reached over the relator's objection.[180] The relator's statutory interest in the litigation puts the individual in a role distinct from that of a mere agent for the government.

The majority also considered the argument that standing could be based on the statutory bounty paid to a successful relator. The right to share in the potential recovery certainly gave the relator a concrete interest in the outcome of the suit.[181] But the majority thought an interest in the outcome of litigation is not enough under Article III unless it "consist[s] of obtaining compensation for, or preventing, the violation of a legally protected right."[182] "A *qui tam* relator has suffered no such invasion[.]"[183] The majority reasoned that the bounty itself would not suffice as a basis for standing in light of prior cases indicating that standing cannot be grounded in rights that are a "byproduct" of the litigation, like an award of attorneys' fees or a right to recover litigation costs.[184]

The majority ultimately found a basis for a *qui tam* relator's standing in cases involving assignment of claims:

> We believe . . . that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized

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[174] *Id*.
[175] *Id*. at 771-72 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975) (emphasis added by the *Vermont Agency* Court)).
[176] *Id*. at 772.
[177] *Cf. supra* notes 156-58 and accompanying text (Blackstone's discussion of acquisition of property rights by filing popular action).
[178] *Id*. (quoting 31 U.S.C. § 3730(b)).
[179] *Id*. (citing 31 U.S.C. § 3730(c)(1)).
[180] *Id*. (citing 31 U.S.C. § 3730(c)(2)(A)-(B)).
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*. at 773 (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 107 (1998) and Diamond v. Charles, 476 U.S. 54, 69-71 (1986)).

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> "representational standing" on the part of assignees, we have routinely entertained their suits, and also suits by subrogees, who have been described as "equitable assign[ees.]"[185]

Viewing the *qui tam* relator as a partial assignee, the majority concluded that "the United States' injury in fact suffices to confer standing on respondent Stevens."[186]

In light of the oft-emphasized originalist rationale for standing doctrine, the majority thought its conclusion "confirmed" by "the long tradition of *qui tam* actions in England and the American Colonies."[187] The majority noted the advent of statutes authorizing *qui tam* litigation in the 14th century:

> These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), and—more relevant here—those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves[.][188]

While the majority acknowledged that *qui tam* litigation had given rise to various abuses, leading to statutory reforms, it noted that England continued to allow *qui tam* actions by informers until 1951.[189] In the time period most relevant to the Court's originalist analysis of Article III, *qui tam* legislation was widespread at both the state and federal levels:

> *Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.[190]

This history was "well nigh conclusive" with respect to the question of whether *qui tam* actions by uninjured informers presented "cases" or "controversies" amenable to judicial resolution when Article III was adopted.[191] The sections that follow will consider some of the statutes of the First Congress relied upon by the *Vermont Agency* majority, as well as other late 18th century federal penal statutes from the first decade following ratification of the Constitution.

1. Private Enforcement of Early Federal Penal Statutes

Vermont Agency recognized that the first Congress authorized informers without any particularized injury to enforce statutory rights of the public at large,[192] a pattern that continued

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[185] *Id*. at 773-74 (citations omitted).
[186] *Id*. at 774.
[187] *Id*.
[188] *Id*. at 775 (citations omitted).
[189] *Id*. at 775-76.
[190] *Id*. at 776-77 (citations omitted).
[191] *Id*. at 777.
[192] *See supra* notes 183, 190 and accompanying text.

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in legislation passed by subsequent Congresses. Provision for popular enforcement was common when Congress sought to regulate decentralized activity—*e.g.*, the slave trade or trade with Native American tribes—that might take place in remote areas outside the view or reach of federal officials.[193] Congress also authorized *qui tam* actions in contexts like revenue collection where Congress had funded a sizable federal workforce, but needed some means to monitor and regulate the conduct of federal officials.[194] Early legislative reliance on popular enforcement was selective, with Congress deploying all three enforcement options discussed by Blackstone.[195] Sometimes the same legislation would impose multiple forfeitures enforced in different ways, some by uninjured common informers, others by federal officials and still others by aggrieved parties.

a. *Revenue Collection and Financial Controls*

The earliest federal tax statutes provided for collection of duties on imports and tonnage of ships.[196] The regulatory framework concentrated most law enforcement power in federal revenue officials. Forfeitures provided for in the 1789 collection statute and its 1790 successor were generally enforced by federal collectors appointed under the legislation.[197] However, the 1789 statute did include provisions allowing uninjured private informers to collect forfeitures from federal officials who failed to take the statutorily-required oath or who neglected to post "a fair table of the rates of fees, and duties demandable by law."[198] The 1790 statute again allowed uninjured informers to collect the penalty for failure to post a table of fees and duties and also a new forfeiture when a federal official failed to "give a receipt for the fees he shall receive, specifying the particulars."[199] In addition to these provisions allowing popular enforcement against federal officials, both the 1789 and 1790 statutes included a forfeiture "for the use of the party grieved" if a customs officer demanded or received more compensation than the law authorized for performing statutory duties.[200]

Congressional reliance on popular enforcement in the process of revenue collection greatly expanded in 1791 when Congress imposed duties on distilled spirits produced within the United States, and not just spirits imported from abroad.[201] The statute's enforcement provision

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[193] *See infra* notes 214-30, 240-42 and accompanying text.
[194] *See infra* notes 196-209 and accompanying text.
[195] *See supra* notes 146-54 and accompanying text.
[196] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1291-96.
[197] *See* An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, 1 Stat. 29, § 36 (1789) [hereinafter 1789 Collection Act]; An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, 1 Stat. 145, § 67 (1790) [hereinafter 1790 Collection Act]. While these statutes did not allow an informer to sue for most of the penalties specified in the legislation, they did provide for someone who provided information on which an action was based to receive a quarter of the proceeds. *See* 1789 Collection Act, *supra*, § 48; 1790 Collection Act, *supra*, § 69.
[198] 1789 Collection Act, *supra* note 197, §§ 8, 29.
[199] 1790 Collection Act, *supra* note 197, § 55.
[200] 1789 Collection Act, *supra* note 197, § 29; 1790 Collection Act, *supra* note 197, § 55.
[201] *See* An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and Also upon Spirits Distilled Within the United States,

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indicated that half of any penalty (unless otherwise allocated) would go to the person who made a seizure authorized by the legislation or who first discovered the facts giving rise to the forfeiture.[202] The forfeiture could be collected through an action of debt maintained in the name of the person entitled to it or through an information filed in the name of the United States.[203] One penalty subject to popular enforcement under the statute applied to federal officials who colluded to help individuals violate or evade the statute.[204] The legislation also allowed informers to collect penalties from private parties for actions such as removing spirits from a distillery at night,[205] importing spirits in undersized containers,[206] or offering bribes to federal revenue officers.[207] Statutes of the Second Congress added more alcohol-related tax forfeitures subject to popular enforcement.[208] The Third Congress incorporated common informers into enforcement of new duties imposed on carriages.[209]

The First Congress also authorized private citizens to help enforce statutes establishing government financial controls. The legislation organizing the Treasury Department created penalties for officials with specified conflicts of interest or who reaped unauthorized personal gains in conducting business for the government.[210] The statute provided that "if any other person than a public prosecutor shall give information of any such offence," resulting in a conviction, the person "giv[ing] information" was entitled to half the forfeiture.[211] This statute might be read as simply providing a reward for private testimony leading to conviction, but assuming it authorized the private informer to file an "information" to initiate the prosecution, an option mentioned by Blackstone, then it amounts to a *qui tam* provision.[212] Another statute of the First Congress, incorporating the Bank of the United States, authorized popular enforcement of

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and for Appropriating the Same, ch. 15, 1 Stat. 199 (1791) [hereinafter Distilled Spirits Act]; Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1296-98.

[202] *See Distilled Spirits Act*, *supra* note 201, § 44.

[203] *Id*. The provision instructed the federal attorney for the district where the penalty was incurred to file an information in the name of the United States upon application. *Id*.

[204] *Id*. § 49.

[205] *Id*. § 20.

[206] *Id*. § 33.

[207] *Id*. § 47. *See generally* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1296-97 & nn. 400-403.

[208] *See* An Act for Raising a Farther Sum of Money for the Protection of the Frontiers, and for other purposes therein mentioned; ch. 27, 1 Stat. 259, § 11 (May 2, 1792) (forfeiture for failing to declare wine held for sale prior to adoption of statute); An Act Concerning Duties on Spirits Distilled Within the United States, ch. 32, 1 Stat. 267, §§ 13 (new forfeitures), 17 (incorporating enforcement mechanisms from 1791 act) (May 8, 1792).

[209] *See* An Act Laying Duties Upon Carriages for the Conveyance of Persons, ch. 45, § 10 (June 5, 1794). The statute gave half of any penalty or forfeiture to the person (not a federal inspection officer) who "shall first give information of the cause, matter or thing" giving rise to liability. *Id*. The provision also authorized suit in any federal or state court of competent jurisdiction. *Id*. While the statute did not expressly say that the private informer could file the suit, the Supreme Court has suggested, at least in dictum, that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (citing Adams v. Woods, 2 Cranch 336 (1805)); *see Vermont Agency*, 529 U.S. at 777 n.7 (reciting this rule of construction and characterizing it as dictum).

[210] *See* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65, § 8 (Sept. 2, 1789); *see also* An Act Supplemental to the Act "Establishing the Treasury Department," and for a Farther Compensation to Certain Officers, ch. 18, 1 Stat. 215, § 1 (March 3, 1791) (forfeitures applied to additional Treasury officials).

[211] *Id*.

[212] Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1300-01.

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forfeitures for engaging in prohibited business transactions or for lending money above specified thresholds without statutory authorization to the federal government or to state or foreign governments.[213]

b. *Managing Relations with Native American Tribes*

Several early federal statutes relied on common informers to enforce laws regulating interactions with indigenous Native American populations. Popular enforcement may have made sense to Congress in this context on the ground that the sparse federal presence in frontier areas could hinder monitoring and enforcement by Executive Branch officials. The First Congress required a federal license before a person could "carry on any trade or intercourse with the Indian tribes."[214] A person attempting to trade without a license would forfeit merchandise in the person's possession "one half to the benefit of the person prosecuting, and the other half to the benefit of the United States."[215]

The Second Congress replaced the 1791 statute with an expanded regulatory regime.[216] Again, unlicensed attempts to trade with Native American tribes resulted in forfeiture of merchandise, together with fines and imprisonment.[217] A new forfeiture applied to someone who settled on lands belonging to a Native American tribe.[218] Another provision regulated the purchase of horses from Native American territory,[219] and an unauthorized attempt to purchase land from a tribe could result in a fine and imprisonment.[220] A federal official with trade licensing authority was subject to a forfeiture if the official had an interest in a regulated transaction.[221] The enforcement provision of the new statute specified that "all fines and forfeitures" under the act would be divided "one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use."[222] This provision tracks Blackstone's discussion of penal statute enforcement in England, which indicated that the king might get a share of a forfeiture collected by a common informer, but could keep the entire forfeiture if the king himself pursued the enforcement action.[223]

The Fourth Congress again replaced prior regulatory regimes designed to preserve harmony with Native American tribes.[224] This statute retained the prior provision for the informer to keep half

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[213] An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191, §§ 8-9 (Feb. 25, 1791); Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1301-02.
[214] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (July 22, 1790).
[215] *Id*. § 3.
[216] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 1, 1 Stat. 329 (Mar. 1, 1793); *see* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1304-05.
[217] An Act to Regulate Trade and Intercourse with the Indian Tribes, *supra* note 216, § 3.
[218] *Id*. § 5
[219] *Id*. § 6.
[220] *Id*. § 8.
[221] *Id*. § 7.
[222] *Id*. § 12.
[223] *See supra* note 148 and accompanying text.
[224] An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 30, 1 Stat. 469, § 21 (May 19, 1796).

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of any fine or forfeiture unless the United States sued first.[225] Penalties were imposed for a variety of violations, including entering Native American territory without a passport or with hostile intent,[226] settling on tribal land,[227] engaging in unauthorized trade,[228] and purchasing tribal land.[229] The Fifth Congress again passed legislation on this topic, covering much of the same ground as prior statutes and including a comparable provision for popular enforcement.[230]

c. *Postal Service Regulations*

Postal regulations adopted under the Articles of Confederation were enforced by actions in state court pursued by either the Postmaster General or the Treasurer of the United States.[231] Under the new Constitution, however, the Second Congress shifted to a set of postal regulations enforced in significant part by *qui tam* informers.[232] The enforcement provision specified that "all pecuniary penalties and forfeitures, incurred under this act" would be distributed "one half for the use of the person or persons informing and prosecuting for the same" and the other half to the United States.[233] Some forfeitures imposed under the statute penalized acts by private parties, such as obstructing the mail, operating a competing postal service or evading payment of postage by counterfeiting the handwriting of someone with franking privileges.[234] Other forfeitures enforceable by private informers regulated actions of postal service employees. Postal workers could be sued, for instance, for seeking payments greater than the postage rates established by law or for delaying, hiding or stealing letters or newspapers in their possession.[235] Subsequent postal statutes adopted by the Third and Fifth Congresses contained comparable provisions, including provisions for popular enforcement by *qui tam* informers.[236]

d. *Shipping Regulations, the Slave Trade and Import/Export Controls*

Early Congresses frequently turned to popular enforcement in statutes regulating the shipping industry or imposing controls on imports or exports. A statute of the First Congress, for instance, called on *qui tam* informers to enforce rules concerning the relationship between seamen and their employers. The master or commander of a ship could forfeit $20 for every seaman or mariner who had not signed a written contract, "one half to the use of the person prosecuting for the same" and the other half to the United States.[237] Another provision imposed a forfeiture of

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[225] *Id*. § 18.
[226] *Id*. §§ 3-4.
[227] *Id*. § 5.
[228] *Id*. § 8-11.
[229] *Id*. § 12.
[230] *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 46, 1 Stat. 743 (Mar. 3, 1799).
[231] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1302-03.
[232] *Id*. at 1304.
[233] An Act to Establish the Post-Office and Post-Roads Within the United States, ch. 7, 1 Stat. 232, § 25 (Feb. 20, 1792).
[234] *Id*. §§ 5, 14, 20.
[235] *Id*. § 11, 16, 22
[236] *See* An Act to Establish the Post-Office and Post-Roads Within the United States, ch. 23, 1 Stat. 354, § 25 (May 8, 1794); An Act to Establish the Post-Office of the United States, ch. 43, 1 Stat. 733, § 24 (Mar. 2, 1799).
[237] An Act for the Government and Regulation of Seamen in the Merchants Service, ch. 29, 1 Stat. 131, § 1 (July 20, 1790).

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$10 per day on any person who harbored or hid a seaman who was supposed to be onboard ship, half payable to the person who prosecuted the action.[238] These *qui tam* provisions were in addition to other portions of the statute creating remedies for seamen against their employers and vice versa.[239]

Popular enforcement played a key role in early statutes seeking to suppress the slave trade. A statute of the Third Congress prohibited use or preparation of a U.S. ship for trade or traffic in slaves. Violations could result in seizure and forfeiture of the vessel, and each person knowingly aiding and abetting the violation would forfeit $2000, half to the federal government and the other half "to the use of him or her who shall sue for and prosecute the same."[240] A U.S. citizen would forfeit $200 per person received or transported from abroad for sale into slavery, with half allocated to the person who sued.[241] The legislation organizing the Mississippi Territory (after it was ceded to the federal government by Georgia) provided that any person importing slaves into the territory from outside the United States would forfeit $300 per slave, half to the United States "and the other moiety for the use of any person or persons who shall sue for the same."[242]

International tensions sometimes resulted in legislation designed to further diplomatic or military aims and Congress made selective decisions about who would be entitled to enforce particular provisions. For instance, the Third Congress temporarily restricted export of armaments, providing for enforcement by federal customs and revenue officers.[243] Another statute of the same Congress, however, provided that a ship outfitted in this country for hostilities against a country at peace with the United States would be forfeited, "one half to the use of any person who shall give information of the offence" and the other half to the government.[244] The Fifth

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[238] *Id*. § 4.

[239] *See id*. §§ 1 (compensation owed from employer to seaman without a contract), 2 (allowing employer to dock wages of seaman who fails to be on ship when scheduled), 3 (remedies if crew complains about fitness of vessel), 5 (forfeiture by seaman absent for more than 48 hours), 7 (employer's remedies against a deserter), 9 (compensation due if ship required to impose short allowances). The First and Second Congresses adopted legislation setting up a system for registration and regulation of ships built in the United States or owned by U.S. citizens. *See* An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for Other Purposes, ch. 11, 1 Stat. 55 (Sept. 1, 1789); An Act Concerning the Registering and Recording of Vessels, ch. 1, 1 Stat. 288 (Dec. 31, 1792). The latter act provided that if a U.S. ship did not have its name and port painted on the stern, the owners would forfeit $50, "one half to the person giving the information thereof" and the other half to the United States. An Act Concerning the Registering and Recording of Vessels, *supra*, § 3. However, since these statutes relied principally on enforcement by federal revenue officers, this provision may have simply provided a reward for useful information rather than authorizing the private informer to sue. *See* An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for Other Purposes, *supra* § 21 (providing for enforcement using methods employed in legislation for collection of duties); An Act Concerning the Registering and Recording of Vessels, *supra*, § 29 (same).

[240] An Act to Prohibit the Carrying On the Slave Trade from the United States to any Foreign Place or Country, ch. 11, 1 Stat. 347, §§ 1-2 (Mar. 22, 1794).

[241] *Id*. § 4.

[242] An Act for an Amicable Settlement of Limits with the State of Georgia, and Authorizing the Establishment of a Government in the Mississippi Territory, ch. 28, 1 Stat. 549, § 7 (Apr. 7, 1798). The legislation provided that a person imported into the Mississippi Territory in violation of the act was entitled to freedom. *Id*.

[243] An Act Prohibiting for a Limited Time the Exportation of Arms and Ammunition, and Encouraging the Importation of the same, Ch. 33, 1 Stat. 369, § 4 (May 22, 1794).

[244] An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. 50, 1 Stat. 381, § 3 (June 5, 1794).

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Congress incorporated popular enforcement into laws relating to the Quasi-War with France. One statute forbade any ship owned or controlled by U.S. residents to travel to a French port, on pain of forfeiting the vessel, with half of the proceeds to the United States and the other half "to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same."[245] Revised legislation on the same topic eight months later continued the ban on travel to French ports and the provision for popular enforcement, but created a defense if the vessel visited the port due to bad weather, shortage of supplies or other unavoidable mishaps.[246]

e. *Other Provisions for Popular Enforcement*

Other statutes of the first five Congresses included provisions for popular enforcement of federal laws. For instance, the legislation organizing the first census under the new Constitution allowed either private informers or government officials to sue federal marshals who failed to file timely and accurate census returns.[247] A statute of the Second Congress provided for the United States to mint copper coins.[248] Anyone using or receiving non-U.S. copper coins after the time specified in the legislation would forfeit the coins and an additional $10.[249] The forfeiture could be recovered "with costs of suit for the benefit of any person or persons by whom information of the incurring thereof shall have been given."[250]

2. Mixing and Matching Remedies

Most of the penal statutes discussed above fall into the typical eighteenth-century enforcement patterns discussed by Blackstone. When rights or interests of the public were at stake, Congress might provide for enforcement of statutory penalties by government officials or by any member of the public (whether or not injured).[251] When private rights or interests were at stake, Congress might provide a cause of action to the party aggrieved.[252] However, there were also a number of early federal statutes in which Congress varied these standard patterns of enforcement.

The first copyright statute, cited in Justice Scalia's majority opinion in *Vermont Agency*, provides a particularly interesting scheme for enforcing federal copyrights.[253] Any person who printed or imported copies of a copyrighted work without the copyright owner's written consent, or offered unauthorized copies for sale, would forfeit the infringing documents to the copyright holder, who was instructed to destroy them.[254] In addition, the defendant had to pay 50 cents per page for the infringing copies, "the one moiety thereof to the author or proprietor of such map,

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[245] An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, ch. 53, 1 Stat. 565, § 1 (June 13, 1798).
[246] An Act further to suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof, ch. 2, 1 Stat. 613, §§ 1, 6 (Feb. 9, 1799).
[247] An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, 1 Stat. 101, §§ 2-3 (Mar. 1, 1790); Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1299-1300.
[248] An Act to Provide for a Copper Coinage, ch. 39, 1 Stat. 283 (May 8, 1792).
[249] *Id*. § 2.
[250] *Id*.
[251] *See supra* notes 148, 151-54 and accompanying text.
[252] *See supra* notes 148, 150 and accompanying text.
[253] *See Vermont Agency*, 529 U.S. at 776 n.5.
[254] An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, During the Times therein Mentioned, ch. 15, 1 Stat. 124, § 2 (May 31, 1790).

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chart, book or books who shall sue for the same, and the other moiety thereof to and for the use of the United States."[255]

The initial general criminal statute passed by the first Congress also warrants consideration.[256] Section 16 of the statute made it a crime in areas under the exclusive jurisdiction of the United States or on the high seas to steal "the personal goods of another."[257] The same section criminalized stealing "arms, ordnance, munition, shot or powder, habiliments of war, or victuals" of the United States in a person's custody.[258] Anyone committing or aiding and abetting either offense would be fined four times the value of the stolen property. The statute provided for "one moiety [of the quadruple damages] to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor."[259] In the case of these property crimes, an uninjured private informer could bring an action based on theft of government property or theft of private property belonging to another individual and, in addition to the informer's bounty, recover statutory compensation payable either to the United States or to the private property owner.[260]

Another interesting enforcement scheme appears in a 1798 statute concerning naturalization.[261] The statute required the clerk or recording officer of a court to accept a declaration by an alien of an intention to become a United States citizen, and to certify and transmit abstracts of such declarations to the Secretary of State.[262] A clerk who refused or neglected to create the certified abstract, after the alien tendered the specified fee, was subject to a forfeiture of $10.[263] Other forfeitures applied to clerks who neglected to transmit certification of naturalizations occurring before the legislation was enacted, and to persons who failed to make required reports concerning aliens living in this country.[264] All of the penalties imposed by the statute were to be "recovered in the name" of "any person, who will inform and sue for the same."[265] Like other early federal statutes, this legislation allowed an uninjured informer to vindicate legal interests of the public, but it also allowed an uninjured informer to sue to vindicate rights of another individual—the alien seeking a path to citizenship.

III. Rethinking Statutory Damages in Light of *Vermont Agency*

Originalist reasoning has long played a significant role in the law of standing. Writing for four Justices in a 1939 case about legislative standing, Justice Frankfurter considered it "common ground among judges" that the Constitution "presupposed an historic content" for the Article III

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[255] *Id*.
[256] An Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (Apr. 12, 1790).
[257] *Id*. § 16.
[258] *Id*.
[259] *Id*.
[260] *See Vermont Agency*, 529 U.S. at 777 n.6 (noting that statute allowed "informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods").
[261] An Act supplementary to and to Amend the Act, Intituled "An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act heretofore Passed on that Subject," ch. 54, 1 Stat. 566 (June 18, 1798).
[262] *Id*. § 2.
[263] *Id*.
[264] *Id*. §§ 3, 5.
[265] *Id*. § 7.

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"judicial Power."[266] The framers of Article III extended judicial power "only to 'Cases' and 'Controversies,'" referencing "what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union."[267]

All nine Justices in *Vermont Agency*, regardless of judicial philosophy, found strong support in eighteenth century legal history for the conclusion that a litigant suing under a federal *qui tam* statute satisfies the requirements of Article III standing. Justice Scalia's majority opinion found the long history of popular enforcement in England and the numerous *qui tam* statutes passed by the first Congress nearly conclusive evidence that *qui tam* actions were "cases and controversies" of the sort traditionally resolved by judicial process.[268] Justice Ginsburg, writing for herself and Justice Breyer, agreed with the majority that "history's pages place the *qui tam* suit safely within the 'case' or 'controversy' category."[269] Justice Stevens, joined by Justice Souter, while disagreeing with the Court's interpretation of the FCA, nevertheless agreed that "[t]he historical evidence summarized by the Court is obviously sufficient to demonstrate that *qui tam* actions are 'cases' or 'controversies' within the meaning of Article III."[270] The *Vermont Agency* decision offers a useful reminder that historical evidence of original meaning is significant for most judges engaged in constitutional interpretation, even judges who do not claim the originalist label and who are more pluralistic about permissible methods of interpretation.[271]

The body of historical evidence relied upon to validate *qui tam* actions in *Vermont Agency* also speaks to the more general issue of congressional power to authorize suits for statutory damages, and should have informed the *TransUnion* Court's decision. In Blackstone's taxonomy, the *qui tam* action was a subset of the broader category of "popular actions," which were themselves a subset of the remedies a legislature could select to enforce a "penal statute."[272] In Section II, we surveyed a range of federal penal statutes enacted soon after ratification of the Constitution, including statutes of the first Congress considered in *Vermont Agency* and comparable legislation in the nation's first decade.[273] These early federal statutes illustrate how the framing generation understood Article III and the scope of congressional power to authorize litigation for statutory

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[266] Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring, joined by Roberts, Black & Douglas, JJ.); *id*. at 461 ("As abstractions, these generalities represent common ground among judges. ").
[267] *Id*. Judicial power could only be exercised "in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Id*. at 460. Courts were not to resolve "abstract, intellectual problems," but rather were to act only when "a concrete, living contest between adversaries called for the arbitrament of law." *Id*.; *see also* Muskrat v. United States, 219 U.S. 346, 356 (1911) ("[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").
[268] *Vermont Agency*, 529 U.S. at 777.
[269] *Id*. at 788 (Ginsburg, J., concurring).
[270] *Id*. at 801 (Stevens, J., dissenting).
[271] Justice Breyer, for instance, includes text and history among the range of tools judges properly consult in the process of resolving constitutional cases, but also embraces other interpretive tools textualist and originalist judges might downplay. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION, at __ (2005).
[272] *See supra* note 148 and accompanying text.
[273] *See supra* notes 192-265 and accompanying text.

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penalties.[274] Just as early congressional enactments showed that common informers without any particularized injury may bring actions permitted by Article III, the same body of evidence indicates that Congress can authorize litigation to recover statutory damages by a person whose rights are infringed, whether or not the litigant has suffered any concrete injury beyond the statutory violation.

A. *TransUnion* Reconsidered: Statutory Damages as Modern Forfeitures

The *TransUnion* majority concluded that Article III does not allow Congress to authorize pursuit of statutory damages unless the litigant can show a concrete and particularized injury in fact: "No concrete harm, no standing."[275] For this purpose, the majority thought, the mere fact of a statutory violation is not enough to support standing, even if the defendant violated statutory duties owed to the plaintiff individually.[276] Picking up on *Lujan*'s distinction between litigation of public rights and private rights, the *TransUnion* Court believed that standing requirements, including the requirement that a plaintiff show a concrete and particularized injury, are necessary to keep courts within their proper role, deciding only "the rights of individuals."[277] A regime in which Congress "could freely authorize unharmed plaintiffs to sue defendants who violate federal law," the Court believed, would violate Article III and undermine Executive Branch authority.[278]

While the *TransUnion* majority affirmed the importance of history and tradition in resolving questions of Article III standing,[279] it did not engage in the sort of historical analysis that characterized the *Vermont Agency* opinion.[280] Only Justice Thomas' dissent in *TransUnion* included any substantial consideration of historical materials, and the majority did not discuss the sources Justice Thomas highlighted.[281] The federal statutes reviewed in Section II are particularly relevant to the issue addressed in *TransUnion* because statutory damages under the FCRA are a modern version of the statutory forfeitures at issue in eighteenth century penal statutes. Blackstone explains that a penal statute imposes a forfeiture on a party "transgressing the provisions therein enacted."[282] The FCRA establishes numerous requirements applicable to consumer reporting agencies and authorizes statutory damages (or actual damages) for a willful violation.[283] Blackstone says the offending party under a penal statute is required to pay the

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[274] The Court has accorded particular significance to early federal legislation in determining constitutional meaning. *See* Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. 299, 315 (1851) (contemporaneous construction of Constitution by first Congress entitled to great weight); Martin v. Hunter's Lessee, 14 U.S. 304, 351-52 (1816) (construction of Constitution in Judiciary Act of 1789 and acquiescence by states).
[275] *TransUnion*, 141 S. Ct. at 2200.
[276] *Id*. at 2205.
[277] *Id*. at 2203 (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)).
[278] *Id*. at 2207.
[279] *TransUnion*, 141 S. Ct. at 2204; *id*. at 2206 (arguing broader understanding of congressional power "would flout constitutional text, history, and precedent"); *see also Spokeo*, 578 U.S. at 338, 340-41.
[280] In fairness to the Court, the relative lack of historical examination in *TransUnion* may be because the parties' briefs did not argue the case in a manner that would facilitate such an analysis.
[281] *Id*. at 2216-19 (Thomas, J., dissenting); *see id*. at 2207 n.3 (rejecting Justice Thomas' position based on precedent, without discussing historical evidence).
[282] 3 Blackstone, *Commentaries*, at *159.
[283] 15 U.S.C. § 1681n(a)(1)(A).

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statutory forfeiture to whoever the legislature specifies.[284] The FCRA requires payment of statutory damages to the consumer whose statutory rights are violated.[285] Statutory damages in modern legislation like the FCRA mirror the operation and serve the same purposes as forfeitures under the eighteenth century penal statutes discussed by Blackstone and relied upon by the Court in *Vermont Agency*.[286]

Once we recognize that the FCRA is a contemporary penal statute and that the FCRA provision authorizing statutory damages is a modern version of an eighteenth-century statutory forfeiture, the early federal statutes reviewed in Section II offer the best available evidence concerning the framing generation's understanding of the congressional power issue *TransUnion* resolved.[287] That evidence undermines the *TransUnion* Court's principal conclusions concerning Article III limits on Congress' power to authorize pursuit of statutory damages. The *Lujan* line of cases rests on the premise that, at the time the Constitution was adopted, Anglo-American jurisprudence embraced a fundamental distinction between litigation of public rights and litigation of individual rights.[288] While that distinction was recognized in eighteenth century jurisprudence and may be decisive for standing in other areas of law, it was not a critical distinction in the context of framing era penal statutes authorizing collection of statutory forfeitures.[289] Whether a forfeiture protected rights of individuals or rights of the community as a whole, the question of who could sue to collect the forfeiture and what kind of injury, if any, the litigant needed to show were deemed matters for legislative determination.[290]

The Court has already recognized in *Vermont Agency* that Congress may authorize a private informer without any particularized injury to sue for a statutory forfeiture based on a violation of public rights.[291] Early federal penal statutes followed the English practice of allowing "actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute."[292] As Justice Scalia noted in *Vermont Agency*, English legislation from the 14th century onward "allowed informers to obtain a portion of the [statutory] penalty as a bounty for their information, even if they had not suffered an injury themselves[.]"[293] Shortly after the framing of the Constitution, Congress passed a "considerable number" of such statutes and continued to do so for at least a decade.[294] Thus, even though the *qui tam* informer in *Vermont Agency* had not been injured in any individual way by the agency's alleged fraud in connection

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[284] 3 Blackstone, *Commentaries*, at *159-60.
[285] 15 U.S.C. § 1681n(a)(1)(A).
[286] *See*, *e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) ("statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment"); *see id*. at 349-52 (discussing practice under eighteenth century penal statutes protecting copyrights in England and the U.S. in deciding that statutory damages under modern copyright statute should be subject to jury trial).
[287] *See supra* notes 192-265 and accompanying text.
[288] *See supra* notes 39-47 and accompanying text.
[289] *See infra* notes 310-13 and accompanying text.
[290] *See infra* notes 291-309 and accompanying text.
[291] *Vermont Agency*, 529 U.S. at 774 ("We conclude . . . that the United States' injury in fact suffices to confer standing on respondent Stevens.").
[292] 199 U.S. 212, 225 (1905).
[293] *Vermont Agency*, 529 U.S. at 775.
[294] *Id*. at 776-77; Section II(B) *supra*.

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with federal grants, Article III permitted him to pursue an FCA claim based on harm to the financial and sovereignty-based interests of the United States.[295] The system the *TransUnion* majority considered irreconcilable with Article III—"[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law"—is pretty much the exact system the *Vermont Agency* Court decided was constitutional.[296]

While Congress can authorize an uninjured *qui tam* informer to collect a forfeiture based on violation of public rights, the legislation reviewed in Section II highlights other enforcement patterns followed in early federal penal statutes.[297] For instance, uninjured common informers were sometimes authorized to collect forfeitures based on unlawful conduct affecting other private individuals.[298] We noted the first federal criminal statute, which allowed a private informer to sue for quadruple damages when a defendant stole "the personal goods of another."[299] The forfeiture in such cases was split fifty-fifty between "the owner of the goods" and "the informer and prosecutor."[300] This pattern of statutory enforcement was not as common as *qui tam* litigation to vindicate public rights, but it was by no means unprecedented. For instance, an eighteenth century statute from colonial Georgia allowed a private informer to collect a statutory forfeiture based on performance of a fraudulent land survey, with the recovery divided between "the party or parties aggrieved" and "the person who shall make information thereof, and sue for the same."[301] Another early federal statute allowing private vindication of the rights of others is the immigration statute that authorized an uninjured informer to collect a forfeiture when a clerk of court failed to certify and transmit an alien's declaration of intent to become a U.S. citizen.[302]

Blackstone noted that penal statutes could also authorize collection of statutory forfeitures by "the party grieved."[303] This was another enforcement pattern Congress embraced in early federal legislation. The 1790 statute providing for collection of duties on imports, for example, allowed an uninjured common informer to collect a forfeiture when a federal revenue officer neglected to post a table of rates and fees or failed to give a receipt for fees received, but only "the party grieved" could collect the distinct forfeiture imposed when a federal officer demanded higher

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[295] *See supra* notes 172-75, 182-91 and accompanying text.
[296] *Compare TransUnion*, 141 S. Ct. at 2207 ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority.") *with Vermont Agency*, 529 U.S. at 775 (Parliament enacted *qui tam* statutes "that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves"), 776 ("*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution.").
[297] *See supra* notes 192-265 and accompanying text.
[298] *See supra* notes 256-65 and accompanying text.
[299] *See* An Act for the Punishment of certain Crimes against the United States, *supra* note 256, § 16 and accompanying text.
[300] *Id*.
[301] An act to prevent frauds and abuses in the admeasuring and laying out his majesty's lands in this province, § 4 (Mar. 5, 1765), *in* HORATIO MARBURY & WILLIAM H. CRAWFORD, DIGEST OF THE LAWS OF THE STATE OF GEORGIA, FROM ITS SETTLEMENT AS A BRITISH PROVINCE, IN 1755, TO THE SESSION OF THE GENERAL ASSEMBLY IN 1800, INCLUSIVE, at 313-14 (1802).
[302] *See* An Act supplementary to and to Amend the Act, *supra* note 261 and accompanying text.
[303] 3 Blackstone, *Commentaries*, at *159-60.

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compensation than authorized by law.[304] Congress presumably viewed the two forfeitures imposed on federal officers as different in kind, and therefore thought they should be enforced in different ways. It may be that Congress considered claims that an officer failed to post a table of fees or neglected to give a receipt (subject to a $100 forfeiture) less serious than the charge that the officer demanded unauthorized compensation (subject to a $200 forfeiture), and therefore wanted to shield officers more fully from the potential for frivolous or manufactured claims in the latter category.[305]

Another provision for an aggrieved party to enforce a statutory forfeiture appears in the patent statute enacted by the First Congress, which provided for the person violating a patent to "forfeit to the person aggrieved" the infringing items.[306] The statute also allowed the patent owner to recover damages as assessed by a jury.[307] The first federal copyright statute included the unusual provision discussed earlier, allowing the copyright owner to collect a statutory forfeiture, with half of the money going to the copyright owner and the other half to the United States.[308] As Justice Scalia noted in *Vermont Agency*, this statute allowed an aggrieved party "to sue for damages on both their own and the United States' behalf."[309]

The historical materials reviewed earlier above make clear that penal statutes straddled the divide between public and private rights in eighteenth century Anglo-American legal thought. This explains why Blackstone discussed popular actions in both his volume on Private Wrongs and his volume on Public Wrongs.[310] It illuminates the legislative decision in many penal statutes to let informers choose between civil and criminal procedures for enforcing statutory forfeitures.[311] And it is highlighted in the Latin phrase that gives rise to the term "*qui tam* action," which speaks of a private litigant "who pursues this action on our Lord the King's behalf as well as his own."[312] The theory behind popular enforcement was apparently that even when a statute protects rights of the public, private individuals are proper plaintiffs because they share in the public injury attributable to the defendant's disregard of the community's laws. As Sir William Hawkins observed in his treatise on *Pleas of the Crown*, case law did not require the informer in

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[304] 1790 Collection Act, *supra* note 197, § 55.
[305] *See* Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 577-78 (2022) (discussing problem of baseless or fraudulent claims filed by common informers).
[306] An Act to Promote the Progress of Useful Arts, 1 Stat. 109, § 4 (April 10, 1790).
[307] *Id*. *See also TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) (discussing *Whittemore v. Cutter*, 29 F. Cas. 1120 (Cir. Ct. Mass. 1813)).
[308] *See supra* notes 253-55 and accompanying text.
[309] *Vermont Agency*, 529 U.S. at 776 n.5. A further Anglo-American variation on private enforcement of the rights of other individuals was a penal statute "which first gives an Action to the Party grieved, and in his Default, after a certain Time, to any one who will sue." 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 272 (1721). Another statute from colonial Georgia illustrates this pattern, giving an unlucky gambler six months to recover gambling losses from the winner, after which the suit could be brought by any person, with half of the recovery going to the litigant and the other half to the poor. *An additional act to an act entitled "An act to suppress lotteries, and to prevent other excessive and deceitful gaming*, § 1 (Mar. 25, 1765), *in* MARBURY & CRAWFORD, DIGEST, *supra* note 301, at 253-54.
[310] *See supra* notes 145-54, 159 and accompanying text.
[311] *See supra* note 160 and accompanying text.
[312] *Vermont Agency*, 529 U.S. at 768 n.1.

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a popular action to plead an individual injury because "every Offense" for which the legislature authorized a popular action "is supposed to be a general Grievance to every Body."[313]

Viewed from the perspective of the framing generation, whether to require some sort of particularized injury as a condition for collecting a statutory forfeiture under a penal statute was a matter for legislative determination in drafting the statute. Blackstone explained that the person violating a penal statute was bound "to obey the directions of the legislature" and pay the forfeiture "to such persons as the law requires."[314] Just as Congress could enact a penal statute to protect rights of the public or rights of individuals, Congress could also decide whether the forfeiture should be recovered by a public official, a common informer with no particularized injury or an aggrieved individual whose statutory rights were violated.[315]

Since Congress often gave statutory forfeitures to informers who had not suffered any particularized injury, it would seem to follow *a fortiori* that Congress had power to give statutory forfeitures to those whose only injury was violation of a legal right conferred by statute. As Blackstone put it, a penal statute awarded a forfeiture "for transgressing the provisions therein enacted."[316] For example, the forfeiture for the "party grieved" under the 1790 federal statute for collection of duties applied "if any officer of the customs shall demand *or receive* any greater or other fee, compensation or reward" for carrying out a responsibility required by law.[317] The forfeiture applied if the officer made a "demand" for extra compensation, and the statute did not require the aggrieved party to show concrete injury in the form of actual payment of the money demanded.

Another illustration can be found in the early copyright statute cited by Justice Scalia in *Vermont Agency*. The owner of the copyright was entitled to recover and destroy copies of infringing works in the defendant's possession.[318] In addition, the copyright owner could recover statutory damages of 50 cents per page for the offending copies.[319] The statutory forfeiture applied to copies in the defendant's possession when they were seized, even though such copies presumably could not have produced any "concrete injury" to the copyright holder in the form diverted sales of the copyrighted work.[320] The legal injury flowing from violation of the plaintiff's copyright was sufficient to recover statutory damages, without any additional showing of harm (like lost profits) attributable to the statutory violation.

An early patent law opinion discussed in Justice Thomas' *TransUnion* dissent confirms the conclusion that Congress could grant a statutory cause of action to a plaintiff whose only injury

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[313] 2 HAWKINS, *supra* note 309, at 267 ("Also it hath been adjudged, That a Popular Action may conclude *ad grave damnum*, without adding, *of the Plaintiff*; because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body.").
[314] 3 Blackstone, *Commentaries*, at *159.
[315] *See supra* notes 146-54 and accompanying text.
[316] 3 Blackstone, *Commentaries*, at *159.
[317] *See* 1790 Collection Act, *supra* note 197, § 55.
[318] *See* An Act for the Encouragement of Learning, *supra* note 254, § 2.
[319] *Id*.
[320] *See TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) (quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting) for the proposition that the first copyright statute allowed recovery of statutory damages "even if the holder 'could not show monetary loss'").

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was the legal injury arising from violation of a statutory right.[321] *Whittemore v. Cutter* rested in part on an 1800 federal statute providing that if a person should "make, devise, use, or sell" a patented invention without the patent holder's written consent, the person would "forfeit and pay" to the patent holder "three times the actual damages sustained."[322] The defendant argued that the mere making of the patented invention could not violate the statute because an action would lie only if there were actual damages.[323] Justice Story, sitting as a Circuit Court judge, rejected the argument, noting that "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party."[324] The Justice indicated that where a statutory right is violated, but no actual damages are proved, "the law allows a nominal damage."[325] The *TransUnion* majority never mentioned *Whittemore*, even though it seems to strike at the heart of their conclusion that "an injury in law is not an injury in fact" satisfying Article III and that only a plaintiff who has been "concretely harmed" may sue based on a statutory violation.[326]

Having undertaken an historical investigation comparable to the Court's analysis in *Vermont Agency*, we should also consider what to make of the Court's suggestion that a provision authorizing a *qui tam* action can be analogized to a partial assignment of the government's claim.[327] This portion of the *Vermont Agency* opinion did not purport to offer an eighteenth-century rationale for *qui tam* legislation. Causes of action were not generally assignable at common law, so it is doubtful eighteenth century lawyers would have described popular enforcement in those terms.[328] This facet of the *Vermont Agency* opinion is probably best viewed as an attempt to help modern lawyers make sense of the tradition of popular enforcement by drawing an analogy to a practice recognized in current law. In any event, if standing doctrine is really based on the historical meaning of the words "case" and "controversy," as the Court affirms, the analogy to claim assignment should play a supporting, rather than a leading role. In applying *Vermont Agency*'s reasoning to penal statutes other than those authorizing *qui tam* litigation, we should keep in mind Justice Holmes' reminder that "a page of history is worth a volume of logic."[329]

Our analysis of framing era penal statutes has shown that Congress was understood to have power to award statutory forfeitures to aggrieved parties. Just as Congress sometimes awarded forfeitures to common informers who suffered no injury at all, they likewise awarded forfeitures

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[321] *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) (discussing *Whittemore v. Cutter*, 29 F. Cas. 1120 (Cir. Ct. Mass. 1813)).
[322] *See An Act to Extend the Privilege of Obtaining Patents for Useful Discoveries and Inventions, to Certain Persons therein Mentioned, and to Enlarge and Define the Penalties for Violating the Rights of Patentees*, 2 Stat. 37, ch. 25, § 3 (Apr. 17, 1800)) (referenced in *Whittemore*, 29 F. Cas. at 1121).
[323] *Whittemore*, 29 F. Cas. at 1121.
[324] *Id*.
[325] *Id*.
[326] *TransUnion*, 141 S. Ct. at 2205.
[327] *Vermont Agency*, 529 U.S. at 773-74.
[328] Tiernan v. Jackson, 30 U.S. 580, 597 (1831) ("The general principle of law is, that choses in action are not at law assignable."); Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 Hofstra L. Rev. 1543, 1549-53 (2005); Teal E. Luthy, Comment, *Assigning Common Law Claims for Fraud*, 65 U. Chi. L. Rev. 1001, 1002-03 (1998).
[329] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

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to aggrieved parties whose only injury was the defendant's violation of an individual legal right protected by statute.[330] Early federal penal statutes did not generally include anything like the "concrete injury" requirement imposed in *TransUnion*. A person could recover a forfeiture under a penal statute based on proof that the defendant "transgress[ed] the provisions" of the legislation.[331] Following the reasoning of *Vermont Agency*, these early federal statutes demonstrate how the framing generation understood the "case" or "controversy" requirement and the resulting congressional power to authorize collection of statutory damages.[332]

Since the *TransUnion* jury believed the defendant had violated FCRA duties owed individually to each of the class members,[333] all of the class members satisfied Article III requirements for standing to pursue statutory damages, not just the class members whose credit reports were disseminated to third party businesses. If the *qui tam* relator in *Vermont Agency* had Article III standing to pursue an FCA claim in the absence of any particularized injury, the class members in *TransUnion* surely had standing based on the particularized legal injury attributable to violation of their statutory rights. And since these class members sought statutory damages based on legal injury to their own rights, there is no need to resort to anything like the claim assignment theory offered in *Vermont Agency*.[334]

B. Statutory Forfeitures and Executive Power Under Article II

The *Lujan* line of cases has sought to bolster the Court's Article III standing analysis with arguments about executive power under Article II. *Lujan* contended that allowing plaintiffs lacking particularized injuries to enforce legal duties of executive officials would permit Congress to reassign the President's constitutional duty to ensure faithful execution of the laws.[335] The *Spokeo* Court cited this portion of *Lujan*, arguing that "standing doctrine preserves executive discretion."[336] The *TransUnion* majority expanded on the theme, contending that choices about "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch," and should not be left to private plaintiffs and attorneys who lack accountability to the people and a commitment to the public interest.[337] More broadly, several Justices have raised the question of whether *qui tam* statutes like those *Vermont Agency* validated for Article III purposes might nevertheless violate Article II by permitting private litigation of public claims.

Since my argument follows the Court's analysis in *Vermont Agency*, I will first offer a few comments on the compatibility of *qui tam* litigation with Article II. The Court rejected an analogous Article II argument well over a century ago in *The Laura*, and Justice Harlan's

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[330] *See supra* notes 317-26 and accompanying text.
[331] 3 Blackstone, *Commentaries*, at *159-60.
[332] *See Vermont Agency*, 529 U.S. at 776-78.
[333] *See TransUnion*, 141 S. Ct. at 2202 (jury awards statutory and punitive damages to each class member).
[334] Alternatively, if the Court insists on the point that the class members did not meet Article III's minimum threshold for cognizable injury, the FCRA could be analyzed as involving assignment of a government claim for statutory damages comparable to the claim assignment that occurs in a *qui tam* statute. *See Vermont Agency*, 529 U.S. at 773-74.
[335] *Lujan*, 504 U.S. at 577.
[336] *Spokeo*, 578 U.S. at 347.
[337] *TransUnion*, 141 S. Ct. at 2207.

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reasoning in that opinion seems equally applicable in this context.[338] In any event, whatever one thinks about executive power in the context of an uninjured *qui tam* relator pressing fraud claims on behalf of the United States, Article II seems considerably less relevant to the issue of statutory damages addressed in *TransUnion*. The President has a unique constitutional role with respect to enforcing rights of the public—one that plausibly implicates constitutional allocations of power—but Article II seems considerably less germane when the issue is an individual's standing to litigate based on violation of the plaintiff's own statutory rights.

1. Article II and Qui Tam Litigation of Public Claims

The concerns expressed in the *Lujan* line of cases about preserving Executive Branch law enforcement discretion create significant tension with the Anglo-American tradition of popular enforcement. A *qui tam* statute allows an uninjured private informer to file suit and litigate a claim on behalf of the public without approval from any public official, and the outcome in the popular action generally binds the government.[339] In concluding that *qui tam* relators satisfy Article III standing requirements, the *Vermont Agency* Court made clear in a footnote that it was not addressing "whether *qui tam* suits violate Article II," citing both the Appointments Clause and Article II's instruction that the President must "take care that the laws be faithfully executed."[340] Justice Stevens, by contrast, thought the Court's evidence concerning the extended history of *qui tam* legislation, together with evidence "that private prosecutions were commonplace in the 19th century," were sufficient to resolve any Article II question about the constitutionality of the False Claims Act (FCA).[341]

The question *Vermont Agency* left open about popular enforcement and Article II entered the Court's radar screen again last term in *United States ex rel. Polansky v. Executive Health Resources, Inc*., a statutory case under the *qui tam* provisions of the FCA.[342] Justice Thomas commented in dissent that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation."[343] Citing an article by Professor Saikrishna Prakash, Justice Thomas added that "we should be especially careful not to overread the early history of federal *qui tam* statutes given that the Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited."[344] Justice Kavanaugh, joined by Justice Barrett, filed a concurring opinion agreeing with Justice Thomas that *qui tam* litigation raises substantial constitutional questions and expressing the view that "the Court should consider the competing arguments on the Article II issue in an appropriate case."[345]

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[338] *See* The Laura, 114 U.S. 411, 415-16 (1885).
[339] *See* 3 Blackstone, *Commentaries*, at *159-60.
[340] *Vermont Agency*, 529 U.S. at 778 n.8.
[341] *Id*. at 801 (Stevens, J., dissenting) (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 127-28 & nn. 24-25 (1998) (Stevens, J., concurring in the judgment)).
[342] United States ex rel. Polansky v. Executive Health Resources, Inc., 143 S. Ct. 1720 (2023).
[343] *Id*. at 1741 (Thomas, J., dissenting).
[344] *Id*. at 1741-42 (citing Sai Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 589 (2005)).
[345] *Id*. at 1737 (Kavanaugh, J., joined by Barrett, J., concurring).

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The question whether *qui tam* legislation might violate Article II has been the subject of extended scholarly discussion.[346] As a policy matter, there is significant weight to the concern that popular enforcement of public claims can undermine the role of disinterested government officials.[347] A *qui tam* statute contains a built-in conflict of interest, offering private financial gain to encourage litigation on behalf of the public.[348] *Qui tam* enforcement has generated significant controversy at various points in history because informers tend to prioritize their personal financial interests over potentially competing interests of the public.[349] As Justice Thomas wrote for the Court in *Hughes Aircraft Co. v. United States ex rel. Schumer*, "*qui tam* relators are different in kind than the Government" because they are "motivated primarily by prospects of monetary reward rather than the public good."[350] For instance, a *qui tam* plaintiff might be more willing than a Department of Justice lawyer to pursue an FCA claim based on "technical noncompliance" with government reporting requirements that caused no impact to the federal Treasury.[351]

At the same time, such concerns about the effect of popular enforcement on Executive Branch discretion have traditionally been treated as policy questions for the legislature, rather than constitutional questions for judicial resolution. The Court's opinion in *United States ex rel. Marcus v. Hess* illustrates the point.[352] During World War II, a *qui tam* informer filed suit under the False Claims Act, allegedly based on information disclosed in the government's earlier criminal indictment of the defendants.[353] In the United States Supreme Court, the Department of Justice filed an *amicus curiae* brief objecting to the filing of a *qui tam* action by an "informer" who did not actually provide the information forming the basis for the FCA claims.[354] Justice Black's opinion for the Court catalogued a series of concerns laid out in the Justice Department brief:

> It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863.[355]

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[346] *See* Evan Caminker, 99 YALE L.J. 341, 354-80 (1989); Prakash, *supra* note 344, at 576-96.
[347] *See* Beck, *English Eradication*, *supra* note 138, at 637 (*qui tam* litigation removes benefit of disinterested exercise of prosecutorial discretion).
[348] *Id*. at 611-15.
[349] *See*, *e.g.*, Beck, *Popular Enforcement of Controversial Legislation*, *supra* note 305, at 581-613.
[350] 520 U.S. 939, 949 (1997).
[351] *Id*.
[352] United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).
[353] *Id*. at 545-46.
[354] *Id*.; Brief for the United States as Amicus Curiae, *United States ex rel. Marcus v. Hess*, No. 173, 1942 WL 54209, at 18 (Dec. 8, 1942) ("The reward for the informer was for the disclosure and not merely for the prosecution of the action. Certainly Congress did not pass the statute in order to permit private persons who had contributed nothing to the discovery of the crime to step in and share the proceeds as soon as the facts had been made known as a result of the Government's own prior investigation.").
[355] *Marcus*, 317 U.S. at 547.

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The problem with these arguments, according to the Court, was that they were "addressed to the wrong forum."[356] The government offered "strong arguments of policy against the statutory plan," but its arguments focused on what the statute should have done, not what it actually did.[357] The Justice Department anticipated the Court's conclusion in *Marcus* and persuaded Congress to amend the False Claims Act to address the problem of parasitic claims by relators relying on information already uncovered by the government.[358]

The article by Professor Prakash cited in Justice Thomas' *Polansky* dissent considers the constitutional role of the President in enforcing the laws.[359] Professor Prakash assembles an impressive array of evidence that our first three Presidents, with support from the other branches, regularly issued directives instructing federal prosecutors concerning the performance of prosecutorial duties.[360] In the absence of statutory authority for these actions, this historical record provides relatively good evidence that Article II was understood to afford the President a supervisory role with respect to government attorneys representing the United States.[361]

The implications of this historical evidence for *qui tam* legislation are significantly less clear. To begin with, it seems by no means certain that filing a statutory popular or *qui tam* action should be classified as an exercise of "executive power" within the meaning of Article II. Blackstone notes that authorization to file a popular action under a penal statute is "given to the people in general."[362] This sounds like a non-governmental power—perhaps one of the powers "reserved . . . to the people" under the 10th Amendment—and hence not subject to the legislative-executive-judicial categorization applicable to powers of the government.[363] Our Constitution was adopted when governments were far smaller and less powerful than they are today.[364] Popular enforcement authorized by statute fits comfortably alongside an array of other devices—the militia, the community posse (*posse comitatus*), the privateer operating under a letter of marque and reprisal—by which members of the public were authorized to assist in the projection of communal force and the enforcement of communal law.[365]

Even if we do view popular enforcement as an exercise of "executive power," however, Professor Prakash rejects the notion that *qui tam* legislation is unconstitutional.[366] He finds the assertion "a little hard to stomach" in light of centuries in which popular actions served as the principal means of enforcing English penal statutes.[367] Professor Prakash argues instead that Article II should be read to give the President an implicit power to terminate *qui tam* actions in

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[356] *Id*.
[357] *Id*. at 546-47.
[358] Beck, *English Eradication*, *supra* note 138, at 556-61. The particular issue raised by the Department of Justice in *Marcus* is now addressed through the FCA's "original source" provision. *See* 31 U.S.C. § 3730(e)(4).
[359] *See generally* Prakash, *supra* note 344.
[360] *Id*. at 552-63.
[361] *See id*. at 563-65.
[362] 3 Blackstone, *Commentaries*, at *160.
[363] U.S. Const., amend. X; *see* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1315-16.
[364] *See* Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 135, at 1315.
[365] *Id*.
[366] Prakash, *supra* note 344, at 577.
[367] *Id*.

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order to ensure faithful execution of the laws.[368] He makes this case on textual and structural grounds,[369] acknowledging that we do not know whether early Presidents "ever terminated (or unsuccessfully sought to terminate) popular prosecutions."[370] If we follow Professor Prakash in recognizing an implicit presidential power to terminate *qui tam* actions under the Take Care clause, Congress could still enact *qui tam* legislation and informers could still file *qui tam* actions under the FCA and other statutes without violating Article II.[371]

If the Justices ever do take up the question of the constitutionality of *qui tam* legislation under Article II, the Court's 19th century decision in *The Laura* seems particularly relevant to the analysis.[372] The informer in that case sought forfeitures from a steam vessel under a federal penal statute for carrying more passengers than permitted by the ship's certificate of inspection.[373] The owner of the vessel defended on the ground that the Secretary of the Treasury had exercised a statutory power to remit penalties for violation of the statute, including the portion going to the informer.[374] The appellant argued that the statute was unconstitutional because Article II vested an exclusive power to pardon offenses in the President, and Congress could not encroach on that power by vesting part of it in a subordinate official.[375] That constitutional claim seems structurally parallel to the contention that *qui tam* legislation is unconstitutional because it confers on a private litigant executive power that Article II vests exclusively in the President.[376]

In his opinion for the Court in *The Laura*, Justice Harlan rejected the Article II argument as foreclosed by framing era practice followed without constitutional objection for nearly a century. He noted that "[f]rom the adoption of the constitution to the present moment," Congress had asserted a right to provide for remission of fines by government officers other than the President.[377] A 1797 statute containing such a provision had been applied in a number of cases without any suggestion that it violated the Article II pardon power.[378] Justice Harlan quoted the early opinion in *Stuart v. Laird*, which validated the tradition of Supreme Court Justices sitting on circuits courts.[379] The *Stuart* Court reasoned that a practice "'commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. . . . [T]he question is at rest, and ought not now to be disturbed.'"[380] To similar effect, Justice Harlan quoted a more recent case concluding that Congress could afford copyright protection to photographs because the 1790 copyright statute included protection for analogous

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[368] *Id*.
[369] *Id*. at 580-84.
[370] *Id*. at 587.
[371] Prakash, *supra* note 344, at 594.
[372] The Laura, 114 U.S. 411 (1885).
[373] *Id*. at 412.
[374] *Id*. at 412-13.
[375] *Id*. at 413.
[376] *See Polansky*, 143 S. Ct. at 1741 (Thomas, J., dissenting) (questioning *qui tam* statutes based on view that Article II vests executive power in the President alone).
[377] *The Laura*, 114 U.S. at 414-15.
[378] *Id*. at 415.
[379] *Id*. at 416
[380] *Id*. (quoting Stuart v. Laird, 5 U.S. 299, 309 (1803)).

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works, like maps and charts.[381] A construction placed on the Constitution by legislators "'who were contemporary with its formation, many of whom were members of the convention which framed it'" should receive "very great weight," and when the rights established had "'not been disputed during a period of nearly a century, it is conclusive.'"[382]

A similar train of reasoning would seem to foreclose a contemporary Article II challenge to *qui tam* litigation. The first several Congresses, including members who participated in the Constitutional Convention, enacted a significant number of statutes containing *qui tam* provisions.[383] So far as we know, the statutes were signed without objection by early Presidents and applied in judicial proceedings without anyone raising a constitutional issue under Article II. Over 150 years after ratification of the Constitution, the Supreme Court ruled in *Marcus* that "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it," and emphasized that the Court had no authority to exercise a "veto power" over the legislative decision, notwithstanding "strong arguments of policy against the statutory plan."[384] In these circumstances, following Justice Harlan's reasoning in *The Laura*, it would seem that the early federal *qui tam* legislation reviewed in Section II "fixed the construction" of the President's Article II power in the context of popular enforcement.[385] Congress relied upon that construction during the Civil War when it enacted the False Claims Act and the passage of well over two centuries since this early legislative construction has laid the Article II issue to rest.[386]

2. Article II and Private Claims Seeking Statutory Damages

Whatever the Court ultimately concludes about *qui tam* legislation and executive power, Article II seems much less relevant to the question of statutory damages at issue in a case like *TransUnion*. A statute authorizing *qui tam* litigation has a much greater capacity to undermine the Executive Branch role in enforcing the law than a statutory damages provision like the one in the FCRA. A *qui tam* statute permits any person to sue without requiring any particular connection to the events giving rise to the litigation.[387] The same informer or group of informers can file dozens or even hundreds of cases on behalf of the public.[388] In jurisdictions making extensive use of *qui tam* statutes, it has been common for individuals to become professional informers, who make a living by pursuing a portfolio of cases to collect statutory forfeitures.[389] While the FCA allows the Department of Justice to intervene and assume control of a *qui tam* action,[390] legislation providing for popular actions has not traditionally included such generous

[381] *Id*. (citing Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884)).
[382] *Id*. (quoting *Lithographic*, 111 U.S. at 57).
[383] *See supra* Section II.
[384] *Marcus*, 317 U.S. at 542, 546.
[385] *The Laura*, 114 U.S. at 416 (quoting *Stuart*, 5 U.S. at 309).
[386] *Id*.
[387] 3 Blackstone, *Commentaries*, at *160 (popular action available to "any such person or persons as will sue for the same"); *Marvin*, 199 U.S. at 225 (common informer has "no interest whatever in the controversy other than that given by statute").
[388] *See* Beck, *Popular Enforcement of Controversial Legislation*, *supra* note 305, at 589 (English excise official coordinated group of 30 informers responsible for claims against 1500 persons under the Gin Act of 1736).
[389] *See* Beck, *English Eradication*, *supra* note 138, at 575-79.
[390] *See* 31 U.S.C. § 3130(b).

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provisions for participation by government attorneys. Instead, the filing of a popular action has been understood to preclude a separate claim by government officials and the result in a *qui tam* case has been binding on the government, unless it was the product of collusion.[391] These traditional features of *qui tam* legislation effectively allow private parties to take on the role of public prosecutors and to pursue public litigation that government lawyers might view as unwise, unjustified or counterproductive.[392]

The statutory damages provision of the FCRA, on the other hand, has much less capacity to affect the government's role in enforcing the law. The statute provides that a person who violates an FCRA requirement "with respect to any consumer" is liable for actual or statutory damages "to that consumer."[393] A claim can thus be pursued only by someone who demonstrates an individual connection to an FCRA violation. The statute forces particularization of statutory damages claims and effectively limits the number of cases an individual can pursue without risking sanctions.[394] To be part of the class certified in *TransUnion*, for example, it had to be shown that TransUnion had sent a mailing indicating that they had identified the particular class member as a potential match for a name on the OFAC list, a determination alleged to violate FCRA procedures.[395] The filing of a consumer action for statutory damages under the FCRA does not bind the government or preclude government officials from filing public enforcement actions under a different provision of the statute.[396] In sum, a statutory damages claim for violation of individual consumer rights protected by the FCRA has minimal capacity to interfere with government efforts to enforce the statute, and therefore offers little support for the *TransUnion* Court's construction of Article III.[397] The Court has voiced no Article II concerns about FCRA actions by consumers claiming concrete injuries, and additional private claims by consumers who can show only a violation of statutory rights would not seem to interfere with government enforcement to any greater extent than other private claims.[398]

The *TransUnion* majority, in rejecting Justice Thomas' proposed distinction between treatment of claims based on public rights and claims based on private rights, dropped a footnote expressing concern that Congress might purport to create individual rights to mask suits seeking to enforce rights of the public:

> As we understand the dissent's theory, a suit seeking to enforce "general compliance with regulatory law" would not suffice for Article III standing because such a suit seeks to vindicate a duty owed to the whole community. But under the dissent's theory, so long as

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[391] *See* 3 Blackstone, *Commentaries*, at *160.
[392] Beck, *English Eradication*, *supra* note 138, at 620-33.
[393] 15 U.S.C. § 1681n.
[394] *See* Fed. R. Civ. P. 11.
[395] *See TransUnion*, 141 S. Ct. at 2201-02.
[396] 15 U.S.C. § 1681s.
[397] The statutory requirement of particularization under the FCRA means this is not, for example, a case in which Congress has tried to convert an "undifferentiated public interest" in enforcing the law into an "individual right." *See Lujan*, 504 U.S. at 577.
[398] It's worth noting that the *TransUnion* Court allowed over 1800 class members to recover statutory and punitive damages under the statute, without worrying whether those recoveries would undermine Executive Branch discretion in enforcing the statute. *See TransUnion*, 141 S. Ct. at 2208-09.

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> Congress frames a defendant's obligation to comply with regulatory law as an obligation owed to *individuals*, any suit to vindicate that obligation suddenly suffices for Article III. Suppose, for example, that Congress passes a law purporting to give all American citizens an individual right to clean air and clean water, as well as a cause of action to sue and recover $100 in damages from any business that violates any pollution law anywhere in the United States. The dissent apparently would find standing in such a case. We respectfully disagree. In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law.[399]

This footnote fails to grapple with what the Court decided in *Vermont Agency*.[400] A hypothetical statute allowing anyone to sue for $100 based on violation of a specified statutory requirement appears to describe a garden variety popular action of the kind validated by the *Vermont Agency* decision.[401] It seems comparable, for instance, to the two statutes of the First Congress cited in *Vermont Agency* providing that a federal revenue officer who did not post a table of fees and duties would "forfeit and pay one hundred dollars, to be recovered with costs, in any court having cognizance thereof, to the use of the informer."[402] Since *Vermont Agency* already indicated that informers lacking any concrete injury can satisfy Article III standing requirements and collect forfeitures for violation of statutory duties owed to the public, it is hard to see how this hypothetical counts as an argument against Justice Thomas' position.

In any event, assuming the Court is right to be concerned about Congress purporting to confer "individual rights" that authorize enforcement of public rights, that concern does not seem to be implicated under the FCRA. The FCRA expressly requires the consumer to make a particularized showing that the consumer's individual rights were violated in order to collect statutory

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[399] *Id*. at 2207 n.3.

[400] *See Vermont Agency*, 529 U.S. at 775 (in approving *qui tam* litigation, Court noted that English *qui tam* statutes relevant to opinion allowed informers to recover statutory bounty "even if they had not suffered an injury themselves").

[401] *See* Beck, *English Eradication*, *supra* note 138, at 552-53 (describing distinctive features of *qui tam* legislation). The majority could try to distinguish this hypothetical statute from typical *qui tam* legislation because a *qui tam* statutes allow an informer to enforce rights of the public, while this one purports to give the plaintiff an individual legal right (though, by hypothesis, an "individual right" that is in fact a disguised public right). But we have seen above that the distinction between public and private rights was not critical in the context of penal statutes. Early Congresses allowed uninjured informers to enforce rights of the public in some statutes and the rights of individuals in other statutes. *See supra* notes 291-313 and accompanying text.

[402] *See* 1789 Collection Act, *supra* note 197, § 29; 1790 Collection Act, *supra* note 197, § 55. *See Vermont Agency*, 529 U.S. at 777 n.7. Justice Scalia cited these statutes in a footnote listing legislation that "provided a bounty only," rather than a separate footnote for statutes that "provided both a bounty and an express cause of action." *Compare id*. at 777 n.6 *with id*. at 777 n.7. To my eyes, the language of these statutes providing for the forfeiture "to be recovered with costs, in any court having cognizance thereof, to the use of the informer" seems fairly express in giving the informer a cause of action. In any event, Justice Scalia notes the rule of construction cited in *dicta* in *Marcus* indicating that "'[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.'" *Vermont Agency*, 529 U.S. at 777 n.7 (quoting *Marcus*, 317 U.S. at 541 n.4).

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damages.[403] This congressional limit on statutory damages clearly distinguishes such a claim under the FCRA from one to enforce "general compliance with regulatory law."[404] Since the FCRA claims at issue in *TransUnion* concerned violation of individual rights, rather than public rights, it is hard to see why Article II concerns should affect the analysis.

C. *Vermont Agency*, *TransUnion* and the Separation of Powers

The *TransUnion* majority identified the separation of powers as the "single basic idea" underlying standing doctrine.[405] The Supreme Court has not always viewed standing in those terms. In *Flast v. Cohen*, the Court rejected the government's argument that the traditional bar to federal taxpayer standing was required by Article III: "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."[406] But the *Flast* opinion has since been limited to its facts and Justices today often describe standing as a doctrine designed to keep courts within their traditional, historically-defined role.[407]

Viewed from a separation of powers perspective, standing doctrine seeks to "prevent the judicial process from being used to usurp the powers of the political branches."[408] The *Lujan* line of cases generally envisions that mission in terms of limiting congressional power to confer standing so courts do not usurp Executive Branch functions.[409] Ironically, though, the *TransUnion* Court has now pressed that agenda to the point that judges have begun making decisions traditionally left to legislatures.[410] Instead of following the eighteenth-century pattern, in which courts deferentially followed legislative directions regarding who could recover

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[403] *See supra* note 393 and accompanying text.
[404] *Compare* 15 U.S.C. § 1681n *with TransUnion*, 141 S. Ct. at 2207 n.3; *see also* Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 Geo. Mason L. Rev. 729, 776-86 (2022) (Court can readily distinguish statutory private rights from public rights).
[405] *TransUnion*, 141 S. Ct. at 2203 (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)); *id*. (quoting Marbury, 5 U.S. at 170) ("Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only "'the rights of individuals'[.]"); Allen v. Wright, 468 U.S. 737, 752 (1984) ("the law of Art. III standing is built on a single basic idea—the idea of separation of powers").
[406] 392 U.S. 83, 100 (1968).
[407] *See* Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587, 603-09 (2007) (plurality opinion) (reading *Flast* as a narrow exception allowing standing only to challenge direct congressional expenditure violating Establishment Clause); *id*. at 635 (Scalia, J., concurring in the judgment) ("*Flast* was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function"); *Allen*, 468 U.S. at 761 (separation of powers underlying Article III counsels against recognizing standing "to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties," a task constitutionally assigned to the Executive); *Lujan*, 504 U.S. at 559-60 ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts"); *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (standing requirements "preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature," a concern "generally absent when a private plaintiff seeks to enforce only his personal rights against another private party").
[408] Town of Chester, N.Y. v. Laroe Estates, Inc., 581 U.S. 433, 438 (2017) (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (2014) (same).
[409] *See supra* notes 44, 100-01 and accompanying text.
[410] *See supra* note 314-15, 330-32 and accompanying text.

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statutory forfeitures, the Justices have now taken on the policy-making role of deciding whether particular plaintiffs have "really" been injured in a way that warrants statutory damages.[411] A further irony lies in the fact that this usurpation of legislative functions occurred because a Court committed to augmenting the role of legal history in constitutional decision making has not engaged deeply enough with the framing era history it invokes as the source of its standing rules.[412] The path taken in *TransUnion* contrasts with the *Vermont Agency* opinion, where Justice Scalia allowed framing era legislation to reorient his previously-expressed views on standing.[413]

Justice Scalia was perhaps the most zealous advocate for the separation of powers view of standing doctrine. Even before joining the Supreme Court, he published a lecture entitled, "*The Doctrine of Standing as an Essential Element of the Separation of Powers*."[414] Justice Scalia laid out his understanding that standing doctrine confines courts to their traditional "undemocratic" role of protecting the rights of individuals and minorities against the majority, "and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*."[415] The concrete injury requirement, he argued, helps identify those plaintiffs with an injury other than "the mere breach of the social contract" all of us experience when government acts unlawfully.[416] Justice Scalia quoted approvingly the passage from *Marbury v. Madison* in which Chief Justice Marshall described the Court's province as "solely, to decide on the rights of individuals" and disclaimed any desire to intrude on the President's cabinet or interfere with executive discretion.[417]

Themes reminiscent of Justice Scalia's published lecture appeared throughout the majority opinion in *Lujan*. Justice Scalia identified standing doctrine as a constitutionally required expression of separation of powers principles.[418] He quoted the same passage from *Marbury v. Madison* that featured in his lecture.[419] The injury forming the basis for standing must be concrete and particularized, he contended, in order to distinguish the plaintiff from other members of the community; it cannot be a mere "generalized grievance" about Executive Branch compliance with the law.[420] To entertain claims about the legality of Executive Branch activity by plaintiffs lacking any particularized injury would allow courts "to assume a position of authority" over the Executive Branch and become '"virtually continuing monitors" of executive action.[421]

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[411] *Compare supra* notes 93-101 and accompanying text *with supra* notes 314-15 and accompanying text.
[412] *See infra* notes 439-43 and accompanying text.
[413] *See supra* notes 172, 187-91 and accompanying text.
[414] Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 121, at 881.
[415] *Id*. at 894.
[416] *Id*. at 895.
[417] *Id*. at 883 (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)).
[418] *Lujan*, 504 U.S. at 559-61, 573-78.
[419] *Id*. at 576.
[420] *Id*. at 560 & n.1, 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").
[421] *Id*. at 577 (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); Allen v. Wright, 468 U.S. 737, 760 (1984) and Laird v. Tatum, 408 U.S. 1, 15 (1972)) (internal quotation marks omitted).

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Justice Scalia's advocacy for strict standing rules was part of his broader agenda to constrain federal courts.[422] A similar impulse explains Justice Scalia's frequent defense of originalism as the proper method of constitutional interpretation.[423] Standing doctrine seeks to limit the types of legal disputes judges adjudicate, while originalism seeks to limit the judge's discretion in interpreting the Constitution.[424] In an essay entitled, "*Originalism: The Lesser Evil*," Justice Scalia argued that the "main danger" in constitutional interpretation is that "judges will mistake their own predilections for the law."[425] Originalist theory seeks to counter that danger by establishing "a historical criterion" conceptually distinct from any preference the judge might entertain.[426]

A great deal of debate has taken place over the extent to which originalism can actually perform the function of constraining constitutional decision making by judges.[427] The issue is complicated by the fact that originalists themselves have divided over issues important to the interpretive process.[428] At the same time, originalism does seem to offer a greater capacity than many competing theories to distinguish good constitutional arguments from bad ones.[429] And even if one questions the ability of originalism to constrain decision making by a willful judge (with life tenure), Professor Baude argues that originalist theory can provide valuable internal guidance to a judge who wants to decide legal issues "without importing nonlegal considerations."[430]

Justice Scalia's argument in *Originalism: The Lesser Evil* suggests one picture of what it might look like for originalist methodology to constrain a judge's decision making. If you have evidence that a judge's "predilections" would favor a particular result, but the judge writes an opinion employing originalist methodology to reach the opposite result, you may reasonably

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[422] Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 25 (2016).
[423] *Id*.
[424] A defining features of originalism is the belief that judges and other actors "ought to be constrained by the original meaning when they engage in constitutional practice." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013). The most widely-accepted version of originalism posits that the starting point for applying the Constitution is determining the "original public meaning" of the text. *See* James Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 4-5 (2022).
[425] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 863 (1989).
[426] *Id*. at 864.
[427] *See generally* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHICAGO L. REV. 2213 (2017).
[428] For instance, people who might be classified as originalists have disagreed on matters such as whether one should look for the "original intent" behind or the "original meaning" of the constitutional text, whose perspective should be the frame of reference, whether particular sources should be consulted or disregarded in the inquiry, whether the text alone is binding or should be understood to assume unwritten background principles, and whether interpretation should be followed by judicial "construction." *See id*. at 2220-23; Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHICAGO L. REV. 2193, 2201-02 (noting some ambiguity in Justice Scalia's thinking on whether relevant interpretative community should be "an ordinary member of the public or a lawyer"); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U.L. REV. 1371, 1373 (2019) (discussing distinction between original intent and original meaning approaches).
[429] William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 Green Bag 2d 103, 105 (2016); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2060-61 (2006) ("The existence of reasonably firm criteria makes it easier to check up on originalist interpretations for the soundness of their reasoning and their adherence to correct principles. Nonoriginalism, on the other hand, means never having to say you're sorry.").
[430] Baude, *supra* note 427, at 2223-24

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conclude that originalism constrained the decisional process.[431] By that standard, *Vermont Agency* offers a good example of a decision in which originalist methodology played a constraining role. Justice Scalia's prior pronouncements indicate a predisposition to deny standing to someone like the *qui tam* relator in *Vermont Agency*. The lawsuit pressed a public claim that the defendant defrauded the government.[432] The relator did not argue that the fraud affected him in any way distinct from its impact on other citizens and taxpayers.[433] This was a classic case of an individual suing to enforce the social contract, rather than seeking to vindicate his own individual rights.[434] The case presented a generalized grievance of the sort *Lujan* ruled improper under Article III, even when Congress purports to authorize litigation.[435]

The *Vermont Agency* opinion was driven by Justice Scalia's originalist methodology. In cases before and after *Vermont Agency*, the Justice found post-ratification history, including acts of the first Congress, persuasive in establishing the original meaning of ambiguous constitutional language.[436] The *Vermont Agency* litigation gave Justice Scalia the opportunity to closely examine penal statutes of the first Congress in light of English legal history.[437] That historical research moved the Justice to write an opinion at odds with his prior views on standing and difficult to reconcile with his earlier positions on executive power. The opinion in *Vermont Agency* cited *Lujan* for the proposition that injury, causation and redressability represent the "irreducible constitutional minimum of standing," but omitted *Lujan*'s reference to "particularized" injury as part of that constitutional floor.[438] As a principled originalist who developed a more nuanced understanding of Anglo-American legal history between writing the opinions in *Lujan* and *Vermont Agency*, Justice Scalia adjusted his constitutional analysis in the direction suggested by that historical research, even though it meant weakening some of his preferred constitutional positions.

The Court in *Spokeo v. Robins* invoked originalism, but the majority resolved the case based on precedent, without close examination of framing era historical sources.[439] The *TransUnion*

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[431] If a judge employs originalist arguments to reach a result consistent with the judge's own predilections, that does not necessarily mean originalism failed to guide the judicial decision. In this scenario, however, originalism may provide tools for critiquing the quality of the judge's reasoning. *See supra* note 429 and accompanying text. Thus, originalist theory may provide a level of accountability for a willful judge in the form of negative publicity surrounding an errant opinion.

[432] *Vermont Agency*, 529 U.S. at 770.

[433] *Id*. at 772-73 (*qui tam* relator not seeking compensation for violation of a legally protected right).

[434] Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 121, at 895.

[435] *Lujan*, 504 U.S. at 573-78.

[436] *See* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in* Practice, 92 NOTRE DAME L. REV. 1945, 1957-62 (2017).

[437] *Vermont Agency*, 529 U.S. at 774-78.

[438] *Id.* at 771; Beck, *Qui Tam Litigation Against Government Officials*, *supra* note 138, at 1258. Justice Scalia continued to apply the particularization requirement in later cases, but under statutes that bore less resemblance to framing era penal statutes like those reviewed in *Vermont Agency*. *See*, *e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

[439] *Spokeo*, 578 U.S. at 338 (standing doctrine "is rooted in the traditional understanding of a case or controversy" and seeks to "ensure that federal courts do not exceed their authority as it has been traditionally understood")) (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)). It is interesting to speculate what Justice Scalia might have done in *Spokeo* had he lived longer. He participated in oral argument, but passed away several months before the opinion was released. *Spokeo* was argued on November 2, 2015 and the opinion was released on

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majority also invoked originalist themes, indicating that "history and tradition offer a meaningful guide" to the kinds of cases Article III courts can consider.[440] Like *Spokeo*, however, the *TransUnion* opinion relied on prior case law for its understanding of Article III, rather than engaging with framing era historical sources.[441] The parties' briefs did not invite consideration of the relevance of framing era penal statutes.[442] Justice Thomas' dissent did discuss early patent and copyright statutes, but the majority rejected his analysis based on inferences from precedent, without devoting close attention to the historical materials he cited.[443]

The *TransUnion* majority may have intended a nod in the direction of originalism when it directed courts to "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts.'"[444] Assuming that was the goal, the Court seemed to skip over some important steps in an originalist analysis. This portion of *TransUnion* deploys legal history to guide and police a principle limiting congressional innovation in the recognition of rights.[445] New statutory harms must be analogous to traditional legal harms if Congress wants federal courts to provide redress.[446] But the *TransUnion* Court omitted a demonstration, based on originalist methods, that the language of Article III is best read to limit congressional creation of new kinds of statutory rights subject to litigation.[447]

The Court's opinions in *Spokeo* and *TransUnion* make it sound like the majority only wants to resolve simple objective questions about who has in fact been harmed by a statutory violation.

May 24, 2016, while Justice Scalia passed away on February 13, 2016. *See* 578 U.S. at 330; Justices 1789 to Present (supremecourt.gov). It would not be too surprising if Justice Scalia had joined the *Spokeo* majority. Even after *Vermont Agency*, one could still mentally categorize *qui tam* provisions as a discrete exception to normal standing rules, rather than as one in a range of legislative options for enforcing duties imposed by penal statutes. On the other hand, it seems possible that the research Justice Scalia undertook in writing *Vermont Agency* might have prompted him to work through the the issue of standing to pursue statutory damages in *Spokeo* with a different frame of reference. *See*, *e.g.*, *Vermont Agency*, 529 U.S. at 776 n.5 (noting copyright statute of First Congress that allowed "injured parties to sue for damages on both their own and the United States' behalf").

[440] *TransUnion*, 141 S. Ct. at 2204 (quoting Spring Communications Co. v. APCC Services, Inc., 554 U.S. 269, 274 (2008)).

[441] *See id*. at 2203-07.

[442] *See* Brief for Petitioner, *TransUnion LLC v. Ramirez* (Feb. 1, 2021); Brief for Respondent, *TransUnion LLC v. Ramirez* (Mar. 3, 2021); Reply Brief, *TransUnion LLC v. Ramirez* (Mar. 19, 2021).

[443] *TransUnion*, 141 S. Ct. at 2216-17 (Thomas, J., dissenting); *id*. at 2207 n.3 (rejecting Justice Thomas' position based on precedent, without reviewing statutes or cases he cited).

[444] *Id*. (citing *Spokeo*, 578 U.S. at 341).

[445] *Compare Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.").

[446] It is unclear as yet how vigorously *TransUnion*'s bar on judicial enforcement of novel rights will be enforced. We do not know, for instance, how *TransUnion* might affect litigation relating to statutory privacy rights in the context of new technologies affecting people in ways that did not have clear common law analogues. *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 68 (2021) ("The common law is constantly evolving, and it is doing so quite rapidly in the privacy and data breach contexts.").

[447] It is worth recalling Chief Justice Marshall's observation that the Constitution was "intended to endure for ages to come" and "to be adapted to the various crises of human affairs." McCulloch v. Maryland, 17 U.S. 316, 415 (1819). That reflection made Marshall skeptical of reading the Constitution in a manner that would narrowly limit the means Congress could choose in pursuing ends within the scope of its enumerated powers. *Id*.

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To be concrete, an injury must be "real" and "must actually exist."[448] When we consider how the Court applied the concreteness limitation in *TransUnion*, however, the analysis implicitly involves more nuanced policy judgments about what sorts of plaintiffs merit a statutory remedy.

The *TransUnion* majority found standing for every class member whose credit report was disseminated to a third-party business.[449] The Court did not question what business requested a particular consumer's credit report, whether anyone at the business actually read the report or whether the information TransUnion provided about the OFAC list played any role in a business decision adversely impacting the class member.[450] Some class members allowed to recover statutory damages under the majority's analysis may not have suffered any "real" injury at all. It could well be, for instance, that some subset of the 1853 class members awarded statutory damages voluntarily cancelled the transactions that generated credit checks before anyone at the third-party business read the credit report from TransUnion. It would be hard to see how such a consumer suffered a "real" injury from dissemination of the credit report is no one read the report and it played no role in a denial of credit. The majority's holding does not distinguish those who suffered actual injury from those who did it, but instead presumes injury to those whose credit reports were circulated outside TransUnion. The majority's conclusion about which class members suffered a "concrete" injury was not a simple factual determination about an objective reality, but rather a more subtle policy evaluation (loosely informed by the law of defamation) of when an FCRA violation creates sufficient risk to justify statutory damages.[451]

The *TransUnion* majority invoked separation of powers as the basis for standing doctrine, but then reformulated the standing inquiry to invert the framing era relationship between legislatures and courts. In the eighteenth-century legal tradition described by Blackstone, decisions about who should be able to recover statutory forfeitures and what kind of injury, if any, the person needed to show were policy questions within the legislative domain.[452] While the *TransUnion* opinion repeated *Spokeo*'s concession that Congress can elevate "concrete, *de facto*" harms to the status of legally cognizable injuries,[453] it also insisted that courts have a responsibility to "independently decide whether the plaintiff has suffered a concrete harm under Article III."[454]

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[448] *Spokeo*, 578 U.S. at 340.
[449] *TransUnion*, 141 S. Ct. at 2208-09.
[450] *See id*. at 2200 ("For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim."), 2208-09.
[451] *See TransUnion*, 141 S. Ct. at 2224 (Thomas, J., dissenting) ("Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court.") The reallocation of power in *TransUnion* should be a concern even for those who think the majority drew a reasonable line in the FCRA context. There are plausible policy arguments for imposing statutory damages on a credit reporting agency that employs unreasonable procedures, even before false information about a consumer gets circulated to a third-party business. *See id.* at 2221-24. In any event, separation of powers concerns do not focus on the substance of a decision, but rather on a more foundational question of "who decides?" *See* Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin., 847 F.2d 1168, 1174 (5th Cir. 1988) ("Behind the word 'standing' there always lurks the basic question of who decides; whether accommodation is to be achieved politically or by judicial decree.").
[452] *See supra* notes 146-48 and accompanying text.
[453] *TransUnion*, 141 S. Ct. at 2204-05 (quoting *Spokeo*, 578 U.S. at 341).
[454] *Id*. at 2205.

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Contrary to the Court's assurance that standing doctrine "prevent[s] the judicial process from being used to usurp the powers of the political branches,"[455] the standing inquiry as formulated by *TransUnion* puts the judiciary in charge of decisions that eighteenth century law left to legislative bodies.[456] At the end of the day, it will be life-tenured judges, rather than politically accountable members of Congress, who decide whether an individual seeking to vindicate a statutory right has suffered an injury worthy of litigation and warranting a statutory recovery.

IV. Conclusion

How a court engages with history in the process of constitutional adjudication can make a great difference. Even in a single doctrinal area, two opinions can deploy legal history in very different ways with vastly different consequences. *Vermont Agency* shows a Court careful about its understanding of Anglo-American legal history, resulting in constrained decision making and judicial deference to traditional legislative powers. *TransUnion* shows a Court invoking history, but failing to engage with relevant historical materials, leading the Court to claim powers traditionally exercised by Congress.

[455] Town of Chester, N.Y. v. Laroe Estates, Inc., 581 U.S. 433, 438 (2017) (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (2014) (same).

[456] *See TransUnion*, 141 S. Ct. at 2221 (Thomas, J., dissenting) ("In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights."); *id*. at 2225 (Kagan, J., dissenting) ("The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.").

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PRIVATE ENFORCEMENT AND ARTICLE II

Nitisha Baronia,[*] Jared Lucky,[*] & Diego A. Zambrano[**]

Private enforcement is under attack. In the face of adventuresome statutes that empower private plaintiffs to act as roving bureaucrats, scholars have argued that some private enforcement schemes may be unconstitutional delegations of executive power. That theory is seeing a resurgence in the courts. Taking cues from the Supreme Court's standing jurisprudence, Eleventh Circuit Judge Kevin Newsom recently stated that "Article II's vesting of the 'executive Power' in the President . . . prevents Congress from empowering private plaintiffs"—including those challenging accommodations for compliance with the Americans with Disabilities Act—"to sue for wrongs done to society in general." And in three recent cases, the Supreme Court has flirted with a similar approach when considering whether private relators can represent the interest of the United States in civil litigation (*Polansky*), whether states may deputize private individuals to enforce an anti-abortion statute (*Whole Woman's Health)*, and whether a state can permit private citizens to challenge labor-code violations on behalf of their colleagues (*Viking River Cruises*). Beneath each case lurks the same conundrum: How far can Congress extend private enforcement before running afoul of Article II?

This Article refutes the emerging argument, which we term the "Article II Challenge," that the Constitution should be understood to prohibit private enforcement of the law for public wrongs. Applying a novel, mixed-method study of private rights of action—comprising a quantitative analysis applying large language models, an original historical analysis, and a cross-doctrinal mapping—this Article offers a unified understanding of private enforcement and its constitutionality, not just through the cramped lens of standing, but as an independent mechanism of law enforcement in our constitutional structure. We argue that private enforcement can violate Article II only when it amounts to a criminal prosecution, enforces governmental property interests, or crowds the executive out from enforcement entirely—and even then, only under certain conditions. This leaves the vast majority of private enforcement schemes untouched.

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Introduction

Almost uniquely in the world, the federal and state governments in America empower private plaintiffs, rather than solely public agents, to enforce most important statutes.[1] In almost every area of law—from environmental to civil rights and securities law—the typical enforcement action takes place in a private civil suit. Despite (or because of) its ubiquity, private enforcement has always encountered criticism on normative grounds, including from scholars worried about rights suppression via citizen lawsuits, climate scholars exasperated by environmental lawsuits against green infrastructure projects, and businesses worried about frivolous securities and antitrust claims.[2] In the face of expansive statutes that empower private plaintiffs to act as roving bureaucrats, some have also argued that some private enforcement schemes may be unconstitutional delegations of executive power.[3] For many years, these criticisms and underlying constitutional theory gained little traction.

But the tide may be turning, and legislative authority to establish certain private rights of action is now under question.[4] In *Transunion v. Ramirez*, the Supreme Court observed that "[a] regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law would not only violate Article III *but also would infringe on the Executive Branch's Article II authority*."[5] And in a case that mirrors one recently before the Supreme Court, Circuit Judge Kevin Newsom quoted dicta from that and other recent Supreme Court standing cases to press that "Article II's vesting of the 'executive Power' in the President and his subordinates prevents Congress from empowering private plaintiffs"—including those challenging accommodations for

[1] Diego A. Zambrano et al., *Private Enforcement in the States*, 172 U. PA. L. REV. 61 (2023) ("Scholarship . . . has established that America's system of private enforcement is without parallel in the world."). *But see* Jason Rathod & Sandeep Veheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. Rev. 303, 337 (2016) (describing recent European efforts to adopt the American model).

[2] *See e.g.*, Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259 (2023) (presenting historical examples of private enforcement regimes that were weaponized against constitutional rights); Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV.1187, 1193 (2023) (arguing against private enforcement regimes that allow "vigilantes" to enforce unconstitutional statutes); Anna Mance, *How Private Enforcement Exacerbates Climate Change*, 44 CARDOZO L. REV. 1493, 1516-17 (2023) (arguing that private enforcement regimes can empower interest groups to promote narrow interests that are antithetical to the environment and social welfare).

[3] *See generally* Andrew DeForest Patrick, *Running from the Law: Should Bounty Hunters Be Considered State Actors and Thus Subject to Constitutional Restraints* 52 VAND. L. REV. 171 (1999); Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 1509 (2015); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014).

[4] The attack comes from multiple angles: some courts are narrowing the scope of private rights of action on statutory grounds, without expressly invoking the Article II argument. *See, e.g.*, *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1207 (8th Cir. 2023) (holding that text of Section 2 of the Voting Rights Act does not create a private right of action).

[5] 594 U.S. 413, 429 (2021) (emphasis added).

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compliance with the Americans with Disabilities Act—"to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[6]

In no less than three decisions over the past two terms, the Court has indicated that this concern about enabling private individuals to file lawsuits that vindicate a public interest may infect private rights of action beyond the narrow context of standing.[7] In *Polansky v. Executive Health Resources, Inc.*,[8] the Court addressed how far a deputized private enforcer may carry her False Claims Act lawsuit after the federal government finds her cause no longer advances the public interest. Justice Thomas suggested that such private enforcers improperly "wield executive authority."[9] In *Whole Woman's Health v. Jackson*, the Court struggled to answer whether states may deputize private individuals to enforce Texas's S.B. 8, an antiabortion statute that empowered private plaintiffs to sue abortion providers while prohibiting government officials from enforcing it.[10] While the Court dodged the question, scholars have argued that S.B. 8 unconstitutionally deputized private vigilantes. And in *Viking River Cruises, Inc. v. Moriana*, the Court questioned the extent to which a state could vest private citizens with the authority to challenge labor-code violations on behalf of their colleagues.[11] Beneath each case lurks one constitutional question: when does private enforcement interfere with executive authority?

Courts have been surprisingly unwilling to answer that core question—and not for want of asking[12]—because they have no developed doctrine for doing so. Yet private enforcement of the law is nothing new,[13] and federal courts have built up robust but disparate doctrines to address it in many other areas of the law. They have, for example, applied contract law to evaluate the propriety of private prisons,[14] looked to due process considerations to address private involvement in rulemaking,[15] and

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[6] *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1295 (11th Cir. 2022) (Newsom, J., concurring). Judge Newsom grounded this argument in the Supreme Court's statement in *Lujan* that an environmental citizen suit cannot "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 1289 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)).

[7] *Id.* at 1295 ("Do tester plaintiffs like Laufer proactively exercise law-enforcement discretion in a way that implicates—and may actually violate—Article II? . . . It seems to me that they do.").

[8] United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419 (2023).

[9] *Id.* at 450 (Thomas, J., dissenting).

[10] 593 U.S. 30 (2021).

[11] 596 U.S. 639 (2022).

[12] *See, e.g.*, *Polansky*, 599 U.S. at 443 (Thomas, J., dissenting) ("I would . . . remand for the Third Circuit to consider the serious constitutional questions that may affect the disposition of the Government's motion to dismiss petitioner's *qui tam* suit.").

[13] Several scholars have detailed the long history of private enforcement actions and their many forms. *See, e.g.*, Scott Stern, *Moral Nuisance Abatement Statutes*, 117 NW. U. L. REV. 613 (2022); Huq, *supra* note _; Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 FORDHAM L. REV. 469 (2023).

[14] Challenges to private modes of incarceration have recently seen a resurgence. *See, e.g.*, Jensen v. Shinn, 609 F. Supp. 3d 789 (D. Ariz. 2022) (addressing challenge to private prisons' labor practices as violating the Eighth Amendment), *amended*, No. CV-12-00601-PHX-ROS, 2022 WL 2910835 (D. Ariz. July 18, 2022).

[15] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

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applied standing jurisprudence to indirectly assess whether a private plaintiff may bring a public controversy to court by looking to whether she shared in the injury.[16]

This Article refutes the emerging argument, which we term the "Article II Challenge," that the Constitution should be understood to prohibit private enforcement of the law for public wrongs. Applying a mixed-method study of private rights of action—comprising a quantitative analysis, an original historical analysis, and a cross-doctrinal mapping—this Article offers a unified understanding of private enforcement and its constitutionality, not just through the cramped lens of standing, but as an independent mechanism of law enforcement in our constitutional structure. As we argue, private enforcement can violate Article II only when it extracts punitive remedies, enforces governmental property interests, or crowds the executive out from enforcement entirely—and even then, only under certain conditions.[17] This leaves the vast majority of private enforcement schemes untouched.

Part I—our quantitative contribution—first lays out the current state of private enforcement across all federal laws. To do so, we rely on a dataset developed using large language models to identify every private right of action in federal law. Using this tool, we develop the most comprehensive measure of private rights at the federal level to date. We also explore the wide scope of private suits in all their forms, from direct contracting to government agencies to the *qui tam* lawsuit in which the government remains heavily involved, all the way to the S.B. 8-style civil-suit provision that deploys private individuals to engage in enforcement without any government involvement. This enables courts and scholars to better understand the universe of private enforcement, its importance, and where its limits may lie.

Part II describes the reemerging Article II challenge in more precise terms, detailing its judicial roots as well as its appearance in various separate but related strands of scholarship, ranging from administrative law scholarship on nondelegation to federal courts scholarship on standing. It also explores the originalist source of the critique, particularly as presented by Judge Newsom and the late Justice Scalia. The Article II Challenge in all its forms boils down to three related concerns we detail below, all of which turn on a perceived executive prerogative to prioritize and proactively enforce the law. The Article II critics explicitly rely on the historical claim that "at common law, individual plaintiffs could sue over violations of their own private rights, but not for violation of public rights, like a defendant's general noncompliance with the law."[18]

In Part III we respond to that claim with an original investigation of statutory private rights of action in the Founding Era. One of us—a trained historian—has surfaced previously neglected sources that illustrate the prominence of private

[16] *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).
[17] *See infra* Part V.
[18] *See* Brief for Center for Constitutional Responsibility as Amicus Curiae in Support of Petitioner at 2, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429).

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enforcement of regulatory law in England, colonial America, and the Early Republic.[19] This broader legal context reveals the deep constitutional foundation of private enforcement. Founding-Era lawmakers passed reams of statutes empowering private plaintiffs to sue for wrongs done to society, at both the state and federal level. In the eighteenth century, these laws (including both damages actions and *qui tam*-style bounties) were called "penal statutes"—not because they defined a crime, but because they permitted private litigants to collect a *penalty*. This was a ubiquitous category of litigation in the Founding Era, though largely forgotten today. In both England and America, executive officials had little control over these suits, despite the fact that contemporaries understood them as a means of enforcing regulatory law. As the English political economist and statesman Charles Davenant put it in 1699, "Lawgivers have many times fortified their Laws with Penalties wherein Private Persons may have Profit, *thereby to stir up the People to put the Laws in Execution*."[20] This was also the practice in the late colonial period and Early Republic, when state assemblies in Massachusetts and other states created private rights of action in nearly every domain of legislative activity: duties on luxury goods, restraints on roving livestock, fishing and hunting regulations, limits on dirty industries like tanning and smithing, quarantine measures for people and livestock, prohibitions on usury and price gouging, qualifications for the skilled trades, standards for weights and measures, ship building, fish pickling, meat packing, and more.[21] Even when these suits vindicated patently public rights (like interests in common lands, or mere compliance with regulations) contemporaries did not perceive private enforcement as infringing on executive power. State legislatures continued to enact these "penal statutes" even after many states "vested" their executive branches with powers and duties analogous to those conferred by Article II.

This neglected history of statutory private enforcement reveals that the Article II critics have seriously misunderstood their own historical evidence. In particular, they rely heavily on early federal Framers and jurists who articulated a distinction between public and private rights. Proponents of the Article II Challenge admit that *qui tam* laws (which permit plaintiffs to sue on behalf of the government) did constitute an early example of private litigants vindicating public rights. But they waive away this difficulty by assuming that *qui tam* in the Founding Era was essentially what it is today: an unimportant and idiosyncratic remedy, forming an exception to the general rule. But in fact, *qui tam* laws were only one type of "penal statute"—a well-defined and expansive category of Founding Era lawmaking closely analogous to modern private enforcement. As William Blackstone explained, far from being marginal or idiosyncratic, the great "variety" of penal statutes "with which the subject is at present encumbered" would be too "tedious" to enumerate.[22] The Framers (including John Adams, Thomas Jefferson, James Madison, and Alexander Hamilton)

[19] See Jared Lucky, "The Colonial Origins of Consumer Protection Law" (forthcoming PhD dissertation at Yale University, on file with author).

[20] CHARLES DAVENANT, AN ESSAY UPON THE PROBABLE METHODS OF MAKING A PEOPLE GAINERS IN THE BALANCE OF TRADE 55 (1699) (emphasis added).

[21] Original historical sources in Appendix B.

[22] II BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *420. Compilations by other eighteenth century jurists referenced hundreds of penal statutes. See, e.g., 2 HAWKINS, PLEAS OF THE CROWN , c. 26 (discussing when an "action on a statute" would lie, and how to bring one.)

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understood and participated in this broader legal culture of private enforcement—as did pivotal early jurists like Joseph Story and John Marshall. These figures almost certainly assumed such suits would constitute one of the "necessary and proper" means by which Congress could effectuate its enumerated powers under Article I.

In Part IV, we engage in a cross-doctrinal mapping, weaving together how courts view core concerns about executive power and discretion in different strands of law, from the classic Appointments Clause cases to more obscure but insightful cases applying the Penal Judgments Exception to the Full Faith and Credit Clause and emerging disputes concerning the private-public rights distinction that was recently on display in *SEC v. Jarkesy* and emerging disputes about the private nondelegation doctrine. As a doctrinal matter, we find that private enforcement is consistent with both traditional definitions of executive power and judicial conceptions of constitutional delegation, but only where a core set of four cross-doctrinal concerns which we identify are alleviated.

Part V brings these modes of analysis together by rejecting most elements of the Article II Challenge and proposing that it is only in the zones of criminal prosecution, enforcement of public property rights, and in the hypothetical case where the executive is crowded out that there is any historical or doctrinal support for the Challenge. We apply that understanding to the assessment of federal private enforcement schemes that we conducted in Part I and find that this approach leaves the vast majority of private enforcement schemes untouched. Article II probably limits Congress' power to create exclusively private enforcement regimes. The Texas anti-abortion statute, known as SB 8, is a good example of such a regime, even if it is at the state level. In that statute, Texas not only empowered "any person" to sue abortion providers but also prohibited any state officials from enforcing the law.[23] It therefore simultaneously empowered private litigants to enforce a law while expressly *excluding* the executive from doing so. Were Congress to simultaneously empower private plaintiffs in an area of public law and *prohibit* federal officials from both (a) exercising control over the private lawsuits (by pardon or dismissal) and (b) enforcing that same law in parallel, it would violate Article II.

Two points of clarification before proceeding. To be clear, refuting the Article II challenge on private enforcement is a distinct enterprise from debates about private litigants' Article III standing. Because we defend private rights of action writ-large, the narrow zone of interference with Article II that we identify applies without distinction to the vagaries of how a court may describe a plaintiff's injury in a particular case. True, the Supreme Court's recent attention to private enforcement has been almost entirely based on standing limitations in cases like *Transunion*. And we recognize, as Tara Grove does, that "[s]tanding doctrine helps ensure that private parties do not exercise the 'discretionary power' that inevitably accompanies the authority to see that federal law or an area of federal law is obeyed."[24] Chief Justice Roberts, too, has recognized that

[23] See TEX. HEALTH & SAFETY CODEA NN. §§171.207(a),171.208 (West 2023).
[24] Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. PA. J. CONST. L. 781, 827-28 (2009); *see also Spokeo*, TK.

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"Article III standing" ensures the Court does not trample on "the executive's responsibility of taking care that the laws be faithfully executed."[25] But we leave standing to the side because we agree with Judge Newsom that the Supreme Court's standing jurisprudence is not supportable.[26] As James Pfander has thoroughly demonstrated, there is no historical support for Article III limits on Congressionally created causes of action, and evidence from the Early Republic is overwhelming that Congress can create Article III standing.[27] Adopting that understanding, we reference standing doctrine only as another lens for viewing how courts consider the practical concerns we are concerned with in that analogous context.

As to our method of constitutional interpretation, our review of the history of private enforcement and its implications leads to a critique of originalist theories of Article II that is internal to the methodology of originalism. To the extent that proponents of the Article II challenge rely on original public meaning, their reading of the history is contradicted by founding-era practice. But, in addition, Part IV focuses instead on case law—the core concern is identifying whether the Article II challenge satisfies the Dworkinian "fit and justification"[28] criteria. Our argument is that it does not—instead, the best reading of the caselaw and existing legal landscape leads to the conclusion that most private enforcement regimes are constitutional.

I. Private Enforcement of Federal Law

The term private enforcement, as we use it here, refers to statutory reliance on private parties to file lawsuits for private or public remedies.[29] This type of enforcement can be contrasted from administrative regimes that empower public agencies to file lawsuits. The focus of this definition is on *deliberate* Congressional action to empower private parties as a solution to a legislative problem. It is broad because it captures any and all private rights of action in federal law (but not common law). Yet, we recognize that many private rights of action are narrow, underutilized, apply to private-private civil claims, and are sometimes mere codification of the common law. For that reason, scholars often focus on more robust PRAs that are connected to multiple damages or fee shifting provisions.[30] Even more, private

[25] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993).
[26] Laufer v. Arpan LLC, 29 F.4th 1268, 1288 (11th Cir. 2022) (Newsom, J., concurring) ("Like me, these jurists have questioned the historical basis for the injury-in-fact requirement.").
[27] *See generally* JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021). Other scholars have exposed standing as a modern construct. *See, e.g.*, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1391 (1988) ("The law of standing is, thus, an example of the obfuscatory power of metaphor."). Still, there may well be other justifications for our current standing regime, including *stare decisis* based on decades of precedent. We take no position on how broad or narrow current standing rules should be.
[28] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 81, 86- 88 (1977).
[29] *Cf.* Stephen Burbank, Sean Farhang & Herbert Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 640 (2013) (using a different definition, "situations in which government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on private actors as enforcers").
[30] *Id.*

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enforcement is most interesting when it constitutes the main enforcement mechanism in an area of public law—a legal regime that governs either government institutions or a regulatory area of public concern. Our focus, therefore, is on private enforcement regimes that empower private parties to enforce public laws.

Congress has adopted private enforcement regimes in almost every area of public law. In the Sherman Act of 1891, Congress built in private enforcement as a cornerstone of antitrust law. Seventy years later, the Civil Rights Act of 1964 then kicked off the modern Congressional trend of inserting private rights of action into most federal regulatory statutes, ranging from environmental law and consumer protection, all the way to employment law. As discussed in a recent paper, "[i]n these areas, private parties are often the main vehicle of statutory enforcement—accounting for 90% of antitrust claims, 98% of employment discrimination claims, and a large percentage of litigation in environmental and related contexts.[31]

Take, for instance, the Americans with Disabilities Act of 1990 (ADA), a key area of federal private enforcement.[32] The ADA bars discrimination against disabled individuals in "any place of public accommodation."[33] The motivation behind the statute was that, as one court put it, "there was a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life."[34] But in addition to relying on the Department of Justice, the statute empowers "any person who is being subjected to discrimination on the basis of disability in violation of [Title III]" to bring a civil action."[35] Some of the statutory language goes much further, allowing not just any injured person to sue but also anyone "who has reasonable grounds for believing that [they are] about to be subjected to discrimination."[36] Such a person can file a suit for "preventive relief" and need not "engage in a futile gesture" of actually suffering an injury, as long as they have notice that a covered entity will not comply with the act.[37] But private parties cannot recover damages.[38] Given this ample private right of action, it is no surprise that the federal government has described "private suits" as "an essential complement to [its] enforcement."[39] According to the Chamber of Commerce, ADA lawsuits increased by

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[31] Žygimantas Juška, *The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement*, 62 ANTITRUST BULL. 603, 605 (2017); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3 (2010); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018) (Ginsburg, J., dissenting); Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law,* 33 YALE L. & POL'Y REV. 119 (2014).

[32] Burbank et al., *supra* note 29, at 685.

[33] 42 U.S.C. § 12181 *et seq.*

[34] PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001).

[35] 42 U.S.C. § 12188(a)(1).

[36] ADA Title III Regulation, 28 C.F.R. § 36.501(a) (2024).

[37] *Id.*

[38] 42 U.S.C. § 2000a-3(a).

[39] Brief of the United States as Amicus Curiae Supporting Neither Party, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429).

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349% between 2012 and 2021, reaching "12,298 filings" and "in 2023 are yet again set to surpass the 10,000 mark."[40]

Congress has also enacted a wave of labor, civil rights, and environmental laws with private rights of action,[41] provoking a robust conservative counter reaction to them in the form of standing doctrine.[42] The State of Texas expanded the bounds of private enforcement in 2021, when S.B. 8 established a private cause of action to sue anyone that assisted in performing an abortion—even while abortion was federally protected at the time.[43] The action took the legal world by surprise and some scholars have identified it as marking new territory,[44] while others have observed that private civil suits—including those that encroach significantly on civil liberties—are rooted in a rich federal and state-level American tradition.[45] Scholars have extensively theorized why these regimes pop up when they do,[46] the shifting political incentives for their use,[47] and others have unearthed a string of historical and contemporary examples that add to the growing body of literature identifying and describing these regimes.[48]

A. Quantifying Federal Private Enforcement

In order to fully understand the prevalence of private enforcement—and drive home the vast American legal landscape that the Article II Challenge threatens—we begin by quantifying the appearance of express private rights of action in federal law. A complete description of our methods will follow in an Appendix. But, to summarize, we first obtained a publicly accessible version of the entire U.S. Code assembled by the Office of the Law Revision. We then used 30 keyword queries one of us developed in a previous project that identified private rights of action in state law, such as "may sue," "file an action," and "shall be liable." This first step produced 3,324 subsections to analyze. Next, we used a large language model to identify which of the filtered subsections contained private rights of action. Our process identified the following:

- **618** subsections of the U.S. code associated with a private right of action.
- **383** PRAs occurring near a fee-shifting clause (approximately 62%)

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[40] Brief of the Chamber of Commerce et al. as Amicus Curiae in Support of Petitioner, *Acheson Hotels* (No. 22-429).

[41] *See, e.g.*, Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L.REV. 1483, 1493 (2022); Burbank et al., *supra* note 29, at 643–46.

[42] Cass Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 197, 211 (1992).

[43] For a detailed description, see Huq, *supra* note **Error! Bookmark not defined.**, at 3–5.

[44] *See, e.g.*, Michaels and Noll, *supra* note **Error! Bookmark not defined.**; Norris, *supra* note 41.

[45] *See, e.g.*, Stern, *supra* note 3; Huq, *supra* note **Error! Bookmark not defined.**; Pfander, *supra* note 13; Z ambrano et al., *supra* note **Error! Bookmark not defined.**, at 64 ("Scholarship on civil litigation has established that America's system of private enforcement is without parallel in the world.").

[46] *See, e.g.*, FARHANG. *supra* note 31, at 60, 64-65.

[47] *See, e.g.*, Sean Farhang & Stephen B. Burbank, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 658 (2021).

[48] *See, e.g.*, Zambrano et al., *supra* note 1, at 3 (presenting "the first systematic empirical investigation of the hidden world of state private enforcement"); Huq, *supra* note **Error! Bookmark not defined.** (presenting historical examples).

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- **407** PRAs occurring near a multiple damages clause (approximately 66%).
- Most PRAs appear in areas of the U.S. Code associated with Commerce and Trade, Public Health and Welfare, Transportation, and Labor.

A more complete methodology section will follow. For now, the table below provides a few examples of keywords that we used and the resulting private rights of action in a range of areas.

Keywords	Private right of action
bring an action	any person who suffers direct and substantial economic injury as a result of an alleged violation . . . may bring an action to require compliance with such provision.
is liable	The owner, charterer, managing operator, agent, master, or individual in charge of a vessel is liable to a person suing them for carrying more passengers than the number of passengers permitted by the certificate of inspection . . .
action may be	If there is a disagreement about a loss insured under this chapter, a civil action in admiralty may be brought against the United States . . .
bring a civil action	A person who is aggrieved by a violation of this chapter may provide written notice of the violation to the chief election official of the State involved. If the violation is not corrected . . . the aggrieved person may bring a civil action . . .
private right of action	Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may. . . bring . . . an action based on a violation of the regulations prescribed under this subsection to enjoin such violation, an action to recover for actual monetary loss from such a viola
commence a civil action	. . . any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter. . .
bring a civil action	If any person knowingly, or by reason of negligence, discloses a financial record of an individual in violation of subsection (b), such individual may bring a civil action for damages against such person in a district court of the United States.

Focusing on the more robust forms of private enforcement, we then quantified federal PRAs that are associated with a multiples damages or fee shifting clause.[49] The private enforcement literature sees these provisions as evidence of legislative mobilization of private plaintiffs.[50] Relying on this literature, we utilized a similar methodology to Sean Farhang.[51] We found **383** private rights occurring near a fee-shifting clause (approximately 62%) and **407** private rights occurring near a multiple damages clause (approximately 66%). The best work to date, by Sean Farhang, found about **300** federal PRAs associated with fee shifting or multiple damages. The fact that

[49] *See e.g.*, Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021 (2020); Maureen Carroll, *Fee Shifting, Nominal Damages, and the Public Interest*, 98 ST. JOHN'S L. REV. (forthcoming 2024).
[50] FARHANG, *supra* note 31, at 60.
[51] *Id.* at 81.

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our method produced a similar number is a significant validation of our findings, which demonstrate that if anything, Farhang's work may *under*estimate the number of private enforcement schemes out there.

Finally, we broke down the presence of PRAs by where they appeared in the U.S. Code. Table X below excerpts the top 15 areas where most PRAs appear. These include parts of the code dealing with Commerce and Trade, Public Health and Welfare, Transportation, and Labor.

Title number (Title name)	PRAs
Title 15 (COMMERCE AND TRADE)	93
Title 42 (THE PUBLIC HEALTH AND WELFARE)	89
Title 49 (TRANSPORTATION)	53
Title 29 (LABOR)	34
Title 26 (INTERNAL REVENUE CODE)	25
Title 18 (CRIMES AND CRIMINAL PROCEDURE)	25
Title 17 (COPYRIGHTS)	25
Title 12 (BANKS AND BANKING)	23
Title 16 (CONSERVATION)	22
Title 7 (AGRICULTURE)	19
Title 28 (JUDICIARY AND JUDICIAL PROCEDURE)	18
Title 47 (TELECOMMUNICATIONS)	17
Title 46 (SHIPPING)	16
Title 33 (NAVIGATION AND NAVIGABLE WATERS)	15
Title 22 (FOREIGN RELATIONS AND INTERCOURSE)	12

The upshot is that PRAs appear throughout the U.S. Code and in different areas of the law. Many of them contain fee-shifting provisions that incentivize private litigation. Although this quantitative analysis fails to break down PRAs by level of importance, some private rights of action can lead to thousands of cases per year and have a significant effect on the economy. That is the case, for instance, of the private right of action in the securities laws.

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B. Situating Private Enforcement and Qui Tam Claims

We next situate private rights of action within the broader private enforcement landscape.[52] This list is not exhaustive, but it covers important areas relevant to the analysis in this Article:

Private Enforcement for Public Harms. There are robust regimes in the context of private enforcement of public law that seem to depend on public injuries. Return to the ADA: tester plaintiffs often pursue claims against public facilities for injuries to all potential disabled customers. Still, the ADA is an imperfect example because many testers do assert an injury in fact in the form of stigma or denial of access to facilities.

By contrast, a pure example of private enforcement for a purely publicly experienced harm is the Clean Air Act (CAA) (and its companion, the Clean Water Act).[53] Congress adopted the CAA in 1970,[54] crafting a powerful PRA that allows

> any person [to] commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.[55]

This provision was "explicitly justified as a mechanism that would deputize 'private attorneys general' to assist the Environmental Protection Agency (EPA) . . . in the enforcement of environmental regulation."[56] Among other things, "the primary goal of Congress . . . was to protect the public interest by allowing private actions, a policy which it considered a necessary supplement to administrative action."[57] Since its adoption, several groups have become forceful enforcers of the statute, including the Natural Resources Defense Council and Sierra Club Legal Defense Fund.[58] Yet one feature of the statute is that plaintiffs cannot collect damages—the remedy is almost always an injunction (along with attorneys' fees and costs).[59] More recent amendments

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[52] Of course, scholars have recognized that private enforcement regimes come in different flavors. *See, e.g.*, Norris, *supra* note 41, at1493–94 (describing differences between private-enforcement regimes ranging from *qui tam* regimes to the Freedom of Information Act).

[53] One of the amicus briefs submitted in a recent ADA case in front of the Supreme Court claims that these three statutes "deputize uninjured private citizens to enforce federal law." Brief of Center for Constitutional Responsibility, *supra* note 18, at *3.

[54] 42 U.S.C. § 7604.

[55] *Id.*

[56] Mance, *supra* note**Error! Bookmark not defined.**, at 4 (citing Matthew C. Stephenson, *Public R egulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005)).

[57] Edward J. Little, *The Aftermath of the Clean Air Amendments of 1970: The Federal Courts and Air Pollution*, 14 B.C. L. REV. 724, 745 (1973).

[58] Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 47, 50 (2001); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192.

[59] Adler, *supra* note 58.

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allow CAA and CWA plaintiffs to collect "civil fines payable to the treasury."[60] And, of course, plaintiffs "can settle their suits, even where settlement is not expressly authorized, on terms that include cessation of violations, supplemental environmental projects, and payment of monies to the plaintiff or other organizations."[61]

As a whole, the CAA and related statutory schemes empower private citizens and groups to "ensure that federal regulations are enforced and that environmental problems are corrected."[62] Law enforcement (and deterrence of public harms) by private plaintiffs is a core feature.

Private Enforcement and Qui Tam. *Qui tam* is an ancient common law writ that allows a plaintiff to sue on behalf of the government, usually for an injury or fraud on the public fisc.[63] For instance, the most prominent *qui tam* provision is embedded in the 1863 False Claims Act, a statute that "imposes civil liability upon '[a]ny person' who, inter alia, 'knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.'"[64] In other words, the statute seeks to prevent fraud on the government. "[A] private person (the relator) may bring a *qui tam* civil action 'for the person and for the United States Government' against the alleged false claimant, 'in the name of the Government.'"[65]

While *qui tam* is just another name for a form of private enforcement in which an informer receives a bounty, the typical *qui tam* scheme is often unique. First, *qui tam* claims are officially *on behalf* of the government, not the private plaintiff. The injury is solely the government's own interest in preventing fraud. Second, these statutes afford the government significant control over the claim—the executive can usually end any *qui tam* claim at any time. Finally, *qui tam* plaintiffs benefit through a bounty—a fee that comes "out of the [government's] recovery for filing and/or prosecuting a successful action on behalf of the Government."[66] Based on these differences, some scholars and courts have attempted to draw a distinction between *qui tam* and private enforcement of public laws. As we fully explore in Section V below, we think this distinction should not be overstated. There is good evidence that *qui tam* served as a model for modern private enforcement and that Congress believed that many new statutory regimes were consistent with traditional qui tam principles.[67] We therefore take a middle-ground position: we view *qui tam* as a label for certain private

[60] *Id.*
[61] Thompson, Jr., *supra* note 58, at 192.
[62] *Id.*
[63] Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012).
[64] *Vermont Agency*, 529 U.S. at 769.
[65] *Id.*
[66] *Vermont Agency*, 529 U.S. at 769.
[67] Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, 2000 U. ILL. L. REV. 185, 192.

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enforcement regimes, while recognizing that courts may treat those schemes differently.

Private Rights of Initiation Against Government Action. Several statutes also create a unique form of private enforcement that empowers plaintiffs to sue the government for failure to pursue its regulatory obligations. For instance, under the Clean Air Act, "citizen enforcement may compel the Administrator [of the EPA] to perform a nondiscretionary duty."[68] Cass Sunstein and Richard Stewart call these provisions a "private right of initiation."[69] The private party "challenges an agency's failure to take action," and in that sense, initiates a dialogue between courts and agencies over their statutory duties.[70] These are a different variation of private enforcement—one that empowers a party to sue only the government. In that sense, they are a form of citizen monitoring of government officials. The Supreme Court has viewed private rights of initiation with suspicion.[71] And, to be sure, these rights implicate similar values and principles as private enforcement. But because they are sufficiently distinct, we do not (for now) focus on these rights of action.

Other Delegations. Governments often outsource not only the prosecution of civil claims against those who violate public laws, but also the identification and investigation of those violators. For example, Congress has expanded whistleblower regimes in a range of areas, including, for example, the securities laws. Many of these private regimes run parallel to their public counterparts; others are symbiotic with them. In Appendix A, we develop a typology that roughly categorizes these forms of government action, accompanied by some examples culled from literature. The message is clear: in several doctrinal areas, courts recognize that private parties can and do exercise executive power. And none of it violates Article II.

II. The Article II Challenge

This Section introduces the Article II challenge on private enforcement. That challenge rests on three legs: First, proponents argue that private enforcement schemes cannot empower private plaintiffs to exercise prosecutorial discretion (i.e., decide *when and how* to enforce the law) or to proactively enforce the law, because only the Executive has the choice of "how to prioritize and how aggressively to pursue legal actions." Second, that when *unharmed* plaintiffs file a claim that interferes with a *public* right, they do so on behalf of the public in the manner only the publicly accountable executive is authorized to.[72] Third, they argue that private rights of action improperly pursue remedies that accrue to the public at large, and which only the executive may

[68] Roger A. Greenbaym & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 FORDHAM ENV'T L. REV. 79 (2011).
[69] Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1981).
[70] Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).
[71] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 576 (1992).
[72] TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021). The argument explicitly relies on the historical claim that "at common law, individual plaintiffs could sue over violations of their own private rights, but not for violation of public rights, like a defendant's general noncompliance with the law." Brief for Center for Constitutional Responsibility, *supra* note 18,at 2.

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bring.[73] The underlying concern is that when private litigants begin to sue like the government does—in a manner that punishes public harms and vindicates public rights—they not only prohibit the discretion guaranteed to the Executive by the Take Care Clause, but also avoid public accountability.

We recognize that describing the Challenge could give undue legitimacy to what might be more easily dismissed as an ends-focused tool for defanging the regulatory state. But as we explain below, the theory has already begun to gain prominence, and we see scholarly value in exposing its weaknesses on its own terms.[74]

A. The Article II Challenge's Jurisprudential Roots

Judges seem increasingly receptive to the argument that private enforcement can violate Article II, even though it contradicts long running case law holding that private enforcement of the law—in its many forms—is definitively constitutional, regardless of these features.[75] The Supreme Court has itself indicated that it may be open to the Article II challenge but only indirectly: civil-suit standing cases warn that Congress cannot transfer the President's power to enforce the law to private plaintiffs, the Supreme Court has reserved the question of whether the *qui tam* violates Article II, and several Appointments Clause cases open the door to the possibility that delegation to private plaintiffs could violate the Appointments Clause.

1. Standing Doctrine's Article II Undercurrents

Begin with original traces of Article II limitations on private enforcement in major Supreme Court precedent on standing—*Valley Forge Christian College v. Americans United for Separation of Church and State*, *Lujan v. Defenders of Wildlife*, and *TransUnion v. Ramirez*. In those standing cases, the Supreme Court signaled that private parties cannot enforce the law without a direct injury at stake. Take, for instance, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, where the Court voiced a "concern that certain classes of injuries could give private individuals an unlimited amount of prosecutorial discretion."[76] In denying a non-profit organization's standing to challenge a federal government conveyance of property to a Christian college, the Supreme Court noted that the organization could not merely assert that "the Constitution has been violated," implying that a private organization could not take on the role of enforcing the Establishment Clause without a more direct injury to its interests. The Court made its reliance on Article II explicit in *Allen v. Wright*, when it explained while rejecting taxpayer standing to challenge exemptions for allegedly discriminatory private schools that "[t]he Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws

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[73] *Id.*

[74] We thank Amalia Kessler and others for emphasizing this distinction.

[75] *See, e.g.*, United States *ex rel.* Kreindler v. United Techs., 985 F.2d 1148, 1155 (2d Cir. 1993); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993); United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 806 (10th Cir. 2002).

[76] Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PENN L. REV. 1311, 1352 & n.190 (2014); Valley Forge Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982).

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be faithfully executed.'"[77] In other words, standing doctrine has served in part to guard the executive's prerogative to vindicate the public interest through exclusive public suits.[78]

Although the Court then temporarily distanced itself from this Article II justification for standing,[79] its most recent major standing case again made the Article II basis for standing doctrine explicit. In *Transunion*, a case involving a class action claim over alleged violations of the Fair Credit Reporting Act, the Court explained that "[a] regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law would not only violate Article III *but also would infringe on the Executive Branch's Article II authority*."[80] Justice Kavanaugh's opinion also made a specific—and, as we show below, mistaken—claim about the history: that "until the 20th century, Congress rarely created 'citizen suit'-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm."[81]

Finally, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the Court held that the Clean Water Act's citizen-suit provisions enabled private litigants to extract from defendants monetary penalties payable to the government.[82] Finding that private plaintiffs had standing to extract penalties payable to public coffers, the Court explained that "[s]uch penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation."[83] The opinion prompted Justice Kennedy to observe:

> Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.

Finding that these Article II questions had not been properly raised, Justice Kennedy left them "best reserved for a later case."[84]

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[77] 468 U.S. 737, 761 (1984).

[78] *See, e.g.*, Sarah Leitner, *The Private Rights Model of* Qui Tam, 76 FLA. L. REV. 1, 10 (2024); Jack Goldsmith & John Manning, *The Protean Take Care Clause*, 164 U. PENN L. REV. 1835, 1845 (2016).

[79] *See* Steel Co v. Citizens for a Better Environment, 523 U.S. 83, 102 n.4 (1998) ("[O]ur standing jurisprudence, which, though it may sometimes have an impact on presidential powers, derives from Article III and not Article II."); Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 778 n.8 (2000) (citing *Steel Co.*, 523 U.S. at 102 n.4). We thank Elliot Setzer for this and other critical contributions.

[80] TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021).

[81] *Id.* n.1.

[82] 528 U.S. 167, 174 (2000).

[83] *Id.*

[84] *Id.* at 197 (Kennedy, J., concurring). In a dissent, Justice Scalia agreed that the issue had not been raised and did not address Article II concerns with the statute. *See id.* at 209 (Scalia, J., dissenting).

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2. *Qui Tam*'s Article II Problem

Similarly, in the context of *qui tam*, litigants, judges, and the Executive Branch have at times indicated that empowering private plaintiffs to bring claims on behalf of the government can be an intrusion into executive power.[85] In *Vermont Agency*, the Court declined to address whether *qui tam* suits violate the Take Care Clause but left open the possibility, noting: "[i]n so concluding, we express no view on the question whether *qui tam* suits violate Article II."[86] Although Justice Thomas joined that opinion in full, he has more recently written separately to endorse the argument that the *qui tam* scheme may improperly usurp executive power under the Take Care clause and the Appointments Clause.[87] Even the Executive, for its part, has equivocated on the constitutionality of *qui tam* actions: a Department of Justice's Office of Legal Counsel Opinion by William P. Barr initially concluded that relator-initiated *qui tam* suits violated Article II.[88] But only a few years later, that same Office adopted the opposite approach.[89]

As described in our Introduction, a recent trio of Supreme Court cases has revived, but ultimately dodged, that core question: *Polansky*, *Whole Woman's Health v. Jackson*, and *Viking River Cruises, Inc.*[90] The upshot is that the Supreme Court has arguably embraced several different ingredients of the Article II challenge—the civil-suit standing cases warn that Congress cannot transfer the President's power to enforce the law to private plaintiffs, *Vermont Agency* reserves the question whether the *qui tam* violates Article II.

3. Articulating The Article II Challenge

Drawing on these signals from the Supreme Court, Eleventh Circuit Judge Newsom recently articulated a comprehensive Article II challenge to private enforcement in *Laufer v. Arpan LLC*, with an emphasis on originalism. *Laufer* involved a disabled plaintiff and self-styled advocate who sued a hotel for denying disabled guests an equal opportunity to make reservations for accessible guest rooms.[91] The plaintiff had never visited the hotel nor attempted to make a reservation there. Instead, the plaintiff merely visited the hotel's website. By her own admission, the plaintiff was a "tester," an advocate who specializes in monitoring whether "places of public accommodation and their websites comply with the ADA." In this capacity, Laufer filed more than 50 ADA lawsuits against hotel owners for alleged noncompliance with ADA regulations requiring hotels to ensure that disabled individuals "can make reservations for accessible guest rooms . . . in the same manner as individuals who do not need accessible rooms." Plaintiff took advantage of a broad private right of action

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[85] *See* Leitner, *supra* note 78, at 16 & n.134. Though the Court has thus far rejected that proposition, in part because of the controls that *qui tam* provisions place in the Executive.
[86] *See* Vermont Agency of Nat. Res. V. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000).
[87] *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 449 (Thomas, J., dissenting).
[88] OLC Opinion No. TK.
[89] OLC Opinion No. TK.
[90] *See supra* notes TK-TK.
[91] *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1295 (11th Cir. 2022) (Newsom, J., concurring).

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in the ADA, empowering any "aggrieved" person to file a claim. But Laufer admitted that "she ha[d] no intention to visit the [hotel]."

The key question in the case (and the parallel case that the Supreme Court recently disposed of as moot),[92] then, was whether Laufer suffered a concrete injury under Article III. The Eleventh Circuit quickly answered yes, because a tester can satisfy Article III standing by showing an "emotional injury" from discrimination.[93] But Judge Newsom's concurrence took the case into Article II territory. In his telling, there was a separate problem because "Article II's vesting of the 'executive Power' in the President and his subordinates prevents Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[94] An ADA plaintiff, in this view, "principally seeks to advance the rights of disabled people generally." When a plaintiff does that, Newsom argued, they are unduly exercising executive power for the three reasons outlined in Part II above: (1) they usurp executive *discretion*, (2) sue to vindicate a public harm, and (3) extract a remedy payable to the public.

Judge Newsom drew on the case law that we have described above for each of these points—including by leaning heavily on *TransUnion*—but added a focus on history. Drawing on historical scholarship concerning prosecutorial discretion, Judge Newsom first noted that "enforcement discretion is a proper aspect of the executive function."[95] That is so because "a central premise of our constitutional order" is to provide "structural checks against the exercise of arbitrary power."[96] He observed that Laufer "literally manufactures her own standing . . . by bringing herself to the source of her own injury." This violates Article II, he proposes, because "[t]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch," even though they are "accountable to no one."[97] As to the second concern, Judge Newsom has elsewhere argued that the "Framing-era evidence" similarly "indicates that the President's constitutional power 'to enforce the execution of [the] laws'" includes "the pursuit of what we would recognize today as *civil* sanctions—for example, "pecuniary mulcts" (i.e., fines) and "suspension[s] or divestiture[s] of privileges."[98] Third, as to remedy, Judge Newsom noted that the remedy to an ADA tester does not accrue to the plaintiff "but rather to society at large," because Laufer admitted that even though she sought "an injunction ordering the hotel to review their websites," she had no intention to visit the hotel and could not possibly benefit from the hotel's change to its policies. His articulation of the theory adds nuance and gravity to the calls to attack private rights of action on an Article II basis. This focus on history

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[92] *See* Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023).
[93] *Laufer*, 29 F.4th 1268 at 1269.
[94] *Id.* at 1295.
[95] *Id.* (citing Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 701 (2014)).
[96] *Id.* (citing Grove, *supra* note TK).
[97] *Id.*
[98] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136, 1140 (11th Cir. 2021) (Newsom, J., concurring) (citing THE FEDERALIST NO. 21, at 134–35 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

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builds on then-Judge Antonin Scalia's influential 1983 law article on standing doctrine.[99]

A critical assumption of the Article II Challenge is that there is a clean dichotomy between public and private rights—but that is not necessarily the case, and infringement on rights considered inherently public (such as the right to clean shared air) may be exercised on an individual basis. Taken to its extreme, this private rights-public rights dichotomy could upend private enforcement in the United States. Like torts, nearly all statutory rights of action seek to redress injuries *and* deter harmful behavior. In that sense, they promote the public interest through the adjudication of private rights, with no opportunity for executive enforcement discretion. Moreover, if Judge Newsom's interpretation of the historical evidence is correct, modern class actions (which are far more concerned with deterrence than compensation, and permit a few private litigants to bring claims on behalf of thousands or even millions of others) would be seriously out-of-step with the original meaning of Article II.

B. The Article II Challenge in Scholarship

A long thread of scholarship has questioned the constitutional validity of private enforcement regimes based around an executive non-delegation doctrine. Somewhat analogous to the judicial challenge, the academic argument can be summarized as follows: Article II can prevent Congress from delegating the executive power to (1) impose punishment on legal violations and (2) exercise prosecutorial discretion. Congress crosses the line when, in effect, its delegation (3) usurps the executive's role to ensure that "an area of federal law is obeyed."

In *administrative law*, scholars have for decades considered the possibility that delegation of executive power to private parties can violate the separation of powers. Gillian Metzger once argued for a pure "private nondelegation doctrine" that would impose restrictions on private actors when they act as government agents for the purposes of policing government contracts, private prisons, and private-public partnerships for the administration of public benefits.[100] Specifically, Metzger briefly observed that private civil-suit provisions and *qui tam* lawsuits could serve as improper exercises of delegated governmental power by a private entity.[101] But the focus of her critique was, narrowly, on the role of private parties in policing executive power. Building on Metzger's critique, Dina Mishra has argued that "*the* executive power" cannot be delegated, and that any delegation in which the executive sacrifices control over the party exercising executive power may be unconstitutional.[102] Applying her theory to contracts with private prisons, Mishra posited that this nondelegable executive power might include the power to impose punishment and extract violence

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[99] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881, 882 (1988). He was not the first to suggest this—in fact, Justice Frankfurter was—but has been easily the most influential jurist in the modern development of standing doctrine.

[100] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

[101] *Id.* at 1445 & nn. 270–71.

[102] Mishra, *supra* note **Error! Bookmark not defined.**.

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as well as the power to interpret statutes for the purposes of execution.[103] Other scholars have since drawn the same connection.[104]

Federal courts scholarship, too, has developed its own version of an Article II nondelegation doctrine. Professor Tara Leigh Grove has argued that modern standing doctrine ought to be reframed in Article II terms, and that Article II's implicit nondelegation requirement "prohibits the delegation of the Executive Branch's duty to see that federal law or an area of federal law is obeyed."[105] In other words, Grove identifies a similar executive nondelegation doctrine as Mishra, but cloaks it in the language of standing.[106] Other scholars have recognized that the Supreme Court's increasingly cramped view of Article III standing after *TransUnion* throws into question whether *qui tam* relators have standing to bring their claims.[107] One has connected Grove's theory with Newsom's concurrence in *Laufer* to argue that such a doctrine of standing might permit cases that the Supreme Court has rejected on standing grounds to move forward while excluding a narrow class of cases, like the tester-plaintiff case, on Article II grounds.[108]

Still more, a third class of scholars leaves aside constitutional arguments to make *normative critiques* of private enforcement as potentially threatening individual rights, particularly when states create regimes that may conflict with federally protected rights.[109] Some of this scholarship has reemerged in the wake of Texas' anti-abortion law, S.B. 8. That law empowered "anyone" to sue abortion providers for performing abortions—even though abortion remained constitutionally protected at the time.[110] In response, some scholars argued that such aggressive use of private enforcement violated Article II and the Due Process clause. These arguments begin to share similarities with the Article II Challenge. For instance, Wasserman and Rhodes argue that individuals suing pursuant to S.B. 8 are state actors.[111]

* * *

With judicial and scholarly challenges on private enforcement in mind, we can summarize the constitutional challenge as follows: Article II protects a core of executive non-delegable powers, including prosecutorial discretion (or the ability to pick and choose when to enforce the law), the duty to engage in proactive enforcement

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[103] Mishra briefly observed that her theory could jettison certain categories of private suits. *Id.* at 1537, 1551–53.

[104] *See* Leitner, *supra* note 78, at 15. (quoting Morrison v. Olson, 487 U.S. 654, 696 (1988)).

[105] Grove, *supra* note **Error! Bookmark not defined.**, at 783-85.

[106] *Id.*

[107] As one scholar notes, "if we take the Court's decision in *TransUnion* seriously, *qui tam* as it is currently understood violates Article III *and* infringes Article II authority." *See* Leitner, *supra* note 78, at 12.

[108] *See* Jonathan Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. (forthcoming 2024) (manuscript at 38).

[109] *See* Michaels & Noll, *supra* note **Error! Bookmark not defined.**; Huq, *supra* note **Error! Bookmark not defined.**.

[110] For a detailed description, see Huq, *supra* note **Error! Bookmark not defined.**, at 3–5.

[111] Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1079–83 (2022).

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of the law (so as to ensure that an area of federal law is obeyed), and the ability to seek remedies that accrue to the public at large. Congress cannot delegate a combination of these powers to private enforcers.

III. Private Enforcement and Executive Power in the Founding Era

In this Section, we surface previously neglected historical sources to demonstrate the prominence of private enforcement in the Founding Era. Textualist critics argue that "Executive Power" in the eighteenth century entailed an exclusive discretion over law enforcement; as a result, the "Vesting" and "Take Care" clauses of Article II limit the ability of Congress to empower private litigants to enforce federal law. To the extent these critics seek to call private *civil* enforcement into question, their challenge raises a concrete historical question: were regulatory statutes empowering private parties to bring a *civil cause of action* seen as an affront to executive power in the Founding Era?

This Section answers that question by canvassing the relevant sources, from background understandings in the English and colonial legal systems to early state and federal lawmaking. We focus mostly on the law on the books (of which there is more evidence, and which can reflect codified shared societal understandings) but also consider the law in action. In short, the Article II critics ignore key elements of Founding-Era legal practice and seriously misunderstand Founding-Era legal theory. They overstate the discretionary powers of British and American executive officers, and overlook the extensive use of private enforcement by Parliament, colonial assemblies, state legislatures, and early Congresses. In fields that we now regard as "public law," like tax enforcement and economic regulation, statutory private enforcement was the rule rather than the exception in the Founding Era. Standing alone, this history does not provide a mechanical test for defining the separation of powers. But it does show that private rights of action for reasons of public policy were not perceived as inherently executive. The Americans who framed and ratified the Constitution saw no conflict between widespread private enforcement and the separation of powers in the federal Constitution.

A. England: Active Plaintiffs, Passive King

First, the Article II critics misunderstand the robust tradition of private enforcement that the Framers inherited from the English legal system. Jurists like Judge Newsom and Justice Thomas are right to suggest that the separation of powers in British constitutional law influenced the Framers, but they do not reckon with the limited enforcement discretion possessed by the Crown and the long history of regulatory private enforcement by statute in England.

The misunderstanding is most evident in the way these critics deploy William Blackstone as an authority for the public rights-private rights approach. Nearly all proponents of the Article II challenge to private enforcement cite the influential distinction his *Commentaries* drew between "private" and "public wrongs" in the late 1760s. At the level of abstraction, the *Commentaries* seem to make a vigorous case for

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the executive's exclusive power to redress public wrongs. Blackstone wrote that the King, as the embodiment of executive power, was "the proper person to prosecute for all public offences and breaches of the peace."[112] Indeed, "public liberty . . . cannot subsist long in any state, unless the administration of common justice be in some degree separated from both legislative and also from the executive power."[113] Joining the power of the executive and judiciary would soon "over-balance" and usurp the prerogatives of the legislature.[114]

But a closer reading reveals that Blackstone's theory of "public wrongs" did not preclude private enforcement. Far from it: the *Commentaries* themselves reveal that the Crown's executive power to redress public wrongs was fully compatible with (and even presupposed) a system of near total private enforcement.[115] Article II critics tend to identify three core elements of enforcement power: discretion over whether to bring an action; authority to control or terminate a pending case; and the option to pardon or remit a penalty after conviction.[116] With respect to criminal offenses—the quintessential public wrong—the King and his officers possessed these powers only in part. Moreover, the Crown exercised (almost) no control over the suits most relevant to modern debates about private enforcement—private actions to collect civil damages or other penalties authorized by statute.

The Crown had almost no discretion over the decision to initiate criminal actions.[117] When Blackstone wrote that the king "is always present in all his courts, though he cannot personally distribute justice," he was not suggesting that local executive officials acted in the king's stead by deciding when to prosecute.[118] There *were no* local public prosecutors in Blackstone's England.[119] In fact, England had no

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[112] 1 WILLIAM BLACKSTONE, COMMENTARIES *258-59.

[113] *Id.* *259.

[114] *Id.* *260.

[115] Indeed, Blackstone's public/private distinction likely derived more from civil law theory than common law practice. As David Liebermann notes, one of the chief objectives of the *Commentaries* was to reduce English law to a "System," through a "selective rationalization and adaptation of a messy and technical body of inherited materials." Lieberman, *Blackstone and the Categories of English Jurisprudence*, in Norma Landau (ed.), LAW, CRIME AND ENGLISH SOCIETY (Cambridge 2009). Blackstone frequently seized on Roman and Civil law concepts to make sense of English "materials," and it is striking how heavily his discussions of separation of powers theory rely on continental legal theorists like Montesquieu and Cesare Beccaria, rather than common law mainstays like Coke and Hawkins.

[116] See, e.g., Laufer v. Arpan LLC, 29 F.4th 1268, 1291-94 (2022) (Newsom, J., concurring) (identifying the choice of whether to bring suit, and the ability to decline an existing prosecution, with "executive-style enforcement discretion"); Price, *Enforcement Discretion*, supra note TK.

[117] Studies of seventeenth- and eighteenth-century court records have confirmed the dominance of privately initiated suits in English criminal justice. *See, e.g.*, Norma Landau, *Indictment for Fun and Profit*, 17 L. & HIST. REV. 507 (1999).

[118] 1 WILLIAM BLACKSTONE, COMMENTARIES *259.

[119] J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 35-50 (1986) (describing private prosecution in eighteenth century England and tracing the slow rise of public prosecution after 1850). The closest thing to a local public prosecutor in eighteenth-century England was probably the coroner, 4 WILLIAM BLACKSTONE, COMMENTARIES *305.

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officers comparable to American district attorneys until 1879.[120] In nearly every case, a "private prosecutor"—usually, though not necessarily, the crime victim—would hire an attorney at his own expense to pursue the claim in the name of the king.[121] The only meaningful exception was the Attorney General's power to file a criminal information for "public misdemeanors" *ex officio* (that is, by the authority of his office).[122] This category excluded all felony prosecutions, and in practice encompassed only a narrow range of political offenses which might "disturb or endanger [the King's] government"—for example, libels on government, breaches of quarantine, bribery, or obstructing a revenue officer.[123] All other criminal actions—by indictment, presentment, information, and appeal of felony—left private actors with the choice of whether to initiate a case. The *Commentaries* and other contemporary treatises leave no doubt that in the vast majority of cases the King merely "lent the sanction of his name to a [private] prosecutor" over which Crown officials had little or no control.[124]

Executive officers did have some power to intervene in criminal cases that private parties brought in the King's name. The Attorney General could enter a writ of *nolle prosequi* (meaning, roughly, "unwilling to prosecute") to stay a criminal proceeding, even one initiated by a private prosecutor.[125] And, of course, the King could pardon convicted criminals and commute punishments—a regular occurrence in the English justice system, where so many property offenses carried a death sentence.[126] But both the *nolle prosequi* and the pardon were inapplicable against the Founding Era suits most directly relevant to modern private enforcement: actions on "penal statutes."

The King had almost no power to control prosecutions under penal statutes. To twenty-first century ears, the term "penal statute" is a synonym for a "criminal law." But in the eighteenth century, it had a distinct meaning. Most Founding-Era crimes were common law offenses, defined by judicial precedent rather than statute.

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[120] Philip B. Kurland and D. W. M. Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 550-562; David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 476 (1995).

[121] Until 1859, when Parliament required private prosecutors of perjury, conspiracy and libel claims to obtain permission from the Attorney General, "any person could prosecute for any crime and could prosecute any person he could get a magistrate to bind over." Thomas J. Robinson Jr., Note, *Private Prosecution in Criminal Cases*, 4 WAKE FOREST INTRAMURAL L. REV. 300, 304 (1968).

[122] 4 WILLIAM BLACKSTONE, COMMENTARIES *305. A modern editor of the Commentaries notes that informations *ex officio* were "perceived to be repressive, as they bypassed the grand jury and were usually reserved for political offences." Ruth Paley, *Introduction* to 4 WILLIAM BLACKSTONE, COMMENTARIES , at xxiii (Wilfrid Prest ed., Oxford Univ. Press 2016).

[123] 4 WILLIAM BLACKSTONE, COMMENTARIES *305; JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 582 (1818) (giving these examples).

[124] 4 WILLIAM BLACKSTONE, COMMENTARIES *305. Joseph Chitty's influential treatise (written at the close of the Founding Era) gave essentially the same account as Blackstone: *"criminal prosecutions, though in the name of the king, are usually instituted by some particular individual."* 1 CHITTY, *supra* note 123, at iii.

[125] *Id.*, at *849; STEPHENS, HISTORY OF THE CRIMINAL LAW OF ENGLAND 496 (1883).

[126] Friedman, *supra* note 120, at 481-82, 496.

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By contrast, "penal statutes" were positive laws which assessed a *penalty*;[127] as Blackstone defined them, "such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted."[128] The penalty could be payable solely to the King, or to "the party aggrieved," but

> more usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor: and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur* [who prosecutes this suit as well for the lord king, etc., as for himself]."[129]

In other words, the category of "penal statutes" comprehended a broad range of suits authorized by the legislature: some brought by common informers for a penalty, some by aggrieved parties for damages; some by plaintiffs suing solely in their own name, and some by plaintiffs splitting the reward with the sovereign. Actions on penal statutes could be brought by civil or criminal process,[130] but Founding-Era English jurists distinguished them from true "criminal proceedings."[131] While some penal statutes simply attached fines to "particular crimes and misdemeanors," the "greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land."[132] In other words, they were regulatory, touching "mere matters of police and public convenience."[133] These actions spanned an "extraordinarily wide range of offenses," from matters directly affecting the public fisc (like customs duties) to regulations of purely private agreements (like usurious loans, or apprenticeships) to vice legislation (like bans on Sunday amusements).[134]

Even though penal statutes sought to achieve *public* regulatory ends, eighteenth-century jurists understood the statutory awards they conferred as a kind of private property. Accordingly, as early as *Stretton and Taylor's Case* in 1588, the common law courts determined that the Attorney General could only enter a *nolle prosequi* for

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[127] *See, e.g.*, GILES JACOB, *Information*, *in* A NEW LAW DICTIONARY (1729) (noting that a private plaintiff may proceed "upon the Breach of some Penal Law or Statute, wherein a Penalty is given to the Party that will sue for the same") There appears to have been a semantic shift in the early nineteenth century; by 1820, Chief Justice Marshall used "penal statute" in a more modern sense, to refer to a federal law punishing "manslaughter on the high seas." United States v. Wiltberger, 18 U.S. 76, 93-94 (1820).

[128] 3 WILLIAM BLACKSTONE, COMMENTARIES *161.

[129] *Id.*

[130] In 1729, Giles Jacob categorized informer's suits as civil actions, but noted that they could also "be rank'd under criminal actions." *See* GILES JACOB, *Actions*, *in* A NEW LAW DICTIONARY, *supra* note 127.

[131] See, e.g., CHITTY, *supra* note 123, at *840-41. (noting that *qui tam* informations were actions "the recovery of a pecuniary penalty, than criminal proceedings")

[132] 2 WILLIAM BLACKSTONE, COMMENTARIES *420.

[133] 2 WILLIAM BLACKSTONE, COMMENTARIES *262.

[134] Paley, *supra* note 122, at iii.

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the Crown's portion of a *qui tam* action.[135] That rule remained in force throughout the eighteenth century,[136] and *Stretton* was cited as good law in England as late as 1861.[137] Similarly, it was well-established that the Attorney General had no power to interfere in an action brought for compensatory damages, whether the injured party sued under common law or penal statute.

The same conceptual limitations applied to the post-conviction power of pardon. If no private informer had brought an action on a penal statute, the king was free to pardon the defendant's conduct and block any future claims.[138] But after the suit commenced, the King could not "remit any thing but his own part of the penalty."[139] By commencing suit, the informer "made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest."[140]

Penal statutes pose an obvious problem for the public rights-private rights theory of Article II: they are the archetypal example of private litigants enforcing the law on behalf of the public. As the English political economist and statesman Charles Davenant put it in 1699, "Lawgivers have many times fortified their Laws with Penalties wherein Private Persons may have Profit, *thereby to stir up the People to put the Laws in Execution*."[141] Even though claimants under a penal statute exercised a kind of executive power, the Crown's discretionary controls over public law litigation—the *nolle prosequi* and the pardon—did not apply to them. In that sense, "actions on statutes"[142] clearly anticipated modern statutory rights of action. Their acceptance in the Founding Era suggests that legislatively authorized private enforcement did not infringe on the "Executive power" as Blackstone and other English authorities understood that concept.

In fact, the Article II critics of private enforcement arguably seek to give the Executive authority which the King of England emphatically lacked: the "Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyment."[143] The public rights-private rights theorists suggest that the Executive must have the power to override or control legislation which permits private parties to enforce public law. In practice, that principle would amount to a *judicial* power to reject the claims of private litigants who "execute" the law by pursuing

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[135] *Stretton and Taylor's Case*, 1 Leon. 119 (1588).
[136] Regina v. Allen, 1 B&S 854, 931 (1861).
[137] TK.
[138] *See, e.g.*, Vanderbergh v. Blake, 145 E.R. 451 (Hardres 194, 199) (1673).
[139] 2 WILLIAM BLACKSTONE, COMMENTARIES *436.
[140] *Id.* *438
[141] CHARLES DAVENANT, AN ESSAY UPON THE PROBABLE METHODS OF MAKING A PEOPLE GAINERS IN THE BALANCE OF TRADE 55 (1699) (emphasis added) ("In Countries deprav'd, nothing proceeds well, wherein particular Men do not one way or other find their Accompt, and rather than a Publick Good should not go on at all; without doubt, 'tis better to give Private Men some Interest to set it forward.")
[142] This was William Hawkins's catchall term for civil private enforcement. *See* HAWKINS, *supra* note **Error! Bookmark not defined.**, c. 26, § 1.
[143] English Bill of Rights of 1689, 1 W & M, Sess. 2, Ch. 2 (stripping this power from the king).

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statutory causes of action. Such an account of executive power bears a striking resemblance to the royal prerogative of dispensing—that is, "the power to allow exceptions to the law, to permit what otherwise would be illegal, to grant a subject license to act as if the law dispensed did not exist."[144] In 1689, the English Bill of Rights stripped this power from the King and by extension, from judges who might seek to assert it on the Crown's behalf.[145] For example, in the 1709 case of *Bruse v. Harcourt,*[146] the Court of the Exchequer recognized the implications of the Bill of Rights for private enforcement. There an informer brought an action for an illegal importation of French wine, in violation of a parliamentary embargo. Awkwardly, it turned out that the wine had been purchased "by the Queen's order, with her money."[147] But the Crown could not simply "dispense" with an inconvenient private prosecution. The Queen had to defend herself on grounds of statutory construction, like any other litigant.[148]

It would be very surprising if the Framers understood the English tradition of "Executive power" in the way that Judge Newsom and others suggest. The King's control over criminal proceedings was largely nominal, and the English executive had even less control of actions on penal statutes. Blackstone saw no contradiction between the British constitution's vaunted separation of powers, and the practical reality that most English laws—from crimes, to regulatory statutes, to private disputes—were enforced at the initiative of private litigants. Given the strong association of the dispensing power with the "heavy and insupportable yoke of arbitrary power,"[149] it would have actually been a striking departure from English tradition if Article II's Executive "vesting" or "take care" clauses imparted on the President a free-floating authority to annul private suits (either for damages or monetary penalties) that had been duly authorized by statute.

B. Importation to the Colonies

Legal practice in early America—both before and after Independence—evinced a similar understanding of private enforcement, at least with regard to civil and regulatory matters. In fact, private enforcement loomed even larger in the colonies than in Britain, simply because Americans were subject to multiple "layers" of regulatory statutes. First, there were the numerous actions on statutes (many hundreds of years old) that the colonists knew from England. Colonial assemblies frequently reenacted English penal statutes, and it appears that many colonists brought claims

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[144] Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, *in* 10 EIGHTEENTH-CENTURY STUDIES 434, 435 (1977).

[145] *Id.* The English Bill of Rights, enacted after the Revolution of 1688, declared "That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall." 1 W & M, Sess. 2, Ch. 2.

[146] 145 E.R. 778 (Parker 274) (1709).

[147] *Id.*

[148] *Id.* Even before the Glorious Revolution, the English courts would probably not have permitted the Crown to remit a private litigant's claim under a penal statute. *See* Vanderbergh v. Blake, 145 E.R. 451 (Hardres 194, 199) (1673).

[149] 1 A VINDICATION OF THE PROCEEDINGS OF THE LATE PARLIAMENT OF ENGLAND 2 (1690), *quoted in* Edie, *Revolution and the Rule of Law, supra* note 144, at 434.

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under English statutes even when they hadn't been specifically reenacted.[150] Then came those Acts of Parliament which applied specially to the colonies.[151] All of these laws were enforced, primarily, by *qui tam* provisions. Finally, the colonial assemblies themselves (and the state legislatures that succeeded them) passed reams of statutes which relied on private enforcement. American legal historians have long recognized the informer's action as a key part of the "colonial heritage" which remained a regulatory tool for both state and federal government throughout the nineteenth century.[152] And informer's actions have been discussed at length in the context of Article III standing[153] and in scholarly discussions of modern *qui tam* statutes.[154] But the prevalence and variety of private enforcement in early American lawmaking—and its significance for the separation of powers—has been largely overlooked.

The interpretative value of colonial and state practice is sometimes discounted on the grounds that these legislatures were not constrained by the same separation of powers framework that the Constitution eventually adopted. That critique largely misses the point. The delegates of the Constitutional Convention, almost without exception, gained their legislative experience in colonial and state assemblies. Furthermore, some colonies already had strict separation of powers in place. Massachusetts, for example, committed itself to an even stricter separation of powers than the federal convention later adopted: "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and executive powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."[155] Even Justice Scalia, a trenchant defender of executive power, thought the federal Constitution simply captured the Massachusetts principle with more "economy of expression."[156] Accordingly, legal practice in Founding-Era Massachusetts offers a reasonable proxy for the background understandings of executive power embodied in the federal Constitution.

When Massachusetts obtained a new royal charter in 1692, the reorganized provincial government immediately devised a new court system and enacted statutes empowering private litigants to seek monetary penalties (and sometimes compensatory damages) by "bill, plaint, or information."[157] The legislature never looked back: the

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[150] *See* ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1-22 (1969).
[151] *See, e.g.*, The Navigation Act of 1651, 12 Cha. 2 c. 18 *et seq.*
[152] LANGBEIN ET. AL., HISTORY OF THE COMMON LAW 223 (2009); *see also* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 39 (3d ed. 2005).
[153] *See, e.g.*, Sunstein, *supra* note 42 (suggesting that *qui tam* and other common law actions provide a precedent for expansive statutory standing); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 MICH. L. REV. 689 (2004) (refuting Sunstein's account).
[154] *See, e.g.*, Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553 (2022) (discussing the historical precedents for the recent Texas abortion statute); Leitner, *supra* note 78 (considering constitutional limits of *qui tam* actions).
[155] MASS. CONST. pt. I, art. XXX (1780).
[156] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).
[157] *See, e.g.*, An Act for the Regulating and Encouragement of Fishery, ch. 32, 1 Acts and Resolves 71 (1692/1693).

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Assembly continued to create private rights of action, in similar terms,[158] well into the nineteenth century. Approximately ten percent of all public acts passed in Massachusetts between 1690 and 1820 expressly relied on private litigants for enforcement.[159] That somewhat understates the prevalence of private enforcement, because some statutes created multiple rights of action.

Those actions enforced public policy in nearly every domain of legislative activity: duties on luxury goods, restraints on roving livestock, fishing and hunting regulations, limits on dirty industries like tanning and smithing, quarantine measures for people and livestock, prohibitions on usury and price gouging, qualifications for the skilled trades, standards for weights and measures, ship building, fish pickling, meat packing, and more.[160] Nearly all of these causes of action were "popular actions" (permitting any informer to sue) but many *also* authorized injured parties to bring claims for damages. These private suits—obviously calculated to achieve public regulatory ends—defy the hard and fast distinction between public and private rights proposed by some Article II critics of private enforcement.

Laws regulating the commons, a quintessential public right, typify this blend of public and private remedies. In 1693, the Assembly passed "An Act For Regulating Of Fences, Cattle, &c.," for "the better preventing of damage in corn-fields, and other improved and common lands, by horses, neat cattle, sheep, or swine, going at large."[161] The Act established limits on the number of "horse-beasts" that townspeople could keep on the commons, and set penalties for overgrazing the commons—ten shillings for each unregistered horse. Half of any penalty collected was earmarked for town use, but the other half was reserved "to him or them that shall inform and sue for the same before any justice of the peace within the county." Another provision required pig owners to yoke swine kept on the common and ring their noses, to keep them from squeezing through fences and rooting up crops. If any unyoked or unringed swine were found on the commons, their owners would "be liable to pay sixpence per head; and if found damage feasant [i.e. rooting up a private field] being unyoked or unringed, to pay twelvepence per head, *over and above double damages to the party injured*."[162] Obviously, a private plaintiff who sued an overgrazer was vindicating a public right in commons property. Claims for harm caused by unyoked pigs—which combined

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[158] The general practice of permitting the informer to sue by either civil or criminal process continued throughout the period, although the particular enabling language ("by bill, plaint, or information") did change over time. *Cf.* An Act to Provide for the Storing and Safe Keeping of Gunpowder in the Town of Cambridge, ch. 35 (1809) (permitting recovery by information, indictment, or action on the case).

[159] This figure is based on text searchers for legislative terms specific to informer's actions, made possible by the state of Massachusetts's digitization of the Acts and Resolves. Not all of these Acts took effect; some were vetoed by the King (through the oversight of the Board of Trade in London, a committee of the Privy Council responsible for the colonies).

[160] *See* Lucky, *supra* note **Error! Bookmark not defined.**, at 43-67.

[161] An Act for Regulating of Fences, Cattle, &c., ch. 7, 1 Acts and Resolves 138 (1693/1694). The 1693 Act apparently remained in force throughout the following century, with minor amendments in 1751 and 1758.

[162] *Id.* (emphasis added) The per-pig penalty was to be collected by an informer's action, with half the fine going to the town and half to the prosecuting informer; but the damages provision gave a (potentially) separate right of action to the injured party.

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compensatory damages with deterrent penalties—would have redressed injuries to both private property and a public resource.

While provincial court records are spotty, it is clear that both government officials and private citizens frequently brought these types of statutory claims. In his career as a colonial lawyer, John Adams worked on a number of such cases and never identified a separation-of-powers issue even in his most ardent defense against such suits.[163] For example, Adams defended one client from a civil *qui tam* action brought according to a statute governing voting procedures at town meetings.[164] The law provided that any moderator who permitted an unqualified person to "give his voice" at the meeting would forfeit five pounds, half to the poor of the town, "and the other moiety to him or them that shall inform or sue for the same in any of his majesty's courts of record."[165] The plaintiff alleged that the presiding officer of the Rowley town meeting had counted the vote of a man who did not meet the property qualifications for the franchise. It is hard to imagine a more "public right" than one citizen's interest in local electoral procedures. But Adams—constitutional savant and separation of powers obsessive—never seems to have identified this as a problem. In fact, despite the ubiquity of private claims under both Parliamentary and provincial rights of action, and frequent complaints about the excesses of "common informers," and endemic constitutional debates, *no one* in Revolutionary Massachusetts seems to have made the argument pressed by the Article II critics—that private litigants who sought to enforce a public right were unconstitutionally exercising an "executive power."

C. Reformation and Retention in the States

That conceptual framework did not change substantially after the American Revolution or the ratification of the Constitution. States retained their colonial *qui tam* laws and private rights of action and continued to enact new ones. Widespread efforts to reform "penal statutes" in the 1780s only demonstrated their continuing vitality in American law. Although many states adopted local prosecutors with discretionary powers far greater than those of the English Attorney General, early state case law shows that their enforcement discretion did not extend to private suits for civil remedies. Neither prosecutors nor judges claimed the power to set aside private statutory claims, even when they interfered with the government's vindication of public rights.

Again, Massachusetts illustrates the general trend. In 1779, the House of Representatives passed an omnibus reenactment of colonial laws (including dozens of *qui tam* laws) which had been found "useful and beneficial."[166] The adoption of the

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[163] The Adams Papers preserve Adams's notes (and sometimes even his diary entries) on many informer's actions. *See, e.g.*, 2 LEGAL PAPERS OF JOHN ADAMS 147-68, 181 n.28, 396-411 (Wroth & Zobel eds., 1965). In other words, Adams had plenty of occasions to ruminate on the constitutional implications of private enforcement.

[164] *Id.* at 3 (explaining the case in an editorial note, and reproducing Adam's notes on the matter).

[165] Act of 15 Jan. 1743, 3 Acts and Resolves 47-48.

[166] An Act for Continuing Sundry Laws That Are Near Expiring, ch. 18, 5 Acts and Resolves 1120 (1779/1780).

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1780 constitution, with its express commitment to separation of powers, did not dampen the state's enthusiasm for private enforcement. The new constitution provided that all colonial laws "shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution."[167] If executive officials had an *exclusive* power to redress public wrongs, then "popular statutes" would surely have been repugnant to the new constitutional order. But the old actions remained on the books,[168] and the legislature continued to deploy private enforcement schemes for public ends.

If anything, these new causes of action were even more ambitious and public-rights-oriented than their colonial predecessors. In 1783, for example, the legislature overhauled the state's probate laws.[169] One striking new provision imposed a duty on every executor to present the will to the Register of Probate within 30 days of the testator's death.[170] Any executor who failed to do so would forfeit five pounds "for each month he or she shall delay to present the will, to be recovered by action of debt, one moiety to the plaintiff [i.e. the informer], and the other moiety to the legatees."[171]As the Supreme Judicial Court later noted, "The object of the statute was to compel a seasonable presentation of the will to the Probate Court."[172] In other words, the statute permitted any informer to vindicate a *public* interest in reliable public records (and more obliquely, the private statutory rights of will beneficiaries). Any number of modern consumer protection statutes operate on the same theory—from the Fair Credit Reporting Act to the Telephone Consumer Protection Act.

Massachusetts also injected private enforcement into areas that would otherwise have been governed by public nuisance law. To support the contention that private parties should not be allowed to redress public wrongs of a civil or regulatory nature, Article II critics of private enforcement sometimes point to the Founding-Era distinction between private nuisances and public nuisances. Public nuisances vexed or endangered the community at large, rather than inflicting an injury on some private person. Classic examples included obstructions of public roads, keeping hogs in the city, or running a "disorderly inn" or "bawdy house." Because "the law gives no *private* remedy for anything but a *private* wrong," Blackstone noted that "no [civil] *action* lies for a public or common nuisance, but an *indictment* only: because, the damage being common to all the king's subjects, no *one* can assign his particular proportion of it."[173] This is dubious support for a constitutional principle limiting statutory private enforcement. Blackstone was merely restating the common law theory of nuisance,

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[167] MASS. CONST., ch. VI, art. VI (1780).

[168] See Joseph Story et al., *Preface* to THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY (Story et al. eds., 1814) (explaining that there was "no general repeal" of colonial laws in that state and that several remained in force even in 1814).

[169] An Act Prescribing the Manner of Devising Lands, Tenements, and Hereditaments, ch. 24, 5 Acts and Resolves (1783).

[170] *Id.* § 16.

[171] Hill v. Davis, 4 Mass. 137, 139 (1808) (Parsons, C.J.) (construing this statute in an informer's action).

[172] *Id.*

[173] 3 WILLIAM BLACKSTONE, COMMENTARIES *219-20.

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which (as he himself recognized) could be altered by statute.[174] As discussed above, even an *indictment* in the King's name would be largely controlled by a private litigant in England.

In any case, American legislatures do not seem to have adopted Blackstone's conceptual framework—they frequently encouraged private civil suits to redress public nuisances. For example, in an age of timber buildings, keeping a large stockpile of gunpowder in a densely populated area was clearly a nuisance and a public wrong.[175] But an 1809 law in Massachusetts empowered informers to police this offense against the public with private suits.[176] The Act required all residents of Cambridge to store gunpowder in "brass, copper, or tin canisters," and forbade anyone from storing more than fifty pounds of gunpowder at a time. Violators would "forfeit and pay the full value" of the gunpowder, "one moiety to the use of the person who shall inform, complain, or sue for the same," the other to the town of Cambridge.[177] The penalty could be recovered "by information or indictment" or by "action on the case" before any court of competent jurisdiction.[178] Massachusetts was not an outlier. Every state in the union continued to pass penal statutes (with both private damages awards and *qui tam* provisions) in the first twenty-five years of independence.[179] A sweeping revision of Virginia's statutes (proposed by Thomas Jefferson in 1776, and later taken up by James Madison) included twelve informer's actions and many more statutory damages provisions.[180]

That is not to say that professional private litigants were popular.[181] Edward Coke famously called informers "viperous vermin," and "common informer" had become a term of abuse by the eighteenth century.[182] Undoubtedly, penal statutes created perverse incentives for both extortion and collusion. Informers often encouraged unwary defendants to break the law and extorted settlements for frivolous claims. Alternatively, because one plaintiff's successful claim would bar subsequent prosecutions, violators of penal statutes sometimes paid a confidante to sue and recover a sham judgement as a shield against legitimate claimants. As early as the reign

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[174] *Id.* (discussing ways in which Parliament had extended and contracted the definition of a public nuisance); CHITTY, *supra* note 123, *851 (listing "keeping great quantities of gunpowder so as to endanger the neighborhood" alongside other nuisances).

[175] 3 WILLIAM BLACKSTONE, COMMENTARIES *219-20 (citing Acts of Parliament treating gunpowder as a nuisance).

[176] An Act to Provide for the Storing and Safe Keeping of Gunpowder in the Town of Cambridge, ch. 35 (1809).

[177] *Id.* § 1.

[178] *Id.*

[179] See Lucky, *supra* note **Error! Bookmark not defined.**, at 83-87.

[180] 8 PAPERS OF JAMES MADISON 391-99 (Rutland & Rachal eds., 1973) (editorial note on James Madison's manuscript list of the Jefferson's proposed bills).

[181] Gerald Hurst, *The Common Informer*, 147 CONTEMP. REV. 189, 190 (1935). More recent work has captured the profound resentment against informers at the popular level. *See, e.g.*, Warner, Jessica, and Frank Ivis, *'Damn You, You Informing Bitch': Vox Populi and the Unmaking of the Gin Act of 1736*, 33 J. SOC. HIST. 299, 300 (1999) (recounting mob action against informers who brought cases under the Gin Act in London).

[182] Joseph Chitty's treatise on criminal procedure noted in passing that "common informer" had become a mere "epithet" on par with "extortioner," "heretic," and "vagabond." CHITTY, *supra* note 123, *207.

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of Queen Elizabeth, Parliament had imposed limitations on penal statutes to reduce the potential for such abuse.[183] Actions on statutes usually had to be brought within a year of the offense.[184] Informers also had to bring suit in the locality where the offense occurred, where judges would have more awareness of the plaintiff's character and better access to the evidence.[185]

As American jurisdictions continued to create private rights of action after Independence, several states reenacted these longstanding restraints on penal statutes. One of Jefferson's model bills—which James Madison passed in 1786—provided that collusive private prosecutions of a penal statute would not bar recovery by a subsequent good faith plaintiff.[186] It also made any private prosecutor who settled or discontinued a *qui tam* action without leave of court liable for the whole penalty. In 1788, Massachusetts passed an "Act for the Ease of the Citizens Concerning Actions Upon Penal Statutes" which imposed the familiar one-year statute of limitations, required the informer to bring his action in the county where the offense occurred, and permitted defendants to make a general denial of the informer's factual allegations.[187] New York's 1788 "Act to Redress Disorders by Common Informers and to Prevent Malicious Informations" imposed the same restrictions as Massachusetts, and copied the Virginia anti-collusion provisions verbatim.[188] The thrust of these reforms was to make private enforcement *more effective and less onerous* by imposing legislative safeguards familiar from English history. They did not eliminate private claims or subject them to the control of executive officers.

However, early American legal culture diverged from English practice in one important respect. By the eve of the American Revolution, many of the colonies did have local public prosecutors.[189] Although private criminal prosecutions continued in most states, public prosecuting attorneys were charged with bringing indictments to the grand jury and supervising important criminal cases. The early move toward public prosecution in America might support a more expansive view of executive discretion over *criminal* law in the Founding Era.[190] But what about the broader power—claimed

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[183] See GILES JACOB, A REVIEW OF THE STATUTES, BOTH ANCIENT AND MODERN; ESPECIALLY CONCERNING THE PRACTICK PART OF THE LAW 8-9 (1715) (digesting limitations on informer's actions imposed by statutes and case law).

[184] *Id.*

[185] *Id.*

[186] A Bill Providing That Actions Popular, Prosecuted by Collusion, Shall Be No Bar to Those Which Be Pursued with Good Faith, *in* 2 PAPERS OF THOMAS JEFFERSON 626-27 (Jefferson's manuscript copy). The Bill was enacted unchanged on Nov. 28, 1786. *See* 12 Hening Stat. 354-55.

[187] Act of June 19, 1788, ch. 13.

[188] Act of Feb. 6, 1788, ch. 9.

[189] "Some were county officials appointed by the courts; some were deputies of the attorney general but were nominated by the court and operated with little supervision; some were deputies of the attorney general operating directly under his purview." Jacoby, supra note __, at 30.

[190] However, even this suggestion presents a problem for the defenders of the Article II challenge: local prosecutors were officers of the *states* rather than the federal government. The fact that state officers frequently enforced federal law in the Founding Era weighs against the idea that Article II contemplates a truly exclusive enforcement discretion for the federal executive. *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 303 (1989).

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by supporters of the Article II Challenge—over private *civil* claims vindicating a public interest under a statute? If public prosecutors possessed such a power, they would likely have exercised it over private *qui tam* suits. As the reforms of the 1780s indicate, these claims frequently conflicted with (or even subverted) the government's enforcement priorities. Evidence that American prosecutorial officials quashed private statutory claims would demonstrate a striking divergence from English practice, and support the private rights-public rights interpretation of Article II.

But the evidence points in the opposite direction. The settled rule in America seems to have mirrored the common law limits on the *nolle prosequi* in England: the Attorney General (or other prosecuting officer) could bar private litigants from pursuing a penalty if he filed first. But he could not terminate a private party's preexisting civil action. A South Carolina case explicitly reconciled such informer's actions with state constitutional law.[191] In *State v. Matthews* (1806), the court construed a 1784 statute which provided a *qui tam* penalty against anyone keeping a billiard table without a license. The law had adopted the standard formula of English penal statutes, which permitted the informer to proceed "by bill, plaint, or information." Keeping an unlicensed billiards table was a purely regulatory offense—an affront to the public interest, but not the cause of any private injury. Moreover, the state constitution put law enforcement firmly in executive hands, with provisions mirroring the federal "take care" and "vesting" clauses—in addition to an express requirement that "all prosecutions shall be carried on in the name and by the authority of the State of South Carolina." Despite these constitutional commitments to executive power, the court upheld the statute's private enforcement scheme. Justice Grimke explained that public-rights oriented *qui tam* actions were "in a great measure, private suits"—in contrast to actions implicating physical punishment or imprisonment. Private claims for monetary penalties—even those brought to vindicate a public interest—were thus "civil" matters beyond the control of government prosecutors.

An early Massachussets case demonstrates how private *qui tam* claimants could use these rules of preclusion to actively thwart a state prosecution. In *Commonwealth v. Churchill* (1809),[192] a private plaintiff "sued an action of the case *qui tam* against the defendant to recover a penalty for taking usurious interest," under a 1783 statute which "provided that the penalty may be recovered by indictment, or by action on the case, one moiety to any person who may prosecute for the same." The trial court found in favor of the defendant, and the plaintiff appealed. Before the appellate proceedings commenced, the Solicitor General initiated a criminal indictment "for the same offence, and to recover the same penalty." The defendant answered that the pending civil claim was a bar to the state's indictment.[193] Citing a bevy of English authorities, Chief Justice Theophilus Parsons ruled against the Commonwealth, identifying a distinction between "indictments to recover forfeitures on penal statutes" and

[191] State v. Matthews, 2 Brev. 82 (S.C. 1806).
[192] 5 Mass. 174, 4 Tyng 174 (1809).
[193] After this plea was entered, the civil plaintiff appears seems to have dropped the suit—a strong indication of a collusive prosecution designed expressly to thwart enforcement. *Id.* That makes the court's decision to block the Solicitor General's subsequent claim even more striking.

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"indictments for crimes."[194] Although usury was widely regarded as a serious wrong and an offense against the community, Massachusetts law did not denominate it a misdemeanor or a felony. Bringing an indictment to recover the statutory penalty was the most potent enforcement tool available to public prosecutors. Nonetheless, the court found that the statutory authorization of a private suit overrode the enforcement priorities of the Solicitor General. "Perhaps the positive rules of law furnish [the usurer] this screen," concurring Justice Sedgwick concluded. "If they do, it is for the *legislature only* to remedy the evil."[195]

The constant use of private enforcement by state legislatures, coupled with cases like *Matthews* and *Churchill,* demonstrate that American jurists saw no separation of powers problem with private litigants bringing statutory claims to vindicate a public right.[196] That remained true even after states adopted public prosecutors, and vested their executive officers with a constitutional duty to enforce the laws.

D. Post-Constitutional Debates and Article I

The theory and practice of the early federal government reveals broad-strokes agreement with the English, colonial, and state background: widespread private enforcement of public wrongs, through statutorily authorized suits, did not infringe on the constitutional powers of the executive.

Article II challengers make two argumentative moves with the early federal evidence to reach the opposite conclusion, that private enforcement of public rights runs afoul of the original meaning of executive power. The first move concerns legal theory: Article II critics quote the Framers' emphatic endorsements of the separation of powers, and then quote American jurists who articulated the private rights / public rights distinction. From these abstract principles, the Article II critics deduce that enforcement discretion is an exclusively executive power, and that this discretion extends beyond criminal law to regulatory or civil matters that concern the public. The second move concerns legal practice: the Article II critics minimize the significance of private enforcement in early federal law generally, and suggest that *qui tam* laws in particular were an "idiosyncratic exception." But on closer inspection, both of these claims rely on anachronistic assumptions.

First, the Article II critics fundamentally misapprehend the way early American jurisprudence conceptualized private enforcement. The judicial opinions endorsing the

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[194] *Id.* (citing *Rex* vs. *Stratton & al. Doug. 240.;* Rex vs. *Swan & Jeffry. Fast.* 104; Reginia v. Harris, *Cro. Eliz.* 261.; *Hawk. P. C. B.* 2. c. 26. § 63).

[195] *Id.* 183 (emphasis added).

[196] Coincidentally, the authors of both opinions (John Grimke and Theophilus Parsons) were Federalists who defended the national Constitution's expansive executive powers in their states' respective ratifying conventions. If anyone had endorsed the Article II Challenge in the Founding Era, it would have been these two jurists. But they did not.

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public rights view of Article II follow a predictable sequence.[197] After the inevitable citation to Blackstone (to show that redressing public wrongs is an executive power), comes a nod to the Federalist No. 47 (to show that such a power must be kept away from the other branches): "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Then comes Justice Story's dicta on Article II in *Martin v. Hunter's Lessee,* for the implication that this power may not be delegated to private parties:

> The second article declares that 'the executive power shall be vested in a president of the United States of America.' Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible.[198]

The speech of future-Justice Marshall to the House of Representatives in 1800 completes the loop: "A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. But a public prosecution carried on in the name of the United States, can without impropriety be dismissed at the will of the government."[199] Top this off with the irresistible dictum of *Marbury v. Madison* that "the province of the Court is solely to decide on the rights of individuals," and a constitutional principle emerges. When Congress authorizes private suits in furtherance of some public goal—economic regulation, protection of civil rights, etc.—it might be giving litigants "the sort of proactive enforcement discretion property reserved to the Executive Branch."[200]

But that early federal evidence appears in a radically different light when viewed in the broader context of Founding Era private enforcement. As discussed above, statutory plaintiffs (including common informers) were widely understood to possess an "imperfect" property interest in their claims. As Greg Ablavsky has recently shown, in the parlance of the Early Republic, an imperfect or inchoate right was nonetheless *vested*, even though title was not yet absolute.[201] In Blackstone's evocative phrase, penalties given by the legislature to "any person that will sue for the same" are "placed as it were in a state of nature . . . open therefore to the first occupant, who declares his intention to possess them, by obtaining judgement to recover them."[202] As described above, the same conception governed colonial and state practice—as Justice Story and Justice Marshall knew well. Justice Story helped compile the first complete edition of the colonial session laws of Massachussets, which included dozens of

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[197] Typical examples include Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting); Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1116–17 (Newsom, J., concurring); Laufer v. Arpan LLC, 29 F.4th, 12681295 (Newsom, J., concurring).

[198] 14 U.S. (1 Wheat.) 304, 329–30(1816) (Story, J.)

[199] John Marshall, Speech Delivered in the House of Representatives of the United States, on the Resolutions of the Hon. Edward Livingston 28 (Mar. 7, 1800).

[200] Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 13 (2023) (Thomas J., concurring) (citation omitted).

[201] Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 347 (2022).

[202] 2 WILLIAM BLACKSTONE. COMMENTARIES *437.

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informer's actions.[203] He also voted to enact *qui tam* laws, both as a federal Congressman and as a Representative in the Massachussets state legislature.

Chief Justice Marshall's articulation of the public/private rights distinction must be understood in the same light. As he noted in *Adams v. Woods*, "almost every fine or forfeiture under a penal statute, may be recovered by an action of debt, as well as by information."[204] Since at least the time of Hawkins, an action of debt was considered the default civil process for collecting a statutory penalty—a practice followed in colonial America and the Early Republic. The reason is simply that the claimant had a private property interest in a penalty (or damages) conferred by the statute. So when Marshall referred (in his House speech) to private suits "asserting a claim for property," he was not referring only to legal claims for some *preexisting* property right, like a debt or an interest in land. Statutes that created new rights out of whole cloth—e.g. damages unavailable at common law, or informer's penalties—could also give rise to what *Marbury* called the "rights of individuals." *Woods* shows that this was the case even for *qui tam* actions brought under criminal process, to redress a public wrong. Marshall's House Speech was simply stating the conventional wisdom when he said that the executive could "give no direction" regarding such cases. In other words, private statutory claims for novel rights of action could be litigated in federal courts at the discretion of private parties, without offending the Article II power over "public prosecutions."

Broader articulations of the separation of powers—in the *Federalist*, and by other Founding Fathers—are wholly consistent with this understanding. While the *Federalist Papers* argued for an executive with the authority to enforce the laws, and a judiciary that was institutionally independent from the executive,[205] they clearly presupposed that private litigants would continue to play the decisive role in enforcing civil regulatory law.

Puzzlingly, Judge Newsom cites *The Federalist* No. 21 for the proposition that the President's executive discretion to enforce federal law extends to civil remedies such as "pecuniary mulcts."[206] But that essay is a criticism of the Articles of Confederation, not an exposition of the powers of the President. Implicitly, it makes the opposite point—arguing for a stronger federal government which can "raise its own revenues in its own way." The Congress created by the proposed Constitution would do this by laying duties on "articles of consumption." Contemporaries would have recognized that these duties would be enforced by *qui tam* laws. As Hamilton wrote in *The Federalist* No. 15, an indispensable power of Congress was the authority to ensure that laws had a "penalty annexed to disobedience," which (in matters of taxation, as well as public policy) would have invariably been done by authorizing

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[203] Story et al., *supra* note 168.
[204] 6 U.S. (2 Cranch) 336, 341 (1805) (discussing *qui tam* penalties in Act of Mar. 22, 1794, ch. 11, § 2).
[205] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961) ("[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny")
[206] THE FEDERALIST NO. 21, 134–35 (Alexander Hamilton).

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private suits.[207] In fact, just a few months after writing the Federalist Papers, Hamilton himself drafted a tax law enforceable by "any informer" as a Representative in the New York State Assembly.[208] He presumably regarded private suits as simply one of the "necessary and proper" tools available to Congress for implementing the enumerated powers of Article I.

The second argumentative move that the Article II critics make concerns legal practice. The Article II critics are aware of *qui tam* suits, but regard them as "an idiosyncratic exception."[209] They often draw on Article III standing scholarship, where the historic ability of non-injured parties to bring statutory suits has long been debated. For example, Caleb Nelson and Anne Woodhandler have argued that while informer suits do challenge the principle of executive control over suits on behalf of the public, "*qui tam* is at best an anomaly," and "the existence of one historically grounded exception to a general principle of constitutional law does not require repudiation of the entire principle."[210]

That response is inadequate for two reasons. First, as discussed above, private enforcement in the Founding Era was not just *qui tam*; informer's actions were only one of many remedies employed by "penal statutes," which also authorized novel causes of action for damages. Second, while *qui tam* enforcement might seem peculiar or exotic today, there was nothing anomalous about it in the Founding Era. For Blackstone, penal statutes were not an "idiosyncratic exception," but a vast body of encumbrances and obligations that would be too "tedious" to enumerate—for that he directed his readers to several other "laborious compilers."[211] As discussed above, American colonial and state governments used *qui tam* extensively, and "popular statutes" remained just as important for the fledgling federal government. Between 1789 and 1820, Congress deployed private enforcement—mostly informer's actions—to implement nearly every one of its constitutionally enumerated powers: to make war; raise and support a military; grant copyrights and patents; regulate immigration; establish post offices; lay and collect taxes; coin money; and regulate commerce between the states and with Indian tribes.[212] While it is difficult to assess how much

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[207] *See* THE FEDERALIST NO. 15, at __ (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[208] Second Draft of an Act for Raising Certain Yearly Taxes Within This State (Feb. 9, 1787), *in* 4 PAPERS OF ALEXANDER HAMILTON 41-50 (Harold Syrett ed., 1965) (reproducing document in Hamilton's hand proposing penalty for tax evasion, "to be recovered by action of debt for the benefit of any informer")

[209] Laufer v. Arpan LLC, 29 F.4th 1268, 1288 (2022) (Newsom, J., concurring).

[210] Woodhandler & Nelson, *Does History Defeat Standing Doctrine*, *supra* note __, at 731 n.197.

[211] *E.g.*, HAWKINS, *supra* note **Error! Bookmark not defined.**, at c. 26, § 17 (discussing when an "action o n a statute" will lie, and how to bring one).

[212] *See, e.g.*, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124–25 (permitting statutory damages for copyright infringement); Patent Act of 1793, Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318; Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (informer's action for import of liquor without paying duties); Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (informer's action prohibiting trade with Indian tribes); Act. of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (informer's action for failure to comply with postal regulations); Act of Mar. 22, 1794, ch. 11, § 2, 1 Stat. 347, 349 (informer's action against slave trade with foreign nations).

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qui tam litigation actually occurred, a substantial body of federal law developed regarding the property rights of informers in their private claims.

The nature of the Executive's control over these actions soon became a practical question for Hamilton, when he became the first Treasury Secretary of the United States Samuel Dodge, a customs inspector in New York, violated a provision of the 1790 customs act by permitting a vessel to unload several hogsheads of molasses in the dark.[213] After being indicted by an informer suing in the name of the United States, Dodge appealed to George Washington for a pardon. His petition was compelling. Even the grand jury had found that Dodge had no intent to defraud the treasury, and he "maintained that he had been entirely ignorant of the regulation forbidding unlading after seven o'clock in the evening, which had gone into effect only a few days before the incident."[214] The sticking point, however, was that the Act awarded half of the $400 fine to the United States, divided the other half between any private informer and local treasury officials.[215]

Washington requested Hamilton's advice, and Hamilton promptly asked Richard Harrison, a lawyer and the Auditor of the Treasury Department, for his take on how the distribution of the penalty among between the United States, a private person, and several government officers would impact the pardon power.[216] While acknowledging the difficulty of these "untried points," Harrison gave a clear answer the following month: Washington could remit only the United States' portion of the fine, and the other criminal punishments in the act (particularly a ban on federal officeholding).[217] With regard to the portions of the penalty awarded to private individuals, the pardon would be a "mere nullity." Harrison, however, saw no "objection to making the pardon conditional, 'provided the offender satisfy the officers &c. for the one half of the fine or penalty & pay the expences of prosecution.'" Washington ultimately pardoned Dodge—but with the caveat suggested by Harrison.[218] In sum, Hamilton and Harrison came to the conclusion that the Executive had no power to displace a private claim, even when it was brought solely in the name of the United States. The informer's claim was an egregious impingement on prosecutorial discretion; Dodge's violation was purely technical, and a public prosecutor would never have proceeded against him. Nevertheless, in Harrison's view, the only remedy lay with Congress. In 1825 the Supreme Court seems to have taken a similar view in *United States v. Morris,* noting that the authority of the Secretary to remit

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[213] See *supra* at 1.
[214] See editorial note on the case at 7 PAPERS OF GEORGE WASHINGTON 493–95, n.1 (Jack D. Warren, Jr., ed., 1988).
[215] 1 Stat. 177, § 69.
[216] Letter from Alexander Hamilton to Richard Harrison (26 Apr. 1791), *in* 8 PAPERS OF ALEXANDER HAMILTON 312-14 (Harold Syrett ed., 1965).
[217] Letter from Richard Harrison to Alexander Hamilton (24 May 1791), *in* 8 PAPERS OF ALEXANDER HAMILTON 352-54 (Harold Syrett ed., 1965).
[218] 7 PAPERS OF GEORGE WASHINGTON 493–95, n.1 (Jack D. Warren, Jr., ed., 1988) (explaining the aftermath of Dodge's petition).

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a fine or forfeiture "must depend on the construction to be given to the act under which the power was exercised."[219]

In sum, the early federal evidence does not support the inferences drawn by the Article II critics. Theoretical expositions of the separation of powers—even those which made a clear distinction between public and private rights—presupposed that Congress would enforce its laws with "penalties" largely collected by private litigants. Rather than an "idiosyncratic exception," private enforcement in the name of the public was a pillar of the new federal government's regulatory ambitions. Whatever discretion the executive possessed over private claimants was conferred by statute, or limited to blatantly criminal punishments that did not affect the statutory rights of the private plaintiff.

IV. Modern Doctrines of Executive Power

Thus far, we have examined the origins and substance of the Article II challenge and the historical evidence that contradicts the challenge. However, an equally important question is whether the Article II challenge is compatible with the judicial system's conception of the executive's core prerogative to take care that the law be faithfully executed. As described below, standing doctrine ensures that private individuals do not haul into court public injuries that ought to be prosecuted by the executive, state-action doctrine attempts to parse out when private entities begin to wield governmental (and often executive) power, and administrative law attempts to distinguish private rights that individuals must adjudicate in an Article III court from public ones that Congress can permit the executive to adjudicate on its own.

This Part first offers a brief summary of related doctrinal approaches to executive power and the considerations within several doctrinal areas that can inform when, if ever, private rights of action interfere with Article II. It then identifies the key cross-cutting themes that emerge from these distinct doctrinal areas and which inform our subsequent discussion in Part V of when certain private rights of action may infringe upon the Take Care Clause.

A. The Jurisprudence of Executive Power

Below, we lay out, in necessarily broad strokes, five doctrinal areas related to executive power that address the core concerns about executive discretion with which this article is concerned. We begin with (1) doctrine delineating the meaning of Article II's Vesting and Take Care Clauses as well as the Appointments Clause. We then move to (2) doctrine on standing, which we have referenced above. After that, we move to three doctrines that concern executive power but which scholars rarely consider when discussing private rights of action. They include (3) state-action doctrine, (4) various formulations of nondelegation doctrines, and (5) cases concerning the public-private rights distinction in administrative law.

[219] 23 U.S. 246, 287 (1825)

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1. Doctrinal Bounds of Executive Power

The Take Care Clause is a slippery thing. And so before diving into specific cases, a brief mention of scholarship and the usefulness of case law on this topic is in order. Scholars have written extensively on its scope, and on the ways in which case law has over time identified some key components of executive authority that the Clause protects as executive in nature. But as scholars have pointed out, those cases neither define what the Take Care Clause encompasses nor hold that the private civil suit provisions are themselves an improper Congressional divestment of executive power. Indeed, beyond proclaiming (with thin historical support) that the exercise of prosecutorial discretion in criminal cases is a wholly executive prerogative, the Court's cases say little about the extent to which the Clause limits individuals outside the executive branch from pursuing *civil* actions.[220]

The conceptually unsatisfying throughline of the Supreme Court's case law on executive power is that functions Congress and the Court have traditionally permitted the executive to exercise exclusive control over—such as law enforcement—are executive in nature. The Court has found that executive power entails at a minimum the power to prosecute criminal offenses, some unidentified and circularly defined civil enforcement power when carrying out the obligations of executive agencies, the power to appoint executive officials, and to carry out the enumerated provisions of Article II, including the power to protect and engage in diplomacy and war.[221] And although less relevant to our core question, it is worth noting that the executive may also hold some residual power to ensure the laws are faithfully executed, including "to take 'incidental' measures that may be necessary to effectuate statutory commands."[222]

In the civil arena, then, the Court has left muddled not only what executive power entails, but also whether and when Congress can divest it.[223] While the Court has adopted a broad interpretation of the Clause, it has never engaged in a detailed historical or textual analysis of the Clause's meaning.[224] Instead, it has laid down layers of conclusory statements over time that have built up a doctrinal account of executive power.[225] With that caveat in mind, we now turn to a brief description of the Court's understanding of executive power in each of the categories described above.

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[220] Scholars widely acknowledge that "[t]he Court has used the Take Care Clause in numerous ways that are, in many respects, in tension." Goldsmith & Manning, *supra* note 78, at 1853.; *see also* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2116 (2019).

[221] *See Id.* at 1839–53.

[222] *Id.* at 1851. (citation omitted). This power, to the extent it exists, is more a scholarly creation than a doctrinal one. *See id.*; *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61-63 (1993).

[223] Some have argued that the Clause merely tells the Executive that she must not *rebuff* prosecutorial responsibility. *See* Ledewitz, supra note 9, at 797; Rosenberg, Congress's Prerogative, *supra* note 9, at 690; Strauss, *Place of Agencies*, *supra* note 11, at 600-02.

[224] Scholars, of course, have done that work. *See, e.g.*, Prakash, *supra* note 230.

[225] *See* Goldsmith & Manning, *supra* note 78,at 1860–61.

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a. Criminal Prosecutorial Power

The Court has implied that the "Take Care" duty encompasses at a minimum "the duty to ensure competence, observance of law, and prevention of misconduct,"[226] and its cases indicate that criminal prosecutions are squarely executive. In *United States v. Nixon*, the Supreme Court flatly stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[227] Similarly, in *Morrison v. Olson*, the Court concluded that acts taken by an independent counsel are indisputably "executive" because they "typically have been undertaken by officials within the executive branch."[228] That case and others like it express particular concern about preserving in the executive a unitary prosecutorial discretion to initiate and terminate cases, and do not appear as concerned with who moves the case forward. (Indeed, the Court has sanctioned the government's use of private contract attorneys to assist with prosecutions on a contingent fee basis once they have begun, even though some scholars argue that their use threatens constitutional structure because those private lawyers act as delegees and exercise state power.)[229]

When it does find a violation of the Take Care Clause, the Court rarely rejects congressional authority to establish officers who may exercise executive power; instead, it often applies a narrow backstop it draws from Article II's Appointments Clause: require Congress to ensure that the executive retains control over the appointment or termination of the officer charged with executive responsibility.[230] This Appointments Clause analysis in turn considers the level of control the executive retained over the officer.[231]

One odd and critical exception—and one that further exposes the Article II Challenge as a doctrinal misfit—is the Court's historical comfort with *state* enforcement of federal criminal law. With only a few exceptions, the Court regularly authorizes states to enforce federal law without finding a violation of the Take Care Clause,[232] and Congress frequently expressly authorizes states to enforce federal criminal laws.[233] These cases are, of course, motivated by a concern for the special status that states hold in our federalist constitutional structure: as Litman points out,

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[226] *Id.* at 1842.

[227] United States v. Nixon, 418 U.S. 683, 693 (1974); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996). Other federal courts shared this understanding. *See, e.g.*, United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

[228] 487 U.S. 654, 696 (1988).

[229] *See generally* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010).

[230] *See, e.g.*, Myers v. United States, 272 U.S. 52, 133 (1926) (quoting Cunningham v. Neagle, 135 U.S. 1, 63 (1890)); Morrison v. Olson, 487 U.S. 654, 662 (1988).

[231] *See Morrison*, 487 U.S. at 671-72.

[232] A critical exception is *Arizona v. United States*, 567 U.S. 387 (2012), which rejected in large part Arizona's attempt to enforce federal civil (but quasi-criminal) immigration law. But even in that case, the Court struck down Arizona's attempt to enforce federal immigration law because it viewed immigration law as uniquely within the "federal power," not because it interpreted Arizona to have encroached upon the Take Care Clause specifically. *See id.* at 395; Litman, *supra* note TK, at 1312.

[233] *See* Litman, *supra* note TK, at 1311-1312 (citing cases and statutes).

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the Court's presumption against preemption, for example, "is rooted in" the "idea that states have a right to enforce the law, and in doing so, to diverge from how the President enforces the law."[234] That distinction, however, cannot explain away the state encroachment on federal enforcement power, and as Litman argues, the better explanation may be that state enforcement of federal law only further supports "the case for rejecting the absolute interpretation of Article II inherent in separation-of-powers cases and instead embracing the idea that Congress may limit the executive's discretion over the execution of federal law by dividing up the authority to enforce federal civil laws."[235] That power may serve several interests, such as ensuring that federal law is enforced even when an executive declines to enforce it.[236] Peter Shane has advanced a similar argument that the Take Care Clause does not consistently shield federal criminal authority, highlighting as another example federal courts' widely accepted criminal enforcement authority to "appoint prosecutors to handle cases of criminal contempt."[237]

b. Civil Enforcement Power

How does all this apply to civil enforcement power of the kind private litigants may exercise? While courts have recognized that the Executive has discretion over civil administrative enforcement, the boundaries of executive power—and its potential exclusivity—are not so clear in the civil arena.[238] The Court has recognized that Congress may not *entirely* usurp the President's discretion to bring civil suits in the name of the United States by empowering non-executive officials to make the executive file civil enforcement lawsuits. As described below, those cases reveal the Court's understanding that the executive must retain control over lawsuits brought to enforce a statutory scheme, and that Congress may not vest in officials who sit outside the executive's control the power to mandate that the executive file a lawsuit or otherwise act to enforce the regime in a particular way (as in *Heckler* or *Buckley*).[239]

In the *qui tam* context, the Court has recognized that private individuals—who serve as informants and have an interest in receiving a lump sum of the government's civil recovery—hold only a "conditional" interest in the reward "until the money is paid over, as required by law."[240] In those cases, the government controls the prosecution of the case, and the Attorney General has complete discretion to end the lawsuit.[241] It has been "[s]ettled rule" that "courts will not recognize any suit, civil or criminal, as regularly before them, *if prosecuted in the name and for the benefit of the United*

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[234] *Id.* at 1315.
[235] *Id.* at 1322, 1337.
[236] *See id.* at 1347 (describing non-enforcement concern).
[237] *See* Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 261-62 & n.86 (2019) (describing this power and former Justice Scalia's lone opposition to it).
[238] TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 15 (2014).
[239] Outside the civil lawsuit context, the Court has also expressed concerns with requiring the executive to enforce a civil firearm background-check regime in parallel to the states where it is designed to enable criminal prosecutorial enforcement powers. *See* Printz v. United States, 521 U.S. 898, 904 (1997).
[240] *See Confiscation Cases*, 74 U.S. 454, 462 (1868).
[241] *Id.*

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States, unless . . . represented by the district attorney, or someone designated by him to attend to such business, in his absence."[242]

Even outside the *qui tam* context, the Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to that agency's absolute discretion."[243] In *Heckler v. Chaney*, the Court approved the FDA's decision not to impose regulations on drugs used for lethal injections and concluded that the FDA's "refusal to institute" regulatory proceedings "share[d] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch" because "it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[244] The Court has also emphasized the normative benefits of vesting civil prosecutorial discretion in a single expert agency.[245]

The Court has also struck down a law that gave non-presidentially appointed officers the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights."[246] In *Buckley v. Valeo*, the Court explained that the Federal Election Commission exercised executive enforcement power because it exercised "discretionary power to seek judicial relief," an "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[247] This, the Court explained, was because "[a] *lawsuit is the ultimate remedy for a breach of the law*, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"[248] Because the statute that established the Commission "vest[ed] in the Commission primary responsibility for conducting civil litigation of the courts of the United States for vindicating public rights," the Court held, its members had to be appointed consistent with the requirements of Article II's Appointments Clause.[249] Despite this sweeping language, however, what ultimately bothered the Court was a specific statutory requirement that "upon request by the Commission[,] the Attorney General on behalf of the United States *shall* institute a civil action for relief."[250] In other words, where Congress empowers an office to *command* the executive to file suit on behalf of the United Sates, it encroaches on the Take Care power, and the office's membership must be subjected to some form of Executive control to cure the congressional overreach.

Whatever its reach, the executive's prosecutorial discretion in civil cases appears far more limited than in the criminal arena. In *Dunlop v. Bachowski*, for example,

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[242] *Id.* at 458 (emphasis added).
[243] Heckler v. Chaney, 470 U.S. 821, 831 (1985).
[244] *Id.* at 832 (quoting U.S. CONST. art. II, § 3). For futher discussions of this case as it relates to the Take Care Clause, see Goldsmith & Manning, *supra* note 78, at 1848; GARVEY, *supra* note 238, at 10.
[245] *Heckler*, 470 U.S. at 831.
[246] *See* Buckley v. Valeo, 424 U.S. 1, 140 (1976).
[247] *Id.*
[248] *Id.* (quoting U.S. CONST. art. II, § 3) (emphasis added); *see also id.* (citing *Confiscation Cases*, 7 Wall. 454, 458-59 (1869)).
[249] *Buckley*, 434 U.S. at 140.
[250] *Id.* at 140 n.24 (quoting 26 U.S.C. § 437g(a)(7) (1974)).

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the Court held that Congress could reasonably limit the Secretary of Labor's enforcement discretion to decline civil prosecutions for violations of the Labor-Management Reporting and Disclosure Act by requiring the Secretary to provide a reasoned basis for exercising that discretion.[251]

2. Standing

As we have explained, the Court's standing cases have invoked the Take Care Clause as a justification for tightening standing requirements in civil cases. These cases recognize an Article II concern, but address it through the lens of injury and remedy.[252] And some of the doctrine is loosely linked to a historical claim. As discussed above, the *Transunion* majority made a specific, and mistaken, historical claim: that "until the 20th century, Congress rarely created 'citizen suit'-style causes of action for suits against private parties by private plaintiffs who had not suffered a concrete harm."[253]

The Court's majority opinion in *Friends of the Earth*, however, adds a third consideration to the mix. In responding to Justice Scalia's separation-of-powers concerns with the Clean Water Act's provisions permitting private plaintiffs to exact penalties paid out to the government, the Court found comfort in the fact that "the Federal Government retain[ed] the power to foreclose a citizen suit by undertaking its own action," and that "if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to 'intervene as a matter of right' and bring the Government's views to the attention of the court."[254] The Court, in other words, found no separation-of-powers issue because Congress had designed the private right of action to give the executive sufficient control over the litigation.

3. State Action

The Supreme Court has separately recognized a set of scenarios in which private actions sufficiently motivated by or intertwined with government action may be considered state action and therefore made subject to constitutional standards.[255] Although these cases are more about protecting the due process of individuals impacted by the private actor's wielding of governmental authority and do not address Article II, they help probe when litigants may be acting with governmental authority of the kind that could divest the Executive of her Article II authority. The state-action cases scrutinize private conduct that relies in large part on government funding, resembles traditional government activity (such as the establishment of a town),[256] is

[251] 421 U.S. 560, 562-63, 573 (1975).
[252] *See supra* Part II.A.
[253] *Id.* n.1.
[254] Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 188 n.4 (2000) (quoting 33 U.S.C. §§ 1365(b)(1)(B), 1365(c)(2)).
[255] As Alexander Volokh explains, "Delegating coercive power to private parties has long been held to be a potential violation of due process." Volokh, *supra* note **Error! Bookmark not defined.**, at 941.
[256] *Id.* at 183–84.; *see* Marsh v. Alabama, 326 U.S. 501, 505-10 (1946); Evans v. Newton, 382 U.S. 296, 301 (1966); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

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directed by the government,[257] or otherwise relies on state largess,[258] perhaps in the form of an implied partnership that an ordinary person would impute to the state.[259] Generally, the private use of government-sanctioned private remedies does not itself constitute state action. As the late Justice O'Connor explained in *Tulsa Professional Collection Services v. Pope*, the mere "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action. . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."[260] In that case, a state probate court's opening up of state probate proceedings triggered the very state statute that the petitioners had challenged.[261] Thus, even though a private individual invoked the state statute to prohibit the petitioner's claim, the state probate court engaged in state action when it invoked the statute to eliminate petitioner's claim.[262]

All that determines when a private litigant's actions trigger separate state action on behalf of the implementing court that can be challenged. But there is also a narrow set of circumstances in which the Court has extended that logic to hold, in effect, that a private litigant can herself act as an arm of the state. Where the action in question is not adverse to the government,[263] a private litigant may in a narrow set of circumstances constitute a state actor.[264] And in some cases, she may engage in state action. In *Edmonson*, the Court applied state-action doctrine to hold that a private corporate litigant in a private tort case acted as a state actor when it engaged in racially discriminatory jury selection.[265] The Court explained that modern state-action doctrine considers "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."[266] To answer that second, somewhat tautological question, the Court looks to "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[267] Because "a private party could not exercise its peremptory challenges

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[257] *See supra* note 256; *see also Jackson*, 419 U.S. at 357.
[258] Patrick, *supra* note _ at 179 (citing cases).
[259] *Id.* at 185.
[260] 485 U.S. 478, 485-86 (1988). The canonical example of this, of course, is *Shelley v. Kraemer*, in which the Court ruled that state courts' enforcement of racially restrictive covenants constituted state action. 334 U.S. 1 (1948).
[261] *Tulsa Professional Collection Services.*, 485 U.S. at 487.
[262] *Id.*
[263] For this reason, a public defender "is not a state actor." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991) (citing Polk County v. Dodson, 454 U.S. 312 (1981)).
[264] *Id.* at 627; *see also Shelley*, 334 U.S. at 19 (private litigants may not use the courts to enforce racially restrictive covenants); Dennis v. Sparks, 449 U.S. 24, 28 (1980) (bribing a judge).
[265] *Id.* at 622.
[266] *Id.* at 620 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-942 (1982)).
[267] *Id.* at 621-22 (citations omitted).

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absent the overt, significant assistance of the court" in excluding jurors based on their race, the private litigant became a state actor.[268]

As *Tulsa Professional*'s author has observed, the Court's "cases deciding when private action might be deemed that of the state have not been a model of consistency."[269] But *Edmonson* teaches at least that private litigants can in a narrow set of circumstances wield implicit governmental authority. In such cases, then, private individuals may encroach upon the Executive's prerogative to wield that authority.

4. Nondelegation

Courts have also identified a related "due process rationale for striking down delegations of regulatory authority to private parties."[270] These cases, including *Carter Coal*, establish what Alexander Volokh describes as a "mandatory-discretionary" line: when private individuals "force an alteration in the legal regime without any discretion remaining in government and without any protection against their personal biases," they violate due process.[271] The test, then, is outcome-focused: it asks whether the *effect* of the private action is to tie the government's hands at the risk of unchecked private bias. Under that line of cases, Volokh posits that because "[s]uing someone in court . . . has no coercive effect beyond forcing the opposing party to appear to answer your charges," the doctrine does not reach rights of action that empower private individuals to bring civil suits that have the effect of depriving others of their rights, so long as the suits do not operate at the exclusion of parallel executive enforcement.[272]

Justices Alito, Thomas, and Gorsuch have been eager to revive and clarify the private nondelegation doctrine—and after a recent opportunity to do so fell away, a new vehicle for clarifying the doctrine now sits before the Court.[273] In *Oklahoma v. United States*, the question presented is whether Congress may through the Horseracing Integrity and Safety Act of 2020 delegate to a private regulatory body the ability to impose upon states regulations governing horseracing.[274] The Fifth Circuit recently held that it may not, while the Sixth held that Congress's subsequent amendment to enable the FTC to disprove the private body's rules when they violate the enabling statute saves the Act. In their petition for certiorari, the Act's challengers argue that it specifically delegates "prosecutorial power to a private entity" because it permits the private horseracing authority to seek injunctive relief in court.[275] They note that this power to seek injunctive, and not merely monetary, relief makes the Authority less like a *qui tam* relator and more like an Article II prosecutor.

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[268] *Id.* at 624. Jury selection, of course, is unique in that it employs the courts directly in the act of discrimination. *See id.* at 626.
[269] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).
[270] Volokh, *supra* note 4 at 944.
[271] *Id.* at 946 & n.74.
[272] *Id.* at 947.
[273] Justice Alito expressed regret that the Court had to deny review. *See* Texas v. Commissioner, 142 S. Ct. 1308, 1309 (2022) (Alito, J., concurring).
[274] No. 23-402 (2024).
[275] *See* Petition for Certiorari at 21, Oklahoma v. United States, No. 23-402 (2024).

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A related doctrine grounded in constitutional separation-of-powers principles requires that Congressional power not be delegated to private individuals. Drawing from the due process cases cited above, the Court has held that Congress may not delegate its own regulatory power to private individuals.[276] The result is that legislative delegations of power to private individuals is held to the same "intelligible principle" standard as delegations to the executive.[277] In holding that Amtrak was a public entity subject to constitutional restrictions, the Court highlighted the statutory restrictions on Amtrak's appointed leadership and prerogative, Amtrak's reporting requirements to the government and the public, and its public benefits.[278] State versions of the private nondelegation doctrine often conduct a more expansive inquiry and consider the potential for private bias and whether the delegation enables private actors to wield traditional state authority (especially the ability to sanction or punish).[279] As one scholar has uncovered, state-level nondelegation doctrines are often driven not only by a concern about the constitutional separation of powers, but at times by concerns of state sovereignty.[280]

As Volokh notes, courts have often doctrinally confused the "doctrine of private delegations" as arising from both the Vesting Clause and the Due Process Clause, even though both Clauses are driven by distinct concerns and ought to impose distinct consequences: the former buttresses structural constraints in our tripartite form of government, and the latter secures individual fairness.[281] But for our purposes, that doctrinal mingling may be healthy. As Volokh argues, *Carter Coal* itself appeared to implicate both doctrines and offered no clarity as to which it relied on, implying that when it is private individuals to whom Congress is delegating power, both separation-of-powers and due-process considerations may be at play.[282] (Volokh, for his part, does not believe there is any basis in Article I for a separate non-delegation doctrine for delegations to private, as opposed to public, entities).[283]

5. Public Rights

As was recently on display at the Supreme Court in the oral argument for *SEC v. Jarkesy*,[284] the Court has also recognized a distinction in public and private rights that sits at the intersection of its doctrines interpreting individual rights pursuant to the Seventh Amendment and structural limitations on administrative agencies.

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[276] *See* Currin v. Wallace, 306 U.S. 1 (1939); *see also Id.* at 958–60. (citing these and related cases).
[277] *Id.* at 961–62.
[278] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1233 (2014).
[279] *See Id.* at 966–68.
[280] Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1242–43 (2022).
[281] Volokh, *supra* note 4 at 973–74.
[282] *Id.* at 977–78.
[283] *See* Sasha (Alexander) Volokh, *The Horseracing Case, Part 2: Private Delegation Before and After Schechter Poultry*, REASON: THE VOLOKH CONSPIRACY (Nov. 22, 2022), https://reason.com/volokh/2022/11/22/the-horseracing-case-part-2-private-delegation-before-and-after-schechter-poultry/. *But see* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61–62 (2015) ("When it comes to private entities . . . there is not even a fig leaf of constitutional justification.") (Thomas, J., concurring).
[284] No. 22-859 (2023).

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Specifically, in order to determine whether a proceeding constitutes an exercise of Article III's judicial power (and therefore carries with it the procedural protections that ought to accompany Article III proceedings, such as the right to a jury trial), the Court has "distinguished between 'public rights' and 'private rights,'" and has in doing so "given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts."[285] The doctrine is also driven by a judicial nondelegation concern of sorts: Congress may not unconstitutionally usurp the judicial power (which is uniquely suited to adjudicate private claims) and give it to the executive, unless the right at issue is more public than private.

The implications of this doctrine for determining whether Congress may assign a cause of action to a private individual are unclear. One of the key concerns driving the doctrine immediately drops out: private rights of action (as discussed here) are brought in Article III courts and so preserve the defendants' right to a jury trial. To the extent that the structural concerns about usurping judicial authority could be transposed here, they would paradoxically prohibit Congress from assigning to private litigants the ability to file suits that threaten others' privately held rights, but permit suits that threaten publicly held rights.

As oral argument in *Jarkesy* revealed, the doctrine has little light to shed on what constitutes a private right and when a lawsuit threatens it.[286] The Court has defined a public right circularly, as a matter that does not "require judicial determination,"[287] or as one arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[288] In its *Jarkesy* briefing, the Solicitor General argued that the mere fact that violations of a congressionally created civil remedy "could *also* give rise to common-law" private claims of injury did not make the remedy a private one.[289] It remains unclear what does.

The sources of the doctrine, too, are shaky. Although it derives from *Murray's Lessee*, which purportedly adopted the proposition that private land claims may not be adjudicated in a public forum, more recent scholarship has uncovered that historically, "Congress subjected vested rights to private property to non-Article III tribunals, usually with appellate Article III or congressional review but sometimes with sole and final decisionmaking power."[290] The best public-private rights test, then, may be one rooted in congressional intent rather than rigid rules about which rights are public.[291]

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[285] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 334 (2018) (citations omitted).
[286] *See id.* ("This Court has not 'definitively explained' the distinction between public and private rights . . . ." (citation omitted) (quoting oral argument)).
[287] *Id.* at 1373 (quotation omitted).
[288] *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).
[289] Brief for the Petitioner at 24, SEC v. Jarkesy, No. 22-859 (argued Nov. 29, 2023).
[290] Ablavsky, *supra* note 201, at 347.
[291] *Id.* at 348.

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B. Four Cross-Doctrinal Concerns

These doctrines reveal that courts evaluate the propriety of a private delegation or other divestment of executive power along one of four key axes, each of which entails its own set of considerations. When evaluating whether an invocation of judicial power by a private litigant interferes with executive authority, courts consider (1) the formal *relationship* that the delegation creates between Congress and the private individual, (2) the nature of the *right or claim* that the private actor brings into court, (3) the *remedy* that results, and (4) the level of *control* that the Executive retains over the reins to assert the underlying right and drive the course of the specific suit. A preview of these axes and their doctrinal sources follows, after which we describe each axis along with the scholarship that supports it.

Doctrinal Axes—A Preview

Axis	*Relevant Questions*	*Key Cases*
The Authorization	• Has Congress expressly authorized the private litigant to sue on behalf or as an agent of the United States? • Has Congress implicitly done so through indirect funding mechanisms?	• *Vermont Agency* • *Edmonson* • *Oklahoma*
The Right	• Does the right interfere with a parallel and traditional governmental function? • Does the right concern an interest—such as in public property—traditionally held exclusively by the government or political community? Is that right assignable at common law? • Does the right invoke a government-created right or benefit?	• *Morrison* • Justice Thomas's Dissents in *TransUnion* and *Spokeo* • *Edmonson*
The Remedy	• Is the private plaintiff's requested remedy punitive or otherwise designed to accrue to the public? • Does implementing the requested remedy require extensive state involvement? • Does the remedy extend beyond monetary to injunctive relief?	• *Morrison* • *Kokesh* • *Huntington*
Control	• Can the Executive control the litigation? • Does the litigant remain accountable to the public and are there checks to prevent interest-group capture? • Has the executive been excluded from vindicating that right in parallel?	• *Morrison* • *Amtrak* • *Vermont Agency; Ex rel. Polansky*

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1. Statutory Authorization

The first, and most prominent, theme that emerges both from the history and doctrines is that private suits do not necessarily interfere with Article II unless they proceed with the express—and perhaps in some cases, the implicit—imprimatur of governmental authority. In other words, statutory provisions that give private parties the power to prosecute a claim *on behalf* of the government raise the most direct constitutional questions. The clearest examples are *qui tam* actions and statutes expressly vesting federal prosecutorial authority in legal officers who sit outside the purview of the executive branch, such as special prosecutors. When Congress authorizes individuals to sue as agents of the United States—as it in *qui tam* claims—it gives them authority to act with the imprimatur of executive power, which can encroach on the executive's prerogative to "Take Care that the laws be faithfully executed." Both case law and scholarship attach great weight to the statutory label of the private actor. A statute that delegates the authority to sue on behalf of the United States also vests the traditionally exclusive imprimatur of federal executive authority. The formal assignment of the right to sue to a private litigant, as one scholar has noted, is far from "merely cosmetic."[292]

Let's begin with *qui tam* claims. In *Vermont Agency*, the Supreme Court focused almost exclusively on a relator's power to file suit *on behalf* of the United States. The Court homed in on this question mostly to assess whether the government's standing could be assigned to the relator. But, arguably, the delegation of governmental authority to a private party should also be probative of the core question that the Court dodged: whether *qui tam* actions violate Article II. *Vermont Yankee* posits that *qui tam* is constitutional only if it establishes a principal-agent relationship between private civil litigants and the government.[293]

But it is not so clear that the same logic would apply to other private litigants who do not formally sue on the nation's behalf. Recall that the Court's concern in its cases concerning interference with prosecutorial discretion has been that private individuals should not be able to make the executive sue.[294] And the civil statutes at issue in *Heckler v. Chaney* and *Buckley v. Valeo* each concerned mandatory provisions that required the executive to sue—in the name of the government—upon the application of a non-executive entity.[295] For those rights of action, state-action doctrine points to an additional inquiry: the creation of an *implied* agency relationship between Congress and the private litigant based on apparent authority. Private individuals who exercise apparent authority might be said to be, in effect if not by delegation, suing on behalf of the United States and thereby interfering with the executive's exclusive prerogative. A similar inquiry—one rooted in cases like *Edmonson*—might identify

[292] Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 97 (2010).
[293] Such a relationship ensures that the executive is still the principal and the *qui tam* relator merely an agent. *See* Gilles, *supra* note 86 at 351.
[294] *See Confiscation Cases*, 74 U.S. 454, 458 (1868); Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 142 (1976); Morrison v. Olson, 487 U.S. 654, 662 (1988).
[295] *See supra* notes TK.

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some narrow class of private litigants acting without express authorization who may still be acting as improperly appointed executors of law.[296]

In evaluating whether a private suit infringes on the Take Care Clause, the place to begin may therefore be the form of the delegation to the private litigant, formalistic as it may be. This rule may also extend to a very narrow subset of cases in which the tie between the Executive and the private litigant is so strong that an agency relationship can be implied.[297]

2. Right

Taken together, the doctrines also focus on the nature of the right being vindicated. Lawsuits that assert rights shared by the political community might be understood as within the Executive's exclusive prerogative, while those that assert individually held rights (such as most civil rights) can be understood as properly brought by private individuals, even if their assertion of those privately held rights ultimately produces public benefits. Although the concepts are similar, this form of inquiry is distinct from whether a party has suffered individual injury for the purposes of determining her standing to sue. Take, for example, *Laufer*, the ADA tester case. Laufer may not have suffered an individual injury for standing purposes because she filed her lawsuit against a hotel she may not have had any intention to visit. But the underlying right she asserted—the right to be free from discrimination pursuant to the ADA—is best understood as an individually held, rather than a communal, right. Contrast this with a *qui tam* litigant who files a False Claims Act lawsuit against the hotel for its fraudulent use of accessibility-focused tax incentives. That litigant may have standing because he shares a monetary interest in the statutory remedy (as the Court recognized in *Vermont Agency*), but the right he asserts—to be free from fraud—belongs to the government or to the public, not to the private litigant.

To get at whether the right being asserted is private or public, we may look both to Nondelegation doctrines and to Article III's Private Rights Doctrine (though neither provide a clear or satisfying line). Albeit in different contexts and for different purposes, both doctrines attempt to distinguish private from public rights by looking to, among other factors, whether (1) the right of action interferes with a parallel and traditional governmental function, (2) whether it concerns an interest—such as in public property—traditionally held exclusively by the government, and (3) whether it invokes a government-created right or benefit.[298] Leah Litman has proposed another, similar way to conceptualize a private-public rights distinction, grounded in *Lujan*'s standing analysis: "that a suit attempts to vindicate public interests where it seeks to vindicate the interest in living under law—that is, in having people, private citizens, and government respect the law simply because it is the law."[299]

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[296] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991). .
[297] At the state level, Texas's S.B. 8 might resemble one such scheme.
[298] *See supra* Part IV.A.4–5.
[299] Leah Litman, *Taking Care of Federal Law*, 101 Va. L. Rev. 1289, 1305 (2015).

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3. Remedy

Several other doctrines look to the punitive nature of the remedy sought when distinguishing public from private suits: is it merely disgorging the wrongdoer of profits, compensating a private victim, or punishing the wrongdoing itself, much as a prosecution would? When a litigant seeks merely compensatory remedies, her lawsuit seeks to vindicate a private injury; but when her lawsuit requests punitive remedies, such as fines, that serve to punish the defendant but do not accrue to her personally, the lawsuit may serve to remedy a public harm of the form that the Executive ought to retain sole discretion over. And as the dispute in the horseracing case makes clear, a private party with the power to impose an injunctive remedy may be wielding traditional prosecutorial power of the kind mere monetary relief does not trigger.

As relevant to the Article III Public-Private Rights Doctrine, in interpreting punitive statutes, the Court has defined the term "penalty" as applying only when a punishment is imposed "for an infraction of a public law" and not one "for the purpose of redressing a private injury, even though the wrongful act be a public offense."[300] Where the underlying violation for which an agency extracts a payment from the wrongdoer is "committed against the United States rather than an aggrieved individual"—as is the case in a securities action that may proceed even where the victims do not support the prosecution—its prosecution is public.[301] And when that kind of public sanction is "intended to deter, not to compensate," it is further considered a penalty.[302] That is because under the Court's logic, a "violation" of the securities laws "is committed against the United States rather than an aggrieved individual," so that when the Commission seeks penalties "it acts in the public interest, to remedy harm to the public at large."[303] Another, rarely discussed doctrine adopts a similar formulation: in interpreting the "penal judgments exception" to the Constitution's Full Faith and Credit Clause, the Court has explained that whether a law is penal turns on "whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."[304]

Edmonson (the jury-selection case) approached remedy from a different angle: there, the Court noted that one factor in determining whether a private litigant has become a state actor is whether "the injury caused" by her actions to the opposing party "is aggravated in a unique way by the incidents of governmental authority."[305] That case suggests that the nature of the remedy the private litigant seeks (there, a racially biased jury) may be relevant not just as to whether it is compensatory or punitive, but also as to the extent to which the litigant draws on governmental resources and power to implement it. The logic suggests that particular types of injunctive actions requiring heavy Executive involvement (such as a DOJ-monitored

[300] Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 423 (1915).
[301] *See* Kokesh v. SEC, 581 U.S 455, 463 (2017).
[302] *Id.*
[303] *Id.*
[304] Huntington v. Attrill, 146 U.S. 657, 666 (1893).
[305] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) (citations omitted).

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consent order) may be particularly suspect, because the private litigant can be said to have acted much like the Executive by invoking ongoing federal governmental authority to enforce a given cause of action.

4. Control

The doctrines discussed above point to several additional, process-level considerations that can inform judgments about whether a private right of action interferes with the Executive's prerogative. They focus on who holds the ultimate reigns over the litigation and ultimately, the underlying issue. The relevant questions include (1) whether the Executive maintains ultimate control over the litigation and its outcome, either through specific executive-control provisions (such as in the False Claims Act's checks on *qui tam* actions) or through the mechanism by which the private litigant may be removed (perhaps in compliance with the Appointments Clause); (2) whether the litigant remains accountable to the public in the manner that the executive might be, or if there are other checks in place to prevent interest-group capture over the right of action; and (3) whether the executive may vindicate the underlying right in parallel to the private litigant.

This concern also appears in the standing cases. In *Friends of the Earth*, for example, the Supreme Court worried that the Clean Water Act's provisions permitting private plaintiffs to exact penalties paid out to the government could unconstitutionally constrain Executive power. The Court rejected the argument because "the Federal Government retain[ed] the power to foreclose a citizen suit by undertaking its own action," and that "if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to 'intervene as a matter of right' and bring the Government's views to the attention of the court."[306] The Court, in other words, recognized the potential Article II problem but rejected it in that case because Congress had given the executive sufficient control over the litigation.

V. Impermissible Private Enforcement

The concerns that the Article II challenge identifies do not fit neatly with history or doctrine, though there are some general areas of overlap. We address them before laying out our understanding of the narrow scope any Article II challenge must take: if there is anything to an Article II critique of private enforcement, it should extend only to those private rights of action that (1) extract punitive or quasi-criminal remedies, or (2) invoke an interest in government property. (Though we continue to research the possibility that there may be some support for a third, more flexible category of impermissible private enforcement in cases where the private enforcement mechanism crowds the executive out from parallel enforcement.)

A. Dismantling the Article II Challenge

[306] Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 188 n.4 (2000) (quoting 33 U.S.C. §§ 1365(b)(1)(B), 1365(c)(2)).

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The first set of concerns that the Article II challenge identifies—a concern that private litigants may interfere with prosecutorial discretion while proactively enforcing the law, does appear in the history but has not been historically treated as a separation-of-powers concern. Executive officials in the Founding Era exercised only limited prosecutorial discretion over criminal actions, and they had essentially no control over private suits for monetary awards authorized by statute. In fact, the financial incentives provided by penal statutes created a well-known class of "common informers" who actively searched for violations that could give rise to successful suits. Informers were not a popular group in England or America. But despite widespread distaste for informers, Founding Era jurists do not seem to have understood them as exercising executive power. Even legislative reform efforts sought to retain the "proactive" elements of *qui tam* enforcement. Founding Era lawmakers viewed overenforcement by private litigants as a policy problem to be remedied through legislation, rather than an unconstitutional intrusion on executive power.

Doctrinally, however, modern courts have been understandably concerned about infringement of the executive's prosecutorial discretion. The concern motivates at least two areas of doctrine. First, the Court has referred to Article II concerns in its standing decisions that concern organizational plaintiffs—those well-resourced to go fishing for violations of law in areas where the executive may exercise more caution or enforcement discretion. The canonical case is *Lujan*: there, the Court expressed concern that the Endangered Species Act gave anyone the ability to police "agencies' observance of a particular, statutorily prescribed procedure" for protecting species.[307] In the criminal and civil Article II cases, the concern about enforcement discretion is more explicit: the criminal prosecution cases, such as *Nixon* and *Morrison*, both express concerns about allowing private individuals to prosecute without deferring to the executive's enforcement discretion.[308] (Though in the civil enforcement cases, such as *Buckley*, the Court's Article II concern is limited to groups that make the *executive* sue—not merely where they may sue on their own.[309])

The Article II Challenge's second concern, that private plaintiffs should not be able to sue over violations of "*public rights*," such as "noncompliance with the law,"[310] has minimal support in history and doctrine when so broadly framed. It also assumes a clean public/private rights divide that falls apart when one considers public rights as held both by the political community and by private individuals within it. Historically, as detailed extensively in Part III, private rights of action have touched public rights of all kinds, including rights shared by the broader public community. The one area in which courts and the legislature have imposed more guardrails is the

[307] Lujan v. Defs. of Wildlife, 504 U.S. 555, 576-77 (1992). The implication, of course, was that environmental groups would employ such a provision to over-enforce a set of laws the Executive may seek to retain discretion over.
[308] *See* Part IV.A.a, *supra.*
[309] *See supra* Part IV.A.1.b.
[310] Brief for Center for Constitutional Responsibility, *supra* note 18,at 2.

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qui tam action vindicating an injury to the public fisc (here, even Hamilton worked to enable a workaround but eventually had to acknowledge that the executive had no power to interfere with the private action directly). As for the doctrine, as we detail in Part IV.B.2 above, both the nondelegation doctrines and the private rights doctrine do consider whether the right asserted is best described as public in nature. But to identify such rights, they look to whether the right interferes with a parallel government function (such as prison management) or concerns an interest held exclusively by the government—such as a right in public property. This does not sweep into its ambit "violations of law" more generally, including civil rights (which as we explain above, are held by individuals and may be enforced either individually or collectively).

The Article II challenge's third concern—*remedies*—was less relevant in history as it is in modern doctrine. In the Founding Era, colonial assemblies and state legislatures frequently relied on private enforcement to protect public resources (like commons land or fisheries) and deter conduct harmful to the public at large (like pollution from tanneries, or the fire risk posed by gunpowder stores). And all "popular statutes," whether state or federal, afforded a remedy to any member of the public who could prove the violation in court. These included injunctive remedies that would halt the challenged conduct, and often included fines that would be paid out in part to the public fisc. As a modern jurisprudential concern, however, the public versus private nature of the remedy rears its head across the cross-doctrinal areas that we have identified in case law touching on Article II. Both state-action doctrine and the Article III public-private rights doctrine consider the nature of the remedy a party seeks in determining whether the private party is acting in a manner that displays incidents of, or encroaches with, executive authority.

B. Three Narrow Zones of Encroachment

Our review of the landscape of private enforcement, the history of these actions, and the doctrinal concerns that courts have articulated support at most a narrow zone in in which private enforcement may infringe on Article II's Take-Care Clause: where there the private civil enforcement action (1) approaches criminal enforcement—a distinction that mostly turns on remedy, (2) enforces a public property interest held exclusively by the government, or potentially (3) crowds the executive out from enforcement. Beyond these narrow zones, Congress may vest in private individuals the authority to bring private rights of action, even for injunctive relief, without interfering with historical or doctrinal understandings of the Take Care Clause.

1. Punitive, Quasi-Criminal Private Prosecutions

Both historically and across doctrinal areas, courts have treated criminal punishment as a distinctly executive function. Although private prosecution was the norm in the early colonies, several colonies by the Founding had to turn to a public

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prosecution model,[311] and there is some historical evidence that the extraction of punitive remedies was identified as an executive prerogative by then—though as Peter Shane has pointed out, this may speak more to the authorization, and not the exclusive prosecutorial power of, prosecutors.[312]

Modern jurisprudence, too, considers criminal punishment as a unique—though not necessarily exclusive—province of the executive. In cases across doctrines in which the Court has expressed concern about private involvement in civil litigation, the Court has emphasized the extraction of punitive remedies as a uniquely executive prerogative.[313] In both *Nixon* and *Morrison*, for example, the Court asserted that criminal prosecutions are squarely executive in nature, and required private individuals engaging in such prosecutions to be held accountable to the Executive—in those cases, by requiring their appointment be consistent with the Appointments Clause.[314] arCauses of action that extract a punitive public remedy—such as damages paid directly to the public fisc as punishment or injunctive actions that approach the power to jail—may be constitutionally suspect if the statute is designed with few practical limitations on the way in which a cause of action can be brought and procedures by which the executive can exert some control over it. Yet this concern is not necessarily cross-doctrinal, as the Court's comfort with and protection for state executive enforcement of federal criminal law undermines the argument that the Take Care Clause commands that the federal executive exclusively enforce federal law, including criminal law.[315]

Even so, there are strong normative reasons to recognize this limitation, the precise contours of which will need to be fleshed out in future scholarship. Such a line, if drawn narrowly, might functionally separate punitive components of remedies for traditionally private tort-like suits from those that extract public benefits in the name of the people. It may also be consistent with the conclusions of scholars considering delegation in political legal theory that the power to delegate violence is uniquely problematic.[316]

2. Suits to Enforce Government-Held Property Interests

Both history and doctrine support that to the extent that the executive has a sole prosecutorial prerogative in the civil context, it may include protecting and enforcing the property of the United States, because the interest at stake in those cases is not shared diffusely by the public, but held entirely and concretely by the

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311 *See supra* note 183 and surrounding text.

312 *See* Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241, 259 (2019); *supra* notes 196-200 and accompanying text (discussing two cases in Early Republic suggesting that informer's actions were in substance "civil" because they carried only monetary penalties, rather than threat of imprisonment.)

313 *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2194 (2020) (identifying criminal prosecution as a "core executive power").

314 *See supra* Part IV.A.1.a.

315 *See id.*

316 Jacob D. Charles & Darrell A. H. Miller, Symposium, *Violence and Nondelegation*, 135 HARV. L. REV. F. 463 (2021).

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government. It is, in other words, an interest held by a singular and identifiable public entity, rather than one experienced by private individuals in the manner a Clean Air Act violation may be. Rights of action to vindicate that interest must, as many *qui tam* provisions already do, subject the private action to some form of executive oversight.[317]

Historically, the evidence on this is somewhat mixed. Early colonial America's grazing and yoking laws enabled private citizens to police public commons with little to no restrictions.[318] And as the *Dodge* example illustrates, the executive in early America could not prevent a private plaintiff from bringing a prosecution based on injury to the public fisc—but it *could* prohibit a private plaintiff from enforcing the portion of the damages meant to be paid out to the public fisc.[319] Hamilton's concern in the *Dodge* example illustrates that at the founding, concerns about private enforcement as encroaching on executive power appeared only when a private litigant claimed to be vindicating a harm to the public fisc.

Doctrinally, too, this distinction could make sense of some discrepancies. It would resemble the flipside of Sarah Leitner's solution, and would, in line with Justice Thomas's separate writings in *TransUnion* and *Spokeo*, treat injuries to property as limited to those who own an interest in that property: just as an individual may not sue to vindicate an interest in another's privately held property without the property-owner's authorization, so too she cannot sue to vindicate an interest in government property without specific authorization. The Penal Judgments Exception to the Full Faith and Credit Clause, too, views the executive interest in protecting government property as core to executive power.[320]

Qui tam provisions as they exist today offer the perfect example. The False Claims Act—the classic and most invoked federal *qui tam* right of action—*expressly authorizes* private relators to sue on behalf of the government in order to recover for fraud on the government—in other words, to recover an injury to the public fisc.[321] And it is these *qui tam* actions that have come under the most direct doctrinal scrutiny, first in *Vermont Agency*—where they survived only because of the statutory form of the delegation to the relator to sue directly on the government's behalf—and then as the target of Justice Thomas's dissents. Scholars, too, have treated *qui tam* actions with suspicion, carving them out as though they are separate from the classic private right of action. But the distinction that makes certain *qui tam* suits a threat to Article II is that they grant private litigants the remarkable authority to vindicate harm to the federal government's property (in the False Claims Act, that property is the public fisc; in parts of the Indian Protection Act, it is Native land). Such provisions, then, implicate nearly every cross-doctrinal concern identified in Part IV.B: they (1) formally grant the litigant the authority to sue on behalf of the United States, (2) involve a claim not to a

[317] But keep in mind that the 1863 False Claims Act did not subject *qui tam* claims to complete executive control. That change came later on in the history of *qui tam*. 31 U.S.C. §§ 3729 – 3733.
[318] *See supra* Part III.B.
[319] *See id.*
[320] Huntington v. Attrill, 146 U.S. 657, 669 (1892) (quoting Rafael v. Verelst, 2 W. Bl. 1055, 1058).
[321] *See* 31 U.S.C. § 3729 *et seq.*

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publicly distributed interest in the manner a civil rights statute might, but rather to a concretely held public property interest, and (3) may obtain injunctive and punitive remedies (indeed, False Claims Act treble damages are unique in their public and punitive purpose). The only backstop, and one the Supreme Court interpreted and emphasized in *Polansky*, is the extensive manner in which the False Claims Act now permits the Executive to (4) control the private litigant.[322]

3. Crowding Out the Executive

There is some support in the doctrine and history for a final Article II backstop: that Congress cannot *crowd out* the executive from enforcing or otherwise influencing in some way the judicial interpretation of a statute in parallel to private litigants. The main historical support for the backstop is that the King, governors, and President could always pardon a penal statute violation *before* anyone filed a claim.[323] This gave the executive some way to limit these claims. Still, this was likely an extremely narrow power because, as a practical matter, the executive likely could not learn about violations of penal statutes until an informer filed a claim.

The doctrine, too, seems to support the existence of a backstop. Return to Grove's argument that Article II "prohibits the delegation of the Executive Branch's duty to see that federal law or *an area of federal law is obeyed*."[324] Article II may therefore safeguard some role for the executive to influence how federal law is obeyed, even if indirectly. That is why in *Friends of the Earth*, the Supreme Court at first worried that the Clean Water Act could unconstitutionally constrain the Executive power. But the Court rejected the argument because "the Federal Government retain[ed] the power to foreclose a citizen suit by undertaking its own action," and that "if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to 'intervene as a matter of right' and bring the Government's views to the attention of the court."[325] The Court, in other words, recognized the potential Article II problem but rejected it in that case because Congress had given the executive sufficient control over the litigation.

Congress has also supported the Article II backstop by giving the executive specific enforcement power in almost every private enforcement regime. We might interpret this as Congressional understanding of the constitutional limits of its own power—relevant for liquidation and other interpretive methodologies. As David Engstrom points out, "private enforcement has seen some of its most rapid growth in areas like securities, antitrust, and job discrimination, where public actors already possess substantial regulatory and enforcement authority."[326] As far as we can tell, Congress almost never creates exclusively private enforcement regimes. Not only does Congress empower agencies and the President alongside private enforcers, it also explicitly gives the executive a way to influence private enforcement cases. For

[322] United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 424 (2023).
[323] *See, e.g.*, Vanderbergh v. Blake, 145 E.R. 451 (Hardres 194, 199) (1673).
[324] Grove, *supra* note 106, at 783–85.
[325] A quantification is forthcoming.
[326] A quantification is forthcoming.

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instance, Congress sometimes gives the executive the power to intervene in private claims, to disempower private plaintiffs (e.g., *qui tam*), to require notice before a private claim is filed, or to require a "license" from an agency before a private lawsuit can proceed.[327] Congressional action, then, seems to support the existence of some constitutionally protected role for the executive.

A concern with retaining *some* way for the executive to influence an area of federal law also finds some support in the doctrinal axes identified above. As discussed above, the Court has expressed concerns about encroachment upon Article II when a statute (1) expressly authorizes private litigants to sue on behalf of the United States, (2) does so for the vindication of a publicly held interest, (3) imposes a punitive remedy paid out to the public, or (4) fails to grant the Executive sufficient control to shape the law.

There are two ways to conceptualize a crowding-out test:

The first, narrow version would limit Congress' power to create exclusively private enforcement regimes. The Texas anti-abortion statute, S.B. 8, is a good example of such a regime, even if it is at the state level. In that statute, Texas not only empowered "any person" to sue abortion providers but also prohibited any state officials from enforcing the law. It therefore simultaneously empowered private litigants to enforce a law while expressly *excluding* the executive from doing so. Were Congress to simultaneously empower private plaintiffs in an area of public law and *prohibit* federal officials from both (a) exercising control over the private lawsuits (by pardon or dismissal) and (b) enforcing that same law in parallel, it would potentially violate Article II.[328] Of course, the distinction between complementing and replacing executive enforcement may in practice be more a distinction in degree than in kind.

The second, more robust version could obligate Congress to affirmatively give the executive both parallel enforcement power *and* the ability to influence private enforcement cases. Under a more expansive reading of Article II, whenever Congress creates a private enforcement regime it would have to give the executive some form of input into private lawsuits: either the ability to intervene, to "license" private parties before they file lawsuits, or some other method to effectively influence the enforcement of federal law. Congress could, for instance, ward off any Article II concerns by inserting a rider into each private right of action that gives the executive some sort of power to step in with *nolo prosequi* authority.[329] Such a robust conception of Article II could ensure that the executive retains an effective, pardon-power-like ability to restrict private rights of action that run amok. Given that the pardon power is constitutionally confined to criminal cases, however, the primary support for any

[327] A quantification is forthcoming.

[328] *Cf.* Ex parte Young, 209 U.S. 123, 159-60 (1908) ("If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct.").

[329] We thank Amanda Tyler for the language here.

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such backstop would be a set of normative, policy-based concerns. Although the actions of testers pursuant to the ADA comes close, Congress did include several provisions that gave the executive power to influence those cases. Moreover, under the ADA, individuals ultimately bring an individualized right—the right to be free from discrimination—and so do not raise the concern with private claims over purely public injuries.

Even if there is some weak form of Article II backstop, both of these options are a far cry from the Article II challenge. Neither would limit Congress' power to empower private plaintiffs. Rather, the crowding-out concern would limit Congress' power to directly (and in some rare cases, indirectly) limit the *executive*. This will rarely justify striking down a statutory regime, because Congress typically gives the executive specific enforcement power in nearly every private enforcement regime.

* * *

An assessment of this proposed test against the federal rights of action that we quantified in Part I.A has confirmed our understanding that Congress has closely avoided the zones of encroachment that we identify. Nearly every private right of action that we identified extracts only private or non-punitive public remedies, and the few that enable private litigants to assert the government's property interests—most prominently, the Federal Claims Act—contain provisions enabling executive control over the right of action.[330] Our dataset reveals a few novel statutory provisions that may pose an Article II problem. The Telecommunications Act, for example, contains a provision enabling certain broadcast stations to sue satellite carriers that broadcast content without authorization—a harm to the public. But as a condition for collecting statutory damages, the broadcaster must stipulate that the station will "donate the full amount in excess of $1,000 of any statutory damage award to the United States Treasury for public purposes."[331] In other words, Congress has deputized broadcasters to collect statutory awards payable directly to the government as punishment for a civil violation. This potentially implicates our first zone of encroachment (the second zone remains untouched, as the injury here is to public broadcasting, not to any governmental property interest). This unique enforcement scheme may be unconstitutional pursuant to Article II. Little else is.

Conclusion

As it begins to reemerge, the Article II challenge to private enforcement is plausible and perhaps even compelling. But there is little historical support for any separation-of-powers limitation on private rights of action, and doctrines addressing the subject do not identify any single attribute of private rights of action that mark them as threats to Article II. We argue that while there is something to the Article II challenge, it must be limited in application to private rights of action that extract punitive remedies or claim injuries to government property interests without a

[330] A quantification is forthcoming.
[331] 47 U.S.C. § 325.

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mechanism for meaningful executive control over the underlying action. Beyond that narrow sliver, private rights of action need not be placed under a microscope.

Defendants may of course turn to other constitutional arguments that this article does not address, including arguments grounded in the Eighth Amendment and the Due Process Clause. First, it is at least conceivable some types of private statutory claims implicate the Eighth Amendment's limitation of "excessive fines." The Supreme Court technically left this question open in *Browning-Ferris Industries v. Kelco Disposal*, and the broad meaning of "fine" in the Founding Era might support applying it to certain private rights of action that extract stiff monetary penalties. Second, the Fifth and Fourteenth Amendments bar the state and federal governments (including courts) from depriving "any person of life, liberty, or property, without due process of law." One can conceive of, and there may be some historical support for, a potential due process problem with private enforcement of criminal law—i.e., private prosecution of offenses which could lead to imprisonment or corporal punishment. After all, by the time of the Founding (and certainly by the adoption of the Fourteenth Amendment in 1868) many American jurisdictions had rejected the English tradition of private prosecution.

The final backstop, then, lies with Congress. One particular concern with Laufer and with testers more generally is that while they may often serve the public and root out instances of civil-rights violations, they could become motivated by the perverse prospect of settlement.[332] The ADA's right of action, for example, provides only injunctive relief and attorney's fees, but serial testers sometimes offer to settle immediately for cash—one notorious tester filed hundreds of boilerplate complaints accompanied by $10,000 settlement offers for "attorney's fees."[333] This may resemble the illegal "compounding" of eighteenth century informers. But as then, the concern is not that our constitutional structure cannot bear testers. It is that testers may develop financial motivations of the same kind that concerned some quarters at the founding. As then, the solution lies in statutory design: amending civil-rights statute to cap serial settlements by repeat litigants would ameliorate that concern while retaining a critical component of modern civil-rights law.

[332] The law and economics literature has always discussed this problem. *See* K. Elzinga & W. Breit, THE ANTI-TRUST PENALTIES: A STUDY IN LAW AND ECONOMICS (1976); Landes & Posner, The Private Enforcement of Law, 4 J. LEGAL STUD. I(1975); Polinsky, Private Versus Public Enforcement of Fines, 9 J. LEGAL STUD. 105 (1980); Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 STAN. L. REV. 1125 (1970).

[333] Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 7 (2023) (Thomas J., concurring).

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Appendix A: Typology of Private Enforcement

Model	*Investigator*	*Prosecutor*	*Examples*
Public law enforcement	State	State	• Criminal law[334] • Antitrust enforcement actions
Private reporting regimes	Private citizens	State	• Informal report-thy-neighbor regimes[335] • Whistleblower regimes • Moiety Acts
Outsourced investigatory regimes	Private entity contracted by the state	State	• Bail bondsmen models • Criminal investigations conducted through third-party actors[336]
Parallel public enforcement regimes	State or Private citizens (though often must exhaust public remedies)	State or Private citizens	• California Consumer Protection Act[337] • California's PAGA • *Qui tam* suits • Environmental civil enforcement actions • public-private board arrangements • Piggyback and reverse piggyback suits • State governments hiring private law firms • "Tester" suits
Private law enforcement	Private citizens	Private citizens *only*	• Texas's S.B. 8 • Nuisance actions • Breach-of-contract suits

[334] *See, e.g.*, *Cruz v. Arizona*, 598 U.S. _ (2023).

[335] *See, e.g.*, Joe Yurcaba, *Texas Governor Calls on Citizens to Report Parents of Transgender Kids for Abuse*, NBC NEWS, https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-governor-calls-citizens-report-parents-transgender-kids-abuse-rcna17455 ("Texas Gov. Greg Abbott is calling on 'licensed professionals' and 'members of the general public' to report the parents of transgender minors to state authorities if it appears the minors are receiving gender-affirming medical care."); Huq, *supra* note 3, at 21 (describing historical racial reporting regimes dating to the Jim-Crow era, including vagrancy statutes).

[336] One key example of this phenomenon is the FBI's frequent reliance on private actors to assist with investigations. *See, e.g.*, Ellen Nakashima, *FBI Paid Professional Hackers One-Time Fee to Crack San Bernardino iPhone*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html.

[337] For a description, see Charles W. Rhodes & Howard Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators*, 71 AM. U. L. REV. 1029 (2022).

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Appendix B: Primary Source Guide

[*Note to the Reader*: Our piece cites a number of Founding-Era treatises, newspapers, dictionaries, and statutes; most are publicly available in their original format through Google Books, Haithi Trust, and Archive.org. We think that scholars should be more transparent about the use of these sources—as they have become accessible to a wider audience, more and more articles and amicus briefs deploy them without the appropriate context. Accordingly, we plan to prepare an appendix of primary sources for the final version of the article to help the reader locate the works we cite in reliable online editions. We hope this will also facilitate the editorial review and citation process (since we know that these sources can also be difficult for editors to locate).]

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Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World

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PUBLIC LAW LITIGATION IN EIGHTEENTH CENTURY AMERICA: DIFFUSE LAW ENFORCEMENT IN A PARTISAN WORLD

James E. Pfander.*

Abstract

For some time, the Supreme Court has used standing doctrine to limit the authority of federal courts to entertain private suits aimed at enforcing public norms. In its most recent iteration, *TransUnion LLC v. Ramirez*, the Court invalidated a federal consumer protection statute on the theory that it wrongly empowered suit by individuals who lacked the requisite injury in fact. Shutting down private litigation was said to advance separation of powers values and to protect the enforcement discretion of a unitary executive branch. The Court characterized private enforcement as a novel feature of the 1970s, a time the Court viewed with evident suspicion as one that inaugurated interest group litigation.

In truth, the tradition of interest group enforcement of public norms extends to the earliest days of the Republic. During the 1790s, Quakers and other anti-slavery activists secured federal legislation prohibiting American involvement in the international trade in enslaved people. Like other legislation of that period, the 1794 statute empowered both the federal government and private informers to enforce the law. The ensuing litigation, brought by private informers associated with such groups as the Providence Abolition Society, led to the forfeiture and sale of the offending vessels in the admiralty courts of Rhode Island and elsewhere. Drawing on federal archives, this Article recounts a history in which all three branches of the federal government – Congress, courts, and executive branch officials – viewed private litigation through what were called "popular" actions as an uncontroversial tool for enforcing public norms. One finds no objections based on Article II or III of the Constitution

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INTRODUCTION

Ever since the NAACP led the Supreme Court to *Brown v. Board of Education*, we have lived in an interest group litigation world.[1] But the Court has lately followed a more restrictive approach. In *TransUnion LLC v. Ramirez,*[2] channeling Justice Scalia's opinion in *Lujan*, the Court concluded that Article III's standing requirements overrode the Fair Credit Reporting Act.[3] For the Court, the defendant's procedural wrongs, though made actionable by Congress, did not cause any concrete Article III harm.[4] No concrete harm, the Court intoned, no standing.[5]

Alongside injuries in fact, modern standing jurisprudence incorporates a muscular conception of unitary executive power.[6] Unitarian theories hold that Article II vests control over the exercise of law enforcement discretion in the President of the United States and in executive branch officials that answer directly to the President.[7] Such vesting limits Congress's power to authorize groups or individuals outside the executive branch chain of command to enforce federal law.[8] *TransUnion* explains that standing law protects

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[1] On the NAACP's role in *Brown v. Board of Education*, 347 U.S. 483 (1954), see Michael J. Klarman, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007); Richard Kluger, SIMPLE JUSTICE (1975); Mark Tushnet, BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION (1995).

[2] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

[3] *See* TransUnion, 141 S. Ct. at 2211-14 (quoting *Spokeo*, *Lujan*). For an overview of the Fair Credit Reporting Act and its role in data privacy protection, see Shawn Marie Boyne, *Data Protection in the United States*, 66 Am. J. Comp. L. 299 (2018).

[4] The credit reporting company, TransUnion, had violated the law by collecting damaging information about a group of consumers in a procedurally improper way. *See* TransUnion, 141 S. Ct. at 2208, 2211 (assuming that the company had violated the statute as to all 8000 members of the plaintiff class but noting that as to three-quarters of class members the company had not disclosed damaging information to third parties).

[5] *See* TransUnion, 141 S. Ct. at 2200, 2214.

[6] On the impact of unitarian thinking, see United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (invalidating administrative law judge independence as inconsistent with presidential control); Free Enterprise Fund v. Public Co. Acctg. Oversight Bd., 561 U.S. 477, 496-97 (2010) (invalidating limits on presidential removal); *cf.* Morrison v. Olson, (19) (Scalia, J., dissenting) (arguing that statutory provision for an independent counsel violates presidential control over the executive function of prosecution).

[7] For the view that prosecutorial discretion lies at the core of executive power, vested in the president by Article II, see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 701-04 (defining core power as that to execute the law); Ilan Wurman, In Search of Prerogative, 70 Duke L.J. 93, 143-53 (2020) (arguing that prosecution was a core executive power).

[8] *See* Allen v. Wright, 468 U.S. 737, 759-60 (1984) (questioning viability of suits to compel agency action to regulate other parties); Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (expressing concern that Congress could invade the president's duty to ensure faithful execution of laws by converting undifferentiated public interest in compliance with law into an individual right).

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executive enforcement primacy and prevents Congress from violating Article II.[9]

Whatever one might say about its wisdom as a matter of policy, the Court's use of strict standing rules to preclude private enforcement of public law cannot be defended on originalist grounds. In 1794, Congress enacted and George Washington signed a bill that prohibited American involvement in the international trade in enslaved people, legislation modeled on state statutes that those opposed to slavery had earlier secured in New England.[10] The 1794 federal legislation authorized private informers to enforce the law by bringing what were known at the time and described in the press as "popular" or "public" actions.[11] Private individuals were authorized to bring these actions, but they lacked any injury in fact within the parlance of modern standing law and held no office under the United States that empowered them to enforce public law.[12] While informers would share in the proceeds of successful litigation, their goal was to deter and denounce those who engaged in illicit commerce in people. As one contemporaneous news account reported, informer proceedings were brought "more to give sanction and efficacy to the law, than to mulct the violat[o]rs thereof."[13]

This Article tells the story of the 1794 Act, focusing on

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[9] *See TransUnion*, 141 S. Ct. at 2207 (asserting that Congress violates both Article III and Article II when it invests unharmed individuals with power to pursue claims in federal court; such litigation interferes with executive branch authority to calibrate the enforcement potency of a particular statute by investing private parties with enforcement discretion). Such Article II concerns have been a recurrent theme in the Court's standing jurisprudence. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. at 577 (rejecting congressional power to authorize private litigation as a violation of the president's Article II duty of faithful execution). *Cf.* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115, 1132-37 (11th Cir. 2021) (Newsom, J., concurring)

[10] *See* part II.B.

[11] For the history of popular actions, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1406–09 (1988) (arguing that standing law's injury-in-fact requirement was at odds with the early willingness of federal courts to hear suits brought by informers who sought bounties rather than redress of injuries personal to themselves). On the use of popular actions in Scotland as part of the Roman law tradition, see James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis,* 66 Duke L.J. 1493 (2017) (describing the civil law roots of the Scots' actio popularis, or popular action).

[12] On qui tam and informer litigation, see Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235 (2018) (tracing qui tam litigation to its fourteenth century origins in England); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. (1989) (defending qui tam suits from constitutional criticisms based on both Article II and Article III).

[13] *See* Stanton D. Krauss, NEWSPAPER REPORTS OF DECISIONS IN COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, at 507 (2018) (reproducing article from the Providence *Gazette*, Oct. 22, 1791). For an account of *Gordon v. Gardner*, see part I.B.

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enforcement proceedings in Rhode Island. There, a group of Quakers and like-minded activists founded the Providence Society for the Abolition of Slavery. The Society raised funds to support anti-slavery litigation, hired prominent lawyers, and enjoyed a measure of success in enforcing federal law. Digitized federal archives reproduce the formal papers in these cases, revealing as summarized in the Appendix the nature of the claims and the division of the proceeds.[14] In one early proceeding, the federal judge for Rhode Island entered a forfeiture decree against a leading merchant and politician, John Brown. Other proceedings followed, initiated by the Society, by other private informers, and by representatives of the federal government. Relatively intense enforcement during the late 1790s and early 1800s reduced the number of voyages to Africa.[15]

Like regulated industries today, Rhode Island merchants resisted federal control. In one early example of regulatory capture, Rhode Island merchants kidnaped a federal official to prevent his bidding at the public auction of a forfeited trading ship that the owners meant to repurchase on the cheap.[16] In a second example, merchants physically assaulted an informer who ventured to Rhode Island to enforce the law.[17] Finally, in an early example of revolving-door practices, President Jefferson placed an important Rhode Island district in charge of a customs official who had actively participated in voyages to Africa and showed scant interest in enforcing federal law against his former associates.[18] Coupled with Jeffersonian pardons that restored the freedom and property of convicted traders, friendly customs officials enabled merchants to resist public enforcement of the law.[19] "Politics," in the words of one observer, ultimately "triumphed over law."[20]

Whatever its ultimate success, the Providence Society's early foray into interest group mobilization illustrates early republic reliance on private enforcement of public laws.[21] Contemporary

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[14] See https://www.archives.gov/research (collecting digitized records of anti-slavery litigation in Rhode Island district court, 1787-1803).

[15] See Jay Coughtry, THE NOTORIOUS TRIANGLE: RHODE ISLAND AND THE AFRICAN SLAVE TRADE, 1700-1807 at 228-29 & Appendix (1981) (reporting a decline in voyages to Africa during period of intense federal enforcement up to 1803 and a subsequent increase in voyages following President Jefferson's appointment of a pro-slave-trade customs officer).

[16] *See* Charles Rappleye, SONS OF PROVIDENCE: THE BROWN BROTHERS, THE SLAVE TRADE, AND THE AMERICAN REVOLUTION 317-18 (2006) (recounting the kidnaping of one Bosworth to prevent his bidding at the auction of a vessel forfeited to the government)

[17] *See* note 150 infra (describing the assault on John Leonard).

[18] *See* notes 167-68 infra (recounting the appointment of Charles Collins).

[19] For Jefferson's pardons of Topham and Ingraham, see note 169 infra.

[20] *See* Coughtry, supra note 15, at 229.

[21] *See* Nicholas R. Parrillo, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 30-1 (2013) (describing regimes of bounties that

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constitutional actors – presidents, legislators, executive officials, federal judges – embraced private informers as part of a more robust administrative state.[22] Early acceptance of private enforcement complicates the originalist case for unitary executive control of the law enforcement function; indeed, the Society's work resembles public law litigation efforts today. As a potential counterweight to executive non-enforcement of the laws, reliance on popular actions may deserve a closer look in this age of partisan division.

This Article takes that look in three parts. Parts I and II describe the work of the Abolition Society, placing informer proceedings in historical context. Stepping back, part III suggests that the Abolition Society's role in enforcement of the anti-slavery provisions of the 1794 Act (like other early examples of informer litigation) poses an important challenge to the historical case against citizen suit standing. The Article concludes that, whatever the unitary executive and standing implications of Articles II and III, they did not disable Congress from allowing private citizens to enforce public laws banning the international trade in people.

I. INFORMER SUITS TO ENFORCE PUBLIC LAW

In chronicling America's failure to end slavery in the late eighteenth century, historians contrast the success of gradual emancipation in New England with the failure of abolition movements in the upper and lower South.[23] Religious groups, including the Society of Friends, or Quakers, played a central role in these abolitionist efforts.[24] In Rhode Island, Quaker meetings encouraged congregants to free enslaved people, and to support efforts to achieve broader reforms. In the spirit of broader reform,

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were either open to all comers or restricted to eligible office holders).

[22] For evidence that undercuts the conventional view of severe weakness in the administrative apparatus of the early Republic, see Jerry Mashaw, CREATING THE ADMINISTRATIVE CONSTITUTION (2012); William Novak, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Brian Balogh, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009).

[23] *See* William M. Wiecek, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 90-95 (1977) (describing the progress of gradual emancipation in the North, the failure of similar measures in Upper South, and the utter rejection of emancipation in the Deep South). Only Vermont, among early states entering the Union, prohibited slavery in its Constitution. *Id*. at 48. *See also* Gordon Wood, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 100-25 (2021); Edmund S. Morgan, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975); *Slavery and Freedom: The American Paradox*, 59 J. Am. Hist. 5 (1972).

[24] On religious groups in early abolition efforts, see Wood, supra note , at 100 (describing the Quakers' role in founding the nation's first abolition society in 1775); Wiecek, supra note , at 84-88 (describing the abolition societies as "intensely litigious").

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members of the Quaker meeting in Providence sought legislation that would end the participation of Rhode Island merchants in international human trafficking. Rhode Island had a substantial stake in oceangoing commerce, and many of its merchants participated in the international trade in enslaved people. Indeed, some estimates suggest that, during the eighteenth century, Rhode Island merchants were responsible for 60-90% of the American traffic in African people.[25]

Moses Brown knew the traffic well.[26] Son of a leading Providence merchant, Brown and his brothers had financed voyages to the African coast before 1776. But after joining the Quaker meeting, Brown denounced slavery, freed the people he owned, and joined with other Quakers to secure legislation in 1787 that sought to end Rhode Island's involvement in the international trade.[27] This part describes both the legislation itself and the way members of the Abolition Society used informer actions to secure its enforcement.

A. Litigating Rhode Island's Role in the Trade

Taking a page from English law books and religious societies,[28] the early abolition societies in the United States relied extensively on litigation to achieve their goals.[29] Freedom suits

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[25] Craig A. Landy, *Society of United Irishmen Revolutionary and New-York Manumission Society Lawyer: Thomas Addis Emmet and the Irish Contributions to the Antislavery Movement in New York*, N.Y. History 193, 202-09 (2014). See also Coughtry, supra note , at 25 (same). Cf. David Fitts, *The Volume and Structure of the Transatlantic Slave Trade*, Wm & Mary Q. (3d Ser.) 22 (2001) (Rhode Island merchants made around 1000 voyages to Africa in the eighteenth century, roughly half of the North American participation).

[26] See Rappleye, supra note , at 127-34 (describing Moses Brown's conversion from slave owner and merchant to abolitionist).

[27] On the passage of the Rhode Island law, see Rappleye, supra note , at 248.

[28] For an account of Granville Sharp's support of the *Somerset* litigation, see Wiecek, supra note , at 25-30. For the suggestion that Mansfield's opinion in the case does not expressly free slaves on their arrival in England, *see id*. at 32 (noting that the case centered on the legality of compelling a slave to return from England to a colonial world of servitude). For background on the anti-slavery movement in Britain, see Roger Anstey, THE ATLANTIC SLAVE TRADE AND BRITISH ABOLITION, 1760-1810 (1975). On the rise of abolition societies in the United States, organized locally within a loose national confederation centered in Philadelphia, see Wiecek, at 83-87. On the extension of such societies into Virginia and the upper South, *see id*. at 88-89.

[29] Religious societies had a complex relationship to informer-style litigation. In seventeenth-century England, religious groups were often the target of informer proceedings and only later came to use informer statutes to enforce public morals. When they did, they worked to rehabilitate the reputation of public-spirited informers by distributing manuals that relayed advice on how to "improve their self-presentation." For an account, Beck, supra note , at __ (quoting Jeanne Clegg, *Reforming Informing in the Long Eighteenth Century*, Textus XVII 337, 343-48 (2004)). On abolition societies in Virginia, see A. Glenn Crothers, *Quaker Merchants and Slavery in Early National Alexandria, Virginia*, 25 J. Early Rep. 48

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proceeded on trespass theories, contesting the legality of confinement and corporal punishment as tortious as applied to free individuals.[30] Much of the litigation was undertaken on a pro bono basis by sympathetic members of the bar, sometimes referred to as "counsellors" to the abolition societies of the day.[31]

Along with other New England states, Rhode Island in 1784 had adopted a statute providing for the gradual emancipation of enslaved people. Three years later, the adopted "An Act to Prevent the Slave-Trade and to Encourage the Abolition of Slavery," prohibiting any citizen or person residing in Rhode Island from any participation in the African trade.[32] The law was written in broad terms to proscribe those with any interest in a vessel (whether as master, factor, or owner) from acting to "buy, sell, or receive on board their vessel" with intent to cause to be imported or transported "any Natives or Inhabitants" of "that part of the World known as Africa" without their voluntary consent. Those convicted of violating the law were subject to a penalty in the amount of £100 for every person so transported and £1000 for every vessel used in the trade. Massachusetts adopted a virtually identical bill in March 1788 and Connecticut followed suit a short time later.[33]

The statute authorized broad enforcement, providing that the penalties were to be recovered by bill, complaint, or information, brought before the courts of the state. As for the proceeds of a successful forfeiture proceeding, the statute specified that one "moiety" would be paid into the general treasury of the state and the other moiety paid "to and for the use of the person or persons who shall prosecute for and recover the same." These were terms of art that were understood to authorize both government officials and

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(2005).

[30] *See* Wiecek, supra note , at 88-89.

[31] On the importance of counsellors to the abolition societies, see Wiecek, supra note , at 87 (identifying William Lewis, Jared Ingersoll, and William Rawle – all leading members of the bar -- as counsellors to the Pennsylvania abolition society); Moseley, supra note , at 55, 63 (describing counsellors as elected members of the society who provided legal services without charging a fee); Landy, supra note , at 201-02 (describing Thomas Emmet's appearance as counsellor in the Topham litigation, alongside Egbert Benson). Counsellors often came from the legal community's elite ranks, creating an anti-slavery bar comparable to public interest lawyers today.

[32] An Act to Prevent the Slave Trade and the Encourage the Abolition of Slavery (October 1787). For the text of the Rhode Island statute, see Appendix I.

[33] *See* Coughtry, supra note , at 206 (describing the migration of laws throughout New England banning the trade). The Massachusetts law specified penalties of £50 for every person so transported and £200 for every vessel used in the trade. *See* . Although these figures may suggest that Massachusetts effectively adopted a lesser set of penalties, Rhode Island had experienced substantial inflation, reducing the value of its emission of paper money.

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private parties to bring enforcement actions.[34] When such suits were successful, private informers would typically retain as a bounty half the proceeds. It was the bounty, rather than redress for an injury, that gave rise to the plaintiff's interest in the litigation.[35]

Moses Brown and his friends organized the Providence Society for the Abolition of the Stave Trade in February 1789 for the express purpose of privately enforcing the ban on participation in the trade.[36] Others have told the story of the Brown family, the decision of Moses Brown to join the Quaker meeting, his family's support for the creation of Brown University, and his activities as an abolitionist.[37] Correspondence and records from the early meetings of the Abolition Society reveal that members paid dues to a fund aimed at supporting anti-slavery litigation.[38] At the same time, the Society began a public relations campaign, aimed at persuading merchants to renounce the trade voluntarily.[39]

B. *Gordon v. Gardner*: Anti-Slavery's First Popular Action

The Society enforced an anti-slavery statute in *Gordon v. Gardner*, a suit to penalize owners of a vessel that had fitted out in Boston and conveyed over 100 African people into slavery.[40] According to news accounts, members of the Society attended the trial and were described by the defense attorneys as the "patrons of the suit" and the "real plaintiffs" in the action.[41] The jury returned a

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[34] *See* Beck, supra note, at 1254-56 (statutes were subject to qui tam enforcement if they gave part of a penalty to a private litigant who shall sue for it); *cf.* Adams v. Woods, 6 U.S. 336 (1805) (recognizing that the 1794 Act contemplates both criminal proceedings by information and civil proceedings by debt).

[35] *See* Marvin v. Trout, 199 U.S. 212, 225 (1905) (observing that the "right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer"); *see generally* Beck, supra note , at 1256 (quoting Hawkins treatise from 1721 to the effect that any person can bring a popular action).

[36] Rappleye, supra note , at 259-60 (describing the Society's organization in February 1789, after six Rhode Island ships cleared for Africa). *See also* Papers of the American Slave Trade Series A: Selections from the Rhode Island Historical Society, at 55-56 (describing the Society's founding, its minute book, and its organizational charter).

[37] *See* Rappleye, supra note , at 127-34; see also Coughtry, supra note , at 205-07, 259-60 (describing the Society's organization in February 1789, after six Rhode Island ships cleared for Africa).

[38] *See* Rappleye, supra note , at 260.

[39] Rappleye, supra note , at 261-67.

[40] *See generally* Rappleye, supra note , at 267-69. This Article's description of the litigation draws on news accounts in the Providence *Gazette* from October 1791 and the *Columbian Centinel* from November 1791. *See* Stanton D. Krauss, Newspaper Reports of Decisions in Colonial, State, and Lower Federal Courts Before 1801, at 507-12 (2018).

[41] Krauss, supra note , at 509 (reproducing the article "Slave Trade Law Case: Gordon v. Gardner," *Columbian Centinel*, Nov. 9, 1791); Coughtry, supra note , at 208.

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plaintiff's verdict for £200, a good deal lower than the amount demanded in the initial complaint or information.

Press accounts reflect broad interest in the trial but do not reveal arguments that such "popular actions" to enforce public law interfered with the role of government or were unfit for judicial resolution because the plaintiffs lacked standing to proceed on behalf of the public.[42] These were notable omissions: defendants were represented at trial by the Rhode Island Attorney General (Channing) and that state's deputy governor (Bradford).[43] From all that appears, no one challenged the judicial character of the proceeding or the ability of informers to bring suit to enforce a public law.[44]

Sure enough, when we consult treatises, we find that both England and New England often chose to supplement public enforcement of the law by authorizing private parties to take on enforcement duties as informers.[45] Popular actions of various sorts were also commonplace feature of litigation before the Scottish Court of Session.[46] For Blackstone as for the lawyers of the early Republic, arguments as to the perceived problems associated with the use of popular actions and informer proceedings were better addressed to legislative bodies than to the courts.[47]

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[42] See Krauss, supra note , at 508 (quoting the *Columbian Centinel*: "This was a popular action, grounded [on an act of the Massachusetts legislature]").

[43] *See* Coughtry, supra note , at 209. *See also* Krauss, supra note , at 508-09 (identifying counsel to the defendants as Channing and Bradford). Bradford's sons-in-law were Charles Collins and James DeWolf, both active participants in slave trade. *See* Coughtry supra note, at 209. Collins was later the choice of Thomas Jefferson to serve as the customs collector for the Bristol district. *See* note 167-68 infra.

[44] Intriguingly, Rotch pursued the claim in the name of Gordon, a local deputy sheriff whose appearance may have helped to ensure that any proceeds were duly shared with the Commonwealth of Massachusetts. On the role of sheriffs as public accountants, see James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 Ohio St. L.J. 493, 508 (2021).

[45] *See* William Blackstone, 3 COMMENTARIES ON THE LAW OF ENGLAND 160 (1765) (explaining that forfeitures "are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general"); *see also* 4 id. at 303-04 (describing the use of criminal informations as being pursued as a "sort of qui tam" proceeding, with one part of the penalty payable to the Crown and another "to the use of the informer"). Blackstone recognized that the prospect of popular enforcement creates a risk of multifarious proceedings. But once any one begins "a qui tam, or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others and conclusive even to the king himself." 3 id. at 160. For more on preclusive effect, see note 216-17 infra.

[46] *See* Pfander, supra note 21 (recounting reliance in Scotland on popular actions in equity as well as bounty-based informer litigation).

[47] *See* notes 21, 23 supra. The Court, in an opinion by Justice Scalia, embraced a narrow version of this history. *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 777 (2000) (invoking history in upholding one form of informer proceedings under the federal False Claims Act).

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The decision was notable, finally, for the reception it received in the newspapers of the day. The *Providence Gazette* ran a favorable notice. This was, the paper recounted, a "popular action" on behalf of the "Abolition Society" of this town in which the plaintiff relinquished the larger claim and settled for a smaller verdict.[48] The paper praised this "mild and humane" procedure.[49] Much the same message came through in the more complete account of the litigation that appeared in the *Columbian Centinel* in November 1791. After recounting the arguments and decision, the editors described the case as "important" to "humanity and to commerce," and expressed confidence that the paper's "faithful" account of the matter would "gratify" its readers.[50]

Rhode Island's reentry into the union in May 1790 complicated enforcement efforts.[51] The 1790s were thus a time of regulatory change, as state control of the waterfront gave way to federal regulators with uncertain power to secure the enforcement of state law. Perceptions of federal primacy may explain why the abolition societies pressed for national legislation.

II. INFORMER LITIGATION AND FEDERAL LAW

Shortly after the Constitution took effect and Congress convened to legislate the federal government into existence, the Philadelphia Society of Friends organized a petition drive to persuade Congress to ban slavery.[52] Supported by an aging Benjamin Franklin, the petitions laid bare a sectional divide. James Madison, member of the House of Representatives, sought a middle ground; he urged Congress to declare that its powers did not extend to freeing people from slavery but might well extend to certain aspects of international commerce.[53] This part tells the story of the adoption and early

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[48] *See* Krauss, supra note , at 508 (quoting *Columbian Centinel*, Nov. 9, 1791).

[49] *See* note 25 supra.

[50] *Id*. at 512.

[51] For an account of Rhode Island's overwhelming initial rejection of the Constitution, acting by popular referendum in 1788, and its narrow vote in convention to ratify two years later, and see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475, 527-28, 538-39 (1995). Congress wasted little time adopting legislation to establish federal customs districts in Rhode Island and to extend the Judiciary Act to Rhode Island. *See* 1 Stat. 126, ch. XIX (June 14, 1790) (federal customs districts); 1 Stat. 128, ch. XXI (June 23, 1790) (federal courts).

[52] On the 1790 petition drive, and Franklin's role, see Wiecek, supra, at 94-6. For an imaginative reevaluation of the 1790 petition drive and the underpinnings of the pro-slavery federal consensus it seemingly confirmed, see Maeve Glass, Slavery's Constitution: Rethinking the Federal Consensus, 89 Ford. L. Rev. 1815, 1832-37 (2021).

[53] The final House resolution, reaffirming the federal consensus, explained that Congress had "no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States." Wiecek, supra note , at 95. But the House nonetheless recognized

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enforcement of legislation that tracks Madison's suggestion.

A. Prohibiting American Involvement in the Slave Trade

The failure of the 1790 petition drive set the stage for a second, more successful, round of petitioning in early 1794. By then, the federal government had moved from New York to Philadelphia and was embroiled in debates over how to address the foreign policy implications of the French Revolution.[54] Many have speculated as to why this second round of petitioning bore fruit. Some credit President Washington's growing personal antipathy to slavery; Washington met with Quaker petitioners and presented their anti-slavery petition to Congress.[55] Others argue that the law was largely symbolic, reflecting a congressional desire to exercise some control over trade and commerce in a world where American shipping faced threats from both French and British combatants.[56]

One might also observe that the legislation represented an early example of sectional compromise over issues related to slavery that conformed to what historians refer to as the federal consensus.[57] Perhaps one might best understand the law in the terms Massachusetts Senator Henry Cabot used: the 1794 Act would affect "the citizens of our northern states, not those of the south." Noting the existence of state-law prohibitions and expressing a desire "to give force to those state laws," Cabot explained the importance of obtaining a "federal regulation" to "help back up the state

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that Congress might restrict American participation in the trade of enslaved people to foreign ports. *Id*.

[54] Pursuant to the Residence Act of 1790, Congress convened in Philadelphia in December 1790 and would remain there until its move to the District of Columbia in 1800. *See* 1 Stat. 130 (1790). On the political impact of the French Revolution and Citizen Genet's trip up the Eastern seaboard of the United States, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM, 1788-1800, at 330-54 (1993); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 174, 181-89 (2009).

[55] Quakers came to Philadelphia to lobby Congress and gained an audience with President Washington, who later presented their memorial to Congress. See Rappleye, supra note , at 297. On Washington's views of slavery, and his decision to free his slaves upon his death, see Akhil Reed Amar, THE WORDS THAT MADE US 649-52 (2021) (describing Washington's growing concern with slavery). *See also* Wood, Empire, supra note , at 525 (describing Washington's attitude toward slavery and his role in supporting the 1794 Act).

[56] *See* Sarah A. Batterson, "An Ill-Judged Piece of Business": The Failure of Slave Trade Suppression in a Slaveholding Republic 12 (2013) (unpublished ph.d dissertation on file with author) (linking act of 1794 to military conflict between Britain and France and the American desire to preserve neutrality while asserting regulatory control over the merchant marine).

[57] The consensus held that the federal government was to defer to state decisions as to the legality of slavery. See Wiecek, supra note , at 94-96; Glass, supra note , at 1832-37.

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enforcement machinery."[58] In short, the law did less to introduce a new set of policies than to facilitate federal enforcement on the waterfront.

Like the New England laws, the 1794 Act prohibited persons from fitting out vessels in the ports of the United States for the purpose of transporting enslaved people.[59] The act subjected any ship or vessel so fitted out to forfeiture in any federal court for the district in which it was seized and prosecuted. Apart from condemnation of the vessel, the act also imposed penalties of $2000 on each of the individuals involved in preparing a ship for an enslaving expedition to Africa. Finally, irrespective of whether the voyage began with vessel preparations in the United States, the act subjected citizens of the United States who participated in the trade to a fine of $200 for every person taken on board a ship for transportation into slavery. Like the enforcement provisions in the New England statutes, the act provided that any fines imposed would be divided, with one "moiety" to the use of the United States and the other moiety "to the use of him or her who shall sue for and prosecute the same." Both federal officials and abolition societies could bring suit to enforce the law against private merchants.

The 1794 Act reflects a remarkable consensus as to the legitimacy of no-injury private informer litigation. The Providence Society had procured and enforced similar laws in New England, relying on private informer litigation. The federal law was modeled on New England legislation and specifically provided for the payment of bounties to informers who successfully prosecuted a violation of the law.[60] Congress and the President both apparently agreed that there was nothing amiss in authorizing such private enforcement. Litigation to enforce the new law in Rhode Island and elsewhere, the subject of the next section, would confirm that the federal courts shared the consensus view that private informers were proper parties to enforce public norms.

B. Enforcement in Rhode Island Federal Court

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[58] *See* Rappleye, supra note , at 298 (quoting Henry Cabot). Cabot explained that the proposed act would not affect "the character of the servitude . . .of persons in the United States." Instead, the "measure affects the citizens of our northern states, not those of the south." All of the northern states have barred involvement in the trade. "In order to give force to those state laws, it is desired that a federal regulation be obtained which will help back up the state enforcement machinery." While one historian doubts Cabot's explanation, Rappleye, supra, at 298, one must recognize that federal officers, running the customs houses, may well have lacked authority to enforce state penal laws directly. One can also question whether state laws remained in effect and enforceable after control of seagoing commerce passed to the federal government.

[59] See 1 Stat. 347, 3d Cong., 1st Sess. ch. 11 (March 22, 1794).

[60] Id. at § 2.

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If responsibility for enforcement of the 1794 Act was shared between federal officials and private informers, the federal government was slow to commence prosecutions. Enter the abolition societies. Initiating a claim in March 1797, nine members of the Providence Abolition Society brought the first successful prosecution under the new law, targeting the Providence-based merchant John Brown, brother of Moses Brown.[61] The Society's members financed the litigation, much the way they had underwritten the Massachusetts state court proceeding in *Gordon v. Gardner*.[62]

At the same time they were pursuing Brown, the Society also initiated claims against a second leading merchant, Cyprian Sterry.[63] Unlike Brown, Sterry sought to negotiate a resolution of the claims against him. By July 1797, Sterry and the Society had come to terms; he would renounce the trade and the Society would drop its claims. Historians report that Sterry was as good as his word; in later years, his name does not appear on ship registers or cargo manifests associated with voyages to African ports.[64] Brown, by contrast, refused to broker a deal with the Society. His refusal may have had the backing of other merchants in Rhode Island, some of whom reportedly encouraged Brown to make a test of the new federal law.[65]

In the first phase of the proceeding, the federal judge issued an order for the condemnation and sale of the *Hope* under section 1 of the 1794 Act.[66] Later, the Providence Abolition Society sought to recover the substantial fines and penalties specified for violation of sections 2 and 4 of federal law. The evidence rather clearly suggested that Brown had engaged in forbidden transportation of enslaved people. But the jury, to which Brown was entitled in a suit to impose a fine, ruled for Brown and assessed the costs of litigation against the Society.[67] Some suggest that Brown used improper methods to influence the jury.[68] But the influence may not have been overtly

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[61] See Rappleye, supra note , at 305-06.

[62] See Rappleye, supra note , at 305-12 (recounting the decision to pursue Brown, the initial success, and the downside of the strategy).

[63] See Coughtry, supra note , at 213-14 (recounting the settlement with Sterry).

[64] See Rappleye, supra note , at 309.

[65] See Coughtry, supra note , at 214-15.

[66] No jury was empaneled, in keeping with practice in admiralty proceedings. *See* Waring v. Clarke, 46 U.S. 441, 460 (1847). The suit against Brown's ship, the *Hope*, does not appear in the Rhode Island archival materials. The same vessel was involved in the earlier Massachusetts case, *Gordon v. Gardner*.

[67] Id. at 311-12. While the Rhode Island archives do not include a record of the proceeding, the amount of costs awarded in such matters could be quite substantial. In one unsuccessful freedom suit, the New York Manumission Society was obliged to pay $1700 (costs and the amount of the bond forfeited when the suitors failed to appear at trial). See T. Robert Moseley, *A History of the New-York Manumission Society, 1785-1849*, at 63 (1963) (unpublished dissertation on file with author).

[68] Id. at 312.

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corrupt. The people of Rhode Island had mixed views about the international traffic in enslaved people and may have seen the vessel's forfeiture as penalty enough. Well-known in Rhode Island, Brown was elected to the U.S. House of Representatives as a Federalist in 1798. His involvement in the prohibited trade to Africa did not entirely undercut his popularity with Rhode Island voters.[69]

Eventually federal officials began more actively to enforce federal law. Historians recount over twenty government prosecutions in the period from 1798 to 1803.[70] But jury nullification meant that officials often sought forfeiture of the offending vessel in an admiralty proceeding triable to the judge.[71] Even this modest penalty was rendered less potent by the maneuvers of owners, who arranged to game the bidding process so as to depress sales prices at forfeiture auctions.[72] Still, federal prosecutions, including those instituted by John Leonard, a government informer sent to Rhode Island, made inroads on the trade.[73]

C. Enforcement in New York

Something comparable to the work of the Providence Abolition Society was unfolding in New York City. There, the New York Manumission Society had been established to seek an end to slavery, to litigate freedom claims, and to otherwise defend the rights of free people of color.[74] To do so effectively, the Society appointed

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[69] On Brown's involvement in the destruction of a British revenue cutter in 1772 and other activities in support of the Revolution, see Rappleye, supra note , at 102-26. On Brown's activities in Congress in 1798, *see* Coughtry, supra note , at 221, 225-26 (describing Brown's failed attempt to weaken the 1794 Act and his successful effort to secure legislation that would create a new customs district for the port of Bristol, Rhode Island).

[70] See Coughtry, supra note , 217.

[71] The archives indicate that attorney's fees in forfeiture proceedings in admiralty were roughly double those paid in suits at law to impose a fine. The preference for forfeiture may have also reflected these fee-based incentives.

[72] See Rappleye, supra note , at 317-18 (sale of forfeited vessels sometimes fetched as little as $10 at auction). Historians report that in 1799 slave merchants had Samuel Bosworth, the surveyor of customs, kidnaped and transported some miles away from the site of an auction at which Bosworth planned to bid on a vessel sold by court order. *See id*.; Coughtry, supra note , at 218 (describing the role of John Brown in the kidnaping of Bosworth and concluding that it ended local enforcement of the 1794 Act). *See also* United States v. Brig Orange (February 1800) (Case 7 Appendix II) (dismissing a forfeiture proceeding under the 1794 Act in deference to an earlier, friendly suit for mariners' wages that led to the sale of the vessel and a change of ownership that was said to shield the new owners from liability for prior violations). For an account, see Coughtry, supra note , at 220 (describing government officials as "stunned" by the decision immunizing the ship from forfeiture).

[73] On Leonard's role as a government-sponsored prosecutor or informer, see Coughtry, supra note , at 22-24. For evidence of a decline in voyages to Africa, see appendix II.

[74] For an account of the New York organization and its role in qui tam litigation, see

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a standing committee to collect information about the unlawful kidnaping of people of color, enabling the Society to intervene quickly when individuals faced possible sale into slavery.[75] The Society learned in February 1801 that a Rhode Island merchant, Phillip Topham, had just returned from an African voyage as the captain and nominal owner of the brig *Peggy* and had stopped off in New York on his way home. James Robertson, a member of the Society's standing committee, had Topham arrested to answer an informer proceeding seeking to impose of fine of some $30,000. Eventually, Topham raised bail and was released from jail to return to Rhode Island.[76]

The New York Society brought the case to trial before the New York federal circuit judge William Paterson in 1805.[77] The suit proceeded in the name of Robertson, qui tam, and was handled by lawyers closely associated with the New York Society.[78] Among those giving evidence in the case were Society members and the Rhode Island collector, William Ellery, who introduced a cargo manifest showing that the *Peggy* cleared out of Newport harbor in 1799 bound for Africa with a cargo of rum.[79] That, coupled with evidence from witnesses from the West Indies who had seen people of color aboard the *Peggy*, was enough to persuade the jury to bring in a plaintiff's verdict of some $16,000.[80] Unable to pay that amount, Topham was imprisoned. Efforts to secure a pardon began immediately, as Topham's friends and supporters in Rhode Island pressed both the Society and President Jefferson for relief.[81]

D. Enforcement under President Jefferson

Moseley, *supra* note , at 166-68. *See also* Landy, supra note , at 202-09 (recounting the litigation in *Robertson v. Topham*, a qui tam action brought in New York federal district court to enforce section 4 of the 1794 statute against a Rhode Island sea captain).

[75] *See* Moseley, supra note , at 166-68; Landy, supra note , at 202-09.

[76] Later, a dispute arose as to the financial implications for those who backed the voyage of the Peggy. Justice Story, riding circuit in Rhode Island, held that the courts were not available to enforce, or otherwise sort out the affairs of the parties to, an illegal transaction. *See* Fales v. Mayberry, 8 Fed. Cas. 970 (C.C. Dist. R.I. 1815). Story also rejected the claim that the assignment of an interest in the transaction removed the taint of illegality. Id. at 972. *See also* The Alexander, 1 F. Cas. 362 (Cir. Ct. D. Mass. 1823) (Story, J.) (upholding forfeiture of vessel that was employed in trafficking but interdicted before any African people had been taken on board).

[77] See Landy, supra note , at 205-07.

[78] See Landy, supra note , at 204-09 (highlighting the efforts of Thomas Emmet, among others, as counsellors to the New York Society).

[79] *Id*. at 205-06.

[80] *Id*. at 206.

[81] *Id*. at 207-08.

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Presaging the policy-inflected swings in enforcement priorities that we see today, enforcement faltered under President Thomas Jefferson, especially in Rhode Island. Several factors contributed to the change in enforcement intensity. For one thing, Jefferson replaced the Treasury comptroller with a Maryland Republican, Gabrielle Duvall.[82] For another, Rhode Island merchants persuaded Congress in the waning months of the Adams Administration to create a new customs district for the port of Bristol, thus enabling ships to clear directly from that port without having to deal with the more exacting customs officials at Newport.

Fending off these efforts for a time, outgoing President John Adams appointed Jonathan Russell, a Federalist committed to enforcement of the law, as the customs official for the new Bristol district. A short time later, in response to petitions from the merchants in Bristol, Jefferson removed Russell from office and replaced him with Charles Collins. A close protégé of DeWolf, Collins had himself served as the captain of slaving voyages before accepting the responsibility for the enforcement of federal law.[83] Historians report that from 1804 to 1807, federal prosecutions of ceased, as local officials declined to enforce the law. As a result, voyages to Africa from Rhode Island ports rose during the period, marking the completion of a transition from Federalist to Republican administrations.[84]

Apart from the appointment of officers with active hostility to federal enforcement, President Jefferson pardoned earlier violations.[85] But the limited power Jefferson wielded confirms that he regarded private informer enforcement as constitutionally proper.[86] Under the law of pardons, Jefferson could release Phillip Topham from prison and remit any penalty the government had collected but a presidential pardon did not reach the private property

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[82] See Coughtry, supra note , at 227.

[83] On the appointment of Collins and the resulting decline in prosecutions and increase in African clearances, see Coughtry, supra note , at 228-29.

[84] Id.

[85] For an account of Jefferson's pardons of Nathaniel Ingraham and Phillip Topham, both Rhode Island captains, see Landy, supra note, at 207-08. Landy reports that Jefferson rejected early appeals on their behalf, taking the position that both should serve some time in prison for their violations of the law. Topham's pardon took effect in 1808, Ingraham's in 1804. The government returned its share of Ingraham's fine to him that same year. Id. at 207 n.54; *see also* Coughtry, supra note, at 223 (reporting on the return of the government's moiety to Ingraham).

[86] On pardons for civil offenses, see Saikrishna Prakash, Imperial from the Beginning: The Constitution of the Original Executive 105 (2015) "'[o]ffenses against the United States' [in Article II] should be understood as encompassing any violation of federal law in which public interests predominate," including "civil offenses prosecutable by the government."); see generally Noah Messing, *A New Power? Civil Offenses and Presidential Clemency*, 64 Buff. L. Rev. 661 (2016) (collecting scholarly views).

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rights of third parties.[87] Jefferson respected that limit and explained that Topham had served a suitable prison term for the violation of federal law. In granting tailored relief based on particular facts, Jefferson stopped well short of issuing a blanket pardon to all persons prosecuted under the terms of the 1794 act. In accepting the legitimacy of Topham's conviction, Jefferon's approach differed from that he took in pardoning those convicted under the Sedition Act.[88] While Jefferson saw the Sedition Act as a nullity that could not support prosecutions or convictions of any sort,[89] he did not express similar qualms about the enforcement of the 1794 act.

Nonetheless, Jefferson's pardons and appointments express a policy of toleration for the international traffic in people that undercut the enforcement of the 1794 law. To be sure, Jefferson signed the 1808 ban on the importation of enslaved people into the United States.[90] But Jefferson did little else to challenge slavery abroad and actively took steps, through the implementation of the Louisiana Purchase and other measures, to extend the reach of slavery at home.[91] Jefferson acted to enhance (through import restrictions) the value of the people he and his fellow planters already owned and did little to end slavery in the United States or curtail American participation in the trade with other countries.[92]

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[87] See William F. Duker, *The President's Power To Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 526 (1977) ("[I]f a suit was for the king's branch of a law only and not to the particular damage of any third party, the king could pardon or dispense; if the suit was not only for the king's benefit but for the profit or safety of a third person, the king could not release the party."); William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN, § 34, at 392 (3d ed. 1739) ("[T]he King cannot by any Dispensation, Release, Pardon or Grant whatsoever, bar any Right, whether of Entry, or Action, or any legal Interest, Benefit or Advantage whatsoever before vested in the Subject."). Knote v. United States, 95 U.S. 149 (1877) (general pardon releases individual from crime but does not automatically restore property forfeited into the hands of the government).

[88] *See* Saikrishna Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613, 1664-74 (2008). In addition to granting blanket pardons and declining to consider the specific facts of the case, Jefferson directed government attorneys to dismiss any pending prosecutions under the Sedition Act. *Id*.

[89] *Id*. at 1664-74 (describing Jefferson's blanket pardons to nullify convictions for sedition).

[90] On the import ban in 1808, see WOOD, EMPIRE OF LIBERTY, supra note , at 357–365.

[91] For an account of the Louisiana Purchase from the perspective of Northern opinion, see Garry Wills, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 114–26 (2005) (noting the Federalist opposition to Southern expansion and to the eventual admission of more slave states to the Union). Jefferson and the Virginians took a different view, welcoming slave states and the political power they would add to Congress and the Electoral College, as well as the wealth a growing domestic market would transfer to plantation owners in the old South. Indeed, the legislation implementing the Louisiana Purchase banned the importation of slaves to that region, thereby raising the value of enslaved people in the old South. Wills, *supra*, at 121. Jefferson himself sold eighty-five people, seventy-one at public auction, and thereby benefited personally from the growing domestic market. *Id.*

[92] The domestic market in enslaved people extended the institution throughout the old

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E. The Supreme Court and the 1794 Act

The Supreme Court did not immediately take up litigation under the 1794 Act. The Court had power under the Judiciary Act to issue writs of prohibition to district courts, sitting in admiralty, but merchants in Rhode Island did not pursue such relief.[93] Several years later, as forfeiture appeals began to arrive, the Court fine-tuned federal procedure,[94] but it did not question the constitutionality of the statute under Articles II or III.[95] In the end, then, we can say that the practice of the federal courts at all levels – district, circuit, and supreme – was to proceed to the merits of claims under the 1794 Act without raising doubts as to their bona fides.[96] All three branches thus appear to have shared the consensus view as to the legality of informer-based litigation, a consensus even Jefferson did not contest.

III. BOUNTY-BASED ENFORCEMENT IN CONTEXT

This part situates the bounty-based enforcement practices of

American southwest and the new southern territory encompassed within the Louisiana Purchase. For an account of Jefferson's implacable opposition to importation and his steady support for expanding the domestic market for enslaved people, see James E. Pfander & Elena Joffroy, *Equal Footing and the States "Now Existing": Slavery and State Equality Over Time*, 89 Fordham L. Rev. 1975 (2021). On Jefferson and the political power conferred by the three/fifths clause, see Wills, supra note , at 2-13.

[93] For the Court's first encounter with the law, see Adams v. Woods, 6 U.S. 336, 342 (1805) (argued in 1804 on a division of authority in the circuit court for the district of Massachusetts) (applying general federal two-year limitation period to action, brought in debt, to enforce the 1794 Act). On the Court's oversight of admiralty courts, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1471-74 (2000) (describing review by writs of prohibition).

[94] *See* Caroline v. United States, 11 U.S. 496, 500 (1813) (requiring greater particularity in libel seeking forfeiture of vessel for fitting out in violation of the 1794 Act but granting leave to amend on remand); *see also* The Merion, 22 U.S. 391, 408 (1824) (granting leave to amend on remand). On the applicable statute of limitations, see Adams v. Wood, 6 U.S. at 342. *Compare* Tryphenia v. Harrison, 24 Fed. Cas. 252 (Cir. Ct. D. Pa. 1806) (1794 Act does not apply to the movement of enslaved people from one Caribbean Island to another).

[95] Thus, in *The Merino*, the Court confirmed the power of a court of admiralty to forfeit vessels captured in Spanish Florida for violation of the 1794 Act (as amended in 1800). *See* The Merino, 22 U.S. 391 (1824) (upholding forfeiture brought by a U.S. army colonel under the 1794 Act). As with *The Merino*, litigation after 1820 often arose from military seizures of slave-trade vessels. Similarly, the Court upheld the forfeiture of a vessel, despite its conveyance in a straw sale to evade the law's application. *See* The Plattsburgh, 23 U.S. 133, 145 (1825). *See also* The Emily and Caroline, 22 U.S. 281 (1824) (affirming forfeiture as vessel was being made ready to sail).

[96] Justice Paterson presided over the *Topham* litigation in New York as part of his circuit-riding duties. For an account of the Topham litigation, see notes 118-25 supra and accompanying text. Justice Story frequently encountered the 1794 Act on circuit. *See* note 120 *supra*.

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the Providence Abolition Society in the web of enforcement tools more generally available to Congress, drawing on Nicholas Parrillo's indispensable work on the way fees, bounties, and salaries shaped the enforcement incentives of private actors and government officials.[97] Then this part considers the manner in which private enforcement worked in tandem with public enforcement, contributing to the efficacy of federal law in a fee-based enforcement world.

A. Anti-Slavery Litigation in a Fee-Based World

Parrillo's account of the early Republic's fee-based enforcement system helps to clarify much that seems curious about anti-slavery litigation and informer proceedings more generally. As a form of what Parrillo called an alien imposition, these laws sought to challenge an ingrained practice that some wealthy and influential merchants viewed as a legitimate source of private gain. That helps to explain why Congress in 1794 chose to follow the lead of state legislatures in New England in relying on bounties and private informers to ensure enforcement. The character of anti-slavery laws as a form of alien imposition also helps to explain some otherwise curious choices by the Providence Abolition Society. The Society sought to change cultural norms and to encourage voluntary compliance with anti-slavery laws. The members had reason, therefore, to compromise their claims in exchange for promises that merchants would forgo the trade. By using the threat of enforcement to procure promises of future compliance, the Society sought voluntary compliance.

The alien quality of the anti-slavery law may also explain why the Society did not pursue maximum penalties in every case. As we have seen, in *Gordon v. Gardner*, the Society deliberately cut back on its demand apparently in an effort to persuade the public that its purpose was to serve as a high-minded exponent of public values, rather than as the sort of "viperous vermin" who were often attracted to informer litigation.[98] Moreover, when the Society attempted to impose a substantial penalty on John Brown in federal litigation, the jury refused to convict and saddled the Society with court costs. Some historians have criticized the relatively mild enforcement choices of the Society, suggesting that a more vigorous program may have more effectively ended merchant involvement with the trade.[99] But increasing rigor may have only accentuated the alien quality of

[97] *See* Parrillo, supra note.

[98] *See* J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Litigation, 78 N. Car. L. Rev. 539, 578 (2000) (quoting Lord Coke's disparaging description of informers in England).

[99] *See* Coughtry, supra note , at 229 (characterizing the strategy of leniency as unwise).

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the enforcement regime and further undermined the perceived legitimacy of federal law in the local community.

Parrillo's account also predicts some blurring of the lines between public and private proceedings, something we see in Rhode Island litigation. Indeed, the government attorney for the district of Rhode Island, David Barnes, appeared as counsel for the United States and for several informers. Thus, in *Whitaker*, Barnes signed the declaration as counsel for the informer, just as he did in *Rotch v. Packard* (Case 10 Appendix II) – a nominally "private" enforcement proceeding. At the same time, Barnes appeared for the United States in a series of "public" libels brought to forfeit vessels.[100] One supposes that Barnes was known in the Rhode Island district for his experience handling such proceedings; he was later appointed federal district judge for Rhode Island. Judging from court papers in the Rhode Island archives, Barnes would earn the same fee whether he libeled a vessel in the name of the government or in the name of an informer; such fees were payable from the proceeds of any forfeiture as part of the costs of the action and the evidence from the bills of costs in the archives suggests that the attorney fees were the same in public and private litigation.[101] In terms of legal representation and payment, then, little might separate the government's forfeiture action from the informer proceeding.[102]

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[100] Barnes appears as counsel of record in at least eleven proceedings in Rhode Island district court. See Appendix II.

[101] In the records of *United States v. Schooner Betsy* (August 1799) (Case 3 Appendix II) and *United States v. Neptune* (December 1799) (Case 6 Appendix II), we find bills of costs prepared by the clerk of court. Costs include attorney's fees for the district attorney, David Barnes, in the amount of $17.00 in both cases. The *Neptune* record indicates that the clerk signed a receipt, acknowledging payment of his fees by the marshal. The marshal's returns in the two cases indicate that the *Betsy* was sold for $351 and the *Neptune* was sold for $451. In a successful libel proceeding brought by a private informer, *Sherman v. Brig Stork* (August 1803) (Case 18 Appendix II), counsel for the libellant (then United States district attorney David Howell) was apparently paid the same amount, $17.00, that Barnes had been paid in public cases.

[102] The law of preclusion, for example, appears to have operated with equal force as to initial proceedings brought by the government and by an informer. *See* 2 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 125 (1751) ("it seems agreed, that a conviction or acquittal *bona fide* in any action or information on a penal statute, whether by the party grieved, or a common informer, or a release *bona fide* from the party grieved, or common informer, after such a conviction, hath always been a good bar of any subsequent prosecution for the same offense."); 1 Matthew Bacon, A NEW ABRIDGMENT OF THE LAW 67 () ("Wherever a suit on a penal statute may be said to be depending, it may be pleaded in bar of a subsequent prosecution, being expressly averred to be for the same offence, as it may, though it be laid on a day different from that in the former…"); *see generally* Harold Krent, *Executive Control Over Criminal law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 301 (1989) (describing qui tam actions as quasi-criminal and likely preclusive of subsequent criminal proceedings). Notably, as the limiting reference in Hawkins to *bona fide* releases suggests, qui tam settlements could pose problems of collusion; hence the rule that settlements had no preclusive effect on subsequent proceedings unless approved by the

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B. The Lessons of Federalist-Era Enforcement

One can understand why public figures in the early Republic did not view informer litigation as a threat to the executive role: the institutions of law enforcement looked very different in the 1790s. The government lawyers of the United States, known as "district attorneys" until Congress changed their name in 1948 to United States Attorneys, did not answer to higher-ups in a Department of Justice. Indeed, Congress did not create the Department until 1870, in the aftermath of the Civil War.[103] Nor does it appear that district attorneys answered to the Attorney General of the United States, a partially fee-paid lawyer in the nation's capital and a member of the President's cabinet but one with limited duties.[104] Instead, local government lawyers worked part time for the government and part time for their own account.[105] They received no salary, and were entitled only to such "fees" as were payable to lawyers in the courts where they practiced; government prosecutors were not placed on salary until much later in the nineteenth century. In admiralty proceedings, such as those to forfeit vessels for violation of federal

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court. *See* Raynham v. Rounseville, 9 Pick. 44 (Mass. 1829). The extension of non-party preclusion to informer actions suggests that their quasi-criminal character implicated double jeopardy concerns.

[103] See Jed Shugerman, The Creation of the Department of Justice: Professionalization without Civil Rights or Civil Service, 66 Stan. L. Rev. 121 (2014).

[104] The office of attorney general originated in section 35 of the Judiciary Act of 1789, which called for the appointment of a lawyer to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and to offer legal advice and opinions to the President and department heads. For an account, see James Eisenstein, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978); Susan Low Bloch, *The Early Role of the Attorney General In Our Constitutional System: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 566 (quoting statute). The attorney general was paid $1500 a year for part-time work and was not provided with any additional funds to hire staff or maintain an office. Unlike those that created the Departments of War and Foreign Affairs, the relevant statute did not require the attorney general to comply with presidential directives. *See* Bloch, *supra*, at 573-79, 581. Nor did it empower the attorney general to supervise the work of the district attorneys. This was a matter about which the nation's first attorney general, Edmund Randolph, complained to Washington. Id. at 586 n.85 (noting the absence of any supervisory authority over district attorneys).

[105] The duty cast on district attorneys was to "prosecute" crimes and offenses against the United States and "all civil actions in which the United States shall be concerned." JA 89 § 35. But the statute did not obligate the district attorney to answer to the Attorney General or President in making decisions about what to prosecute. As a result, the Treasury Department appears to have played a far more important supervisory role than the Attorney General. The recalibration of enforcement priorities under Jefferson took place within Treasury as the department responsible for overseeing merchant shipping in the nation's ports. See Coughtry, supra note , at 226-27; Rappleye, supra note , at 327 (describing the role of Treasury Secretary Wolcott in demanding more stringent enforcement).

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law, the case files in the Rhode Island archives reveal that the government's attorney was paid fees from the proceeds of the sale of the condemned vessel.[106]

C. Article II, Separation of Powers, and Public Actions

The experience with anti-slavery law enforcement in the early republic casts serious doubt on the claim that Article II was understood at the time to vest the executive with an exclusive enforcement discretion that forecloses Congress from relying on private informers to play a supplemental or independent role in law enforcement. As we have seen, all three branches of government proceeded on the assumption that laws conferring bounty-hunting rights on private suitors posed no constitutional threat to the executive's role. Washington, in supporting the legislation and signing the bill into law in 1794, did not threaten a veto to preserve executive power. Nor did Article II concerns arise as an issue for those who debated the bill in Congress. Nor finally did the federal courts in Rhode Island or New York raise such concerns, as they proceeded to adjudicate forfeiture claims under the federal statute. No one seems to have been concerned with any threatened dilution of the executive's enforcement authority.

After the switch to salary-based compensation, as Professor Parrillo shows, the incentives of local prosecutors changed.[107] For one thing, government prosecutors on salary were encouraged to exercise some discretion in deciding what claims to pursue. That discretion, coupled with their placement within a hierarchical Department of Justice, encouraged local prosecutors to attend more closely to their departmental superiors than to local claimants in deciding what matters to pursue.[108] Salary-based compensation also corresponded to a switch to full-time employment; local government attorneys could no longer practice part-time for their own account earning fees for their role in private informer litigation.[109] Such

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[106] See Appendix III. One salaried federal judge paid himself fees from the proceeds of suits in admiralty, until Congress intervened to countermand the practice. For an account, see James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich. L. Rev. 1, 25-28 (2008).

[107] *See* Parrillo, supra note , at 273-89.

[108] For an account of the changes to a hierarchical system, see Bloch, supra note , at 816 (recounting the congressional decisions to put the attorney general on a full-time salary in 1853, to place the attorney general in charge of the district attorneys and marshals in 1861, and to establish a Department of Justice in 1870).

[109] The switch from fees to salary, although recommended in a prescient report of attorney general William Bradford in 1795, did not take place until 1896. *Compare* Fees for Courts, Report of Wm Bradford to U.S. House of Representatives, January 1795, in No. 61, American State Papers: Miscellaneous 117 (1794) (recommending an end to fee-based

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institutional changes practically eliminated the ability of local prosecutors to handle the suits of private litigants and drove a wedge between the role of the district attorney and the private informer.

The history of informer litigation suggests that today's conception of Department of Justice primacy in the enforcement of federal law rests on modern congressional design rather than early republican notions of constitutional compulsion. But opinions giving voice to originalist claims about unitary executive control fail to take account of the change in institutional structure. Justice Scalia's dissent in *Morrison v. Olson*,[110] did not address the comparative independence of early republic informers and district attorneys in Rhode Island and elsewhere. His later opinion in *Vermont Agency*, upholding private informer litigation under the federal False Claims Act,[111] did engage with the weight of history. But Justice Scalia stopped well short of upholding the standing of private informers to enforce public laws whose violation caused no injury, proprietary or otherwise, to the federal government.[112] His grudging acceptance of informer suits to recover government money did not extend to informer suits to enforce public laws.[113]

IV. CONCLUSION

Distant and often inaccessible, the past provides a questionable set of guideposts for the development of modern policy. But at a minimum, the story of the Providence Abolition Society shows that the Supreme Court does not fully grasp the history of interest group engagement in the articulation and enforcement of public law norms. Deeply religious and morally opposed to slavery, the members of the Providence Abolition Society lobbied and litigated for something that was to them more important than private gain: an end to slavery and to American involvement in the international commerce in enslaved people. Although much has changed in the intervening centuries, the abolitionists of New England had at least one thing in common with the consumers in *TransUnion*: their private suits to enforce public norms would supplement public enforcement and did not identify a personal injury. That the modern Court has come to view such litigation as

compensation) *with* Parrillo, supra note , at 277 (describing the legislative decision to switch to salaries in 1896).

[110] *See* Morrison v. Olson, (19) (Scalia, J., dissenting)

[111] *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 777 (2000).

[112] *See* Vermont Agency, 529 U.S. at 778 n.8.

[113] See James E. Pfander, Cases Without Controversies: Uncontested Adjudication in Article III Courts (2021) (discussing *Vermont Agency*).

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constitutionally problematic perhaps tells us more about the novelty of the Court's standing and unitary executive doctrines than about the history of no-injury litigation.

APPENDIX I

An Act to Prevent the Slave Trade and the Encourage the Abolition of Slavery, Rhode Island October 1787

Be it enacted . . . That no citizen of this State, or other person residing within the same shall for himself or any other person whatsoever, either as master, factor, or owner of any vessel, directly or indirectly import or transport, buy or sell, or receive on board their vessel with intent to cause to be imported or transported from their native country, any of the natives or inhabitants of any state or kingdom in that part of the world called Africa, as slaves, or without their voluntary consent.

And be it further enacted . . . That every citizen, inhabitant, or resident, as aforesaid, who shall import or transport, or cause to be imported or transported, any of the said inhabitants of Africa, contrary to the true intent and meaning of this Act, and be thereof lawfully convicted, shall forfeit the sum of one hundred pounds lawful money for every person by him or them so imported or transported; and the sum of one thousand pounds for every vessel by him or them employed in the importation or transportation aforesaid, to be recovered by bill, complaint, or information before the superior court, or either of the inferior courts within this state: The one moiety whereof shall be paid into the general treasury for the use of this state, and the other moiety to and for the use of the person or persons who shall prosecute for and recover the same.

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APPENDIX II

ENFORCEMENT PROCEEDINGS, 1799 - 1803
ACT OF 1794, 1 STAT. 347
RHODE ISLAND FEDERAL DISTRICT COURT[114]

Case Number	*Lead Plaintiff*	*Defendant(s)*	*Claim Type*	*Date*	*Fine or Price at Auction*	*Owner*	*Counsel*	*Informer*	*Archive Number*
1	[115]U.S.	Schooner Lucy	Forfeiture and Sale	July 1799	$800	Charles DeWolf	David Leonard Barnes, District Attorney		7795496
2	U.S.	Brigantine Eliza	Forfeiture and Sale	July 1799			Barnes		7795497
3	[116]U.S.	Schooner Betsy	Forfeiture and Sale	Aug 1799	$351	Estate of John Woodman	Barnes		7795501
4	[117]U.S.	Schooner Flying Fish	Forfeiture and Sale	Sep 1799	$1601	Samuel Packard	Barnes	Rotch	7795499
5	[118]U.S.	Sloop Ranger	Forfeiture and Sale	Oct 1799	$605		Barnes		7795498

[114] Proceedings before the U.S. district court for the district of Rhode Island, Judge Benjamin Bourne presiding. Bourne served as district judge from 1796 to 1801, when he was appointed judge of the circuit court created in the Midnight Judges' Act of 1801. Bourne lost his judgeship when Congress repealed the Act in 1802. In most proceedings in the archives, the United States was represented by David Leonard Barnes, District Attorney for Rhode Island until his appointment as the district judge of the Rhode Island federal district court in 1802, after Bourne's elevation created a vacancy. For Rhode Island judicial biographies, see https://www.rid.uscourts.gov/historical/district-court-judges-biographies.

[115] Following the decree of forfeiture, the vessel was purchased at auction by P. DeWolf, a name suggestively similar to that of the previous owner. The DeWolf clan were among the most active human traffickers in Rhode Island but historians do not identify a DeWolf family member whose name begins with P. See Coughtry, supra note , at 47-49.

[116] In this, as in many of the forfeiture case files, the bill of costs includes attorney's fees of $17.00, payable to Barnes from the proceeds of the sale. Counsel for the estate argued unsuccessfully that the vessel was no longer subject to forfeiture after the owner's death transferred title to the estate.

[117] This successful forfeiture proceeding antedated a penalty proceeding, later pursued by William Rotch (a member of the Providence Abolition Society) against the captain, Samuel Packard, who fitted out the Flying Fish for the slave voyage that led to the vessel's forfeiture. *See* Rotch v. Packard (Case 10).

[118] Case file reveals that the vessel was forfeited and sold at auction for $605 to Captain James Terry of Newport.

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Case Number	*Lead Plaintiff*	*Defendant(s)*	*Claim Type*	*Date*	*Fine or Price at Auction*	*Owner*	*Counsel*	*Informer*	*Archive Number*
6	[119]U.S.	Schooner Neptune	Forfeiture and Sale	Dec 1799	$451		Barnes		7795495
7	[120]U.S.	Brigantine Orange	Forfeiture and Sale	Feb 1800			Barnes		7795500
8	[121]U.S.	Snow Mary	Forfeiture and Sale	Apr 1800	$701		Barnes		7795522
9	[122]U.S.	Paul Brownell	Fine	May 1800	$800	Ship Mac		Nathaniel Whitaker	7795514
10	[123] William Rotch	Samuel Packard	Fine	May 1800				Rotch	7795513

[119] The case file includes the usual bill of costs, reflecting fees of $17 for the attorney. The case file also includes a receipt from the clerk of the court, Edmund Ellery, acknowledging receipt of fees from the marshal, presumably following the vessel's sale. The marshal's return reveals sale of schooner for $451 to Jeremiah Ingraham of Bristol, the highest bidder. William Ellery served as the customs officer for the district of Providence.

[120] Coughtry reports that the *Orange* was boarded by naval officers on the high seas while transporting people into slavery. See Coughtry, supra note , at 219-20. When news reached Rhode Island, Barnes initiated a forfeiture proceeding against the vessel. One Munro appeared as owner, claiming that he had purchased the *Orange* for $7300 following a forfeiture proceeding instituted to collect seamans' wages. Judge Bourne ruled in favor of Munro, despite some evidence that the wage suit and forfeiture were collusive. *See id.* After Barnes became the district judge, he ruled in 1803 that seamen had no cognizable claim for wages when serving on a slave voyage, thus invalidating a seamen's wage forfeiture proceeding aimed at forestalling a genuine forfeiture action. Coughtry, supra note, at 220. *See also* The San Jago de Cuba, 22 U.S. 409 (1824) (rejecting seamen's claim for payment of wages from the proceeds of a forfeited vessel).

[121] A "snow" is a two-masted sailing ship.

[122] Nathaniel Whitaker, described as resident of Bath, Maine, brought suit against Paul Brownell, resident of Newport, to recover a fine of $800 for four persons taken on board the ship Mac and transported into slavery in Cuba. Whitaker, in the declaration, stated that he sues "as well for the United States of America, as for himself" and complained that Brownell, on March 2, 1799, transported four persons from Africa to Cuba "to be there sold as slaves". Following a conviction, counsel for the defendant moved unsuccessfully for a new trial. See Coughtry, supra note , at 222. Court issued a warrant for an attachment of defendant. Barnes appeared as the attorney for Whitaker. Bill of costs includes an attorney's fee ($2.00); a fee for the writ ($.25); a fee for service of the writ ($5.50); and for the preparation of the writ ($1.00). One supposes that the small charge was to purchase the form of writ from the court and the $1.00 fee for completing the form may have gone to Barnes. In addition, the bill included a "fee for all other services" $6.00, much like the fee in forfeiture matters. In all events, it appears that Barnes may have earned $8.00 or $9.00 in fees for a debt proceeding to collect a fine as compared to the $17.00 in fees he earned for a successful action to forfeit a vessel in admiralty.

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Case Number	*Lead Plaintiff*	*Defendant(s)*	*Claim Type*	*Date*	*Fine or Price at Auction*	*Owner*	*Counsel*	*Informer*	*Archive Number*
11	U.S.	Snow Fair Eliza	Seizure of Property (the Ship); Sale of the Ship for the US	July 1800	$600	Jeremiah Ingraham	Barnes		7795524
12	U.S.	Sloop Juliet	Forfeiture and Sale	July 1800	$801	Captain John Stanton	Barnes		7795523
13	U.S.	Sloop Good Intent	Forfeiture and Sale	Sep 1800					7795525
14	[124]U.S.	James DeWolf	Fine	Feb 1801	$3,000	Nathaniel Ingraham; James DeWolf	Barnes	John West Leonard	7795521
15	U.S.	Brigantine Warren	Forfeiture and Sale	June 1803					7795658 7795659

[123] This was a follow-on suit to the earlier proceeding (Case 4) to forfeit the Flying Fish. Rotch had Packard arrested on a debt claim to enforce the 1794 Act. The writ of attachment explains that Packard of Providence Rhode Island on March 15, 1799, fitted out the schooner, The Flying Fish, for transporting people from Africa "to be there sold of disposed of as slaves contrary to the form of the statute in such case made and provided." The proceeding was discontinued, perhaps after the parties reached a settlement. Ordinarily, the courts must approve such settlements, see Haskins v. Newcomb, 2 Johns. 405 (1807), a rule that serves both to ward off collusive or extortionate arrangements and ensures the government's receipt of its moiety.

[124] On Leonard's appearance in Rhode Island as special prosecutor, see supra notes __ and accompanying text. In the declaration, Leonard describes himself as citizen of New York, suing as well for himself as for the United States in an action in debt. Seeking $20,000 in penalties, Leonard proceeded in debt to recover money owed. The case file includes an affidavit by Thomas Cook (signed with an X, his mark). Cook sailed aboard the Fanny, captained by Nathaniel Ingraham of Bristol. The Fanny took on board 73 people for sale. DeWolf was at the wharf in Bristol when the ship sailed and the Fanny carried rum and tobacco to Africa. DeWolf was represented at the deposition and asked if Leonard paid or promised Cook anything to appear in the proceeding. Cook said no. The case file also includes an affidavit from Samuel Arnold, to the same effect, with similar questions from DeWolf. While the jury acquitted DeWolf, Leonard successfully prosecuted the ship's captain, Ingraham, who was heavily fined and jailed for his role. *See* Coughtry, supra note , at 222-24. On later successful efforts to persuade Jefferson to pardon Ingraham, *see id.* at 223.

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Case Number	*Lead Plaintiff*	*Defendant(s)*	*Claim Type*	*Date*	*Fine or Price at Auction*	*Owner*	*Counsel*	*Informer*	*Archive Number*
16	U.S.	Brigantine Minerva	Forfeiture	July 1803		James DeWolf; Nicholas Peck; Charles Collins; William Stagg; William May			7795673
17	[125]U.S.	Sloop Nancy	Forfeiture and Sale	July 1803		James DeWolf; Sweeney Freeden; Nicholas Peck			7795674
18	[126] Isaac Sherman	Brigantine Stork	Forfeiture	Aug 1803		James DeWolf		Isaac Sherman	7795572
19	[127] Isaac Sherman	Sloop Nancy	N/A	Aug 1803			David Howell, district attorney; George Blake, counsel for claimant (owner)	Isaac Sherman	7795571

[125] Some evidence of efforts to prevent witness from testifying, apparently leading to contempt proceedings. Evidence, including a deposition from William Stagg, suggests that the ship was outfitted for slave trade and that slaves were transported from Africa to Havana, Cuba.

[126] Judge Barnes decrees a forfeiture and sale, apparently by default. Bill of costs includes attorney's fees of $17.00. Case file includes three or four depositions in support of claim, making out a strong case on liability.

[127] In this proceeding, Sherman (a self-described citizen of Boston and a distiller) claims to have been the informer in preferring a complaint to the district attorney David Howell. Howell initiated a successful libel to forfeit the vessel. By this point, Barnes had accepted the district judgeship where he would serve until 1812.

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Case Number	*Lead Plaintiff*	*Defendant(s)*	*Claim Type*	*Date*	*Fine or Price at Auction*	*Owner*	*Counsel*	*Informer*	*Archive Number*
20	U.S.[128]	Ship Amested	Forfeiture and Sale	Sep 1803			Howell	John Earle	7795677 7795675
21	U.S.[129]	Brigantine Eliza	Forfeiture by default	Sep 1803	$4,075	Hail Gladding (Informer)	Howell	Hail Gadding	7795576
22	Isaac Sherman[130]	Charles DeWolf	Fine	Dec 1803		Herald, Sloop of War aka the Thomas Jefferson		Isaac Sherman	7795606

[128] Ship was harbored in Bristol, Rhode Island. This was an emergency libel to arrest the vessel and subject it to forfeiture. John Earle was named as informer. David Howell served as the attorney for the government. Judge Barnes held an emergency session to issue warrant. Marshal returns the warrant with a fee for service, but some ambiguity as to whether the vessel was ever served. No further documents. Perhaps the proceeding was settled and discontinued.

[129] This proceeding resulted in a forfeiture decree by default.

[130] The complaint was styled "Isaac Sherman qui tam vs. Charles DeWolf." Sherman was represented by district attorney David Howell. The jury returned a split verdict, finding the defendant indebted to the plaintiff for "aiding and abetting in fitting out the ship Thomas Jefferson as is set forth in the declaration and the other two charges we find not against him." Signed by 12 jurors. On Sherman's role as an informer, see Coughtry, supra note , at 225 (indicating that Sherman had been willing to compromise until some local toughs cut off a piece of his ear, hardening his view of the defendants).

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QUI TAM LITIGATION AGAINST GOVERNMENT OFFICIALS: CONSTITUTIONAL IMPLICATIONS OF A NEGLECTED HISTORY

*Randy Beck**

The Supreme Court concluded twenty-five years ago, in Lujan v. Defenders of Wildlife*, that uninjured private plaintiffs may not litigate "generalized grievances" about the legality of executive branch conduct. According to the* Lujan *Court, Congress lacked power to authorize suit by a plaintiff who could not establish some "particularized" injury from the challenged conduct. The Court believed litigation to require executive branch legal compliance, brought by an uninjured private party, is not a "case" or "controversy" within the Article III judicial power and impermissibly reassigns the President's Article II responsibility to "take Care that the Laws be faithfully executed." The decision effectively granted the President a semi-exclusive power to monitor and ensure the legality of a broad range of executive branch activity.*

The Lujan *Court overlooked a now relatively unfamiliar aspect of Anglo-American legal history. From the fourteenth through the eighteenth centuries, the English Parliament, American colonial and state legislatures, and early Federal Congresses routinely enacted "qui tam" legislation that authorized uninjured private "informers" to collect penalties for unlawful conduct by government officials. These qui tam statutes authorized private litigation against executive officials in circumstances that would be classified as generalized grievances under modern standing jurisprudence. The* Lujan *Court acknowledged historical use of qui tam legislation, but apparently believed such statutes were limited to regulation of private parties. The widespread practice of regulating government officials through qui tam legislation in the five centuries leading up to*

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the framing of our Constitution suggests the need to reconsider the reasoning of Lujan*, though perhaps not the result, and to revise the Court's understanding of legislative tools available to monitor the legality of executive branch conduct.*

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INTRODUCTION

The generation that framed our Constitution sought to establish "a government of laws, and not of men."[1] Government submission to law was central to the Framers' vision for a constitutionally limited republican government.[2] Over two centuries later, however, many commentators believe executive officials of both major political parties have subordinated the rule of law to the pursuit of other agendas.[3] The past half century in particular has generated numerous reports of federal officials violating seem-

1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); MASS. CONST. of 1780, pt. 1, art. XXX (separating legislative, executive, and judicial powers "to the end it may be a government of laws and not of men").

2 *See* John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies*, UNIVERSAL ASYLUM AND COLUMBIAN MAG., Dec. 1790, at 392 ("[T]he very defanition of a Republic, is 'an Empire of Laws, and not of Men.'") (letter to the Hon. George Wythe, of Virginia).

3 *See* Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 90–93 (2012) (offering illustrative examples of asserted legal violations by federal officials and others, including military action in Libya, treatment of detainees, warrantless surveillance of citizens, and the Iran-Contra affair); Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231, 1237–48 (2016) (detailing and assessing "statutory stretches" employed to justify military operations in Kosovo, Iraq, Syria, and Libya as well as methods of interrogation and surveillance); Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), https://newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-seek-congressional-authorization (critiquing Obama administration construction of War Powers Resolution in connection with Libya military operations); John O. McGinnis, *The Coming Lawlessness: The Choices This Election Are Bad News for the Rule of Law*, CITY J. (Oct. 4, 2016), http://www.city-journal.org/html/coming-lawlessness-14770.html (expressing concerns about legal fidelity of both major-party presidential candidates in the 2016 election). *See generally* DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015) (detailing claims of unlawful Obama administration actions); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1056–98 (2008) (surveying conflicts over legislative regulation of military and national security activities from the Truman administration through the George W. Bush administration); Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63 (2015) (also detailing claims of unlawful Obama administration actions).

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ingly clear legal requirements or offering implausible rationales for ignoring applicable rules.[4]

The importance of government respect for law warrants careful consideration of the mechanisms available for enforcing legal constraints on government officials, especially executive branch officials who apply the law to others.[5] This Article will focus particular attention on the Supreme Court's twenty-five-year-old decision in *Lujan v. Defenders of Wildlife*,[6] which articulated strict limits on judicial monitoring of executive action, even when authorized by Congress. The *Lujan* Court assigned the President a virtually exclusive authority to police the legality of a broad range of executive branch conduct. In litigation initiated by private parties, *Lujan* concluded, the judiciary may only evaluate the legality of executive action as a step toward redressing particularized harm to an identified plaintiff.[7] The decision rested on two constitutional theories: challenges to the lawfulness of executive conduct by those without a particularized injury (1) would exceed Article III judicial power, which is limited to resolution of "Cases" and "Controversies," and (2) would reassign the President's Article II responsibility to "take Care that the Laws be faithfully executed," making courts "virtually continuing monitors" of executive action.[8] Under *Lujan*, Congress lacks power to authorize private litigation of generalized grievances concerning the legality of executive branch conduct.[9]

This Article challenges *Lujan*'s conclusion that only the President or his subordinates may litigate generalized grievances about executive lawlessness. The challenge rests on an often overlooked aspect of Anglo-American legal history, the extensive practice of regulating public officials through "qui tam" legislation.[10] The qui tam label derives from a longer Latin phrase describing a litigant "who pursues [an] action on our Lord the King's behalf as well as his own."[11] From the fourteenth century through the eighteenth century, Parliament often enacted qui tam statutes that allowed any person to sue for a statutory offense and instructed the court to divide any recovery between the crown and the private litigant, called a "common informer."[12] The informer did not need to allege individualized injury "because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body."[13] The Supreme Court has acknowledged (post-*Lujan*) that qui tam actions satisfy Article III case or controversy requirements, given their

4 *See infra* notes 46–65 and accompanying text.

5 *See* 2 JAMES WILSON, *Of the Executive Department*, *in* Lectures on Law 183, 198 (1790) ("[T]he law is higher than the magistrate, who administers it.").

6 504 U.S. 555 (1992).

7 *Id.* at 560–61.

8 *Id.* at 577 (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

9 *Id.* at 576–77.

10 *See infra* Part II.

11 Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

12 *See infra* Section II.A.

13 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 267 (1721).

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long historical pedigree,[14] but continues to recite standing principles that cannot be reconciled with qui tam history.[15] The Court has left open the question of whether qui tam statutes might violate the Article II Take Care Clause as interpreted in *Lujan*.[16]

The *Lujan* Court was aware of the historical use of qui tam legislation, but apparently believed informer statutes regulated only "private part[ies]."[17] The Court overlooked Parliament's extensive use of qui tam legislation from the fourteenth century onward to enforce specified duties of government officials.[18] This English practice of regulating public officials through qui tam legislation crossed the Atlantic and was widely followed in the American states at the time the Constitution was ratified.[19] Federal legislators, beginning with the First Congress under the new Constitution, authorized qui tam litigation against numerous executive branch officials, including revenue officers, census workers, treasury employees, postal workers, and officials overseeing trade with Native American tribes.[20] This centuries-old practice of authorizing qui tam informers to litigate generalized grievances concerning the lawfulness of government conduct undermines *Lujan*'s conclusion that the Take Care Clause was intended to grant the President virtually exclusive authority to police the legality of executive action in the absence of particularized harm.[21] It was well established at the time of the framing that a legislature could authorize judicial monitoring of executive conduct at the behest of private informers who lacked any individual injury.

Part I of this Article considers constitutional principles potentially relevant to judicial monitoring of executive branch legal compliance. In addition to the Article III case or controversy requirement and the Article II Take Care Clause argument from *Lujan*, we review the Supreme Court's decision in *Morrison v. Olson*,[22] upholding appointment of "independent" prosecutors to investigate executive branch officials. The *Morrison* majority concluded that the President exercised "sufficient control" over the independent counsel to satisfy Article II, section 1 of the Constitution, which vests all "executive power" in the President,[23] while Justice Scalia's *Morrison* dissent argued that

14 *See Vt. Agency*, 529 U.S. at 771–78.

15 *See infra* note 139 and accompanying text.

16 *See Vt. Agency*, 529 U.S. at 778 n.8.

17 Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–73 (1992) ("Nor . . . is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a suit *against a private party* for the Government's benefit, by providing a cash bounty for the victorious plaintiff." (emphasis added)).

18 *See infra* Section II.A.

19 *See infra* Section II.B.

20 *See infra* Section II.C.

21 *See infra* Section III.B.

22 487 U.S. 654 (1988).

23 *Id.* at 696 ("Notwithstanding the fact that the counsel is to some degree 'independent' and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over

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any limitation on the President's control made the statute unconstitutional.[24] The "unitary executive" principle that underlay both the majority and dissenting opinions in *Morrison* provides another possible basis for objecting to litigation against executive officials by uninjured private citizens who are not subject to presidential control.

Part II of the Article focuses on the history of qui tam legislation directed at government officials in England, the early American states, and the initial Congresses following ratification of the Constitution. Qui tam legislation in England and the early American states helped accomplish several goals related to regulation of government conduct. Authorizing qui tam litigation (1) enhanced monitoring of decentralized government activity,[25] (2) countered incentives for official resistance to legislative mandates,[26] and (3) bolstered public confidence in the lawful performance of important government functions.[27] These objectives help explain the decision by the First Congress to adopt qui tam statutes regulating federal revenue officers,[28] census workers,[29] and treasury officials,[30] as well as the adoption of qui tam statutes in the Second Congress regulating postal employees[31] and officials licensing trade with Native American tribes.[32]

Part III of the Article considers the constitutional issues raised above in light of the history surveyed in Part II. Section III.A addresses the "case or controversy" requirement and the doctrine of standing. Cass Sunstein argues that the history of qui tam legislation shows that the Court reached the wrong outcome in *Lujan*.[33] On this view, Congress has power to create universal standing to litigate generalized grievances, whether or not the statute includes a bounty. While that could be an accurate understanding of Article III, the conclusion does not necessarily follow from the history of qui tam legislation. The bounty provision of a qui tam statute gives the successful informer an individual right to payment, a concrete individual interest that distinguishes a qui tam statute from a bare universal authorization to sue. The Endangered Species Act (ESA) citizen suit provision considered in *Lujan* is also distinguishable from a traditional qui tam statute in terms of the duties enforced and the relief available. Qui tam statutes tended to define specific legal duties of executive officials that could be enforced through private collection of financial penalties, while the ESA sought to authorize

the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.").

24 *Id.* at 705 (Scalia, J., dissenting).

25 *See infra* subsections II.A.1, II.B.1.a.

26 *See infra* subsections II.A.2, II.B.2.

27 *See infra* subsections II.A.3, II.B.3.a.

28 *See infra* subsection II.C.1.

29 *See infra* subsection II.C.2.

30 *See infra* subsection II.C.3.

31 *See infra* subsection II.C.4.

32 *See infra* subsection II.C.5.

33 Cass R. Sunstein, *What's Standing After* Lujan *? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 164 (1992).

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injunctive relief to enforce any provision of a complex and partially indeterminate regulatory scheme. The history of qui tam legislation should, however, change the way we think about standing and the role of the courts in cases presenting generalized grievances. The *Lujan* Court overreached when it described "particularized" injury as part of the "irreducible constitutional minimum" of Article III standing, and when it suggested that Congress may never authorize private litigation of generalized grievances about executive branch conduct.[34]

Section III.B considers implications of Part II's history for *Lujan*'s reading of the Take Care Clause. The Anglo-American history of regulating government officials through qui tam litigation provides powerful evidence that Article II was not understood to create a semi-exclusive presidential authority to police the legality of executive branch conduct. Based on more than four and a half centuries of legislative practice, the First Congress believed it could grant members of the public standing to litigate generalized grievances about the legality of executive branch conduct, at least when it conferred a financial interest in the litigation. So far as we know, neither President Washington nor anyone else raised any constitutional concerns.

Lujan's reading of the Take Care Clause not only overlooks settled patterns of interbranch relations at the time of the framing, but also ignores the practical obstacles that would have made any centralized presidential monitoring of federal officials largely superficial.[35] The Constitution anticipated activities that would take federal officers throughout the already vast territory of the United States at a time when means of travel and communication were much less advanced than today. Viewed from the perspective of the late eighteenth century, a semi-exclusive presidential power to monitor the lawfulness of executive conduct would have meant virtually no monitoring at all for a great deal of important executive branch activity.

Section III.C considers whether qui tam litigation against executive branch officers can be reconciled with the "unitary executive" principle embodied in Article II, section 1, which vests all "executive power" in the President. The best answer to this constitutional concern flows from Blackstone's explanation that qui tam legislation authorizes a species of "popular action," because the statutory right to sue is "given to the people in general."[36] The power to file a qui tam action is a nongovernmental power and hence does not implicate the tripartite constitutional allocation of governmental power among the three branches.

A number of eighteenth-century mechanisms called on citizens to participate in the enforcement of laws and the projection of communal force. Local sheriffs could call out a *posse comitatus* of armed citizens to help catch a fleeing criminal or keep the peace. Citizen jurors were called upon to authorize prosecutions as members of a grand jury, or to render verdicts about the legality of a defendant's conduct as members of a petit jury. The

34 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

35 *See infra* notes 503–07 and accompanying text.

36 3 WILLIAM BLACKSTONE, COMMENTARIES *160.

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government could muster the citizen militia to fight external enemies or to enforce the laws. Seagoing vessels could be licensed as "privateers," supplementing government naval forces. All of these mechanisms empowered citizens to participate in law enforcement and extend the government's coercive reach, while often serving as checks on governmental power. Qui tam regulation of government officials can be seen as another of these institutions through which the public participated in law enforcement in order to both supplement and restrain executive authority.

The purpose of this Article is to highlight an underappreciated aspect of our legal history that has significant implications for ongoing constitutional debates. I do not advocate broad revival of the tradition of regulating executive officials through qui tam legislation. Elsewhere, I consider whether selective use might be appropriate to promote legal accountability in particular contexts, such as where a conflict of interest within the executive branch could hinder enforcement of the laws.[37] Whatever implications this aspect of our history might have for future policy discussions, however, this Article looks to the past principally to inform present debates about constitutional power.

I. THE CONSTITUTION AND JUDICIAL MONITORING OF EXECUTIVE CONDUCT

James Wilson, one of our first Supreme Court Justices, lectured on law at what became the University of Pennsylvania.[38] In a lecture on the executive department, Wilson expressed the view, widely embraced in the framing generation, that the "principle of democracy" means the law should be "higher than the magistrate, who administers it."[39] Many of the core political values of the framing generation could be realized only if government officials respected legal constraints on their conduct. Popular sovereignty would be operationalized through law, as agents of the people functioned within constitutional boundaries established by popular conventions and legislative boundaries enacted by the people's representatives.[40] Liberty would be pre-

37 *See* Randy Beck, *Promoting Executive Accountability Through* Qui Tam *Legislation*, 21 CHAP. L. REV. (forthcoming 2018). For example, perhaps it would be useful to enact a qui tam statute penalizing an official who expends federal funds without a supporting congressional appropriation, an area where presidential support for the expenditure could preclude internal executive branch remedies and standing doctrine would complicate efforts to obtain a judicial remedy. *Id.*; *see also* U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

38 *See James Wilson (1742–1798)*, PENN BIOGRAPHIES, http://www.archives.upenn.edu/people/1700s/wilson_jas.html (last visited Nov. 28, 2017). Wilson also signed the Declaration of Independence and participated in the Constitutional Convention. *Id.*

39 *See* 2 WILSON, *supra* note 5, at 198.

40 *See* THE FEDERALIST NO. 78, at 452 (Alexander Hamilton) (ABA 2009) ("[T]he power of the people is superior to" the legislature and judiciary, which are bound by "[the will of] the people, declared in the Constitution."); JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT, ch. XI, § 141, at 79 (Prometheus Books 1986) (1690) ("[N]or can [the people] be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them."); 2 WILSON, *supra* note 5, at 198 ("[T]he principle

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served through law that defined and limited the power of government.[41] Law would even secure a measure of equality, helping ensure that those seen as similarly situated would be treated in similar ways.[42]

Given the central role of government submission to law in realizing our political values, we should pay careful attention to whether executive officials observe legal constraints on their conduct and to available mechanisms for enforcing compliance. In this Part, I review claims that executive officials sometimes ignore clear legal rules or offer dubious justifications for executive action. We then consider principles drawn from Articles II and III of the Constitution that may limit judicial examination of executive conduct. The constitutional analysis begins with a brief consideration of *Morrison v. Olson*, an important Article II case, and then pays particular attention to *Lujan v. Defenders of Wildlife*, which embraced both Article II and Article III grounds for limiting litigation against executive officials. This Part of the Article concludes with an introduction to qui tam legislation, a feature of Anglo-American legal history that casts considerable doubt on the historical analysis driving the *Lujan* decision.

A. Recent Executive Conduct and the Rule of Law

While our political philosophy prioritizes executive respect for legal boundaries, the past half century has generated numerous reports of illegal conduct by the executive branch, or conduct of dubious legality. The Nixon administration declined to spend appropriated funds on policy grounds unrelated to the authorizing statutes[43] and covered up a burglary of Demo-

of democracy [means] . . . that the law is higher than the magistrate, who administers it; that the constitution is higher than both; and that the supreme power, remaining with the people, is higher than all the three.").

41 *See* JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 32 (1960) (noting that under early American political philosophy, "[government's] authority derived from law" and "[b]y the same token its authority was limited by law"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1608, at 472 (1833) (arguing that a republic with a limited constitution cannot have "any practical restraint upon the acts of the government, or any practical enforcement of the rights of the citizens" without an independent judiciary "to interpret the constitution and laws, and to preserve the citizens against oppression and usurpation"); 1 JAMES WILSON, *Of the Study of the Law in the United States*, *in* LECTURES ON LAW, *supra* note 5, at 431, 435 ("Without liberty, law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness.").

42 William Cranch, *Preface* to 1 Cranch iii (1804) ("[A judge] can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."); 1 JAMES WILSON, *Of Man, as a Member of Society*, *in* LECTURES ON LAW, *supra* note 5, at 621, 638 ("With regard to all, there is an equality in rights and in obligations; there is that 'jus aequum,' that equal law, in which the Romans placed true freedom."); Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) ("[T]he minority possess their equal rights, which equal law must protect, and to violate would be oppression.").

43 *See* Train v. City of New York, 420 U.S. 35, 41 (1975) (EPA lacked authority to refuse allocation of funds authorized for municipal sewage and sewage treatment facilities); St. Highway Comm'n of Mo. v. Volpe, 479 F.2d 1099, 1118 (8th Cir. 1973) (U.S. Secretary of

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cratic National Committee headquarters that eventually led to the President's resignation.[44] The Ford administration sent troops into Cambodia to rescue the crew of a captured merchant ship (the *Mayaguez*), going so far as to bomb an airfield and storage depot after the rescue, notwithstanding congressional funding restrictions forbidding "combat activities" and "hostilities" in Southeast Asia.[45] A State Department official acknowledged that the Carter administration sometimes violated section 502B of the Foreign Assistance Act,[46] banning security assistance to countries engaged in a pattern of human rights violations.[47] National security officials in the Reagan administration violated at least the spirit and probably the letter of the Boland Amendment by funneling profits from Iranian arms sales to the Nicaraguan Contras.[48] George H.W. Bush and other presidents have been criticized for ignoring statutory language based on signing statements asserting broad and untested claims of executive power.[49] The Clinton administration construed an appropriations provision as authorizing participation in NATO's Kosovo operation beyond the sixty-day limit of the War Powers Resolution (WPR), even though the WPR explicitly rejects authorization by that means.[50]

Transportation did not have express or implied authority to withhold highway funds on nonstatutory grounds); *cf.* Brown v. Ruckelshaus, 364 F. Supp. 258, 263 (C.D. Cal. 1973) (denying standing to challenge EPA's withholding of funds for water treatment plants).

44 *See* Gerald Caplan, *The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered*, 41 MCGEORGE L. REV. 311, 326–32 (2010) (reviewing JAMES ROSEN, THE STRONG MAN (2008)).

45 Barron & Lederman, *supra* note 3, at 1072.

46 *See* Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 263–75 (1982) (discussing interpretation of various statutory terms and application to various aid packages; noting situation involving Argentina when nonstatutory exceptions "were abused in a way that seriously undermined the purpose of section 502B" and proposed military training package to Guatemala that "seemed to be clearly contrary to section 502B"); *see also* Jeffrey B. Whalen, *Does the Law of Human Rights Guide—Or Rationalize—U.S. Foreign Policy?*, 79 AM. SOC'Y INT'L L. PROC. 18, 19 (1985) ("The executive branch has found it very difficult to comply with the laws and usually has sought to circumvent, ignore or even violate the laws. Both the Reagan and Carter Administrations have been unable or unwilling to carry out fully the requirements of the statutes.").

47 *See* 22 U.S.C. § 2304 (2012).

48 *See* Schauer, *supra* note 3, at 95 ("Someone asking the question, *ex ante*, whether the Iran-Contra scheme violated the Boland Amendment could not have been in any serious doubt about the answer to that question."). *But see* Cruz, *supra* note 3, at 92 ("It is disputed whether the diversion of the Iran arms sales proceeds to the Contras violated the Boland Amendment.").

49 *See* Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an "Unstructured Institution,"* 16 WM. & MARY BILL RTS. J. 231, 242–43 (2007) (signing statements by first President Bush included "some of the more expansive claims of presidentialist constitutionalism"; second President Bush issued signing statements raising constitutional objections to over 1000 statutory provisions "frequently based on no legal authority whatever"); *see also* Shane, *supra* note 3, at 1260–61 (noting second President Bush raised constitutional objections to "1,070 provisions embodied in 127 statutes" including some that "were wholly unprecedented and even silly").

50 *See* Barron & Lederman, *supra* note 3, at 1090 & n.619.

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The proliferation of terrorist incidents and political polarization since the turn of the century have, if anything, heightened pressures on the executive branch to overstep legal boundaries. The Department of Justice under President George W. Bush offered a narrow reading of the "severe physical or mental pain or suffering" required for interrogation to constitute "torture," based on a strained analogy to use of the phrase "severe pain" in an unrelated medical benefits statute.[51] Only the threat of resignation by several high level Justice Department officials prevented continuation of an ongoing surveillance program viewed as legally indefensible.[52] The Obama administration violated the WPR by ordering extensive Libya operations based on an implausible argument that U.S. forces were not engaged in "hostilities."[53] Published reports indicate that the Foreign Intelligence Surveillance Court issued a top secret ruling criticizing the National Security Agency for prohibited data searches raising serious Fourth Amendment issues and for a lack of candor in disclosing the extent of the practice.[54] Critics also alleged a number of unlawful acts in implementing the Affordable Care Act (ACA), including delay of the employer mandate beyond the statutory effective date[55] and

51 *See* Shane, *supra* note 3, at 1238, 1269–72; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President 5–6 (Aug. 1, 2002) (regarding standards of conduct for interrogation under 18 U.S.C. §§ 2340–2340A, and defining "severe physical or mental pain or suffering" in torture statute by reference to potential sources of "severe pain" in statute concerning medical benefits).

52 *See* Julian Sanchez, *What the Ashcroft "Hospital Showdown" on NSA Spying Was All About*, ARS TECHNICA (July 29, 2013), https://arstechnica.com/tech-policy/2013/07/what-the-ashcroft-hospital-showdown-on-nsa-spying-was-all-about/.

53 Goldsmith & Waxman, *supra* note 3 (saying the Obama administration rendered WPR's sixty-day limit "meaningless in many important contexts" with "unconvincing" argument that the administration was "not engaged in 'hostilities' even though they were part of seven months of air strikes that helped decimate Libyan army units and bring down the government"); Shane, *supra* note 3, at 1246–48; Jennifer Steinhauer, *Obama Adviser Defends Libya Policy to Senate*, N.Y. TIMES (June 28, 2011), http://www.nytimes.com/2011/06/29/us/politics/29powers.html (quoting Democratic Senator Jim Webb on the administration's position: "When you have an operation that goes on for months, costs billions of dollars, where the United States is providing two-thirds of the troops . . . where they're dropping bombs that are killing people, where you're paying your troops offshore combat pay and there are areas of prospective escalation . . . I would say that's hostilities.").

54 *See* Tim Johnson, *Secret Court Rebukes NSA for 5-Year Illegal Surveillance of U.S. Citizens*, MIAMI HERALD (May 26, 2017), http://www.miamiherald.com/news/nation-world/national/article152948259.html.

55 Under section 1513(d) of the ACA, the employer mandate provisions were to apply "to months beginning after December 31, 2013." Pub. L. No. 111-148, tit. I, § 1513(d), 124 Stat. 119, 256 (2010). The administration nevertheless decided that employers with fifty to ninety-nine employees would not be expected to comply with the provision until 2016, a delay of two years, and that employers with a hundred or more employees would not need to comply until 2015. *See* Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-

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federal payments to health insurance companies in violation of statutory directives[56] or in the absence of congressional appropriations.[57] The Trump administration was accused of unconstitutional conduct, or at least stretching prior legal precedents, in bombing Syria without first seeking congressional authorization.[58] High-level officials of both major parties have conducted public business using private email systems, skirting laws designed to promote transparency, preserve records, and increase cybersecurity.[59] Administrative agencies routinely fail to satisfy regulatory deadlines set by statute.[60]

27626c5ef5fb_story.html; Avik Roy, Opinion, *Well, Never Mind Then: To 'Ease the Transition to a 30-Hour Week,' Obamacare Employer Mandate Delayed Again*, FORBES (Feb. 10, 2014), http://www.forbes.com/sites/theapothecary/2014/02/10/well-never-mind-then-to-ease-the-transition-to-a-30-hour-week-obamacare-employer-mandate-delayed-again/#6ec7aadb57fe.

56 Section 1341 of the ACA provided for the Department of Health and Human Services (HHS) to collect funds from insurers for a reinsurance program, administrative costs of the reinsurance program, and additional amounts to deposit into the U.S. Treasury. The statute provided that the funds collected for the third purpose "shall be deposited into the general fund of the Treasury of the United States and may not be used for the [reinsurance] program established under this section." Pub. L. No. 111-148, tit. I, § 1341(b)(4), 124 Stat. 119, 208–11 (2010). Nevertheless, HHS allocated all of the funds collected to the reinsurance program, rather than depositing funds into the Treasury as required by the statute. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-328016, DEPARTMENT OF HEALTH AND HUMAN SERVICES: TRANSITIONAL REINSURANCE PROGRAM (2016); *see* Seth Chandler, Opinion, *Busted: GAO Finds Payments to Insurers Under Affordable Care Act Are Illegal*, FORBES (Sept. 29, 2016), http://www.forbes.com/sites/theapothecary/2016/09/29/busted-gao-finds-payments-to-insurers-under-affordable-care-act-are-illegal/#6828d20147db.

57 *See* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016) (determining that HHS payments to insurers pursuant to section 1402 of ACA violate Constitution's Appropriations Clause).

58 *See* Jack Goldsmith, Opinion, *The Constitutionality of the Syria Strike Through the Eyes of OLC (and the Obama Administration)*, LAWFARE (Apr. 7, 2017, 7:31 AM), https://www.lawfareblog.com/constitutionality-syria-strike-through-eyes-olc-and-obama-administration; Michael Stokes Paulsen, Opinion *Trump's First Unconstitutional War*, NAT'L REV. (Apr. 11, 2017), http://www.nationalreview.com/article/446633/donald-trump-syria-strike-unconstitutional-declaration-war. *But see* John Yoo, Opinion, *Trump's Syria Strike Was Constitutional*, NAT'L REV. (Apr. 13, 2017), http://www.nationalreview.com/article/446692/trump-syria-strike-constitutional-presidents-have-broad-war-powers.

59 *See* U.S. OFFICE OF INSPECTOR GENERAL, ESP-16-03, OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS (2016) (reporting on varying use of nondepartmental email accounts for State Department business by officials in multiple administrations); *see also* Matt Apuzzo & Maggie Haberman, *At Least 6 White House Advisers Used Private Email Accounts*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/us/politics/private-email-trump-kushner-bannon.html.

60 *See generally* Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1169–71 (9th Cir. 2002) (multiple Fish and Wildlife Service failures to satisfy twelve-month deadline for addressing listing petitions under Endangered Species Act); *In re* Bluewater Network, 234 F.3d 1305 (D.C. Cir. 2000) (Coast Guard failure to issue oil spill regulations eight years after statutory deadline); Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) (Fish and Wildlife Service failed to meet one-year deadline for identifying critical habitat for Rio Grande silvery minnow); *In re* Barr Labs., Inc., 930 F. 2d 72 (D.C. Cir. 1991) (FDA failed to act within 180-day deadline for decisions on new drug and antibiotic applications); Oxfam Am., Inc. v. SEC, 126 F. Supp. 3d 168 (D. Mass. 2015) (failure to meet 270-day deadline for

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We could debate at length the legality of some of these executive actions, the constitutionality of the duties imposed, and the wisdom of the underlying legislative directives.[61] But we could also cite other examples of legally dubious executive behavior.[62] Commentators from varying political and jurisprudential perspectives have discerned threats to the rule of law in such executive conduct.[63] My own view is that human nature poses a perpetual threat to the rule of law. Humans chafe at impediments to the pursuit of passionately desired ends, including government officials convinced of the justice, necessity, or expediency of a favored course of action. James Madison observed that "power is of an encroaching nature" and must "be effectually restrained from passing the limits assigned to it."[64] The "great difficulty" in framing a government, he argued, lies in "enabl[ing] the government to control the governed" while "oblig[ing] it to control itself."[65] Preserving the rule of law requires a mutually reinforcing combination of cultural habits and accessible legal remedies.[66] The need for an effective response to unlawful conduct warrants close examination of constitutional principles that may limit the power of courts to review the legality of executive action.

issuance of regulations under Dodd-Frank); Ctr. for Food Safety v. Hamburg, No. C12-4529, 2013 WL 5718339 (N.D. Cal. 2013) (FDA failed to meet seven deadlines for food safety regulations).

61 I have argued elsewhere that the President's duty to obey the law and the presidential oath to uphold the Constitution justify ignoring statutes that he reasonably views as unconstitutional. *See* J. Randy Beck, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 16 CONST. COMM. 419 (1999) (book review).

62 *See* sources discussing numerous additional examples of legally questionable conduct by various administrations, *supra* note 3.

63 *See* BERNSTEIN, *supra* note 3, at 4 ("The Obama administration's actions . . . reflect long-standing progressive unease with the concept of the rule of law."); McGinnis, *supra* note 3 (arguing that both major party presidential candidates in the 2016 election would be unreliable defenders of the rule of law); Shane, *supra* note 49, at 231, 233 ("Critics of the Bush 43 administration have not infrequently charged that the administration's unilateralism is antagonistic to the rule of law."); Shane, *supra* note 3, at 1272 (explaining that stretching a statute to reach a surprising interpretation "is more consistent with rule of law values" than advancing a claim of uncontrollable and unreviewable presidential power, but for several reasons "the statutory stretch strategy might be thought actually to undermine the rule of law").

64 THE FEDERALIST NO. 48, at 279 (James Madison) (ABA 2009).

65 THE FEDERALIST NO. 51, at 294 (James Madison) (ABA 2009).

66 Peter Shane points out that "many plausible conceptions" of the "rule of law" can be offered. *See* Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 680 (2014). However, one suspects that most of the contending alternatives would include an expectation that "government actors should obey the law" and that "meaningful recourse should be available" when law has been violated. *Id.* at 681. Shane focuses on recourse for those "injured" by violations of law. *Id.* But I contend that maintaining respect for the rule of law also requires effective remedies for unlawful conduct even when one cannot identify an injured party with sufficient motivation to pursue relief.

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B. Morrison v. Olson *and the Unity of Executive Power*

The Supreme Court in *Morrison v. Olson* considered constitutional challenges to the independent counsel provisions of the Ethics in Government Act, a post-Watergate statute designed to deal with potential conflicts of interest that can arise when the Department of Justice investigates important presidential appointees.[67] The statute instructed the Attorney General to seek judicial appointment of an independent counsel to investigate high-ranking executive branch officials unless the Attorney General's preliminary inquiry found "no reasonable grounds to believe that further investigation is warranted."[68] One argument against the statute was that it violated the separation of powers by limiting the President's control of an official wielding Article II executive power.[69]

The *Morrison* majority acknowledged that "the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[70] The Court rejected the separation of powers argument, however, because the statute gave the President various means to control the independent counsel. The Act permitted the Attorney General to remove the independent counsel for "good cause," a power that allowed the President to carry out his constitutional duty to take care that "the laws are 'faithfully executed.'"[71] While the "no reasonable grounds" for further investigation standard might seem to require frequent appointment of an independent counsel, the Court noted that the Attorney General's decision whether to seek appointment was subject to the Attorney General's unreviewable discretion.[72] The appointing court defined the independent counsel's jurisdiction by reference to facts submitted by the Attorney General, and the independent counsel was required to follow Justice Department policy if "possible."[73] The Court concluded that these features of the statute afforded the executive branch "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[74]

The Court's opinion in *Morrison* was written by Chief Justice Rehnquist, who had previously served as Assistant Attorney General for the Office of Legal Counsel (OLC), a division of the Department of Justice that deals regularly with separation of powers issues.[75] The dissenting opinion was written

67 Morrison v. Olson, 487 U.S. 654, 660 (1988).

68 *Id.* at 661 (quoting Ethics in Government Act, 28 U.S.C. § 592(b)(1) (1982)).

69 *See id.* at 705–06 (Scalia, J., dissenting).

70 *Id.* at 691 (majority opinion).

71 *Id.* at 692–93, 696.

72 *Id.* at 696.

73 *Id.*

74 *Id.*

75 *See* Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1741 (2006) ("Rehnquist next encountered

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by Justice Scalia, another former head of OLC.[76] Justice Scalia argued that the statute violated the Constitution by depriving the President of plenary authority over the independent counsel. Focusing on Article II, section 1's grant of "the executive Power" to the President, Justice Scalia argued that "this does not mean *some of* the executive power, but *all of* the executive power."[77] The Framers of the Constitution deliberately rejected models of divided executive power. Alexander Hamilton defended this aspect of the constitutional design, arguing that unity in the Executive promoted energetic law enforcement and helped maintain accountability.[78] Based on the Framers' decision to vest executive power in a single set of hands, Justice Scalia believed the Constitution would not tolerate any statutory limitation that deprived the President of exclusive control over the exercise of executive power.[79]

While the majority and Justice Scalia disagreed over the degree of control the President must exercise, they agreed on the basic principle that executive power must by subject to presidential direction. If Congress provided for a person to exercise "executive power" within the meaning of Article II, section 1, without giving sufficient means of presidential supervision, the statute would presumably be unconstitutional under either the majority or dissenting opinions. All of the Justices in *Morrison* viewed the independent counsel's authority to investigate and prosecute criminal charges against executive branch officials as an exercise of executive power. This constitutional bar to the completely independent exercise of executive power could affect who may litigate against executive officials and under what circumstances.

C. Lujan v. Defenders of Wildlife *and Generalized Grievances*

A few years after *Morrison*, the Supreme Court issued its decision in *Lujan v. Defenders of Wildlife*,[80] an important precedent on the law of standing. The doctrine of standing seeks to identify the sorts of "Cases" and "Controversies" that fall within the Article III judicial power.[81] *Lujan* was brought by environmental organizations against the Secretary of the Interior, challenging regulations that applied the Endangered Species Act (ESA) only to federal government actions in this country or on the high seas.[82] The central question for the Court was whether the plaintiffs had standing to seek judi-

the separation of powers with his appointment as Assistant Attorney General for the Office of Legal Counsel (OLC) in the Justice Department.").

76 Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 500 n.150 (1993).

77 *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

78 THE FEDERALIST NO. 70 (Alexander Hamilton).

79 *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting) ("As I have said, however, it is ultimately irrelevant *how much* the statute reduces Presidential control.").

80 *See* 504 U.S. 555, 555 (1992).

81 *See* U.S. Const. art. III, § 2.

82 Under section 7(a)(2) of the Endangered Species Act:

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cial review of the federal government's failure to apply the ESA to federal projects in foreign countries. The Court described "the core component of standing" as "an essential and unchanging part of the case-or-controversy requirement of Article III."[83] It laid out an oft-cited version of a familiar three-part test:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[84]

In cases challenging the legality of government conduct, the majority indicated, a person who is "an object" of the government's action will ordinarily have standing, but standing will be harder to demonstrate when the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*."[85] The *Lujan* majority concluded that the plaintiff environmental organizations could not show that the government's restricted application of the ESA would cause an "imminent" injury to their members, because the individual members had no definitive plans to travel to countries where endangered animals were allegedly threatened by federal action.[86]

The most relevant portion of the *Lujan* opinion for our purposes is the section rejecting the "procedural injury" theory of standing embraced by the Court of Appeals. The appellate court had relied on the ESA's "citizen suit" provision, which authorized "any person" to "commence a civil suit on his own behalf" to enjoin violation of "any provision" of the ESA, including the provision requiring interagency consultation before federal actions that

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> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

Lujan, 504 U.S. at 558 (alteration in original) (quoting 16 U.S.C. § 1536(a)(2) (1982)). The initial regulation applied the ESA to federal actions abroad, but a revised regulation reinterpreted the Act to apply only to actions taken within the United States and on the high seas. *Id.* at 558–59.

83 *Id.* at 560.

84 *Id.* at 560–61 (footnote omitted) (citations omitted).

85 *Id.* at 561–62.

86 *Id.* at 563–64.

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might threaten the habitat of endangered animals.[87] As explained by the *Lujan* majority, the Court of Appeals reasoned:

> [T]he citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure.[88]

The *Lujan* majority rejected the appellate court's procedural injury theory based on caselaw holding that

> a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[89]

The majority surveyed a number of cases in which the Court had applied this rule against private litigation of "generalized grievances."[90] For instance, in *Schlesinger v. Reservists Committee to Stop the War*, the Court dismissed a suit by citizens claiming that members of Congress violated the Constitution's Incompatibility Clause by holding commissions in the military reserves.[91] The Court noted that the conduct challenged "would adversely affect only the generalized interest of all citizens in constitutional governance," a kind of interest that could not serve as a predicate for standing to sue.[92] The Court has similarly held that an injury a person suffers in her capacity as a taxpayer, in common with all other taxpayers, is too generalized to support Article III standing.[93] Consistent with this long line of cases, the *Lujan* Court insisted that federal court litigation must be premised on a "particularized" injury, meaning "that the injury must affect the plaintiff in a personal and individual way."[94]

Lujan broke new ground when it expressly ruled that the Constitution prevents Congress from conferring standing on private persons to litigate generalized grievances:

> [T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of

87 *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g) (1982)).

88 *Id.* at 572 (second alteration in original) (quoting Defs. of Wildlife v. Lujan, 911 F.2d 117, 121–22 (8th Cir. 1990)).

89 *Id.* at 573–74.

90 *Id.* at 574–75.

91 *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

92 *Id.* at 217, 220.

93 *Lujan*, 504 U.S. at 574–75.

94 *Id.* at 560 n.1.

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> the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.[95]

The Court's analysis rested on its understanding of the role of courts, as distinguished from the role of the political branches of government: "'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.' Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[96] Since vindicating the public interest is the job of the political branches, the Constitution would not allow Congress to transfer that function to the courts by conferring standing to litigate generalized grievances on private parties:

> 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." It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action."[97]

In short, the *Lujan* Court thought congressional attempts to confer standing absent a particularized injury would infringe the Constitution in two distinct ways: (1) by exceeding Article III's case-or-controversy limitation on judicial power, and (2) by undermining the President's responsibility to ensure faithful execution of the laws under the Take Care Clause of Article II.[98]

The *Lujan* Court grounded its decision on what it took to be the traditional relationship between the judicial and executive branches. The Court has elsewhere said that the case-or-controversy limitation is designed to identify suits "traditionally amenable to"[99] or "historically viewed as capable of resolution through the judicial process."[100] The *Lujan* majority, noting that

95 *Id.* at 576.

96 *Id.* (citation omitted).

97 *Id.* at 577 (citations omitted) (first quoting U.S. CONST. art. II, § 3; then quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); and then quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

98 *Lujan*'s standing principles apply to any federal court litigation—not just suits against the government—but it is likely that the "generalized grievance" limitation will have heightened impact on lawsuits challenging unlawful government conduct, a context in which individuals might be motivated to challenge illegal conduct that does not affect them individually. The Article II limitation would seem to apply principally to suits against executive branch officials, but it is possible that a court could view some lawsuits against private parties as implicating the President's Take Care Clause responsibilities.

99 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

100 GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 382 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)); *see also* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) ("We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.").

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the Constitution does not define "legislative Powers," "executive Power," or "judicial Power," argued that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[101] In seeking this "common understanding" of the appropriate activities of the judiciary, the Court relied on eighteenth- and early nineteenth-century sources—the Federalist Papers and *Marbury v. Madison*.[102] Justice Scalia was more explicit about the historical nature of the inquiry in a law review article that anticipated the *Lujan* ruling, referring to a separation of powers–based requirement of particularized injury as the "original understanding" of standing doctrine.[103]

The central elements of *Lujan*'s standing analysis continue to guide the Court a quarter century later. For instance, two terms ago, in *Spokeo, Inc. v. Robins*, the Court decided that the Ninth Circuit conducted an incomplete Article III analysis when it focused on allegations that the defendant had posted inaccurate information in violation of the plaintiff's rights under the Fair Credit Reporting Act.[104] This was enough to satisfy *Lujan*'s requirement of particularization, since it was the plaintiff's rights (rather than public rights) that were allegedly violated, but did not necessarily satisfy *Lujan*'s distinct requirement that the plaintiff's injury be "concrete."[105] The Court quoted *Lujan*'s description of injury in fact as part of the " 'irreducible constitutional minimum' of standing"[106] and reiterated the principle that Article III does not allow Congress to confer standing on an uninjured litigant.[107]

D. Vermont Agency *and Qui Tam Litigation of Generalized Grievances*

Lujan's restrictions on private litigation of generalized grievances were based on the Court's understanding of the judiciary's traditional role. The

101 *Lujan*, 504 U.S. at 559–60 (internal quotation marks omitted) (first quoting U.S. CONST. art. I, § 1; then quoting U.S. CONST. art. II, § 1; and then quoting U.S. CONST. art. III, § 1).

102 *See id.* at 560 (discussing THE FEDERALIST NO. 48 (James Madison)); *id.* at 576–77 (discussing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

103 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897–98 (1983).

104 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545–46 (2016).

105 *Id.* at 1548 ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis, however, that independent requirement was elided.").

106 *Id.* at 1547 (quoting *Lujan*, 504 U.S. at 560).

107 *Id.* at 1547–48 ("Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" (alteration in original) (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997))); *id.* at 1549 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.").

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ruling embraced a familiar view of the legal universe. Courts exist to provide redress for private litigants injured by unlawful conduct. They are also available to redress legal claims on behalf of the public, but those claims are pursued by public officials elected or appointed for that purpose. Private litigants seek judicial redress for particularized harms to private interests and public officials seek judicial redress for generalized harms to public interests. This view of the legal system is logical and orderly. It leaves litigation on behalf of the public in the hands of professionals, chosen by voters or accountable to elected officials. It allows government litigators to pursue the optimal level of law enforcement through discretion in case selection, avoiding cases that might result in overdeterrence of socially beneficial conduct.[108] It reduces opportunities for private litigants to subvert the public good in pursuit of private interests.[109]

But while the *Lujan* Court's understanding of the judicial role was logical, orderly, and in certain respects appealing, it was also based on an inaccurate view of eighteenth-century Anglo-American legal history. English and early American courts did entertain suits by "aggrieved" private parties seeking redress for particularized injuries, and they did entertain suits by public officials seeking redress for unlawful conduct that harmed the public. But eighteenth-century English and American courts also routinely entertained suits by private litigants who suffered no particularized injury and who sought judicial redress based on generalized grievances about unlawful activity. From the fourteenth through the eighteenth centuries, qui tam litigation by uninjured common informers was one of three extremely common methods of statutory enforcement, alongside suits by public officials and suits by injured parties.[110]

Beginning in the fourteenth century, the English Parliament enacted hundreds of qui tam statutes, most of which followed familiar patterns. Blackstone explains qui tam legislation as follows:

> [M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur.*" If the king therefore himself commences this suit, he shall have

108 *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 620 (2000) ("In deciding whether to bring suit, the public prosecutor can engage in a case-by-case consideration of the regulatory benefits and the social costs of a particular enforcement action.").

109 *Id.* at 615–37 (detailing situations in which qui tam informers might pursue personal interests in ways that undermine the public interest).

110 *Id.* at 565–608 (describing the English history of qui tam enforcement); *see* JONATHAN ROSE, MAINTENANCE IN MEDIEVAL ENGLAND 297 & n.152 (2017) (discussing qui tam enforcement of livery statutes in which plaintiffs sued for half a statutory penalty and did not allege personal harm or seek compensatory damages).

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> the whole forfeiture. But if any one hath begun a *qui tam*, or *popular*, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself.[111]

A typical example of qui tam legislation is found in a 1745 English statute designed to prevent merchants from passing off foreign linens as British or Irish linens to obtain export bounties.[112] Parliament required the marking of domestic linens and imposed forfeitures for inaccurate markings.[113] Under one section of the statute, any person who engaged in specified forms of mislabeling was subject to the following penalty:

> [S]uch Person or Persons shall forfeit the Sum of five Pounds for every Piece of Linen so stamped as aforesaid, to be sued for and recovered by Bill, Plaint, or Information, in any of His Majesty's Courts of Record at Westminster, the Court of Session, Court of Judiciary, or Court of Exchequer in Scotland, or in any of his Majesty's Courts of Record in Dublin . . . ; and one Moiety of the said Penalties shall be to the Use of the King's Majesty, His Heirs, and Successors, and the other Moiety to such Person or Persons as will sue or prosecute for the same.[114]

In authorizing litigation by any person who would sue, the statute vastly expanded law enforcement resources and greatly increased the likelihood that a merchant fraudulently marking foreign linen would be caught, all at no cost to the government apart from the contingent promise of half of any penalties recovered.[115] While the provision for the informer's "moiety" might occasionally siphon off money that could have been recovered by public officials, the statute's overall effect on the treasury was likely a net positive due to disclosure of statutory violations that would otherwise remain secret. Since export bounties were paid by the government, private plaintiffs authorized to enforce the 1745 statute would be seeking redress for generalized grievances rather than particularized injuries.

William Hawkins's eighteenth-century treatise on *Pleas of the Crown* discussed qui tam litigation in its chapter on proceedings by information.[116]

111 3 BLACKSTONE, *supra* note 36, at *160; *see also id.* at *262 (explaining that statutory forfeitures "which regard mere matters of police and public convenience" are "usually left to be inforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken").

112 An Act for Effectually Preventing the Exportation of Foreign Linens, Under the Denomination of British or Irish Linens 1745, 18 Geo. 2 c. 24, Preamble (Eng.).

113 *See id.* §§ 2–4.

114 *Id.* § 3.

115 *See, e.g.*, Beck, *supra* note 108, at 560 (in debate over the *qui tam* provisions of the False Claims Act, Senator Langer argued that informers would give the Justice Department additional help in enforcing the statute).

116 2 HAWKINS, *supra* note 13, at 277–80. Qui tam statutes might allow enforcement through either criminal or civil process, or give the informer a choice. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *303 ("Informations . . . which are partly at the suit of the king, and partly at that of a subject . . . are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, (the nature of which

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Hawkins noted that an information could be "merely at the Suit of the King" or "partly the Suit of the King, and partly the Suit of the Party," with the latter "commonly called an Information *qui tam*."[117] Statutes were deemed subject to qui tam enforcement if they gave part of a penalty to any private litigant:

> I take it for granted, that [an information or action qui tam] lie on no Statute which prohibits a Thing as being an immediate Offence against the Publick good in general, under a certain Penalty, unless the Whole, or Part of such Penalty be expressly given to him who will sue for it; because otherwise it goes to the King, and nothing can be demanded by the Party. But where such Statute gives any Part of such Penalty to him who will sue for it by Action or Information, &c. I take it to be settled at this Day, That any one may bring such Action, or Information, and lay his Demand *tam pro Domino Rege quam pro seipso*.[118]

Penal statutes sometimes regulated conduct harming both the public and private individuals, and an injured party could file a qui tam action as a means of obtaining redress.[119]

While injured parties could bring qui tam actions, Hawkins makes clear that the judiciary did not impose on qui tam informers any particularized injury requirement of the sort found in *Lujan*. Hawkins noted judicial authority holding "[t]hat a Popular Action may conclude *ad grave damnum* ['to the great damage'], without adding *of the Plaintiff*; because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body."[120] Thus, while *Lujan* concluded that plaintiffs could not bring suit if they suffered only a generalized grievance, Hawkins viewed the generalized nature of a grievance as a justification for conferring standing on a private litigant. Hawkins later indicated that common informers were not entitled to recover costs under a statute "which gives the Demandant his Costs in all Cases wherein he shall recover his Damages; for this seems to suppose some Damage to have been done to the Demandant in particular, which cannot be said in any popular Action."[121] Again, the notion of damage "to the Demandant in particular" is just another phrasing of *Lujan*'s "particularized" injury requirement. Hawkins's analysis shows that no particularized injury was expected when an informer pursued a "popular" or qui tam action. Parliament was well aware of the difference between injured parties and common informers, and sometimes authorized common informers to sue only if the aggrieved party did not.[122]

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was explained in a former volume) only carried on by a criminal instead of a civil process." (footnote omitted)).

117 2 HAWKINS, *supra* note 13, at 259, 264.

118 *Id.* at 265.

119 *Id.* (noting that some penal statutes concerned conduct causing "an immediate Damage to the Party" but also affecting the public good; under such statutes, the "general Opinion" held that "the Party grieved may, and it is holden by some that he ought" to bring his suit as a qui tam action (footnote omitted)).

120 *Id.* at 267.

121 *Id.* at 273.

122 *See id.* at 272.

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The Supreme Court in *Lujan* understood that our legal history included qui tam legislation, but may not have appreciated the ubiquity of such legislation at the time the Constitution was adopted. The majority made clear that the ESA's citizen suit provision did not constitute qui tam legislation: "Nor, finally, is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff."[123] The reference to qui tam legislation as "unusual" was accurate as of the date of *Lujan*, but failed to acknowledge that such legislation was widely used in the eighteenth century, shaping the Framers' understanding of the role of courts and the meaning of the Article III terms "case" and "controversy." Moreover, *Lujan*'s description of qui tam legislation as allowing suit "against a private party"[124] implies that the Court was unaware of the widespread use of qui tam statutes to regulate government officials, a point demonstrated in Part II below.

The Court was confronted with the extensive history of qui tam legislation eight years after *Lujan* in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[125] The *Vermont Agency* case was brought under the most important remaining federal qui tam statute, the Civil War–era False Claims Act, which permits private litigants to sue for frauds against the government.[126] The case presented the question of whether the False Claims Act could be used against a state agency that received money from the federal government. On its own initiative, the Court requested briefing on the jurisdictional issue of whether a qui tam statute satisfies the requirements of Article III standing.[127]

On the standing issue, the *Vermont Agency* opinion highlighted the injury in fact requirement from the Court's prior jurisprudence and noted that the qui tam relator was seeking to litigate based on an injury suffered by the United States, rather than an injury to the "complaining party."[128] The Court nevertheless approved qui tam standing on two grounds. First, the Court drew an analogy to litigation by the assignee of a claim:

> We believe . . . that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the

123 Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–73 (1992).

124 *Id.* at 573.

125 529 U.S. 765 (2000).

126 *See* 31 U.S.C. §§ 3729–3733 (2012).

127 *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 528 U.S. 1015, 1015 (1999) (mem.) (directing parties to file supplemental briefs on the question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?").

128 *Vermont Agency*, 529 U.S. at 771 ("Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*." (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)) (internal quotation marks omitted)).

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> injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.[129]

Second, the Court pointed to the long history of qui tam legislation as support for its decision: "We are confirmed in this conclusion by the long tradition of *qui tam* actions in England and the American Colonies. That history is particularly relevant to the constitutional standing inquiry . . . ."[130] The Court observed that "*[q]ui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution."[131] The Court also documented enactment of a number of qui tam statutes by the First Congress following ratification of the Constitution.[132] The *Vermont Agency* Court thought this history "well nigh conclusive with respect to the question before us here: whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"[133]

The *Vermont Agency* Court tacitly recognized that its holding was inconsistent with the recitation of standing doctrine in *Lujan*. In *Vermont Agency*'s description of the "irreducible constitutional minimum" of standing, Justice Scalia omitted the requirement that the injury be "particularized" and spoke about the injury as something the plaintiff must "demonstrate" rather than something the plaintiff must "have suffered."[134] However, the Court expressly reserved the question of "whether *qui tam* suits violate Article II, in

129 *Id.* at 773. *Vermont Agency*'s suggestion that qui tam legislation effects a partial assignment of the government's claim may work as a modern analogy, but it seems anachronistic as a justification for qui tam standing. Claim assignment was generally impermissible in England during the centuries when qui tam legislation developed. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 275 (2008) ("Prior to the 17th century . . . , with only limited exceptions, English courts refused to recognize assignments at all.").

130 *Vermont Agency*, 529 U.S. at 774. On the historical nature of the Article III inquiry, the Court highlighted an opinion by Justice Frankfurter arguing that, under the Constitution, "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Id.* (alteration in original) (quoting Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring)).

131 *Id.* at 776.

132 *Id.* at 777 & nn.6–7.

133 *Id.* at 777 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)). While the *Vermont Agency* Court found standing to litigate a qui tam suit, it concluded on the merits that the False Claims Act provision allowing suit against a "person" did not authorize suit against a state or state agency. *Id.* at 787.

134 *Compare* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("[I]rreducible constitutional minimum" of standing requires that the "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical"'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))), *with Vermont Agency*, 529 U.S. at 771 ("[I]rreducible constitutional minimum" of standing requires that the plaintiff "must demonstrate 'injury in fact'—a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical'" (quoting *Whitmore*, 495 U.S. at 155)).

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particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."[135] Later decisions of the Court have reverted to *Lujan*'s formulation that the plaintiff must "suffer" a "particularized" injury to satisfy the "irreducible constitutional minimum" of standing.[136] Thus, while *Vermont Agency* offered a partial and temporary corrective to the Court's Article III standing jurisprudence, the Court has thus far ignored any broader implications of qui tam history for understanding interbranch relations under Articles II and III.

II. QUI TAM MONITORING OF GOVERNMENT OFFICIALS IN ENGLAND AND AMERICA

The *Lujan* Court concluded that uninjured private litigants may not sue to remedy generalized grievances about unlawful executive conduct, even if authorized to do so by Congress. The Court believed such litigation did not present a "case" traditionally considered appropriate for judicial resolution and that it would undermine the President's Article II responsibility to supervise execution of the laws. While the Court knew of the tradition of qui tam legislation, it considered such statutes "unusual" and believed they were confined to regulation of private parties. The Court was unaware that at the time the Constitution was ratified, Anglo-American legislatures routinely authorized qui tam suits by uninjured private informers to litigate generalized grievances about unlawful government conduct, including conduct of executive officials. This practice was widely followed in England from the fourteenth century onward, was common in all thirteen American colonies/states in the eighteenth century, and was embraced in a number of statutes enacted by the first two Congresses.[137]

135 *Vermont Agency*, 529 U.S. at 778 n.8; *see also id.* at 801–02 (Stevens, J., dissenting).

136 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014); *see also* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273–74 (2008); Massachusetts v. EPA, 549 U.S. 497, 517 (2007).

137 Earlier studies of qui tam legislation have noted the existence of qui tam provisions directed at public officials. *See, e.g.*, Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 342 n.3 (1989) (listing early federal qui tam statutes, including a statute directed at marshals participating in the census); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303 (1989) ("[B]y authorizing a qui tam action, Congress could permit private citizens to sue the government officials to collect penalties incurred because of misfeasance in office."); Sunstein, *supra* note 33, at 175 ("Notably, the informers' action was available against both private defendants and public officials."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1407 (1988) ("These statutes provided a common mechanism to regulate, by judicial sanction, governmental officials where there was likely to be no aggrieved party with a private cause of action."). This Article seeks to document that qui tam regulation of government officials had been routinely employed for hundreds of years in England and America by the time the Constitution was ratified, and was naturally embraced by early Congresses as an extension of longstanding legislative practice.

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A. British Qui Tam Statutes Regulating Government Officials

In the twelfth year of King Edward II, Parliament adopted a number of statutory provisions designed to address problems in the English legal system.[138] One provision related to enforcement of "assizes" that regulated the price, measure, and quality of consumer goods.[139] Records of manorial courts show numerous fines assessed when appointed "ale-tasters" accused local brewers of "breaking" the "assize of beer," for example, by using too small of a gallon measure or otherwise departing from regulatory standards.[140] The 1318 statute applied to any "Officer in City or in Borough" responsible for enforcing "Assises of Wines and Victuals."[141] If such officers engaged in wholesale or retail marketing of goods regulated by the assizes, the merchandise would be forfeited to the King.[142] The statute was presumably designed to eliminate conflicts of interest affecting officials with enforcement obligations.[143] Allowing a market participant to regulate a competitive marketplace could undermine evenhanded enforcement of the law and cause other merchants to distrust the regulatory process.

The challenge for Parliament lay in ensuring that local officials observed the restriction on their commercial conduct, notwithstanding the economic incentive to violate the statute. England included forty distinct counties covering more than 50,000 square miles.[144] The statute would apply to officers in dozens of cities and boroughs.[145] Given the highly decentralized nature

138 Statute of York 1318, 12 Edw. 2 Preamble (Eng.).

139 *See* SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 612 (2d ed. 2010) (discussing assizes of bread and beer); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1142–43 (1931).

140 SELDEN SOCIETY, 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS 8 (F.W. Maitland ed., 1974) (listing fines for several "[b]reakers of the assize"); *id.* at 11 (several identified as "[b]reakers of the assize," including two who "have gallons which are too small"); *id.* at 18 (fines for breaking assize); *id.* at 23 & n.2 (several people fined, probably for violating assize of beer); *id.* at 27 & n.2 (same); *id.* at 33 (several brewers fined for breaking assize of beer based on information presented by ale-tasters); *id.* at 88–89 (same); *id.* at 113–14 (seller of beer failed to appear to answer charge of violating assize).

141 Statute of York 1318, 12 Edw. 2 c. 6 (Eng.) (applying to any "Officer in City or in Borough, that by reason of his Office ought to keep Assises of Wines and Victuals").

142 *Id.* ("[S]hall not merchandise for Wines nor Victuals, neither in Gross nor by Retale.").

143 *Id.* (reciting statutory goal of securing "the common profit of the People").

144 Peter Kellner & William Harford Thomas, *England*, *in* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/England (last visited Nov. 28, 2017) (listing "Total Area" of 50,302 square miles); David Simpkin, *Total War in the Middle Ages? The Contribution of English Landed Society to the Wars of Edward I and Edward II*, *in* THE SOLDIER EXPERIENCE IN THE FOURTEENTH CENTURY 61, 68 n.26 (Adrian R. Bell et al. eds., 2011) (describing Arrowsmith map of 1815–1816 showing the division of England into forty historic counties).

145 The British National Archives indicates that the term "burrough" or "burh" referred to fortified towns. *See Life in Towns and Villages*, THE NATIONAL ARCHIVES, http://www.nationalarchives.gov.uk/domesday/world-of-domesday/towns.htm (last visited Nov. 28, 2017). The 1086 Domesday Book reportedly recorded "112 towns or burroughs," and

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of the regulated activity, how could the King monitor local officials to ensure they respected the will of Parliament? One option would be to send royal judges throughout the country looking for evidence of statutory violations.[146] The statute affirmed that "the King may assign his Justices to execute this Thing in Cities and Boroughs, when and where it pleaseth him."[147] But that option would not provide systematic or continuous oversight unless the King kept his judges constantly on the road.

Parliament's solution was to provide for qui tam enforcement of the conflict-of-interest provision, allowing common informers to sue the regulated officials. The statute granted standing to whoever would initiate the litigation, instructing the judiciary that "he that will sue [for a thing so forfeited] shall be received."[148] The legislation offered the informer a variety of judicial fora: "the Chancellor, Treasurer, Barons of the Exchequer, Justices of either Bench, and Justices assigned to take Assises."[149] It also swept away potential procedural obstacles, specifying that judges should "admit such Plaints by Writs, and without Writs, and shall determine them."[150] If the evidence established the basis for a forfeiture, the statute directed that "the third part" of the forfeited merchandise "shall be delivered to the Party that sued the Offender, as the King's Gift."[151] This qui tam remedy used a contingent-fee arrangement to supplement available law enforcement resources at no additional cost to the government.[152] If the litigation was successful, the informer's bounty would come out of the proceeds and the remainder would be forwarded to the treasury. If the litigation was unsuccessful, the government owed the informer nothing.

The 1318 conflict-of-interest provision highlights three sometimes overlapping advantages that can flow from qui tam legislation directed at public officials. First, qui tam legislation can extend the reach of government law enforcement resources and allow more effective monitoring of the legality of highly decentralized government conduct. With the qui tam provision in place, any citizen learning of a violation could step forward and act as the King's agent to enforce the statute, in lieu of the more haphazard monitoring provided through occasional visits by royal judges. Second, litigation by private qui tam informers can overcome government officials' resistance to legal mandates, arising from conflicting personal or professional interests or

the number of towns more than doubled over the following 150 years, but the National Archives does not report how many of the towns would have been classified as burroughs. *Id.* *See generally* JAMES TAIT, THE MEDIEVAL ENGLISH BOROUGH: STUDIES ON ITS ORIGINS AND CONSTITUTIONAL HISTORY (1936) (reviewing evidence concerning the origins and characteristics of towns classified as "boroughs").

146 POLLOCK & MAITLAND, *supra* note 139, at 560 (noting royal justices were sometimes sent into English counties with commissions to accomplish particular tasks).

147 Statute of York 1318, 12 Edw. 2 c. 6 (Eng.).

148 *Id.* (alteration in original).

149 *Id.*

150 *Id.*

151 *Id.*

152 *See* Beck, *supra* note 108, at 541.

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divergent policy preferences. The 1318 statute imposed a regulation contrary to the economic interests of local officials. The qui tam provision created a significant threat of forfeiture to counter any economic incentive to violate the statute. Third, a system of qui tam enforcement can enhance public confidence in the integrity of law enforcement processes, reducing the risk that illegal conduct will go unaddressed and countering the suspicion that those in power can violate the law with impunity. These three advantages help explain many of the qui tam provisions Parliament directed at public officials over the succeeding centuries.

1. Enhanced Monitoring of Decentralized Government Activity

The deadly plague that swept through England in 1348–1350 reportedly took thirty to forty-five percent of the population, with even higher percentages succumbing in some parts of the country.[153] The widespread mortality produced enormous economic consequences.[154] In the 1349 Statute of Labourers, Parliament diagnosed the resulting economic problems as the product of a lazy and greedy working class:

> Because a great Part of the People, and especially of Workmen and Servants, late died of the Pestilence, many seeing the Necessity of Masters, and great Scarcity of Servants, will not serve unless they may receive excessive Wages, and some rather willing to beg in Idleness, than by Labour to get their Living.[155]

From the perspective of the political elites, it was as if the real problem the plague created was to make it so much harder to get good help. Parliament's answer to the calamity was to adopt a wide-ranging system of compulsory labor combined with extensive wage and price controls. Those able to work and not otherwise employed could be compelled to serve at wages prevailing three years earlier, before the plague spread to England.[156] Artisans were limited to charging prices that prevailed three years before and food merchants could only charge a "reasonable Price" designed to generate "moderate Gains, and not excessive."[157] Giving alms to a beggar was illegal if the person could work for a living.[158]

By any measure, the Statute of Labourers represented a highly ambitious regulatory undertaking, particularly in the mid-fourteenth century. Parliament sought to regulate most employment relationships throughout the country and most market transactions for consumer goods in ways that defied the laws of supply and demand. The statute's diverse provisions contained a

153 Mike Ibeji, *Black Death*, BBC (Mar. 10, 2011), http://www.bbc.co.uk/history/british/middle_ages/black_01.shtml.

154 *See* Statute of Labourers 1349, 23 Edw. 3 c. 1 (Eng.).

155 *Id.* Preamble.

156 *Id.* c. 1. Those already in service were not permitted to leave without permission or reasonable cause. *Id.* c. 2.

157 *Id.* c. 5–6.

158 *Id.* c. 7.

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variety of enforcement mechanisms, but we will focus on two distinct qui tam provisions included in chapter 6 regulating food prices, one directed at private conduct and the other at public officials. A food merchant found to have charged an excessive price would pay double the amount received "to the Party damnified, or, in Default of him, to any other that will pursue in this behalf."[159] The statute thus deployed qui tam enforcement as a backup mechanism, allowing a common informer to sue only if the aggrieved individual failed to do so. The statute empowered mayors and bailiffs to hear claims against merchants and to levy the statutory penalty.[160] A second qui tam provision, parallel to the first, targeted public officials. If mayors or bailiffs proved "negligent" in enforcing the statute, justices assigned by the King could require the official to pay three times the illegal price "to the Party damnified, or to any other in Default of him that will pursue."[161]

According to one scholar, the King commissioned 671 royal judges between 1349 and 1359 to enforce the Statute of Labourers.[162] Given the extent of the regulatory endeavor, however, Parliament also wanted the cooperation of mayors and bailiffs in enforcing the statute. The provision for suits by aggrieved parties provided a means to monitor both food vendors and local officials to ensure compliance with statutory obligations. The provision for qui tam enforcement further expanded the universe of people incentivized to seek out statutory violations. An aggrieved party who paid inflated prices might not want to file suit. Some "victims" of illegal price inflation might actually be coconspirators, willing to pay higher prices in exchange for access to scarce goods.[163] The qui tam provisions of the Statute of Labourers greatly augmented enforcement resources directed at food merchants and also greatly increased monitoring of mayors and bailiffs for diligence in enforcing the statutory scheme.

Many other English qui tam statutes served a similar purpose of increasing the number of citizens monitoring the legality of decentralized government conduct. Late in the fourteenth century, for example, a practice arose in certain areas of demanding nine bushels in a "quarter" of grain, rather than the eight bushels specified by statute.[164] Parliament provided that

159 *Id.* c. 6.

160 *Id.* (directing that the penalty be paid "to the Use of them at whose Suit such Offenders shall be convict," i.e., either the injured plaintiff or the common informer).

161 *Id.* After providing the treble damage award against mayors and bailiffs, the statute also warned that "nevertheless towards Us they shall be grievously punished." *Id.*

162 BERTHA HAVEN PUTNAM, THE ENFORCEMENT OF THE STATUTES OF LABOURERS DURING THE FIRST DECADE AFTER THE BLACK DEATH 1349–1359, at 20–21 (1908).

163 Conventional economic wisdom suggests that price controls tend to produce economic shortages. Vedat Milor, Note, *The Promotion of Economic Development Through Conflict and Dispute Resolution: Examples from Mexico and Malaysia*, 35 STAN. J. INT'L L. 169, 199 (1999) ("It is well established that price controls create shortages and black marketeering."); Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 638 ("Government price-fixing will be inefficient and will produce a range of unintended harmful consequences, including misallocation of supply and demand, leading to scarcity.").

164 15 Rich. 2 c. 4 (1391) (Eng.).

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someone buying grain at higher than eight bushels to the quarter would forfeit the grain to the King.[165] To ensure that local officials enforced the rule, the statute provided that "the Mayor and Sheriffs of London" and mayors and bailiffs in other cities, boroughs, towns, and markets would incur "like Pain" at the suit of the King, a party, or "any other Person that will sue for the King" if the official did not give the statute "full and due Execution."[166]

A number of qui tam provisions over the ensuing centuries were directed at the "aulnager" and other officers involved in regulating cloth sold by English manufacturers. The Statute of Cloths in the mid-fourteenth century mimicked the enforcement scheme adopted a year earlier in the Statute of Labourers, deploying qui tam litigation as a backup to suit by an aggrieved party. Under the statute, "every Buyer of . . . Cloth, or other that will sue" could receive half of the statutory forfeiture imposed upon proof that the aulnager "hath done any Fraud or Deceit in his Office."[167] An early fifteenth-century statute allowed a qui tam informer to sue an aulnager who sealed cloth that did not meet statutory length and breadth requirements.[168] In the second half of the fifteenth century, Parliament subjected the aulnager and another officer called the "keeper of the seal" to qui tam forfeitures for a more extended list of offenses, including improperly sealing cloth that violated statutory requirements, refusing to seal cloth that complied, charging higher fees than those provided by law, or refusing to show a commission upon request.[169] Statutes in the sixteenth century established responsibilities of local "searchers" and "sealers" regulating the cloth trade, with qui tam forfeitures for a mayor who failed to appoint a town searcher and for improper sealing of cloth.[170]

The need to monitor decentralized government conduct also explains two statutes from the second half of the sixteenth century regulating fairs and markets to prevent sales of stolen horses. The first statute required the person in charge of a fair or market to provide an open space for sales of horses and appoint one or more individuals to oversee and maintain meticu-

165 *Id.*

166 *Id.*

167 Statute of Cloths 1350, 25 Edw. 3 c. 1 (Eng.). The statute also provided for private suit against a mayor, bailiff, or keeper who failed to execute the statute, but it did not specify that the resulting fine should be shared with the private litigant. *Id.*

168 11 Hen. 4 c. 6 (1409) (Eng.) (allowing "every Person which will sue for the King, or for himself" to recover "the Fourth Part" of the £10 penalty for a first offense or the £20 penalty for a second offense).

169 4 Edw. 4 c. 5 (1464) (Eng.); *see also* 8 Edw. 4 c. 1 (1468) (Eng.) (providing for qui tam forfeiture if an aulnager sealed cloths of improper size).

170 *See* An Act Touching the Making of Woollen Clothes 1557, 4 & 5 Phil. & M. c. 5, § 33 (Eng.) (providing for forfeiture by town for improper sealing by searcher or sealer); *id.* § 34 (providing a qui tam remedy to enforce all forfeitures in this statute or the previous statute); An Act for the True Making of Woollen Cloth 1552, 5 & 6 Edw. 6 c. 6, §§ 41–42 (Eng.) (providing for forfeitures for improperly sealed cloth); *id.* § 44 (providing for forfeiture for failures of mayor, bailiff, or head officer to appoint searcher for town or city).

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lous records concerning each transaction.[171] The statute provided for qui tam forfeitures if the person in charge of the fair or market did not appoint a toll gatherer to oversee the space for sales of horses, if the toll gatherer did not properly supervise and maintain records of transactions, and if the toll gatherer or bookkeeper did not deliver the records to be signed by the owner or officer in charge of the fair or market.[172] A few decades later, Parliament adopted another qui tam provision to strengthen the statutory scheme, imposing a forfeiture if the responsible official did not know the seller of the horse or a person vouching for the seller.[173]

2. Countering Official Resistance to Legislative Policies

Government officials sometimes resist compliance with legislative directives due to conflicting economic or professional interests or policy differences with the legislature. The English Parliament repeatedly deployed qui tam provisions in such situations to counter officials' incentives for noncompliance. The 1318 statute discussed above—requiring local officials to refrain from selling merchandise they were responsible to regulate—addressed an economic conflict of interest.[174] Compliance with the statute would undermine economic interests of any official positioned to profit from such sales. The statute's qui tam provision responded to the economic incentive to violate the rule. After 1318, an official contemplating illegal sales would have to consider both the possible profits from a violation and the possible losses if a citizen filed a qui tam action. Similarly, a statute from the early seventeenth century imposed a qui tam forfeiture on the steward of any court-leet or court-baron who personally received more than a small sum by virtue of a grant or lease of the court's profits.[175] The statute sought to protect defendants from excessive fines imposed due to the financial interest of court officers.[176] Parliament believed qui tam enforcement could counteract the stewards' financial incentive to violate the legislation.[177]

Legislative restrictions can also undermine an official's noneconomic interests. In the sixteenth century, King Henry VIII sought to limit the jurisdiction of the ecclesiastical courts, making it illegal in most circumstances for such a court to summon a person who resided in a different diocese.[178] A judicial officer in an ecclesiastical court might chafe at this restriction on the tribunal's jurisdiction, which reduced the court's power and could interfere with the pursuit of justice in particular cases. Parliament's provision for qui

171 An Acte Agaynst the Byeng of Stolen Horses 1555, 2 & 3 Phil. & M. c. 7 (Eng.).

172 *Id.* §§ 2–3 (forfeitures); *id.* § 4 (qui tam remedy).

173 An Acte to Avoyde Horse Stealinge 1588, 31 Eliz., c. 12, § 2 (Eng.).

174 *See supra* notes 142–43 and accompanying text.

175 An Acte that No Psonne Shalbe Cited Oute of the Dioc Where He or She Dwelleth Excepte in Ctayne Cases 1531, 23 Hen. 8 c. 9 (Eng.).

176 *Id.*

177 *Id.*

178 *See id.*

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tam enforcement gave court officials a financial reason to stay within the scope of their more limited statutory mandate.[179]

Qui tam legislation could also address the concern that policy differences might lead to underenforcement of a controversial statutory mandate. In the 1670 Act to Prevent and Suppresse Seditious Conventicles, Parliament sought to promote religious uniformity by penalizing individuals who participated in religious assemblies conducted "in other Manner then [sic] according to the Liturgy and practice of the Church of England."[180] The statute allowed qui tam litigation against participants in such illegal religious services.[181] Parliament also provided qui tam remedies against certain officials with enforcement responsibilities, imposing mandatory reporting obligations on several temporal and spiritual officials. A "Constable[,] Headborough[,] Tythingman[,] Church warden[,] or Overseer of the Poore" credibly informed of an illegal meeting was required to seek a conviction under the statute, and could be sued for a forfeiture of £5 for willfully failing to perform his duty.[182] A Justice of the Peace or Chief Magistrate who willfully failed to execute the Act faced a much larger one hundred pound forfeiture, half to the King and half to the use of the informer.[183]

The statute was highly controversial and provoked criticism from advocates of religious tolerance and from those sympathetic to Catholics and Protestant dissenters burdened by the legislation.[184] Inclusion of qui tam provisions to enforce the statute against private citizens and to spur enforcement efforts by government officials reflected Parliament's expectation of resistance to the statutory policy. Those of us in the United States likely sympathize with the resisters because we disagree with Parliament's objective of securing religious uniformity by law, but any legislative tool can be put to good uses or bad. The key point here is that Parliament saw qui tam regulation of government officials as a means to ensure that its legal directives prevailed in a climate of policy disagreement.

3. Bolstering Public Confidence in Governmental Processes

Belief that government officials violate the law with impunity or that legal processes are untrustworthy can produce a corrosive public cynicism

179 *See id.*

180 An Act to Prevent and Suppresse Seditious Conventicles 1670, 22 Car. 2 c. 1, § 1 (Eng.).

181 *Id.* §§ 1–2.

182 *Id.* § 10.

183 *Id.* Two years later, Parliament sought to weed out "Popish Recusants" from government service by allowing qui tam prosecution of government employees who neglected to take an anti-Catholic oath and participate in an Anglican communion service. An Act for Preventing Dangers Which May Happen from Popish Recusants 1672, 25 Car. 2 c. 2, § 3–5 (Eng.).

184 Beck, *supra* note 108, at 593–95.

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that undermines voluntary legal compliance.[185] Parliament often deployed qui tam regulation as a means of ensuring a remedy for government lawlessness, particularly in situations where one might expect a heightened level of public attention or concern. For instance, a desire to maintain public confidence in the integrity of governmental functions appears to underlie a set of statutes regulating the activities of purveyors who acquired goods for the royal household. A 1362 statute noted complaints about purveyors for the royal family (including the King's eldest son) and other noble families.[186] The statute changed the name of procurement agents from "purveyor" to "buyer," limited the office to the households of the King and Queen, and required buyers to pay market prices.[187] The statute authorized "takings" as necessary to supply the royal households and specified a method for adjudicating price, but buyers were instructed to pursue such takings "in convenient and easy Manner, without Duress, Compulsion, Menace, or other Villainy."[188] The legislation provided a treble damage cause of action to a party "charge[d]" or "grieve[d]" by a malicious taking, purchase, or arrangement for carriage.[189] The statute included qui tam enforcement as a backup, providing that "if the Party will not sue, he that will sue for the King shall have the Third Peny of that which shall be recovered for his Labour."[190] A later enactment provided a qui tam remedy against any purchaser, including the King's purveyor, who bought grain at a measure of greater than eight bushels per quarter.[191]

One common area of public concern is the integrity of tax collection efforts. Parliament repeatedly employed qui tam enforcement to ensure that collected funds made their way to the public treasury for the intended purpose. In 1677, Parliament adopted a wide-ranging tax bill to collect funds for war with France. Under the statute, a local collector who kept any part of the money or paid it to an unauthorized recipient would forfeit £5 per offense, and a Receiver General would forfeit £500 each time he or his deputy failed

185 *See, e.g.*, Gonzalo Lira, *The Coming Middle-Class Anarchy*, BUS. INSIDER (Oct. 12, 2010), http://www.businessinsider.com/coming-middle-class-anarchy-2010-10 ("If a big enough proportion of the populace—not even a majority, just a largish chunk—decides that it's just not worth following the rules anymore, then that society's days are numbered . . . .").

186 36 Edw. 3 c. 2 (1362) (Eng.).

187 *Id.*

188 *Id.*

189 *Id.* c. 3. The statute also forbade the buyer to take payment from a person for "sparing to be made," but it is not clear whether this provision was enforceable through private litigation. *Id.*

190 *Id.*

191 11 Hen. 6 c. 8 (1433) (Eng.). An earlier statute had applied the eight bushel per quarter standard to purveyors, but the statute may have only allowed suit by an aggrieved party. 1 Hen. 5 c. 10 (1413) (Eng.) ("[T]he Party which will sue, have an Action grounded upon the Case.").

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to pay collected funds to the Exchequer.[192] These forfeitures were payable "to him or them that shall sue for the same."[193] A 1694 statute for duties on ships and liquor, again premised on a need for revenue to fight the French, contained a similar provision.[194] If the commissioners and governors responsible for collecting the duties diverted funds (or failed to keep accounts), they were required to pay the amount misapplied to any qui tam informer who would sue.[195]

Qui tam legislation became a common means of enforcing disqualification statutes that limited who could serve in Parliament. In 1742, various government officers were prohibited from becoming members of Parliament, with a forfeiture imposed for each day the person sat or voted in the legislature.[196] Use of qui tam enforcement in this context cannot be explained by a need for information. The facts forming the basis for the forfeiture—the holding of a public office and service in Parliament—would be matters of public record. The most plausible explanation for qui tam enforcement in this context is to make certain that enforcement of the statute could not be blocked by public officials allied with the violator. A 1782 disqualification statute similarly used qui tam litigation to bar members of Parliament who had an interest in a public contract.[197]

Qui tam enforcement was also employed to monitor the activities of private individuals and corporations performing public functions. A fourteenth-century statute imposed a qui tam forfeiture on a juror who accepted a gift in exchange for his vote.[198] A number of eighteenth-century statutes permitted qui tam actions against goldsmiths, silversmiths, and their guilds for offenses connected to the assaying or marking of metal.[199]

192 An Act for Raising Money by a Poll and Otherwise to Enable His Majestie to Enter into an Actuall Warr Against the French King and for Prohibiting Severall French Commodities 1677, 29 & 30 Car. 2 c. 1, § 59 (Eng.).

193 *Id.*

194 5 & 6 Wm. & M. c. 20, §§ 1, 13 (1694) (Eng.).

195 *Id.* § 13. A later provision of the statute provided for qui tam forfeiture by bank officers who lent money to the royal family. *Id.* § 29.

196 An Act to Exclude Certain Officers from Being Members of the House of Commons 1742, 15 Geo. 2 c. 22, § 2 (Eng.).

197 An Act for Restraining Any Person Concerned in Any Contract, Commission, or Agreement, Made for the Publick Service, from Being Elected, or Sitting and Voting as a Member of the House of Commons 1782, 22 Geo. 3 c. 45, §§ 2, 9 (Eng.).

198 34 Edw. 3 c. 8 (1360) (Eng.).

199 An Act for Appointing Wardens and Assaymasters for Assaying Wrought Plate in the Towns of Sheffield and Birmingham 1773, 13 Geo. 3 c. 52, § 4 (Eng.) (providing qui tam remedy); *id.* § 6 (bond and oath of assayers); *id.* § 19 (forfeiture of assayer for improper marking or inappropriate disclosure of designs); *id.* § 29 (recovery on bond for neglect or fraud by assayer); An Act for the Better Preventing Frauds and Abuses in Gold and Silver Wares 1739, 12 Geo. 2 c. 26, §§ 9, 22 (Eng.) (forfeiture for failing to submit required records); An Act for Appointing Wardens and Assay Masters for Assaying Wrought Plate in the Cities of Bristol Chester and Norwich 1700, 12 & 13 Will. 3 c. 4, § 6 (Eng.) (forfeiture by company of goldsmiths or silversmiths for fraud in assaying or marking).

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B. Early State Qui Tam Statutes Regulating Public Officials

Our review of British qui tam statutes directed at public officials suggested that such legislation could typically be explained in terms of one or more of three broad objectives: (1) monitoring decentralized government activity to ensure compliance with directives from a central government, (2) countering government officials' economic and other incentives to violate applicable rules, and (3) bolstering public confidence in the lawful performance of important governmental functions. Those same objectives prove similarly helpful in explaining the extensive use of qui tam legislation to regulate government activity in the eighteenth-century American colonies and states. Our survey of state legislation will be illustrative rather than exhaustive, sampling a wide array of statutes in which legislatures in all thirteen American colonies and states used private qui tam informers to monitor the lawfulness of government conduct.

1. Monitoring Decentralized Government Activity

Governmental functions in England were divided between hierarchically superior central authorities like the King and Parliament and inferior local authorities like mayors, bailiffs, and sheriffs. This structural allocation of authority was often replicated in the early American colonies and states. A centralized legislative assembly would generate laws with statewide application, while local administration would be overseen by town or county officials. Consequently, the American context generated a comparable problem concerning how to monitor decentralized government activities to ensure compliance with centralized directives. Borrowing from English practice, American governments often turned to qui tam legislation for that purpose.

a. Centralized Regulation of Local Administration

The newly independent state of North Carolina enacted legislation in 1777 to overhaul the state's system of caring for the poor.[200] Since impoverished citizens resided throughout the state, the task of caring for those in need fell to local "overseers of the poor," selected at the county level. The North Carolina legislation is remarkable for the large number of statutory forfeitures directed at five distinct categories of local public officials. The county sheriff could be fined £10 for neglecting to advertise the date for initially electing overseers of the poor,[201] £10 for failing to select and advertise a day for the overseers' first meeting,[202] £5 for each overseer he failed to summon to that initial meeting,[203] forty shillings for failing to summon an

200 An Act for Making Provision for the Poor, and for Other Purposes (1777), *in* JAMES IREDELL, LAWS OF THE STATE OF NORTH CAROLINA, c. 7, § 1 (Hodge & Wills eds., 1791) [hereinafter LAWS OF NORTH CAROLINA].

201 *Id.* § 2.

202 *Id.* § 1.

203 *Id.*

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overseer to a subsequent meeting,[204] and £20 for failing to advertise at least ten days in advance the date for the triennial election of new overseers.[205] Those elected as overseers could forfeit £5 if they failed to take the oath to qualify for office,[206] forty shillings if they missed a meeting without sufficient cause,[207] and £20 for refusing to serve as a county warden when selected by the other overseers.[208] The county warden and the clerk hired by the overseers could forfeit £10 for failure to maintain financial records and make them available for annual public inspection.[209] The warden could also forfeit £20 for refusing to care for a poor person settled in the county or returned from another county.[210] The clerk of the county court would forfeit £20 for neglecting to furnish the wardens with an inventory of the county's taxable property.[211] All of these forfeitures could be enforced through qui tam actions, with half of the money allocated to the use of the informer and half to benefit the local poor.[212] One advantage of this extensive system of qui tam enforcement was the elimination of the need for centralized oversight. Assuming local informers were willing to bring qui tam suits and courts were willing to implement the statute, the system could operate as intended without supervision by state officials.

A much more selective use of qui tam enforcement can be seen in a 1789 Massachusetts law establishing a statewide system of public education. The Massachusetts Constitution of 1780 stressed the importance of public education and empowered the legislature to require creation of schools.[213] Acknowledging the "dispersed situation of the [commonwealth's] inhabitants," the 1789 legislation required the formation of local school districts and the hiring of public schoolmasters.[214] Towns or districts that failed to

204 *Id.* § 7.
205 *Id.* § 20.
206 *Id.* §§ 3–4.
207 *Id.* § 7.
208 *Id.* § 5.
209 *Id.* § 6.
210 *Id.* § 23.
211 *Id.* § 12.
212 *Id.* § 19 (allowing, since no different allocation was specified, all of the forfeitures to be recovered "one Half to the Use of the Informer, the other half to the County Warden, for the use of the Poor of the County"). The statute also provided that the overseers would be liable to an aggrieved party if they failed to raise sufficient taxes to meet their financial obligations. *Id.* § 11. The wardens could sue sheriffs or tax collectors who failed to collect or account for tax revenues, *id.* § 13, or a private housekeeper who entertained a poor person without giving notice. *Id.* § 23.
213 MASS. CONST. of 1780, pt. I, art. III. The constitution highlighted instruction in "piety, religion and morality" as an aid to "the good order and preservation of civil government." *Id.* It empowered the legislature to require "the several towns, parishes, precincts, and other bodies-politic, or religious societies, to make suitable provision, at their own expense," for "public protestant teachers." *Id.*
214 An Act to Provide for the Instruction of Youth, and for the Promotion of Good Education (1789), *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 19, at 416 (Wright & Potter Printing Co. 1894) [hereinafter LAWS OF MASSACHUSETTS].

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comply could be compelled to pay money to the county treasury, but this penalty included no provision for qui tam enforcement.[215] The statute did include two regulations of schoolmasters enforceable through qui tam litigation. A person who operated a (presumably private) school for children "in the most early stages of life" without a certificate from the local selectmen would forfeit twenty shillings, half to the informer.[216] A more substantial penalty of £20 per month could be collected from any schoolmaster, including a public schoolmaster, who was not a citizen of one of the United States.[217]

Some qui tam legislation enforced duties relating to appointment and qualification for office. A Massachusetts town could forfeit £50 in a qui tam action if it failed to appoint a committee to implement a law to prevent overharvesting of certain species of fish.[218] An elected fish warden in New Hampshire could face a qui tam forfeiture for refusing the office.[219] Maryland and South Carolina surveyors could suffer qui tam forfeitures for conducting surveys before taking the oath of office.[220]

215 *Id.* at 418–19 ("[P]enalties . . . shall be levied by warrant from the Supreme Judicial Court, or Court of General Sessions of the Peace for the County.").

216 *Id.* at 420.

217 *See id.* ("[H]alf . . . to the use of the person who shall sue for the same.").

218 *See* An Act to Prevent the Destruction and to Regulate the Catching of the Fish Called Salmon Shad & Alewives in the Rivers and Streams in the Counties of Cumberland and Lincoln, and to Repeal all Laws Heretofore Made for that Purpose (1788), *in* LAWS OF MASSACHUSETTS, *supra* note 214, ch. 73, at 157, 162.

219 *See* An Act in Addition to, and in Amendment of an Act, Intitled "An Act to Prevent the Destruction of Salmon, Shad & Alewives in Merrimac River, & for Repealing all the Laws Heretofore Made for that Purpose" (1795), *in* 6 LAWS OF NEW HAMPSHIRE INCLUDING PUBLIC AND PRIVATE ACTS, RESOLVES, VOTES, ETC. EDITED AND PUBLISHED UNDER THE DIRECTION OF THE SECRETARY OF STATE SECOND CONSTITUTIONAL PERIOD 1792–1801, at 221–22 (1917) [hereinafter LAWS OF NEW HAMPSHIRE] ("[I]f any person legally chosen by any of said Towns shall neglect or refuse, after being lawfully notified of his appointment to take the Oath prescribed by this Act or execute the Office he shall forfeit & pay Ten Dollars to any Person who will sue for the same, with cost as aforesaid.").

220 *See* An Act to Ascertain the Fees of the Surveyor General for the Time Being and His Deputies; and to Prevent Any Irregularities Being Committed in the Office of the Said Surveyor General, or by Any of His Deputies (1733) [hereinafter Fees of the Surveyor General Act], *in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA; EDITED, UNDER AUTHORITY OF THE LEGISLATURE, § 7, at 343–47 (Thomas Cooper ed., 1838) [hereinafter STATUTES OF SOUTH CAROLINA]; THOMAS HERTY,?A DIGEST OF THE LAWS OF MARYLAND, BEING AN ABRIDGMENT, ALPHABETICALLY ARRANGED, OF ALL THE PUBLIC ACTS OF ASSEMBLY NOW IN FORCE, AND OF GENERAL USE, FROM THE FIRST SETTLEMENT OF THE STATE, TO THE END OF NOVEMBER SESSION 1797, INCLUSIVE, WITH REFERENCES TO THE ACTS AT LARGE 496 (1799) [hereinafter HERTY, LAWS OF MARYLAND]; *see also* An Act Requiring the Agents of the Lord Baltemore to Certifie into the Secretary's Office the Instructions and Conditions of Plantations, with the Fees by Them Demanded; and Obliging His Lordship's Deputy Surveyors to Qualifie Themselves According to Law (1715) [hereinafter An Act Requiring the Agents], *in* ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF MARYLAND, FROM 1692, TO 1715, at 58 (1723) [hereinafter ACTS OF MARYLAND] (subjecting surveyors to qui tam action for failure to take the oath of office).

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Other qui tam statutes enforced duties relating to administrative tasks like conducting meetings and keeping records. A Rhode Island town clerk who failed to give notice of a town meeting or a town-sergeant or constable who failed to serve the notice on individual freemen were subject to qui tam forfeitures.[221] A New Hampshire constable who failed to give notice of a town meeting could forfeit £10 "to any inhabitant of the town who will sue for the same," one-half "to the use of the Town and the other half to the use of the prosecutor."[222] A Massachusetts town clerk or county register of deeds could face qui tam prosecution for neglecting record-keeping requirements with respect to lost property or stray animals.[223] A Maryland clerk or register could suffer a qui tam forfeiture for allowing public records to be removed from the office overnight.[224] South Carolina surveyors were required to record surveying instructions in a government office.[225]

It was also common to use qui tam enforcement to monitor financial matters. Colonial Maryland regulated fees charged by a variety of state and local officials, with offenders obliged to pay treble damages to the party aggrieved, plus an additional forfeiture to be split between the crown and "the Party or Parties that shall sue for the same."[226] Officers and agents of Lord Baltimore, the Lord Proprietor, faced a qui tam action if they did not post information including fees charged.[227] South Carolina surveyors could be sued for charging higher fees than provided by law.[228] Commissioners of a Maryland county court who took a bond from a sheriff could suffer a qui tam forfeiture if they failed to transcribe and transmit the bond to the appropriate office within two months.[229] In Rhode Island, an officer who retained money paid in fines and forfeitures for more than three months could be sued by a qui tam informer for three times the amount withheld.[230]

221 *See* An Act Declaring Towns to be Bodies Corporate, Establishing Town-Councils, Regulating Town-Meetings, and Prescribing the Manner of Recovering Debts Due from Towns, *in* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, AS REVISED BY A COMMITTEE, AND FINALLY ENACTED BY THE HONOURABLE GENERAL ASSEMBLY, AT THEIR SESSION IN JANUARY, 1798, § 11, at 329–30 (Carter & Wilkinson eds., 1798) [hereinafter LAWS OF RHODE ISLAND].

222 An Act for Regulating Towns and the Choice of Town Officers (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 41, at 592–93 [hereinafter An Act for Regulating Towns].

223 *See* An Act Respecting Lost Goods & Stray Beasts (1788), *in* LAWS OF MASSACHUSETTS, *supra* note 214, ch. 55, at 86, 87–88.

224 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 444.

225 *See* Fees of the Surveyor General Act, *supra* note 220, §§ 6, 10.

226 An Act for the Limitation of Officer's Fees, *in* ACTS OF MARYLAND, *supra* note 220, at 55.

227 *See* An Act Requiring the Agents, *supra* note 220, at 58.

228 *See* Fees of the Surveyor General Act, *supra* note 220, § 1.

229 *See* An Act for the Direction of the Sheriff's Office, and Restraining Their Ill Practices Within This Province (1715), *in* ACTS OF MARYLAND, *supra* note 220, at 177–79.

230 *See* An Act to Prevent the Detention of Fines from the Proper Offices (1794), *in* LAWS OF RHODE ISLAND, *supra* note 221, § 1, at 421–22. The statute obliged the officers from whom the money was withheld to enforce the statute. *Id.* § 2. However, this did not

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American qui tam legislation in the eighteenth century enforced a wide variety of other duties. A New Hampshire sheriff or constable who neglected to serve a lawful precept (a writ or warrant) after tender of payment could be sued for a forfeiture by a qui tam informer or, in the absence of a private suit, indicted for the forfeiture to the use of the county.[231] A New Hampshire town officer appointed to measure wood sold by the cord would forfeit thirty shillings for neglecting to measure wood brought to him.[232] The selectmen of a Connecticut town were subject to a qui tam penalty if they failed to provide a pound to restrain stray animals,[233] and for each month they failed to provide the town constable a black staff with the state's coat of arms on the head.[234] Colonial New Jersey constables could be sued by qui tam informers for failure to perform duties connected with issuance of bills of credit to increase the money supply.[235] In Massachusetts, the keeper of a lighthouse could forfeit £100 for failing to keep the lights burning and visible to ships from sunset to sunrise, two-thirds payable to "the person or persons who shall inform of such neglect."[236] A colonial sheriff in Maryland could forfeit a quantity of tobacco in an action by a qui tam informer if he delayed delivery

supersede the provision for qui tam enforcement. *Id.* § 1 ("[O]ne moiety thereof to the use of the person who shall sue for the same.").

231 *See* An Act Prescribing the Duty and Regulating the Office of Sheriff (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 44, at 608 [hereinafter An Act Prescribing the Duty and Regulating the Office of Sheriff] (providing for forfeiture of £10 within three months to "any person who will sue for the same" or, in the absence of a private suit, recovery by the county through indictment within a year). A "precept" is "[a] writ or warrant issued by an authorized person demanding another's action, such as a judge's order to an officer to bring a party before the court." *Precept*, BLACK'S LAW DICTIONARY (10th ed. 2014). A person falsely pretending to be a sheriff or peace officer could also be sued for a qui tam forfeiture. *See* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 44, at 609.

232 *See* An Act to Prevent the Fraud in Cord Wood Exposed to Sale (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 9, at 758 (stating that forfeiture "to be recovered and appropriated in manner as beforementioned"; prior paragraph provided for forfeiture by person who bought or sold unmeasured wood "one half of which sum shall be for the use of the town or place in which the same is so bought & sold, the other half to the use of the person suing for the same").

233 *See* An Act for Providing and Maintaining Pounds, and for Regulating the Impounding Creatures, and for Preventing Rescues and Pound Breach, *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, § 3, at 344 (Hartford, Hudson & Goodwin 1802) [hereinafter LAWS OF CONNECTICUT].

234 *See* An Act Relating to Constables, *in* LAWS OF CONNECTICUT, *supra* note 233, § 15, at 119–20.

235 *See* An Act for Making Forty Thousand Pounds in Bills of Credit (1735), *in* LAWS OF THE ROYAL COLONY OF NEW JERSEY 1703–1745, at 476–77; An Act for Striking One Hundred Thousand Pounds in Bills of Credit, and Directing the Mode for Sinking the Same (1774), *in* LAWS OF THE ROYAL COLONY OF NEW JERSEY, 1770–1775 (1986), at 219 [hereinafter LAWS OF THE COLONY OF NEW JERSEY].

236 An Act Provision for the Building and Maintaining Light Houses on the Sea Coast of This Commonwealth, and for Repealing All Laws Heretofore Made for That Purpose (1787), *in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 1786–1787, ch. 31, at 597 (Wright & Potter Printing Co. 1893) [hereinafter ACTS OF MASSACHUSETTS].

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of a royal or official letter or refused to give a receipt when passing the letter along,[237] or if he failed to read in the county court an act concerning regulation of slaves.[238] While use of qui tam regulation to supervise local government administration could be quite eclectic in the eighteenth-century American states, we will observe below a number of recurring patterns.

b. Road Maintenance and Construction Obligations

Legislators in the eighteenth century often turned to qui tam supervision of road construction and maintenance activities. Early American governments did not create centralized highway departments of the sort common today. The task of road maintenance was instead delegated to local governments. Officials responsible to carry out road construction and maintenance functions were sometimes monitored and incentivized through qui tam legislation.

Selective use of qui tam monitoring can be seen in a 1774 New Jersey statute that overhauled the system of road construction and maintenance throughout the colony.[239] The statute imposed a number of legal duties on public officials, some enforceable by government officials and others enforced through qui tam litigation. The law required every city, town, and precinct to annually elect two surveyors of the highways and at least two overseers of the roads.[240] If a surveyor or overseer did not take the oath of office, he could forfeit £5 to the local tax collector to use for road and bridge repair, but this provision did not authorize suit by a private party or provide for a private litigant to share in the forfeiture.[241] The same enforcement mechanism applied to a forty shilling forfeiture if the town clerk failed to post notices with the names of those elected, a £5 forfeiture by the clerk of the peace if he neglected record-keeping requirements with respect to new roads approved by the surveyors, and a forty shilling forfeiture if tax assessors or collectors neglected revenue-raising functions.[242] Other provisions allowed overseers to recover highway-related funds from constables[243] and enabled

237 *See* An Act for the More Speedy Conveying Publick Letters and Packets of This Province, and Defraying the Charge Thereof; and to Prevent Abuses of Breaking Open and Concealing Any Letters Whatsoever (1713), *in* ACTS OF MARYLAND, *supra* note 220, at 73–75.

238 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 381.

239 *See* An Act for Regulating Bridges and Roads (1774), *in* LAWS OF THE COLONY OF NEW JERSEY, *supra* note 235, at 178.

240 *Id.* at 178, 182.

241 *Id.* This provision did not explicitly allow enforcement by the tax collector, but did provide for the money to be paid to that official. *Id.* at 178. It did not make provision for qui tam enforcement, neither authorizing suit by a private litigant nor providing for the forfeiture to be split with that person. *Id.*

242 *Id.* at 179–80, 182, 192.

243 *Id.* at 187.

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tax collectors to recover excess bridge funds and related forfeitures from their predecessors.[244]

In addition to the duties enforceable by public officials, the 1774 New Jersey statute used qui tam informers to monitor certain responsibilities of elected surveyors and overseers. A surveyor who neglected duties connected with a petition to open a new road or to alter an existing road could forfeit £5 in a qui tam action.[245] An overseer who failed to perform duties relating to road inspection and maintenance could forfeit £3, recoverable by a qui tam informer.[246] An overseer also incurred a forfeiture if he "connive[d] at" letting a private road worker request a reward from a traveler, excused someone from working "for drink," or got drunk when he should work.[247] The overseer was likewise subject to suit if he neglected to enforce forfeitures incurred by others.[248] These forfeitures imposed on the overseer could be recovered "by any Person whatsoever, One Half to the Use of the Prosecutor."[249] The practice of using qui tam litigation to enforce the duties of overseers and surveyors was not an innovation in the 1774 statute, but instead carried forward a practice that stretched back at least to a 1716 enactment on the same subject.[250]

Qui tam enforcement of road maintenance obligations was common in other states. Selectmen in Connecticut towns could be sued by informers if they failed to maintain sign posts and milestones.[251] A North Carolina over-

244 *Id.* at 189–90. Other provisions of the statute imposed penalties for private misconduct, enforceable by public officials, with only one providing for qui tam litigation as a backup enforcement method. An overseer was empowered to enforce a forfeiture when a citizen failed to provide required assistance in road maintenance activities, with the overseer keeping half of the funds recovered. *Id.* Other forfeitures applied to those who filled in drainage ditches, who failed to remove certain dead trees near the road, who defaced or destroyed road markers, or who blocked or narrowed certain roadways. *Id.* at 184–86, 189–90. A person who left open or destroyed a gate, or who drove through private lands outside the roadway, was liable for a forfeiture in addition to damages for any injured party. *Id.* at 186–87. A small forfeiture applied when citizens assisting with road maintenance requested money, drink, or rewards from travelers. *Id.* at 183–84. This latter provision deployed qui tam enforcement as a backup to enforcement by a public official, allowing recovery "by the Overseer, or any other Person who shall prosecute the same, One Third for his own Use." *Id.* at 184.

245 *Id.* at 181 ("[T]o be recovered by any Person who will sue for the same . . . paid One Half to him who shall sue for the same to Effect.").

246 *Id.* at 183.

247 *Id.* at 184.

248 *Id.*

249 *Id.*

250 *See* An Act for the Better Laying Out, Regulating and Preserving Public Roads and High-ways Thro'-out This Province (1716), *in* THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, FROM THE TIME OF THE SURRENDER OF THE GOVERNMENT IN THE SECOND YEAR OF THE REIGN OF QUEEN ANNE, TO THIS PRESENT TIME, BEING THE TWENTY FIFTH YEAR OF THE REIGN OF KING GEORGE THE SECOND 48–56 (1752) [hereinafter ACTS OF THE PROVINCE OF NEW JERSEY].

251 *See* An Act for Erecting and Continuing a Sign-post in Each Town in This State, *in* LAWS OF CONNECTICUT, *supra* note 233, § 1, at 395 ("[O]ne Half to the Complainer that

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seer of roads faced possible qui tam litigation if he refused appointment to the position,[252] neglected to maintain signs at forks in the road,[253] or failed to keep roads and bridges clear and repaired.[254] New York likewise authorized qui tam prosecution of a person neglecting or refusing the office of overseer of roads,[255] while New Hampshire selectmen were subject to qui tam forfeitures if they neglected to establish post-guides at intersections.[256]

c. Qui Tam Regulation of Judicial Administration

American governments in the eighteenth century often used qui tam legislation to ensure the proper functioning of the legal system. Such statutes sometimes enforced the initial steps necessary to qualify for offices in judicial institutions—taking oaths and, for some roles, posting bond. In North Carolina, a qui tam informer could keep half of the £100 forfeiture imposed on someone who presumed to act as a justice of the peace or justice of a county court without first taking the prescribed oath of office.[257] Virginia adopted the same rule for justices of the peace and magistrates of county or corporation courts, backed by a forfeiture of $1000.[258] The clerk

shall prosecute the same within six Months after such Neglect, and the other Half to the County Treasury; which Fine shall be recoverable of the Select-men."); An Act to Oblige the Several Towns on the Post-Roads, to Erect Monuments, Shewing the Distances from the Several County Towns of Said Roads, *in* LAWS OF CONNECTICUT, *supra* note 233, § 2, at 319 ("[O]ne Half to him or them who shall prosecute the same to Effect, the other Half to the Treasury of the Towns where such Select-men belong.").

252 *See* An Act to Empower the County Courts of Pleas and Quarter-Sessions of the Several Counties in This State, to Order the Laying out Public Roads, and to Establish and Settle Ferries, and to Appoint Where Bridges Shall Be Built, and to Clear Inland Rivers and Creeks (1784), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XIV, § IX, at 534 ("[T]o be recovered and applied as other Fines and Forfeitures by this Act directed.").

253 *Id.* § XI, at 534 ("[T]o be recovered before any Justice of the Peace, and applied as other Fines in this Act are directed.").

254 *Id.* § XIV, at 535 ("[T]o be recovered by a Warrant from any Justice of the Peace by any Person taking out the same, and to be applied to his own Use.").

255 *See* An Act for Dividing the Counties of This State into Towns (1788), *in* 2 LAWS OF THE STATE OF NEW YORK: COMPRISING THE CONSTITUTION, AND THE ACTS OF THE LEGISLATURE, SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION, INCLUSIVE, ch. LXIV, § XIII, at 170 (Thomas Greenleaf ed., 1792) [hereinafter LAWS OF NEW YORK] (moiety of forfeiture "to the use of any person who shall prosecute the same to effect").

256 *See* An Act to Establish Post-Guides and to Facilitate Traveling in and Through This State (1792), *in* 6 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 19, at 66–67 (giving "one half to the use of the prosecutor or Informer").

257 *See* An Act for Establishing Offices for Receiving Entries of Claims for Lands in the Several Counties Within This State, for Ascertaining the Method of Obtaining Titles to the Same, and for Purposes Therein Mentioned (1777), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. I, § LVI, at 309.

258 *See* An Act to Reduce into One, the Several Acts Concerning the County and Other Inferior Courts of This Commonwealth (1792) [hereinafter An Act Concerning Inferior Courts], *in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE, ch. LXVII, § II, at 90 (Augustine Davis ed., 1794) [hereinafter ACTS OF VIRGINIA]. A forfeiture of $1500 applied if someone

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of a Virginia county court could forfeit $1500 for executing the office without an oath and $600 for doing so without posting an adequate bond, both enforceable by qui tam litigation and accompanied by terms of imprisonment.[259] A Virginia county coroner faced a qui tam forfeiture if he executed a writ prior to taking the oath of office and securing a bond.[260]

Some states used qui tam legislation to supervise issuance and execution of writs. A North Carolina clerk who issued a writ without taking adequate security or keeping specified records would forfeit £100 to the defendant plus an additional £50, "one Half to the Use of the Person suing for the same, the other Half to the Use of the Poor of the County."[261] A Maryland county clerk who delivered blank writs to an attorney, sheriff, or other person could suffer a forfeiture of tobacco, half to the government and half to the informer.[262] A North Carolina sheriff who neglected to execute a writ or other process without sufficient cause was required to pay £50 to the aggrieved party; however, if the sheriff executed a "false [r]eturn," he had to pay £50, "one Moiety thereof to the Party grieved, and the other Moiety to him or them that will sue for the same."[263] A New York sheriff would forfeit £100 at the suit of a qui tam informer for executing a writ of replevin notwithstanding an unadjudicated claim of ownership by the person in possession of the property.[264] A New York sheriff executing a writ of *fieri facias* or other writ of execution could face a qui tam prosecution if he sold property without proper notice or outside of authorized hours.[265] A New Jersey con-

acted as a judge of the General Court without first taking the oath, but this statute did not include a provision for qui tam enforcement. *See* An Act Reducing into One, the Several Acts and Parts of Acts Concerning the General Court, and Prescribing the Manner of Proceeding Therein in Certain Cases (1792), *in* ACTS OF VIRGINIA, *supra*, ch. LXVII, § I, at 76.

259 *See* An Act to Reduce into One, All Acts and Parts of Acts Respecting County and Corporation Clerks (1792), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LXX, §§ I, III & VI, at 101–02 [hereinafter An Act Respecting Clerks].

260 *See* An Act Concerning Coroners (1791), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LXXXI, § V, at 132.

261 An Act Directing the Clerks of the Several Courts of Record Within This State as to Their Duty in Office with Respect to Issuing Writs (1787), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XIX, § III, at 619.

262 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 175 ("[O]n penalty of 6000lb. tobacco; one half to the support of government, the other to the informer.").

263 An Act for Appointing Sheriffs, and Directing Their Duty in Office, and for Obliging the Late Sheriffs and Collectors of Public Monies Who Are in Arrear, to Account for and Pay the Same, and Other Purposes (1777), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. VIII, § V, at 331; *see also* THE EARLIEST PRINTED LAWS OF NEW JERSEY, 1703–1722, at 14 (John D. Cushing ed., 1978) [hereinafter LAWS OF NEW JERSEY] (referencing English law from the tenth and eleventh year of King William the Third imposing qui tam forfeiture if sheriff or other officer violated statutory restrictions on returns).

264 *See* An Act to Prevent Abuses and Delays in Actions of Replevin (1788), *in* 2 LAWS OF NEW YORK, *supra* note 255, ch. V, § VI, at 7.

265 *See* An Act to Regulate Sales on Execution (1790), *in* 2 LAWS OF NEW YORK, *supra* note 255, ch. LVII, §§ I–II, at 330.

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stable could pay a £5 qui tam forfeiture if he violated statutory duties relating to summoning jurors and executing judgments.[266]

Qui tam legislation was sometimes deployed to promote good record keeping by judicial officers. A Rhode Island justice of the peace or his estate was required to deliver official papers and records to the town clerk within six months after he left office or died, subject to a qui tam forfeiture for each month's delay.[267] On removal from office or death, a Massachusetts justice of the peace or his estate had three months to lodge official papers and records with the clerk of the court of common pleas, subject to a variable qui tam forfeiture, with a larger forfeiture imposed for anyone who knowingly destroyed, defaced, or concealed records of a deceased justice.[268] The clerk of a Maryland court of record could suffer a qui tam forfeiture of two thousand pounds of tobacco if he did not deliver a legible bill of costs recovered from the defendant.[269] Virginia law imposed a qui tam forfeiture on a court clerk who removed official records and papers from the county.[270] A New Hampshire clerk of court could be sued by a qui tam informer for failing to deliver to the sheriff and the county treasurer an attested list of fines and forfeitures imposed.[271]

Qui tam legislation also enforced a smorgasbord of other duties relating to judicial administration and the integrity of the legal system. In order to prevent malicious prosecutions by information, a qui tam informer could col-

266 *See* An Act to Erect and Establish Courts in the Several Counties in This Colony for the Trial of Small Causes, and to Repeal the Former Act for That Purpose, *in* LAWS OF THE COLONY OF NEW JERSEY, *supra* note 235, at 308 (constable's duties in summoning jury venire); *id.* at 308–09 (constable's duties in executing judgment); *id.* at 311 (qui tam forfeiture for violating statutory duties).

267 *See* An Act Regarding the Proceedings and Trials in Civil Actions, Brought Before Justices of the Peace, *in* LAWS OF RHODE ISLAND, *supra* note 221, § 12, at 193–94 (awarding forfeiture of two dollars a month, "one moiety thereof to and for the use of the State, and the other moiety thereof to and for the use of the informer who shall prosecute for the same").

268 *See* An Act for Rendering Process in Law Less Expensive (1788), *in* LAWS OF MASSACHUSETTS, *supra* note 214, ch. 67, at 126 (awarding forfeiture of £50–500 for neglect and £500–1000 for destruction or concealment, "one half to the Commonwealth & the other half to him or them, who shall sue for the same"). An earlier statute on the same subject imposed different deadlines and smaller forfeitures, but was also enforceable through qui tam litigation. An Act for Rendering Process in Law Less Expensive, *in* ACTS OF MASSACHUSETTS, *supra* note 236, ch. 43, at 110 (forfeiture of £50 for former justice of the peace who delayed six months in lodging records, or for estate executor or administrator who delayed three months, or £100 for destroying, defacing, or concealing records of deceased justice, "one half thereof to the use of him or them, who shall sue for the same").

269 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 91.

270 *See* An Act Respecting Clerks, *supra* note 259, § IV, at 101–02 (forfeiture for removing papers and records); *id.* § VI, at 102 ("All the penalties by this Act imposed, shall be prosecuted for, and recovered by bill, plaint, or information, in any Court of Record, one moiety to the use of the Informer, and the other moiety to the use of the Commonwealth.").

271 *See* An Act Prescribing the Duty and Regulating the Office of Sheriff, *supra* note 231, at 609–10.

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lect a forfeiture if the Attorney General of colonial New Jersey prosecuted someone for a misdemeanor without presentment by a grand jury or an information supported by an order signed by the governor.[272] The judges of a Virginia county or corporation court could incur a qui tam forfeiture if they failed to maintain a sufficient prison, pillory, and stocks,[273] failed to make timely nominations to fill a vacancy in the office of coroner,[274] or if the justices in certain counties failed to provide facilities and equipment needed for hemp inspection.[275] Maryland judges were obliged to maintain a set of standard English weights and measures, subject to enforcement by qui tam litigation.[276] Judges in Rhode Island, Connecticut, and New Jersey could face qui tam actions for performing clandestine weddings.[277] A justice of the peace in South Carolina could incur a forfeiture for failing to administer certain oaths.[278] Virginia followed the English precedent of permitting a qui tam action against a juror who accepted a bribe.[279] Statutes in South Carolina, New Jersey, Virginia, and Maryland used qui tam monitoring to restrict

272 *See* An Act for Preventing Malicious Prosecutions by Informations, *in* LAWS OF NEW JERSEY, *supra* note 263, ch. XLIV, at 27.

273 *See* An Act Concerning Inferior Courts, *supra* note 258, § XIII, at 92.

274 *See* An Act Concerning Coroners, *supra* note 260, ch. LXXXI, § II, at 131–32.

275 *See* An Act to Regulate the Inspection of Hemp (1790), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LIV, § VI, at 59 (giving "one moiety to the prosecutor").

276 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 491.

277 *See* An Act to Prevent Clandestine Marriages, *in* LAWS OF RHODE ISLAND, *supra* note 221, § 9, at 485 (imposing forfeiture for judge or minister performing wedding "without due lawful publication"); An Act for Regulating and Orderly Celebrating of Marriages; and for Preventing and Punishing Incestuous and Other Unlawful Marriages, *in* LAWS OF CONNECTICUT, *supra* note 233, § 3, at 286 (subjecting magistrate or minister to forfeiture for performing marriage without prior publication and consent of parents and guardians for those subject to care and control); An Act to Prevent Clandestine Marriages, *in*?ACTS OF THE PROVINCE OF NEW JERSEY, *supra* note 250, at 79–80 (imposing forfeiture by minister or justice of the people who marries people without a license or publication, half to the crown, "the other half thereof to the Parents or Guardians of such Person who shall be so joyned in marriage as aforesaid, or to such other Person or Persons who shall prosecute the same to Effect"). A similar forfeiture by Massachusetts judges could be enforced by the county treasurer or by a parent or guardian with responsibility for one of the parties. *See* An Act for the Orderly Solemnization of Marriages (1786), *in* LAWS OF MASSACHUSETTS, *supra* note 214, ch. 3, at 9.

278 *See* An Act for Making Aliens Free of This Part of the Province, *in* 2 STATUTES OF SOUTH CAROLINA, *supra* note 220, at 251–53.

279 *See* An Act Concerning Grand Juries, Petit Juries, and Venir (1792), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LXXIII, § XIX, at 108; *see also* An Act Against Such as Shall Procure or Commit Wilful Perjury, and Against Embracery (1789), *in* ACTS OF VIRGINIA, *supra* note 258, ch. XLVIII, § III, at 52; *see also supra* note 198 and accompanying text.

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judges, sheriffs, and clerks from pleading as attorneys.[280] A New Jersey statute used qui tam monitoring to limit the fees attorneys charged.[281]

d. Qui Tam Monitoring of Inspection and Regulatory Regimes

Our review of English law showed use of qui tam statutes to police regulatory regimes, enforcing obligations of officials who regulated cloth or guild officials who assayed precious metals.[282] The practice carried over to the new world, where American governments set up regulatory regimes enforceable by qui tam bounties directed at both government officials and regulated parties. A 1715 Maryland statute used qui tam informers to enforce regulations for "hogsheads" (barrels) of tobacco.[283] The legislation recited difficulties experienced in regulating tobacco merchants, including a conclusion that earlier laws had "in great measure proved ineffectual, either for want of laying sufficient Penalties upon the Offenders, or of proper Methods to inflict them."[284] Under the new legislation, any person who suspected that tobacco had been packed in oversized hogsheads could "call to his Assistance any Justice of the Peace, Sheriff, Vestryman, or Church-Warden" to enter a building or ship for the purpose of seizing and marking the questionable barrels.[285] If examination showed that a hogshead exceeded statutory size requirements, the officer could "condemn the same to the Use of such Informer, who shall thereupon be immediately vested with the Property

280 *See* An Act for Regulating Attorney's [sic] at Law Within This Province (1694), *in* ACTS OF THE PROVINCE OF NEW JERSEY, *supra* note 250, ch. VI, at 343 (forfeiture for justice of the peace, sheriff, clerk, and others pleading as attorney in courts of province unless a party); An Act for Establishing County and Precinct Courts, *in* 7 STATUTES OF SOUTH CAROLINA, *supra* note 220, § VII, at 168; An Act Concerning Counsel and Attornies at Law (1792), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LXXI, § XI, at 104 (forfeiture for justice of the peace, sheriff, or clerk pleading as attorney in court of the county, except as general attorney for nonresident); HERTY, LAWS OF MARYLAND, *supra* note 220, at 51 (forfeiture of 3000 pounds of tobacco if the magistrate, sheriff, or clerk pleads as an attorney in the court where the person holds office).

281 *See* For the Better Enforcing the Observation of the Above Recited Ordinance (An Act Enforcing the Observation of the Ordinance for Establishing Fees Within This Province), *in* LAWS OF NEW JERSEY, *supra* note 263, ch. LXVI, at 55.

282 *See supra* notes 167–70, 199 and accompanying text.

283 An Act Ascertaining the Gauge and Tare of Tobacco Hogsheads; and to Prevent Cropping and Defacing Tobacco Taken on Board Ships or Vessels upon Freight; and for Laying Impositions on Tobacco by the Hogshead, for the Support of Government; and for Encouraging Settlements in This Province, by Ascertaining the Manner of Paying the Alienations, Fines, and Quit Rents, to the Lord Proprietory of This Province, on the Conditions Therein Mentioned (1715), *in* ACTS OF MARYLAND, *supra* note 220, at 87, 168.

284 *Id.*

285 *Id.* The statute provided that the staves could not exceed forty-eight inches in length, that the head could not exceed thirty-two inches in diameter, and that the bulge could not exceed thirty-seven inches in diameter. *Id.* A later section of the statute indicated that duties were charged per hogshead of tobacco, which might suggest a motive for using oversized barrels. *Id.* at 170–71.

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thereof."[286] An informer who actually saw a suspicious hogshead (rather than just learning of one in a concealed location) could immediately seize and mark it on his own initiative before "giv[ing] Information to some Justice, or other Officer," who would then go to examine the barrel.[287] A justice of the peace or other officer who refused or delayed performance of statutory duties would forfeit ten shillings per hogshead to the use of the informer.[288]

New Hampshire used qui tam regulation to monitor the integrity of weights and measures used by local merchants. The selectmen of a town would forfeit $100, half "for the use of the person who shall sue for the same," if they did not procure a set of standard weights, measures, and a scale beam as required by law.[289] The person selected as sealer of weights and measures would forfeit $50 for failing to notify inhabitants to bring or send their scale beams, steelyards, weights, and measures for inspection, and $20 if he neglected some other duty under the act, "one half for the prosecutor."[290] If a person refused to have his weights and measures approved, there was a potential forfeiture to be split between the sealer and the poor of the town.[291] However, a qui tam action could be brought against a merchant who sold merchandise using unapproved weights and measures, or using sealed weights and measures that proved unjust, one moiety for the poor of the town "the other moiety to the informer who shall prosecute the same."[292]

A late eighteenth-century Delaware statute used qui tam monitoring to reinforce a system of health inspections in state ports.[293] The master or commander of a ship carrying more than forty persons, or carrying an infectious passenger, or coming from an infected port would forfeit $1000 if he landed without a permit from a doctor appointed to make inquiries.[294] A smaller $100 forfeiture applied if he concealed the existence of a sick passenger or material information about sickness during the voyage.[295] If the doctor denied a landing permit, the ship could nevertheless try to convince other

286 *Id.* at 168–69. The judgment of the officer was final, and the tobacco was to be released and the mark struck out if the hogshead did not violate the statute. *Id.* at 169.

287 *Id.* at 169.

288 *Id.* The informer also had a cause of action against anyone who altered or removed a marked hogshead before it could be examined by an officer. *Id.* Another provision permitted a qui tam forfeiture by any person who sold a hogshead of tobacco that did not have the weight marked on it. *Id.* at 169–70.

289 An Act Regulating Scale Beams, Steelyards, Weights and Measures (1797), *in* 6 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 21, at 446.

290 *Id.*

291 *Id.* at 445.

292 *Id.* at 445–46.

293 *See* An Act to Prevent Infectious Diseases Being Brought into This State, and for Other Purposes (1797), *in* LAWS OF THE STATE OF DELAWARE: TO THE YEAR OF OUR LORD, ONE THOUSAND EIGHT HUNDRED AND TWENTY NINE INCLUSIVE 298 (R. Porter & Son 1829) [hereinafter LAWS OF DELAWARE].

294 *Id.* § 1.

295 *Id.* § 2.

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local officials to allow landing of sick passengers under conditions that would not endanger public health.[296] The doctor was also instructed to inspect the ship for compliance with statutory standards regarding the adequacy of supplies and accommodations for passengers.[297] A forfeiture of $50 applied if the doctor failed to report violations to a local judge.[298] All of the fines and penalties under the statute were to be divided, with one moiety going to the poor of the county "and the other moiety thereof to the use of him or her who will sue for the same."[299]

Many other early American statutes used qui tam litigation to reinforce inspection regimes. New Hampshire's system for inspecting and branding pot ash and pearl ash exported from the state included a number of potential forfeitures by regulated parties, enforceable by qui tam informers, as well as one applicable to an inspector who delayed more than three hours in performing a requested inspection.[300] A New Hampshire naval officer, responsible for monitoring shipping at the state's ports, could be sued by a qui tam informer for neglecting functions imposed by state law.[301] A North Carolina naval officer could face qui tam forfeitures for allowing a ship to leave port without a certificate of inspection or for refusing to provide a certificate that the master or commander of the vessel had taken an oath required by law.[302]

296 *Id.* § 3.

297 *Id.* § 5, at 299.

298 *Id.*

299 *Id.* § 8, at 299–300. A supplementary statute enacted later may have eliminated the provision for qui tam enforcement. The latter statute provided that all forfeitures in either statute were to be sued for in the name of the state and instructed that suits were to be brought, depending on the location, by the physicians appointed to perform inspections, by specified municipal officials, or by a trustee of the poor. *See* A Supplement to the Act, Entitled, "An Act to Prevent Infectious Diseases Being Brought into This State and for Other Purposes" (1799), *in* LAWS OF DELAWARE, *supra* note 293, § 9, at 303. A colonial Georgia statute with similar purposes provided for qui tam actions against various private individuals responsible for a ship who did not truthfully answer questions about the health status of those on board. *See* An Act to Amend an Act Intituled an Act to Prevent the Bringing into and Spreading of Malignant and Contagious Distempers in the Province; to Oblige Masters or Commanders of Vessels Going out of Any Port Within the Same First to Produce a Passport from the Governour or Commander in Chief; to 'Prevent the Harbouring of Sick Sailors and Others; and for the Regulating and Well Ordering of the Lazaretto upon the Island of Tybee (1770), *in* 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA: STATUTES, COLONIAL AND REVOLUTIONARY 1768 TO 1773, at 156–60 (Allen D. Candler ed., 1970) [hereinafter STATUTES OF GEORGIA].

300 *See* An Act for the Inspection of Pat and Pearl Ashes (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 40, at 825 ("[An inspector who shall] unreasonably refuse neglect or delay to proceed to such examination and inspection for the space of three hours . . . shall for such offence forfeit the sum of twenty shillings to any person who shall sue for the same.").

301 *See* An Act for the Regulation of Navigation and Commerce (1785), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 8, at 78–80.

302 *See* An Act to Prevent the Exportation of Unmerchantable Commodities (1784), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XXVI, §§ VI–VIII, at 496 [hereinafter An Act to Prevent the Exportation of Unmerchantable Commodities].

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A Georgia inspector could incur a qui tam forfeiture if he intentionally and inaccurately certified that hemp or flax was "Clean made & Merchantable" or that flour was "Merchantable."[303] A Maryland tobacco inspector faced a qui tam forfeiture if he did not burn unmerchantable tobacco, but instead allowed it to be carried away from the inspection site.[304] Massachusetts provided for local inspection of nails, with forfeitures applicable to nail sellers as well as forfeitures by nail inspectors for neglect or fraud in the performance of their duties.[305] New Hampshire cullers and surveyors, who inspected wood products prior to shipment, could be sued qui tam for fraud or deceit.[306] A Connecticut statute for inspection of beef, pork, and other products provided qui tam forfeitures for private exporters, as well as for an inspector who gave a "false certificate" of inspection.[307] In North Carolina, an inspector was subject to qui tam prosecution for branding empty barrels or lending his inspector's brand to someone else.[308] Merchants in Rhode Island could be sued by qui tam prosecutors if they sold casks of lime that did not display an inspector's brand or if they employed counterfeit brands or reused casks previously branded, and an inspector could likewise be sued for branding lime in violation of statutory requirements.[309] In South Carolina, a

303 An Act for Encouraging the Cultivation of Hemp Flax and Wheat and for Regulating the Inspection of Hemp Flax and Wheat Flour (1768), *in* 19 STATUTES OF GEORGIA, *supra* note 299, at 92–93.

304 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 505.

305 *See* An Act for Regulating the Manufacture of Nails, Made for Sale or Exportation Within This Commonwealth and Repealing All Laws Heretofore Made for That Purpose (1790), *in* LAWS OF MASSACHUSETTS, *supra* note 214, ch. 36, at 445–46 (forfeiture of £4 for "any neglect or fraud in inspecting Nails" or marking cask "which they have not actually and thoroughly inspected" forfeit to be recovered "by any person who will sue and prosecute therefore").

306 *See* An Act for the Admeasurement of Boards and for Regulating the Tale of Shingles Clapboards Hoops and Staves and for Other Purposes Therein Mentioned (1785), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 4, at 73.

307 An Act for the Inspection of Provisions and Other Articles of Commerce, *in* LAWS OF CONNECTICUT, *supra* note 233, § 12, at 244 (forfeiture for exporter who does not comply with requirements for inspection, packing, and branding, "one Half to the Person who shall prosecute or sue for the same"); *id.* § 13, at 244 (forfeiture for violating rules on tobacco exports, "one Half to the Prosecutor"); *id.* §§ 18–19, at 245 (forfeiture for "false Certificate" by inspector, "one Half to the Person who shall prosecute or sue for the same").

308 *See* An Act to Prevent the Exportation of Unmerchantable Commodities, *supra* note 302, § XXI, at 499. There was also a forfeiture for a person who arranged for branding by someone other than the inspector or his assistant. *Id.*; *see also* An Act the Better to Regulate the Inspection of Tobacco in This State, *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XVI, § V, at 671 (naval officer who neglects to certify mark and quality of each hogshead of tobacco forfeits £50 "to the Use of any Person suing for the same").

309 *See* An Act Regulating the Assize of Lime-Casks, and the Inspection of Lime, *in* LAWS OF RHODE ISLAND, *supra* note 221, §§ 3–5, at 517–18 (§ 3 "moiety to the complainant or informer"; § 4 recoverable by indictment or other due process, "one moiety thereof to the prosecutor"; § 5 "one moiety to and for the use of the prosecutor," other moiety to the inspector).

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receiver could face a qui tam forfeiture for licensing a public house or retailer of liquor without the approval of specified individuals trusted by the legislature.[310]

e. Qui Tam Monitoring of Quasi-Public Functions

In addition to use of qui tam legislation to monitor decentralized conduct by public officials, it may be relevant to highlight qui tam statutes directed at persons performing what could be considered quasi-public functions. For instance, statutes sometimes imposed legal duties on church officials. One colonial New Jersey statute required officials in each parish, church, chapel, or meeting house to read the statute once a year after worship services.[311] The vestrymen of a Maryland parish could suffer a qui tam forfeiture if they failed to inspect the parish library twice a year.[312]

Qui tam legislation was sometimes used to enforce duties of persons liable for militia service. An early New Jersey statute for organizing the militia imposed certain forfeitures enforceable by militia officers. For instance, militia leaders could collect penalties from those who did not appear for semi-annual training, who appeared without the required weaponry, or who refused an appointment to serve as a corporal or sergeant.[313] However, the statute included qui tam forfeitures for individuals neglecting to stand watch in a time of public danger or leaving a post before being relieved by someone else.[314] A Georgia law from 1770 required male militia members to bring guns or pistols when they attended worship services, subject to a penalty of ten shillings, "half to him or them that shall give information thereof."[315] Church leaders were required to periodically inquire into compliance with

310 *See* An Additional Act to an Act Entitled for the Better Regulating Taverns and Punch-Houses, *in* 3 STATUTES OF SOUTH CAROLINA, *supra* note 220, § 7, at 581–85.

311 *See* An Act to Prevent the Destroying and Murdering of Bastard Children, *in* ACTS OF THE PROVINCE OF NEW JERSEY, *supra* note 250, ch. LXXIII, § 3, at 274 (requiring public reading of act annually "by the Clerk of [each] Parish Church, Chappel or Meeting, immediately after Divine Service, under the Penalty of *Twenty Shillings* for every Omission and Neglect therein; to be recovered with Costs, by the Informer").

312 *See* An Act for Securing the Parochial Libraries of This Province (1723), *in* ACTS OF MARYLAND, *supra* note 220, at 30 (imposing forfeiture if a vestry did not inspect libraries twice a year, one moiety to crown, "the other Moiety to the Informer, or him or them that shall sue for the same").

313 *See* An Act for Settling the Militia of This Province, *in* LAWS OF NEW JERSEY, *supra* note 263, ch. XL, at 17–19.

314 *See id.* at 18–19 (awarding "one half to the informer who shall prosecute the same to effect" and the other half to the crown). A very similar statute replicating many of the same provisions was enacted a few years later. *See* An Act for the Settling the Militia of This Province, *in* LAWS OF NEW JERSEY, *supra* note 263, at 139–42.

315 An Act for the Better Security of the Inhabitants by Obliging the Male White Persons to Carry Fire Arms to Places of Public Worship (1770), *in* 19 STATUTES OF GEORGIA, *supra* note 299, § 1, at 138.

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the statute, and could face a qui tam forfeiture if they did not give information against a violator.[316]

Qui tam monitoring also facilitated regulation of quasi-public functions performed by ferry operators. A colonial New Jersey statute authorized the governor to grant an exclusive license to operate a ferry over the Delaware River between Burlington and New Bristol, and established fees that could be charged for ferry service.[317] The ferry operator could be sued by a qui tam informer for failing to keep sufficient boats or failing to duly attend to ferry service.[318] A Rhode Island statute permitted a qui tam action against a ferry operator who refused carriage to someone tendering payment, failed to keep his boat in readiness, or allowed his boat to be absent from the ferry location.[319] A Connecticut statute allowed qui tam suits against ferry operators who did not diligently attend to ferry operations during specified hours, or who charged higher fares than authorized by statute.[320] South Carolina ferry operators could be sued for neglect or for carrying persons in violation of the statute.[321]

2. Conflict of Interest Rules: Countering Incentives for Resistance

As in English law, early American governments sometimes used qui tam legislation to counter conflicts of interest that might result in noncompliance with statutory directives. The Maryland legislature, for instance, required Baltimore and Georgetown to appoint inspectors of potash and pearlash.[322] The inspectors were not allowed to sell or trade in potash or pearlash, subject to a £100 penalty, half allocated to the use of the person suing for it.[323] North Carolina provided for qui tam enforcement of a rule preventing an inspector from purchasing cullings or items that did not pass inspection.[324] A Maryland county surveyor could suffer a qui tam forfeiture if he secretly

316 *Id.* § 2, at 138–39. The congregant could also face a qui tam forfeiture for refusing to cooperate with an inquiry by church leaders under the statute. *Id.* § 3, at 139.

317 *See* An Act for Establishing a Ferry from the Town of Burlington, to the Town of New-Bristol, *in* LAWS OF NEW JERSEY, *supra* note 263, at 34.

318 *See id.*

319 *See* An Act Regulating Ferries, *in* LAWS OF RHODE ISLAND, *supra* note 221, § 7, at 573 (forfeiture for neglecting to keep boat in readiness or refusing to transport person applying for passage); *id.* § 9, at 573–74 (forfeiture for allowing boat to be absent from ferry).

320 *See* An Act for Regulating Ferries, *in* LAWS OF CONNECTICUT, *supra* note 233, § 4, at 196 ("[O]ne Half to the Informer or Complainant, who shall prosecute the same."); *id.* § 13, at 197 ("[O]ne Moiety to the Treasurer of the State and the other Moiety to be divided between the Informer and the Person injured.").

321 *See* An Act for Establishing Five Ferries; One over Winyaw River, Two over Santee River, One over Sampit Creek, and One over Cooper River, *in* STATUTES OF SOUTH CAROLINA, *supra* note 220, §§ 5, 8, at 71–72.

322 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 431–32.

323 *See id.*

324 *See* An Act to Prevent the Exportation of Unmerchantable Commodities, *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XXVI, § XXII, at 499.

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purchased land within the county, personally or through an agent.[325] Statutes regulating fraudulent conduct by inspectors are also relevant here,[326] since inspection fraud would often be motivated by financial considerations.

Use of qui tam regulation to counter conflicts of interest continued well after the framing period. An 1819 Delaware statute provided that a sheriff or constable responsible for selling goods pursuant to law could not bid on the sale items directly or through an agent.[327] An 1829 statute regulated trustees running the local "poor house." Their responsibility for expenditure of public funds created opportunities for self-dealing. To address the problem, the statute provided that no trustee of the poor "shall directly or indirectly furnish any article for the poor" and "all purchases shall be made from persons not Trustees."[328] A violation made the trustee liable to pay "fifty dollars to any person, who will sue for the same."[329]

3. Bolstering Public Confidence in Government

A third reason for using qui tam legislation to regulate public officials is to bolster public confidence in the lawful performance of important government functions. For instance, the secretary of the Maryland assembly was required to record acts of the assembly in an official legislative book and affix his seal.[330] A secretary neglecting to do so could forfeit ten thousand pounds of tobacco, half to the use of the informer.[331] This was not decentralized conduct that would be difficult for the central government to monitor. Nor did the secretary of the assembly operate under a continuing conflict of interest that would impede performance of this duty. The most plausible rationale for using qui tam legislation in this context was to create a high likelihood that a particularly important government function would be regularly and scrupulously performed, regardless of the circumstances. Similar considerations help explain extensive use of qui tam statutes to monitor duties of officials in connection with elections and the collection and expenditure of tax funds.

a. Elections

One critical function of republican government is to conduct elections that allow peaceful reallocation of political authority. If the public comes to doubt the integrity of the election process, the legitimacy of government authority will be called into question. Early American state governments

325 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, ¶¶ 7–8, at 497.

326 *See, e.g.*, *supra* notes 303, 306–07 and accompanying text.

327 *See* A Supplement to the Act Entitled "An Act for the More Easy and Speedy Recovery of Small Debts", *in* LAWS OF DELAWARE, *supra* note 293, § 8, at 214.

328 An Act to Consolidate and Amend the Laws for the Relief of the Poor (1829), *in* LAWS OF DELAWARE, *supra* note 293, § 18, at 445.

329 *Id.*

330 *See* HERTY, LAWS OF MARYLAND, *supra* note 220, at 16.

331 *See id.*

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often used qui tam regulation to supervise persons conducting or participating in elections. Such legislation provided a public check on the electoral process, increasing the likelihood that election-related duties would be faithfully performed and reducing opportunities for public officials to corrupt the integrity of the process.

England had used qui tam legislation to enforce statutory disqualifications for service in Parliament.[332] Similar laws can be found in the early American states. Colonial New Jersey provided that those disabled from serving in the English House of Commons by reason of an office, pension, or salary from the government were also disabled from serving in the state General Assembly.[333] A person who served in the state House of Representatives notwithstanding the statutory disability would forfeit £50 to be recovered "by such Person as shall sue for the same."[334] A North Carolina candidate for office could face a qui tam forfeiture of £500 if he had aided and abetted the British during the Revolutionary War.[335]

Several states used qui tam monitoring to discourage election fraud or misconduct. Connecticut allowed qui tam prosecutions for vote buying.[336] A Pennsylvania election judge, inspector, or clerk who committed willful fraud in connection with an election could forfeit £100 to a qui tam litigant.[337] Qui tam informers ensured the integrity of New Hampshire town meetings, collecting a forfeiture from the moderator if he counted two votes from the same person, added to or subtracted from the lawful vote total, or accepted a

332 *See supra* notes 196–97 and accompanying text.

333 *See* An Act for Securing the Freedom of Assemblies (1730), *in* LAWS OF THE COLONY OF NEW JERSEY, *supra* note 235, at 399.

334 *Id.* at 400.

335 *See* An Act to Amend an Act, Passed at Newbern, in November, One Thousand Seven Hundred and Eighty-four, Entitled, An Act to Describe and Ascertain Such Persons Who Owed Allegiance to This State, and to Impose Certain Disqualifications on Certain Persons Therein Described (1785), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XI, §§ I–II, at 555.

336 *See* An Act for Regulating the Election of the Governor, Lieutenant Governor, Assistants, *in* LAWS OF CONNECTICUT, *supra* note 233, § 13, at 153 (imposing forfeiture of $17 for "giving, offering, accepting or receiving" a gift, fee, or reward for voting in General Assembly election, "one half to him or them that shall sue for and prosecute the same to Effect, and the other half to the Treasury of the Town"). North Carolina imposed a forfeiture for vote buying. However, unlike other sections of the statute, this provision did not specify qui tam actions as a method of enforcement. *See* An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes (1777), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. IV, § XII, at 320–21 (imposing £500 forfeiture for giving money, gift, gratuity, or reward for votes of electors in General Assembly election).

337 An Act to Regulate the General Elections of This Commonwealth and to Prevent Frauds Therein (1785), *in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, ch. MCLXXV, § XXV, at 48–49 (James T. Mitchell & Henry Flanders eds., 1906) [hereinafter STATUTES OF PENNSYLVANIA] ("[E]very specific fine and forfeiture by this act declared and imposed on any person (not otherwise directed) who shall become liable to the same, shall be recovered by actions of debt founded on this act, to any person who shall sue for the same in the court of common pleas of the county or in the supreme court, or by information or indictment to the use of the informer or prosecutor.").

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proxy vote that was not personally delivered.[338] In Rhode Island, the moderator of a meeting could be sued if he failed to follow statutory procedures concerning challenges to the eligibility of a voter[339] or proxy voter.[340]

The fraud suppression statutes were often accompanied by more general qui tam regulation of the electoral process.[341] A Virginia sheriff or mayor could face litigation for a number of election-related offenses, from refusing to conduct a poll when required, to falsely certifying returns, to neglecting to deliver poll books to the clerk of court.[342] A North Carolina sheriff could be sued by a qui tam informer for neglecting or refusing to prepare election returns or otherwise violating election procedures.[343] When Kentucky was organized as a state separate from Virginia, officers conducting the elections could be sued "by any person" for failing to perform election-related duties.[344] In New Hampshire, a constable who failed to provide notice to a person elected to town office could be sued for thirty shillings by "any inhabitant of this State who will sue for the same," half to the use of the town "and the other half to the use of the prosecutor."[345] Sheriffs and town clerks could suffer qui tam forfeitures for neglecting to make timely election returns.[346] Selectmen who neglected to schedule a meeting for electoral purposes would forfeit £10 to a qui tam informer.[347] South Carolina justices of the peace and other officials could also face qui tam forfeitures for neglecting duties under the election laws.[348]

338 An Act to Prevent Undue Influence, and Fraud in Town Meetings, and in the Choice of Town and State Officers (1799), *in* 6 LAWS OF NEW HAMPSHIRE, *supra* note 219, at 568–69.

339 An Act Regulating the Manner of Admitting Freemen, and Directing the Method of Electing Officers in This State (1798), *in* LAWS OF RHODE ISLAND, *supra* note 221, § 10, at 120–21; *see id.* § 12, at 122 (directing forfeitures be recovered "half to and for the use of him who shall inform and sue for the same").

340 *See id.* § 12, at 122 ("And that all the aforementioned forfeitures in this act may be recovered by an action in any court of record in this State proper to try the same; one half whereof shall be to and for the use of this State, and the other half to and for the use of him who shall inform and sue for the same.").

341 *See, e.g.*, An Act Regulating the General Election (1826), *in* LAWS OF DELAWARE, *supra* note 293, § 16, at 186 (imposing qui tam forfeiture on a variety of officers for willful neglect or fraud in connection with election-related duties).

342 *See* An Act Concerning Election of Members of General Assembly (1785), *in* ACTS OF VIRGINIA, *supra* note 258, ch. XVII, § XVII, at 22 (directing that one-half of the specified forfeitures were payable to "any person who will sue for the same").

343 An Act Directing the Method of Electing Members of the General Assembly, and Other Purposes (1777), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. IV, § XV, at 321.

344 An Act Concerning the Erection of the District of Kentucky into an Independent State (1789), *in* ACTS OF VIRGINIA, *supra* note 258, ch. LIII, §§ II–III, at 55.

345 An Act for Regulating Towns, *supra* note 222, ch. 41, at 590.

346 *See* An Act for Laying a Fine on Delinquent Sheriffs and Town Clerks (1786), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 9, at 112–13.

347 *See* An Act for Regulating Towns, *supra* note 222, ch. 41, at 593.

348 *See* An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of This Province in the Commons House of Assembly, and to Appoint Who

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b. Taxing and Spending

Just as the public tends to be very concerned with the integrity of the election process, citizens also have a heightened interest in collection of taxes and expenditure of public funds. Many eighteenth-century American governments found qui tam legislation useful for enforcing duties related to taxing and spending. In 1716, for example, the New Jersey General Assembly responded to a report from the provincial treasurer indicating that several counties had been in arrears on tax payments since 1708.[349] The legislature appointed persons in each county to inspect the tax assessment rolls to determine whether deficiencies were attributable to the death, removal, or insolvency of taxpayers.[350] A tax collector or administrator of the collector's estate who neglected to make tax assessment records available to inspectors could forfeit £50 to "any one that will Sue for the Same to Effect the one Half To be to the Prosecutor and the other half for the support of the Government."[351]

North Carolina property tax legislation invoked the goal of promoting transparency and accountability, declaring it "just and right that the Body of the People on whom Taxes are laid, should know to what Purposes the Monies arising therefrom are applied and appropriated."[352] Under the statute, a county clerk could face a qui tam action for neglecting to post public lists of taxable property and of persons the tax collector deemed insolvent.[353] The requirement of publication was designed to provide a "Check against fraudulent and deficient Returns of taxable Property, and to prevent improper Allowances for Insolvents."[354] A parallel remedy could be invoked against county commissioners who did not publish an "accurate List of the Taxes levied and collected in such Town, together with a List of each Sum expended by said Commissioners, and to whom paid, and for what Purpose."[355]

Legislatures often deployed qui tam informers to ensure maintenance and oversight of tax records. In Maryland, county commissioners were

Shall be Deemed and Adjudged Capable of Choosing or Being Chosen Members of the Said House, *in* STATUTES OF SOUTH CAROLINA, *supra* note 220, §§ 13, 16, 20, at 441–48.

349 An Act to Enable Some Persons in Every County of This Province to Inspect the Rolls of All the Assessments in the Said County, which Lye in the Hands of the Collectors Since the Year One Thousand Seven Hundred and Eight, and also Examine the Acco[un]ts of the Collectors and See What Deficiencies of Persons Dead, Removed, or Insolvent Remain Unpaid, and Report the Same to This House at the Next Meeting of This Assembly, *in* LAWS OF THE COLONY OF NEW JERSEY, *supra* note 235, at 393.

350 *Id.* at 394.

351 *Id.*

352 An Act to Compel Certain Officers Therein Mentioned to Publish the Application of the Public Monies, and Allowances for Insolvents (1786), *in* LAWS OF NORTH CAROLINA, *supra* note 200, at 587.

353 *Id.* § 2, at 588 (forfeiture by clerk neglecting or refusing to perform duties imposed by act "to any Person who shall sue for the same").

354 *Id.*

355 *Id.* § 5.

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empowered to make levies of tobacco to defray public charges.[356] The county clerk was required to annually transmit an account showing the tobacco levied and its disposition, enforceable by a forfeiture of one thousand pounds of tobacco, "[h]alf to the Informer, or him or them that will sue for the same."[357] A North Carolina naval officer could be sued by a qui tam informer for allowing a ship to leave port without proof of tax payment.[358] New Jersey tax collectors could forfeit £50 for failing to pay over money collected, along with a list of assessments.[359] A New Hampshire statute authorized the selectmen of New London to collect a tax from nonresident owners of land to use for road repairs, and provided for qui tam enforcement if the selectmen neglected to account within four years for the appropriation and expenditure of the funds.[360] Similar statutes enforced a duty to account imposed on selectmen of other New Hampshire towns.[361] A 1740 New Jersey statute noted that only certain residents of Essex county had been taxed for repair of the Newark court house and jail, and imposed duties on a number

356 An Act Impowering the Commissioners of the County Courts to Levy and Raise Tobacco, to Defray the Necessary Charges of Their Counties and Parishes (1704), *in* ACTS OF MARYLAND, *supra* note 220, at 37.

357 *Id.*; *see also* HERTY, LAWS OF MARYLAND, *supra* note 220, at 337.

358 *See* An Act for Facilitating the Navigation, and Regulating the Pilotage of the Several Ports of This State (1783), *in* LAWS OF NORTH CAROLINA, *supra* note 200, ch. XX, §§ XV, at 465 (forfeiture for naval officer who allowed ship to clear without master producing certificate of payment from tax receiver), XXII at 466 ("[E]ach and every Fine imposed by this Act, shall be recovered by Action of Debt in any Court of Record having Cognizance thereof, one Half to the Person suing for the same.").

359 *See* An Act for the Support of the Government of His Majesty's Province of New Jersey for Five Years, to Commence from the Twenty Third Day of September, One Thousand Seven Hundred and Twenty, and to End the Twenty Third Day of September, One Thousand Seven Hundred Twenty and Five, *in* LAWS OF NEW JERSEY, *supra* note 263, at 131–32.

360 *See* An Act to Enable the Select Men of New London in the County of Hillsborough to Assess, Levy and Collect a Tax on All the Lands of Non Resident Proprietors in Said Town of Three Pence Acre for the Purpose of Repairing the Public Roads in Said New London (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 8, at 546–47.

361 *See, e.g.*, An Act to Impower the Inhabitants of Wendall in the County of Cheshire to Levy a Tax on All of the Lands (Public Rights Excepted) in Said Town for Making, Bridging and Repairing the High-Ways (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 16, at 556 (one-half to the prosecutor and the other half to the use of the County); An Act to Empower the Inhabitants of Dorchester in the County of Grafton to Levy a Tax on All Lands (Publick Lands Excepted) in Said Town for Making and Repairing the High Ways (1791), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 21, at 803 (same); An Act to Enable the Selectmen of Campton to Assess & Cause to Be Collected One Penny Per Acre Annually for Two Years on All the Unimproved Lands in Said Campton (1792), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 18, at 773 ("[O]ne half to the person or persons who shall sue for the same & the other half to the use of said County."); An Act to Enable the Selectmen of the Town of New Hampton to Assess & Cause to Be Collected One Penny Per Acre on Each Acre of Land in Said Town Annually, Publick Rights Excepted, for the Term of Three Years from the Passing This Act (1792), *in* 5 LAWS OF NEW HAMPSHIRE, *supra* note 219, ch. 24, at 780 (same).

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of officers in order to complete the collection effort.[362] A qui tam provision allowed "any person that will sue" to collect forfeitures from officers neglecting duties imposed by the statute, including assessors, collectors, constables, justices, and specially appointed managers.[363] South Carolina receivers could be sued for misdirection of public funds.[364]

C. Early Federal Qui Tam Statutes Directed at Executive Branch Officials

When members of Congress assembled following ratification of the new Constitution, they faced enforcement problems analogous to those confronted in earlier years by the English Parliament and state legislative assemblies. They had to figure out how to incentivize and monitor executive compliance with congressional directives, even though federal officials would be geographically dispersed throughout a vast territory. Since the new government began its existence encumbered by Revolutionary War debts, Congress needed to provide for that monitoring at a reasonable cost.[365] To accomplish these objectives, the First and Second Congresses borrowed from the practices of the English Parliament and earlier American legislatures, selectively employing qui tam regulation of executive branch officials alongside provisions for litigation by injured parties and by government officials.

1. Revenue Officers

When the House of Representatives opened its doors to the public on April 8, 1789,[366] James Madison gave a speech highlighting the widely recognized "deficiency in our treasury" and urging an impost on imports to estab-

362 *See* An Act for Raising of Money for Finishing and Compleating the Goal and Court-House, Already Erected at Newark in the County of Essex (1740), *in* LAWS OF THE COLONY OF NEW JERSEY, *supra* note 235, at 533–36.

363 *Id.*

364 *See* An Act to Continue an Act Entituled An Act for Laying an Imposition on Furrs, &c., and for Appropriating the Same, *in* 3 STATUTES OF SOUTH CAROLINA, *supra* note 220, at 248; An Additional Act to an Act Intituled an Act to Continue an Act Intituled an Act for Laying an Imposition on Furrs, &c., and for Appropriating the Same, *in* 2 STATUTES OF SOUTH CAROLINA, *supra* note 220, at 296.

365 *See* Letter from Arthur Lee to Tench Coxe (May 12, 1789), *in* 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 4 MARCH 1789–3 MARCH 1791, at 530, 530 (Johns Hopkins Press 2004) [hereinafter DOCUMENTARY HISTORY] ("The augmentation of Offices, will meet with much opposition unless they are demonstrably necessary. For there is much apprehension of alarming the People, with an apparently expensive commencement of the new Government."). Evan Caminker notes that federal resource constraints helped justify the 1986 congressional decision to reinvigorate qui tam litigation under the False Claims Act. *See* Caminker, *supra* note 137, at 350–51.

366 *See* New-York Daily Gazette (Apr. 9, 1789), *in* 10 DOCUMENTARY HISTORY, *supra* note 365, at 3, 3 ("Yesterday the doors of the House of Representatives of the United States, were thrown open for the admission of the Citizens.").

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lish national revenue.[367] Of the first five statutes passed by the Congress, three focused on this revenue-raising goal, including one laying duties on imports,[368] one laying duties on tonnage of ships,[369] and one establishing a system for collection of those duties.[370] The Collection Act involved a massive undertaking in which Congress established fifty-nine collection districts in the eleven states that had already ratified the Constitution (all but Rhode Island and North Carolina), ranging from a high of twenty collection districts in Massachusetts, to a low of one district each in New Hampshire, Pennsylvania, and Delaware.[371] Each district included a port of entry and might also include multiple ports of delivery.[372] The Act provided for appointment of hundreds of federal customs officers to be stationed throughout the eastern ports of the United States. Busier ports of entry would be served by three lead officials—a collector, a naval officer, and a surveyor—aided by minor functionaries including a deputy collector, inspectors, weighers, measurers, and gaugers.[373] Less active ports might be assigned only one or two of the higher ranked officials.[374]

The Collection Act imposed a significant number of penalties on masters and commanders of ships and other private individuals, and provided for forfeitures of merchandise, vessels, and other property for violation of statutory requirements.[375] Congress had a decision to make about enforcement of those penalties. While qui tam legislation had been used in some Anglo-

367 The Congressional Register (Apr. 8, 1789), *in* 10 DOCUMENTARY HISTORY, *supra* note 365, at 4–5.

368 *See* An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States, ch. 2, 1 Stat. 24 (1789).

369 *See* An Act Imposing Duties on Tonnage, ch. 3, 1 Stat. 27 (1789).

370 *See* An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, 1 Stat. 29 (1789) [hereinafter Collection Act].

371 *Id.* § 1.

372 *Id.* For instance, Portsmouth was the sole port of entry for the district of New Hampshire, and all ships were required to enter and clear there, but from Portsmouth they might move on to ports of delivery established at Newcastle, Dover, and Exeter. *Id.*

373 *Id.* (officers assigned to each port), § 5 (duties of collector, naval officer, and surveyor; supervision of inspectors, weighers, measurers, and gaugers), § 6 (deputy collectors), § 15 (appointment of inspectors).

374 *Id.* § 1.

375 *Id.* § 11 (forfeiture for commander of vessel who does not deliver manifests or take oath), § 12 (forfeiture for unloading goods except during the day and with a permit; seizure of goods by customs officer); *id.* § 15 (forfeiture of goods removed from wharf without weighing and gauging or without permission of officer); *id.* § 16 (forfeiture by master or commander if goods delivered do not agree with manifest); *id.* § 23 (forfeiture of packaged goods if inspection shows that they differ from documented entries); *id.* § 24 (forfeiture of goods concealed to avoid duties); *id.* § 25 (forfeiture for concealing or buying goods subject to forfeiture under act); *id.* § 34 (forfeitures for relanding goods once they have been entered for exportation in order to obtain a drawback of duties); *id.* § 35 (forfeiture for offering bribe to customs official and penalties for falsely swearing oath); *id.* § 40 (forfeitures for bringing goods into the United States other than by sea in vessels of at least thirty tons burden).

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American revenue collection regimes, common informers were a controversial method of law enforcement. In a letter to Congressman Goodhue, a Massachusetts merchant expressed hope for a collection system that would operate "without having recourse to the encouragement of a contemptible and infamous host of informers."[376] In a letter to Senator Strong, on the other hand, another Massachusetts merchant passed along an idea from state Comptroller General Leonard Jarvis "that the whole of any forfeiture ought to be given to the informer" as an "inducement to vigilance."[377] James Sullivan, a former judge and future governor of Massachusetts, commented to Congressman Gerry on the need to "eradicate an opinion Established with the body of the people when we were a part of [the] British Empire" that "an Informer against Smuglers was more odious than a theif [sic]."[378] He recommended letters to newspapers throughout the country "to change the public opinion and to make the people veiw [sic] Informers as meritorious."[379]

Congress opted against qui tam enforcement of Collection Act penalties directed at private parties, but tried nevertheless to induce disclosure of smuggling and other offenses. Under section 36 of the Collection Act, all penalties were to be sued for "in the name of the United States . . . by the collector of the district where the same accrued, and not otherwise," with the only exception being for "cases of penalty relating to an officer of the customs."[380] Property subject to forfeiture under the Act was to be "seized, libelled and prosecuted as aforesaid."[381] Though only public officials could enforce the duties of regulated parties, the Act offered rewards for information that resulted in a recovery. Penalties and forfeitures, unless otherwise allocated, were to be split between the government and federal customs officers, with one-half going to the United States treasury and one-half divided among the port's collector, naval officer, and surveyor.[382] However,

376 Letter from Epes Sargent to Benjamin Goodhue (May 26, 1789), *in* 15 DOCUMENTARY HISTORY, *supra* note 365, at 631, 632.

377 *See* Letter from Samuel Phillips, Jr. to Caleb Strong (June 11, 1789), *in* 16 DOCUMENTARY HISTORY, *supra* note 365, at 749, 750 (noting that the Comptroller General, Leonard Jarvis, believed the increased monitoring provided by the heightened financial incentive would "encrease the revenue more than a share of those forfeitures would add to it"); *see also* Letter from Leonard Jarvis to Benjamin Goodhue (Aug. 13, 1789), *in* 16 DOCUMENTARY HISTORY, *supra* note 365, at 1305, 1305–06 (commenting on the first Collection Act and suggesting need for greater financial inducements for informers and officers; noting that "the Act of informing or seizing may be attended with an Odium not attached to the Act of prosecuting").

378 *See* Letter from James Sullivan to Elbridge Gerry (June 23, 1789), *in* 16 DOCUMENTARY HISTORY, *supra* note 365, at 843, 844; *see also* Letter from James Sullivan to Elbridge Gerry (July 25, 1789), *in* 16 DOCUMENTARY HISTORY, *supra* note 365, at 1133, 1134 (referring to "the contempt & abhorrence to informers which has long Existed in the united States").

379 *See* Letter from James Sullivan to Elbridge Gerry (June 23, 1789), *in* 16 DOCUMENTARY HISTORY, *supra* note 365, at 843, 844.

380 Collection Act, *supra* note 370, § 36.

381 *Id.*

382 *Id.* § 38.

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where a recovery occurred "in pursuance of information given to such collector, by any person" other than a naval officer or surveyor, half of the officers' share was "given to the informer."[383] Thus, an informer could not bring suit against private parties for revenue offenses, as would be the case under a qui tam provision, but could furnish information to the local collector—who was authorized to sue—and would receive one-quarter of any resulting recovery.

Though Congress decided against popular enforcement of the Collection Act penalties for private conduct, it did authorize qui tam enforcement of two provisions imposing duties on customs officers. Section 8 of the statute required each collector, naval officer, and surveyor to take an oath "before he enters on the execution of his office."[384] To enforce the oath requirement, Congress provided: "Any collector, naval officer or surveyor, failing herein, shall forfeit and pay two hundred dollars, recoverable with costs in any court having cognizance thereof, to the use of the informer."[385] Section 29 required each collector, naval officer, and surveyor to "cause to be affixed, and constantly kept in some public and conspicuous place of his office, a fair table of the rates of fees, and duties demandable by law."[386] Congress again provided that officers who failed to comply would suffer a qui tam forfeiture of $100.[387]

Why did Congress authorize qui tam enforcement of two forfeitures directed at customs officials under the Collection Act when it opted not to use qui tam enforcement for other aspects of the legislation? The decision likely flowed from the difficult management challenge created by a large and dispersed federal workforce. Treasury Secretary Alexander Hamilton reflected on this difficulty in a report to Congress eight months after enactment of the legislation. Hamilton suggested creation of an additional layer of bureaucracy—appointment of "an officer in each state or other considerable subdivision of the United States, having the general superintendance of all the officers of the Revenue within such state or subdivision."[388] Not only would this facilitate collection of revenue from remote ports, but it was "in the opinion of the Secretary, essential to a due supervision of the conduct of the particular officers engaged in the collection of the revenues."[389] Hamilton believed it impossible that the need for supervision could be satisfied "by any attention or vigilance of an Individual or Individuals at the Head of the Treasury. Distance, and the multiplicity of avocations, are conclusive bars."[390] The oath requirement of section 8 and the requirement to post a

383 *Id.*

384 *Id.* § 8.

385 *Id.*

386 *Id.* § 29.

387 *Id.* (directing that officers "shall forfeit and pay one hundred dollars, to be recovered with costs, in any court having cognizance thereof, to the use of the informer").

388 Report of the Secretary of the Treasury (April 23, 1790), *in* 4 DOCUMENTARY HISTORY, *supra* note 365, at 437, 455.

389 *Id.* at 456.

390 *Id.*

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table of rates and fees under section 29 involved the actions of dozens of customs officials scattered throughout the (then eleven) United States. It would be extremely difficult for President Washington or Secretary Hamilton in New York to monitor all of those officials. As in English and early American state law, qui tam provisions allowed Congress to provide for oversight of the legality of executive conduct at minimal cost and without depletion of federal enforcement resources.

Congress chose not to use qui tam enforcement for other duties of customs officers. For instance, in addition to the provision for qui tam suit for failure to post a schedule of rates and fees, section 29 of the Act included a forfeiture of "two hundred dollars . . . for the use of the party grieved" if a customs officer "shall demand, or receive any greater or other fee, compensation or reward, for executing any duty or service required of him by law."[391] The distinct enforcement mechanisms for these various penalties makes sense because every overcharge by a customs officer would have an identifiable victim, whereas failing to take an oath and failing to post a table of fees might not produce identifiable harm to anyone in particular. Less clear is why Congress failed to allow qui tam enforcement of section 35, which imposed a forfeiture ranging between 200 and 2000 dollars and disqualification for future office if a customs officer took a bribe or "connive[d] at a false entry of any ship or vessel, or of any goods, wares or merchandise."[392]

Congress replaced the initial Collection Act about a year later with a more comprehensive statute including Rhode Island and North Carolina, which had ratified the Constitution in the interim.[393] The expanded legislation designated sixty-seven collection districts and authorized a correspondingly larger number of federal customs officers.[394] The qui tam provision

391 Collection Act, *supra* note 370, § 29.

392 *Id.* § 35. It could be that Congress did not provide for qui tam enforcement of this anticorruption provision to guard federal officials against the possibility of false accusations of soliciting bribes. In the cases where Congress provided for qui tam enforcement, evidence that the officer had complied with the law would be readily available. If an officer had in fact taken the oath of office, it should be possible to produce either the official who administered the oath or the written certification of compliance required by the statute. *Id.* § 8 (requiring sealed certificate of administration of oath transmitted to comptroller of the treasury). If an officer had posted a notice of fees and rates to be charged, it should be possible to produce other officers or members of the public who could testify to seeing the notice. *Id.* § 29. On the other hand, if an informer claimed a federal surveyor in some remote port had demanded a bribe, the litigation could turn into a contest of credibility between two competing witnesses, and Congress may have wanted claims of that sort to be subject to the control of federal prosecutors rather than private informers. In any event, the First Congress later selected qui tam enforcement for anticorruption provisions of a subsequent bill taxing distilled spirits. *See infra* note 403 and accompanying text.

393 An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, 1 Stat. 145 (1790).

394 *Id.* § 1. The statute also authorized new categories of customs officers, allowing construction of up to ten new "cutters" to help enforce the revenue laws, as well as smaller boats, and providing for hiring of officers and sailors. *Id.* §§ 62–65.

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directed at officers failing to take the oath of office was eliminated, and the two hundred dollar forfeiture was now allocated "to the use of the United States."[395] However, the other qui tam provision directed at customs officers in the original statute was expanded. The qui tam forfeiture of $100 was still enforceable against any collector, naval officer, or surveyor who failed to post "a fair table of the rates of fees and duties demandable by law," but now also applied to an officer who failed to "give a receipt for the fees he shall receive, specifying the particulars."[396]

Near the end of its term, the First Congress adopted a major new piece of tax legislation, the Distilled Spirits Act, that adjusted rates on imported liquor and imposed new duties on spirits distilled within the United States.[397] Consistent with Treasury Secretary Hamilton's earlier recommendation, Congress divided the country into statewide revenue districts and created a supervisor of revenue for each district.[398] The supervisors of revenue were responsible for appointing inspectors to oversee imports of distilled spirits as well as inspecting the products of domestic distilleries.[399] The Act imposed forfeitures on private persons designed to force importers and domestic distillers to submit to the inspection process,[400] maintain proper documenta-

395 *Id.* § 5. Congress may have concluded that sufficient oversight was offered through the provision for certification that the oath had been administered, without the need for additional monitoring by qui tam informers. *See supra* note 392.

396 An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, 1 Stat. 145, § 55 (1790). The new provision retained the cause of action for the "party grieved" by an officer charging higher fees than allowed. *Id.* With respect to the other penalties in the revised statute, the legislation still required that they be "sued for . . . in the name of the United States"; such suits could be brought by the collectors of the relevant port, but the law no longer specified that only the collector could prosecute the action. *Id.* § 67. The provision omitted the earlier statutory exception for "cases of penalty relating to an officer of the customs," *see* Collection Act, *supra* note 370, § 36, potentially creating some ambiguity, but Section 55 seems relatively clear in allowing suit by an informer against an officer. *See* An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, 1 Stat. 145, § 55 (1790).

397 An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and Also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, 1 Stat. 199 (1791).

398 *Id.* § 4.

399 *Id.* §§ 7, 11, 18.

400 *Id.* § 8 (forfeiture for importing distilled spirits without reporting for inspection), § 9 (forfeiture for landing distilled spirits without a permit), § 19 (forfeiture for removing spirits from a domestic distillery before branding by an inspector), § 27 (forfeiture for failing to make due entry of preexisting stock of imported spirits with the officer of inspection), § 48 (forfeiture for obstructing or hindering supervisor of revenue or officer of inspection), § 7 (forfeiture for painting "office of inspection" on any building other than official inspection house).

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tion,[401] and pay duties without evasion or corruption.[402] The statute also included forfeitures for fraud or corruption by a federal revenue officer.[403] This time, Congress abandoned its earlier reticence about having qui tam informers enforcing federal tax laws. Unless otherwise specified, all penalties and forfeitures in the statute (those against private parties and those against revenue officers) were subject to qui tam enforcement:

> [O]ne half of all penalties and forfeitures incurred by virtue of this act, except as above provided, shall be for the benefit of the person or persons who shall make a seizure, or who shall first discover the matter or thing whereby the same shall have been incurred; and the other half to the use of the United States. And such penalty and forfeiture shall be recoverable with costs of suit, by action of debt, in the name of the person or persons intitled thereto, or by information, in the name of the United States of America.[404]

The Act instructed federal attorneys to bring enforcement actions upon application and contemplated that federal revenue officers would be entitled to benefit from forfeitures under the statute, but nothing in the language limited the enforcement provision to actions initiated by federal officials.[405]

Given that the earlier Collection Acts did not authorize qui tam enforcement against private parties and made only minimal use of qui tam monitor-

401 *Id.* § 10 (forfeiture for moving distilled spirits from one port to another without a certificate of inspection), § 13 (forfeiture for selling distilled spirits without delivering a certificate of inspection to the purchaser), § 28 (forfeiture of containers of distilled spirits unmarked and unaccompanied by certificate), § 35 (forfeiture by distiller neglecting to maintain or permit inspection of books).

402 *Id.* § 20 (forfeiture for removing spirits from a distillery at night), § 30 (forfeiture for rubbing out or defacing marks on container of distilled spirits), § 31 (forfeiture for putting new spirits in container marked "Old Stock" or keeping old stock beyond deadline for sale), § 32 (forfeiture of spirits fraudulently concealed to evade duties), § 33 (forfeiture of spirits imported in undersized containers), § 45 (forfeiture for counterfeiting or forging certificates), § 47 (forfeiture for bribing supervisor of revenue or officer of inspection), § 55 (forfeiture for relanding spirits designated for exportation).

403 The anticorruption provision read:

> [I]f any such supervisor or other officer, shall enter into any collusion with any person or persons for violating or evading any of the provisions of this act, or the duties hereby imposed, or shall fraudulently concur in the delivery of any of the said spirits, out of any house, building or place, wherein the same are deposited, without payment or security for the payment of the duties thereupon, or shall falsely or fraudulently mark any cask, case or vessel, contrary to any of the said provisions, or shall embezzle the public money or otherwise be guilty of fraud in his office, such supervisor or other officer shall for every such offence forfeit the sum of one thousand dollars, and upon conviction of any of the said offences, shall forfeit his office, and shall be disqualified for holding any other office under the United States.

Id. § 49; *see also id.* § 39 (punishments for oppression or extortion by supervisor or inspector).

404 *Id.* § 44.

405 *Id.* There was a forfeiture in the statute that could only be enforced by the supervisor of revenue for the benefit of the United States. *Id.* § 25 (forfeiture for failing to put up sign or disclose existence of distillery).

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ing for federal officials, why did the First Congress greatly expand qui tam enforcement of the tax laws in the new Distilled Spirits Act? The change in enforcement methods likely responded to Alexander Hamilton's report about the inadequacy of centralized monitoring of a dispersed network of customs officials, combined with a new, more challenging tax collection environment. Under the new legislation, federal tax collection efforts would be more widely distributed throughout the territory of the United States, since duties were no longer concentrated just in ports and coastal areas. Liquor could be distilled anywhere in the country. Moreover, under the new legislation, federal officials would enter into long-term, continuing relationships with domestic distillers regulated by the statute, creating greater opportunities for corruption of federal revenue officers. Consequently, Congress not only adopted Secretary Hamilton's recommendation to appoint regional bureaucrats to monitor federal revenue officers, but also vastly expanded the role of qui tam informers as a supplementary means of monitoring the lawfulness of tax enforcement activities.

2. Census Officials

The First Congress adopted legislation to arrange for the initial United States census, which the Constitution required to take place within three years after Congress began meeting.[406] The census was a matter of substantial political consequence in light of the constitutional directive that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."[407] Many expected the census to significantly alter the allocation of congressional seats established in the initial Constitution, shifting power in the House of Representatives away from southern states and toward eastern states.[408] As it turned out, the initial census did little to change the regional balance of power. What might be

406 U.S. CONST. art. I, § 2. The version of the enumeration bill that first passed the House would have provided for gathering additional information on matters like the occupations of residents, something Madison believed would be useful to legislators and aid the "science of Political Economy." Letter from James Madison to Thomas Jefferson (Feb. 14, 1790), *in* 18 DOCUMENTARY HISTORY, *supra* note 365, at 517, 518. He reported to Jefferson that this language "was thrown out by the Senate as a waste of trouble and supplying materials for idle people to make a book." *Id.*

407 U.S. CONST. art. I, § 2. For these purposes, the Constitution notoriously directed that the count should add to "the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." *Id.*

408 *See* Newspaper Correspondence, *in* 20 DOCUMENTARY HISTORY, *supra* note 365, at 2063, 2064 (newspaper article expressing view that eastern influence will increase after census). There are indications that some eastern members of Congress wanted the census to take place as quickly as possible and that some southern members sought for more time. *See* New-York Daily Gazette (Feb. 9, 1790), *in* 12 DOCUMENTARY HISTORY, *supra* note 365, at 183 (remarks of Mr. Jackson from Georgia); Letter from Henry Wynkoop to Reading Beatty (Feb. 4, 1790), *in* 18 DOCUMENTARY HISTORY, *supra* note 365, at 416 ("[M]uch Conversation was had but nothing done respecting the enumeration[;] the Southern Gentle-

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thought of as eastern states (New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and Vermont) had a combined representation of 25/69 seats (36.2%) in the House of Representatives immediately before the 1790 census results were taken into account and a combined representation of 39/105 seats (37.1%) after the census results were factored in; likewise, what might be deemed the southern states (Virginia, Kentucky, North Carolina, South Carolina, and Georgia) had a combined representation of 25/69 seats (36.2%) before reallocation and 39/105 (37.1%) afterwards.[409] Some states did gain or lose ground within each region. In the South, the biggest winner was Virginia, which grew from 10/69 seats (14.5%) to 19/105 seats (18.1%), while the biggest loser was Georgia, which diminished from 3/69 (4.3%) to 2/105 (1.9%).[410] The biggest winner in the East was Massachusetts, which grew from 8/69 (11.6%) to 14/105 (13.3%), while the biggest loser was Vermont, which lost ground in terms of percentage of the total legislative body, going from 2/69 (2.9%) to 2/105 (1.9%).[411]

The Enumeration Act made federal marshals responsible for overseeing the census in each judicial district, aided by assistants hired to visit each household and conduct the actual enumeration.[412] The census was to begin the first Monday in August 1790, and the assistants were required to make their returns to the marshal within nine months.[413] The marshals had until September 1, 1791, to submit total figures to the President.[414] Two provisions of the legislation established forfeitures applicable to census officials. Under section 2 of the statute, "every assistant failing to make return, or making a false return of the enumeration to the marshal, within the time by this

men are disposed to cast every Obstacle in its way, while those from the eastward generally are disposed to forward it.").

409 *See* Representatives Apportioned to Each State (1st to 23rd Census, 1790–2010), OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, http://foxx.house.gov/uploadedfiles/state_apportionment.pdf (last visited Nov. 28, 2017). The figure of sixty-nine representatives before reapportionment counts the original sixty-five specified in Article I, Section 2 of the Constitution, plus two each for Vermont and Kentucky, which were added to the union and given representation in Congress before the effects of the 1790 census were factored in. *See* An Act for Apportioning Representatives Among the Several States, According to the First Enumeration, ch. 23, 1 Stat. 253 (1792); An Act Regulating the Number of Representatives to Be Chosen by the States of Kentucky and Vermont, ch. 9, 1 Stat. 191 (1791). For each state, the number of representatives before/after the 1792 reapportionment legislation was: Connecticut, 5/7; Delaware, 1/1; Georgia, 3/2; Kentucky, 2/2; Maryland, 6/8; Massachusetts, 8/14; New Hampshire, 3/4; New Jersey, 4/5; New York, 6/10; Pennsylvania, 8/13; North Carolina, 5/10; Rhode Island, 1/2; South Carolina, 5/6; Vermont, 2/2; and Virginia, 10/19.

410 *See supra* note 409.

411 *Id.*

412 An Act Providing for the Enumeration of the Inhabitants of the United States, ch. II, § 1, 1 Stat. 101 (1790).

413 *Id.*

414 *Id.* § 3.

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act limited, shall forfeit the sum of two hundred dollars."[415] Section 3 established forfeitures applicable to the marshal:

> [E]very marshal failing to file the returns of his assistants, or any of them, with the clerks of their respective district courts, or failing to return the aggregate amount of each description of persons in their respective districts, as the same shall appear from said returns, to the President of the United States, within the time limited by this act, shall, for every such offence, forfeit the sum of eight hundred dollars; all which forfeitures shall be recoverable in the courts of the districts where the offences shall be committed, or in the circuit courts to be held within the same, by action of debt, information or indictment; the one half thereof to the use of the United States, and the other half to the informer; but where the prosecution shall be first instituted on behalf of the United States, the whole shall accrue to their use.[416]

Section 3 clearly provided for qui tam litigation as one enforcement method, alongside enforcement by public officials. While somewhat ambiguous, the language "all which forfeitures" in section 3 likely extends to forfeitures of assistants under section 2 as well as those for marshals, since section 2 did not provide another method of enforcement. Qui tam enforcement against census assistants would make sense because of the decentralized nature of their work, which took them throughout the populated territory of the United States, including areas distant from other federal officials. Centralized monitoring to prevent false returns by the assistants would be nearly impossible.[417] Qui tam enforcement would significantly increase the chances that a census assistant's misreported numbers would be discovered and prosecuted. In any event, the statute unambiguously provided for qui tam enforcement against federal marshals, a decision explicable by the importance of ensuring as accurate a count as possible.

3. Treasury Officials

The Act creating the Department of the Treasury contained multiple forfeitures that were likely subject to qui tam enforcement and, at the very least, established rewards for private citizens providing information to support enforcement actions. The statute authorized appointment of "a Secretary of the Treasury, to be deemed head of the department; a Comptroller,

415 *Id.* § 2.

416 *Id.* § 3.

417 The nature of the enforcement problem is illustrated by correspondence between James Madison and Edward Carrington, a federal marshal in Virginia. The bill included a provision for census assistants to collect a $20 forfeiture from persons who failed to give a true account of those residing in a home. *Id.* § 6. Carrington worried that under the Judiciary Act, suits to enforce these penalties would have to be filed in federal district courts "to which it will be impossible for the assistants from the distant parts of the Country to resort for such small Sums . . . nor indeed will they in cases of false returns be able to establish their Suits without witnesses." Letter from Edward Carrington to James Madison (May 3, 1790), *in* 19 DOCUMENTARY HISTORY, *supra* note 365, at 1419. Carrington thought state courts should be given concurrent jurisdiction over these penalties "or none will ever be prosecuted for." *Id.*

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an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury."[418] Section 8 sought to prevent conflicts of interest and abuses of office:

> [N]o person appointed to any office instituted by this act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law.[419]

Violation of these restrictions was deemed a "high misdemeanor" and the officer would "forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States."[420] The statute provided for an informer to share the money recovered in an enforcement action: "[I]f any other person than a public prosecutor shall give information of any such offence, upon which a prosecution and conviction shall be had, one half the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information."[421] Assuming "give information" here authorized the filing of an action, this provision allowed qui tam enforcement.[422] The Supreme Court has said that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue."[423] This forfeiture provision did not contain language like the initial Collection Act, passed a little over a month earlier, which specified that penalty actions against private parties were to be brought "by the collector of the district where the same accrued, and not otherwise."[424]

Qui tam litigation was clearly authorized in later legislation establishing the First Bank of the United States.[425] Section 8 of the statute created a treble-value qui tam forfeiture against individuals involved in prohibited commercial transactions by the bank, "one half thereof to the use of the informer, and the other half thereof to the use of the United States, to be

418 An Act to Establish the Treasury Department, ch. 12, § 1, 1 Stat. 65 (1789).

419 *Id.* § 8.

420 *Id.*

421 *Id.*

422 An "information" was one of the legal mechanisms traditionally available to qui tam informers. *See supra* notes 119–21 and accompanying text.

423 United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943). The *Vermont Agency* Court described this discussion from *Marcus* as "dictum." *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777 n.7 (2000).

424 Collection Act, *supra* note 370, § 36.

425 *See* An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791).

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recovered with costs of suit."[426] Section 9 enforced a ban on lending or advancing more than $100,000 to the United States government (or more than $50,000 to a state or foreign government) without previous authorization by a law of the United States.[427] The forfeiture for violating this rule was allocated as follows:

> [A]ll and every person and persons, by and with whose order, agreement, consent, approbation, or connivance, such unlawful advance or loan shall have been made, upon conviction thereof, shall forfeit and pay, for every such offence, treble the value or amount of the sum or sums which shall have been so unlawfully advanced or lent; one fifth thereof to the use of the informer, and the residue thereof to the use of the United States.[428]

Treasury officials would presumably be among the individuals most likely to violate the restriction on agreeing to a prohibited loan or advance to the United States government.

In the case of revenue officers and census workers, qui tam enforcement made sense as a means of monitoring decentralized government conduct. Activities subject to qui tam regulation would take place wherever liquor was distilled or wherever residents of the United States lived. That rationale for qui tam monitoring seems less relevant for officers of the Treasury Department stationed in the nation's capital. A stronger reason for employing qui tam enforcement in this context would be to preserve congressional control of the public fisc and thereby foster public confidence in the lawful conduct of the nation's financial affairs.

4. Postal Workers

Before ratification of the Constitution, the Articles of Confederation conferred on Congress the power of "establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office."[429] When the new Constitution came into effect, the Post Office was operating under an ordinance enacted by the Confederation Congress in October 1782.[430] The ordinance imposed a variety of restrictions on postal workers, including prohibitions on opening, embezzling, or destroying the mail, and required an oath that each employee would abide by the legislation.[431] These obligations were enforced through forfeitures recoverable by government officials in state courts. A Postmaster General who violated his oath could forfeit $1000 for the benefit of the Post

426 *Id.* § 8.
427 *Id.* § 9.
428 *Id.*
429 ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.
430 An Ordinance for Regulating the Post Office of the United States of America (1782), *in* JOURNALS OF THE CONTINENTAL CONGRESS, at 670.
431 *Id.* at 671 (requiring postal employees to take oath to "well and faithfully do, execute, perform and fulfil every duty required of me, and abstain from every act and thing forbidden" by the legislation).

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Office in an action pursued by the Treasurer of the United States.[432] A postmaster, post-rider, or other Post Office employee who violated his oath could forfeit $300 in a state court lawsuit pursued by the Postmaster General.[433] The Postmaster General and his deputies could also pursue penalties against private parties who carried mail for hire in competition with the federal postal service.[434]

The First Congress provided for appointment of a Postmaster General and for temporary operation of the Post Office under the rules adopted by the Confederation Congress.[435] The new Congress began work on more permanent Post Office legislation, but did not complete the task before it rose for biennial elections.[436] During the course of legislative deliberations in the First Congress, President Washington's new Postmaster General recommended "[a] more accurate description of offences and frauds that may be committed by any person employed" in the department, accompanied by "such penalties as will be most likely to deter from and prevent the actual commission of them."[437] The previous Postmaster General commented on draft legislation that would have continued reliance on centralized supervision and litigation, suggesting that "[c]onsidering the Distance of some of the Offices, & other Circumstances," the Postmaster General should be allowed at least six months to commence suits against subordinates.[438]

New Hampshire postmaster Jeremiah Libbey, in a letter to Senator John Langdon, commented on a proposal to give the Postmaster General one month after the end of a quarter to bring suit against a postmaster failing to account for monetary receipts:

> Suppose . . . that a Post Master at Portsmouth [*New Hampshire*], or Savannah in Georgia—on the first day of [January] (the day the Quarter expires,) should be sick, or some accident happen to him or family that he could not possibly send on his Account & the money, at the time; on the first day of February, the Post Master General is to commence an Action against him, shall I ask where is the Action to be commenced? where the General Office is kept, 700 or 1000 miles from the place where the Post Master lives? or is it to be commenc'd where the Man lives? If so the Post Master General must give Orders for the Action perhaps, before it can be known whether the Accounts & moneys were not sent on, [though] not arrived at the General Office . . . .[439]

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432 *Id.* at 671–72.

433 *Id.* at 672.

434 *See id.* at 672–74.

435 An Act for the Temporary Establishment of the Post-Office, ch. 16, 1 Stat. 70 (1789).

436 *See* An Act to Continue in Force for a Limited Time, An Act Intituled "An Act for the Temporary Establishment of the Post-Office," ch. 23, 1 Stat. 218 (1791).

437 Report of the Postmaster General (Jan. 22, 1790), *in* 6 DOCUMENTARY HISTORY, *supra* note 365, at 1657, 1661–62.

438 Ebenezer Hazard's Remarks (June 24, 1790), *in* 6 DOCUMENTARY HISTORY, *supra* note 365, at 1704, 1706.

439 Letter from Jeremiah Libbey to John Langdon (June 30, 1790), *in* 19 DOCUMENTARY HISTORY, *supra* note 365, at 1973, 1973 (second alteration in original).

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While Libbey was concerned about an unreasonably short statute of limitations, his comments illuminate the difficulty of centralized supervision of subordinates stationed hundreds of miles from the seat of government. The Postmaster General might plausibly monitor financial accounting by postmasters who sent relevant documents to the central office. It would be much more difficult for the Postmaster General to adequately enforce nationwide regulations concerning carriage of mail and charges for services.

Perhaps for such reasons, when the Second Congress enacted legislation to put the Post Office on a more permanent footing, it decided to shift to a system of qui tam enforcement.[440] The statute provided that "all pecuniary penalties and forfeitures, incurred under this act, shall be, one half for the use of the person or persons informing and prosecuting for the same, the other half to the use of the United States."[441] The statute contained a number of regulations of private conduct enforceable through qui tam litigation, including forfeitures for obstructing or delaying the mail,[442] for a ferry operator negligently delaying or refusing to transport mail,[443] for injuring Post Office revenue by operating a competing mail service,[444] and for counterfeiting someone's handwriting to avoid paying postage.[445] More significantly for our purposes, the Act also included several qui tam forfeitures applicable to postal service employees, including penalties for demanding or accepting a higher postage rate than provided by law or an additional gratuity or reward;[446] failing to account for "bye or way-letters" picked up along the route;[447] opening, delaying, secreting, embezzling, destroying, or deserting the mail, or otherwise carrying mail contrary to the Act;[448] and delaying or embezzling newspapers sent through the mail.[449]

5. Federal Indian Agents

In addition to qui tam regulation of postal employees, the Second Congress enacted qui tam legislation to monitor federal employees managing trade with Native American tribes. The statute prohibited trade with the tribes except pursuant to a federal license.[450] Obtaining a license required the applicant to post a bond that would be forfeited if the person did not

440 *See* An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, 1 Stat. 232 (1792).

441 *Id.* § 25.

442 *Id.* § 5.

443 *Id.*

444 *Id.* § 14.

445 *Id.* § 20.

446 *Id.* § 11.

447 *Id.* § 15.

448 *Id.* § 16.

449 *Id.* § 22.

450 An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 1, 1 Stat. 329 (1793).

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comply with trade regulations adopted by the President.[451] A person found in Indian territory without a license and with merchandise typically sold to Native Americans would forfeit the merchandise and pay a fine.[452] A larger forfeiture applied to someone who attempted to settle in Indian territory,[453] or purported to purchase land from Native Americans.[454] A person who bought horses in Indian territory without a license was also liable to a forfeiture.[455]

One forfeiture under the statute applied to federal officials with licensing authority. Under the statute, no agent, superintendent, or other person authorized to grant a license for trade or for purchase of horses could "have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian."[456] An officer violating the restriction could forfeit $1000 and face a possible term of imprisonment.[457] The statute authorized qui tam enforcement, providing that "all fines and forfeitures" under the Act would be split "one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use."[458]

III. Constitutional Implications of Qui Tam Regulation of Government Officials

When *Morrison* considered the constitutionality of "independent" prosecutions of executive branch officers and when *Lujan* addressed civil litigation against federal officials, the Supreme Court paid minimal attention to mechanisms used to regulate government officials when the Constitution was ratified in 1789. This Article has highlighted the common eighteenth-century practice of policing government conduct through qui tam legislation, a practice followed in numerous statutes enacted by our earliest Congresses. This Part will consider what the history of qui tam regulation of government officials might tell us about the constitutional issues raised in *Lujan* and *Morrison*, beginning with the Article III standing question and then moving on to issues arising under Article II.

A. Qui Tam Litigation and Article III Standing

Nearly fifty years ago, Raoul Berger authored a *Yale Law Journal* article challenging the Supreme Court's developing standing jurisprudence on his-

451 *Id.*
452 *Id.* § 3.
453 *Id.* § 5.
454 *Id.* § 8.
455 *Id.* § 6.
456 *Id.* § 7.
457 *Id.*
458 *Id.* § 12.

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torical grounds.[459] Professor Berger drew on Louis Jaffe's earlier work concerning the ability of "strangers" to seek prerogative writs in English courts challenging actions taken without jurisdiction.[460] In addition, Berger noted the long tradition of "informer" or qui tam statutes: "The early English practice in prohibition, certiorari, and quo warranto is not the sole indication of easy access to 'public actions'; there were in addition the centuries-old 'informers' actions" pursued under statutes that "offered financial *inducements* to strangers to prosecute such actions."[461] Steven Winter expanded on the evidence offered by earlier scholars, providing additional detail on the use of qui tam legislation in early state and federal law and noting the existence of qui tam statutes directed at public officials.[462] After the Supreme Court's decision in *Lujan*, Cass Sunstein wrote an ambitious and influential article that drew on the earlier historical research to criticize the Court's standing jurisprudence.[463] Sunstein argued that the law of standing was a twentieth-century invention and that the only relevant question for determining the presence of an Article III case or controversy is whether the law affords the plaintiff a cause of action, something Congress had done in *Lujan* through the citizen suit provision of the ESA.[464]

Evidence concerning American reception of the English prerogative writs lies outside the scope of this Article.[465] Our review of the long tradition

459 *See* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

460 *Id.* at 819 ("When we turn to pre-Constitution English law for light on the meaning of 'case or controversy,' we find that attacks by strangers on action in excess of jurisdiction were a traditional concern of the courts in Westminster. The writ of prohibition supplies perhaps the clearest example.").

461 *Id.* at 825–26.

462 *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988).

463 *See* Sunstein, *supra* note 33, at 170–79.

464 *See id.* at 222–23; *see also* Caminker, *supra* note 137, at 381 ("Article III standing requirements ought to be considered satisfied whenever the plaintiff seeking to invoke the Federal judicial power asserts a cause of action pursuant to a congressional statute.").

465 Ann Woolhandler and Caleb Nelson have responded to standing skeptics, seeking to demonstrate a long tradition in various areas of law of limiting the extent to which private parties may litigate interests of the public. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("[E]ighteenth- and nineteenth-century courts were well aware of the need for proper parties, and they linked that issue to the distinction between public and private rights. Courts regularly designated some areas of litigation as being under public control and others as being under private control. Within the area of private control, moreover, courts paid close attention to whether the correct private parties were before them."). In considering historical evidence concerning English prerogative writs, it might be significant that many of the cases relied on by standing skeptics involved challenges to actions taken without jurisdiction. *See* Berger, *supra* note 459, at 819–24. It is not clear that principles concerning who may challenge an act taken without jurisdiction should necessarily carry over to other sorts of legal claims. For instance, since federal courts must notice defects in jurisdiction sua sponte, they could not rely on standing principles to ignore a suggestion of lack of jurisdiction filed by a stranger to the litigation. *See* Bender v. Williamsport Area Sch. Dist., 475

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of qui tam regulation of public officials, on the other hand, puts us in a good position to consider the relevance of qui tam legislation to the debate over Article III standing doctrine.[466] To the extent the Supreme Court grounds its standing doctrine on historical practice when the Constitution was adopted,[467] it seems fair to conclude that *Lujan* made two related mistakes in its explication of standing doctrine. The Court erred when it identified "particularized" injury as part of the "irreducible constitutional minimum" of standing.[468] It compounded the error when it concluded that Article III bars Congress from authorizing private litigation of generalized grievances about unlawful executive branch activity.[469] In the five centuries leading up to the framing of our Constitution, it was routine for Anglo-American legislatures to authorize litigation of generalized grievances by uninjured informers, including generalized grievances about unlawful government conduct.[470] A qui tam informer did not need to allege individual injury "because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body."[471] There was no expectation in a popular action of "Damage . . . to the Demandant in particular."[472]

If the *Lujan* Court erred in its articulation of standing doctrine, does that mean the Court reached the wrong outcome in light of the citizen suit provision of the ESA? If Professor Sunstein is correct that Congress may create universal standing by simply affording a cause of action to anyone who will sue, the ESA citizen suit provision could arguably be understood to include such a grant. One still might doubt whether Congress intended the ESA's citizen suit provision to confer standing on uninjured plaintiffs. The provision authorized "any person" to file a civil action for injunctive relief "on his own behalf,"[473] a formulation that might imply a statutory requirement to show some individual interest in the relief sought. But, for the purpose of exploring Article III issues in light of the history of qui tam litigation, we will assume that Congress indeed intended to authorize suit by "any person"—whether or not injured in some individual way—to seek injunctive relief based on a federal agency's misapplication of the ESA.

While Professor Sunstein may be correct about congressional power and the proper outcome in *Lujan*, I am not convinced that the history of qui tam legislation necessarily drives us to the conclusions he reached. One can dis-

U.S. 534, 541 (1986) (discussing how every federal appellate court must satisfy itself of its own jurisdiction and that of the lower courts, even if parties are prepared to concede jurisdiction).

466 Woolhandler and Nelson acknowledge that standing skeptics "properly emphasize [qui tam] statutes as telling evidence for their position." Woolhandler & Nelson, *supra* note 465, at 726.

467 *See supra* notes 99–103 and accompanying text.

468 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

469 *Id.* at 573–76.

470 *See supra* Part II.

471 2 HAWKINS, *supra* note 13, at 267.

472 *Id.* at 273–74.

473 *See* 16 U.S.C. § 1540(g) (2012).

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tinguish qui tam statutes from the ESA citizen suit provision on grounds that might justify differential treatment for purposes of Article III standing. *Lujan*'s reading of Article III was guided by the Court's understanding that the case-or-controversy limitation was designed to confine the courts to a historically judicial role, so that federal judges would not be drawn into tasks more applicable to the political branches. Our review of qui tam history allows us a clearer picture of the role judges actually played in the centuries leading up to the adoption of the Constitution, but that role still might be distinguishable from the one Professor Sunstein envisions judges playing under the ESA.

The typical qui tam statute did not authorize pure private representation of the public. Instead, the bounty provision of a qui tam statute was understood to create a private financial interest that the informer pursued alongside the public interest in enforcing the law.[474] The Latin phrase giving rise to the qui tam label—rendered by Blackstone as "*qui tam pro 'domino rege, &c, quam pro seipso in hac parte sequitur*'"[475]—speaks of a litigant who sues "for himself" as well as suing "for the king."[476] The informer's bounty, like the injury suffered by an aggrieved party, gives the qui tam informer a personal and private interest in the litigation that motivates and justifies the individual's invocation of judicial aid. The individual right conveyed by the informer's bounty explains a letter from attorney Richard Harison to Treasury Secretary Alexander Hamilton, opining that a presidential pardon "cannot extend to affect the rights of Individuals" and therefore could not remit the portion of a statutory fine or penalty "expressly given to any Individual" unless the informer consented or the statute qualified the individual's right to payment.[477]

Professor Sunstein suggests that no Article III value would be served by recognizing standing when Congress offers a pecuniary inducement to sue but denying congressional power to grant universal standing in the absence of a bounty provision.[478] Justice Holmes offered a possible response when he commented that "[u]pon this point a page of history is worth a volume of logic."[479] Holmes was justifying resort to the "traditional use" of the constitutional term "direct tax" where a litigant sought to attach the label to a sort of estate tax that "always has been regarded as the antithesis of a direct tax."[480] Similarly, where we seek to determine how the Framers understood the terms

474 Sunstein, *supra* note 33, at 176.

475 3 BLACKSTONE, *supra* note 36, at *160.

476 *Qui Tam Action*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("who as well for the king as for himself sues in this matter").

477 *See* Letter from Richard Harison to Alexander Hamilton (May 24, 1791), *in* THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION (Harold C. Syrett ed., 2011), http://rotunda.upress.virginia.edu/founders/ARHN-01-08-02-0326; *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 335 n.292 (2014).

478 Sunstein, *supra* note 33, at 176–77.

479 N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

480 *Id.*

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"case" and "controversy" in Article III, perhaps historical usage should count more than policy coherence.

In any event, apart from the informer's bounty, the citizen suit provision at issue in *Lujan* differs from the qui tam statutes reviewed in Part II in other important respects that may implicate Article III concerns. The qui tam statutes we examined imposed a financial penalty on an individual government official for a particular unlawful act identified with some precision in the legislation. In defending the Article III standing of qui tam litigants, Evan Caminker noted that "*qui tam* statutes impose penalties for specific misconduct" and therefore present legal issues in a "concrete factual setting."[481] The ESA's citizen suit provision, on the other hand, was not limited to specific misconduct committed by particular officials. It allowed "any person" to sue for an injunction against any person or federal agency "alleged to be in violation of any provision of this chapter."[482] Congress took a complex regulatory regime imposing numerous duties, some relatively indeterminate, and authorized wholesale private enforcement.

The broad sweep of the ESA citizen suit provision arguably created a risk that courts would be drawn into a policy-making role that extended beyond eighteenth-century forms of judicial conduct. We seek to guard against judicial policy making today through principles of statutory interpretation embodied in the *Chevron* doctrine, but similar concerns could be thought to underlie Article III's case or controversy limitation.[483] Universal standing to litigate any statutory interpretation issue under the ESA—as opposed to enforcing specific duties of particular government officials or specific rights of particular plaintiffs—might serve as an invitation to judicial policymaking. Of course, judicial policymaking could also occur under a citizen suit provision applied per *Lujan*. However, one might reasonably believe that the judicial temptation to embrace a free-wheeling policy role will be heightened in cases where the only interests in view are those of the public at large. Limiting citizen suits to plaintiffs with particularized interests at stake arguably tends to point judges in the direction of protecting private rights, a common form of eighteenth-century adjudication.

To put it another way, if understood as a grant of universal standing, the ESA citizen suit provision sought to make courts perpetual monitors of executive branch enforcement of a wide-ranging regulatory regime without being

481 *See* Caminker, *supra* note 137, at 381 (internal quotation marks omitted).

482 Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992) (quoting 16 U.S.C. § 1540(g) (1982)).

483 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 824 (2006) ("For its defenders, *Chevron* signaled a healthy awareness that the resolution of ambiguities calls for judgments of policy—and an accompanying belief that such judgments should be made by political actors, not by the federal judiciary."). Imagine a hypothetical statute, for instance, in which Congress purported to empower federal courts to adopt regulations implementing the ESA in the course of "litigation" pursued by private litigants. A court might well find such a delegation of regulatory authority a violation of the Article III case or controversy limitation.

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entirely clear what Congress expected the Executive to do in implementing the statute. A citizen suit provision applied indiscriminately at least arguably assigns the courts a role distinguishable from the role courts historically performed in enforcing qui tam statutes that imposed specific legal duties on individual public officials. A much-discussed passage from Justice Kennedy's concurring opinion in *Lujan* may help illuminate the point:

> In my view, 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, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation."[484]

In speaking of Congress's failure to identify an "injury" suffered by authorized litigants, Justice Kennedy appears to be concerned about the lack of legislative specificity in identifying statutory duties subject to private enforcement and the interests that would justify allowing private litigants to enforce those duties.[485] The history reviewed in Part II shows that particularized "injury" was not historically required for judicial resolution of a qui tam action, but perhaps Article III could still be understood to require that private plaintiffs show a particularized "interest" (either a legal injury or a financial interest arising from a bounty provision) or that litigation against public officials seeks enforcement of particularized "duties" imposed by statute. None of this establishes that Professor Sunstein was wrong in his view of congressional power, but only that his position is not compelled by the history of qui tam legislation. Someone who recognizes the inconsistency of *Lujan*'s articulation of standing doctrine with qui tam history could nevertheless conclude that *Lujan* reached the right result in the case before the Court.

B. Qui Tam Litigation and the Take Care Clause

Lujan's second ground for rejecting suits by uninjured citizens against executive branch officials rested on the President's responsibilities under Article II of the Constitution. According to the *Lujan* Court:

> 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." It would enable the courts, with the per-

484 *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (quoting 16 U.S.C. § 1540(g)(1)(A) (1982)) (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

485 *Id.* at 580–81.

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> mission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action."[486]

Professor Sunstein sees the *Lujan* opinion as "motivated by many of the concerns expressed in Justice Scalia's dissenting opinion in *Morrison v. Olson*."[487] Justice Scalia argued unsuccessfully in *Morrison* that the independent counsel statute usurped a portion of the executive power allocated to the President.[488] However, *Lujan* reads the Take Care Clause as embodying a version of the unitary executive principle that excludes certain forms of private litigation against executive officials.

Lujan understands the Take Care Clause to grant the President a semi-exclusive constitutional authority to monitor and ensure legal compliance by the President's executive branch subordinates. I use the term "semi-exclusive" because the *Lujan* Court would allow persons or institutions other than the President to address executive lawlessness in some situations. The Court had no problem with judicial monitoring of the legality of executive conduct as a step toward offering redress to an aggrieved private plaintiff.[489] The Court would presumably also allow judicial correction of unlawful executive conduct if the litigation was initiated by the President's subordinates, as in a criminal prosecution of an executive official.[490] Article II gives Congress express power to impeach and remove civil officers for "Treason, Bribery, or other high Crimes and Misdemeanors,"[491] and nothing in *Lujan* calls into question the congressional power to conduct oversight hearings concerning the legality of executive branch activities. But for the broad range of executive branch conduct that occurs below the congressional radar and that does not injure any particular party with a motive to sue, *Lujan* leaves the task of ensuring legal compliance exclusively in the hands of the President.

Jack Goldsmith and John Manning note that the Supreme Court invokes the Take Care Clause in a variety of contexts, but "the Court almost never construes the clause, at least not in any conventional way."[492] In other words, the Court "does not look at any of the evidence one would expect an interpreter to consider in determining the clause's relevance to the many uses to which the Court has put it."[493] Their observation applies with particular force to the Court's reading of the Take Care Clause in *Lujan*. Certainly the

486 *Id.* at 577 (majority opinion) (citations omitted) (first quoting U.S. CONST. art. II, § 3; then quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); and then quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

487 Sunstein, *supra* note 33, at 193.

488 Morrison v. Olson, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

489 *See Lujan*, 504 U.S. at 575 (person with direct injury has standing to seek review of executive action).

490 *See Morrison*, 487 U.S. at 695–96 (discussing President's control over prosecution of criminal activity).

491 U.S. CONST. art. II, § 4.

492 Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1853 (2016).

493 *Id.*

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text of Article II does not compel the Court's view of the clause as a semi-exclusive grant of power to the President. A provision that instructs the President to make sure something happens does not negate the possibility of a redundant responsibility in other actors. If a state law instructed parents to "take care" that their children are clothed and fed, it would not disable school officials from acting when parental responsibilities have been neglected.[494] The more natural understanding of the Take Care Clause is that the President's responsibility to ensure faithful execution of the laws exists alongside any oversight provided by Congress or the courts in the exercise of their constitutional functions.[495]

The bigger problem with the *Lujan* Court's reading of the Take Care Clause, however, is historical rather than textual. As demonstrated in Part II, Article II of the Constitution was drafted against the background of nearly half a millennium of Anglo-American legislation authorizing uninjured common informers to initiate litigation to enforce legal duties of government officials, including officials wielding executive power. From the early fourteenth century to the late eighteenth century, legislatures had routinely enacted qui tam statutes that "convert[ed] the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" and made the courts "virtually continuing monitors" of the legality of executive action.[496] In this historical context, the earliest Congresses believed the Constitution allowed use of these long-recognized legislative tools to monitor and ensure executive branch compliance with the laws. Congress provided for qui tam enforcement of numerous legal duties of executive revenue officers, census workers, treasury officials, postal workers, and officials regulating trade with Native American tribes.[497] President Washington did not raise any concern that the litigation authorized might somehow intrude on his Article II authority.

The Take Care Clause was modeled on the New York Constitution of 1777, which instructed the governor to "take care that the laws are faithfully executed to the best of his ability."[498] This constitutional duty coexisted with the state's tradition of qui tam legislation, including legislation directed at

494 Moreover, if a suit against an executive branch official by an uninjured litigant undermines the President's constitutional role under the Take Care Clause, why wouldn't a lawsuit by an injured litigant equally intrude on the President's authority, especially given *Lujan*'s minimalist understanding of what counts as a particularized injury? Both types of litigation have the same consequence of placing the task of responding to allegedly illegal executive branch conduct in judicial hands.

495 Goldsmith & Manning, *supra* note 492, at 1860 ("The drafters [of the Take Care Clause] may have insisted that the President ensure the legality or good faith of executive officers while not precluding Congress from specifying other means of policing executive legality.").

496 Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)) (some internal quotation marks omitted).

497 *See supra* notes 365–457 and accompanying text.

498 N.Y. CONST. of 1777, art. XIX; *see* Goldsmith & Manning, *supra* note 492, at 1861 & n.169.

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public officials.[499] The principal duty of the English King, reflected in his coronation oaths, was "to govern his people according to law."[500] For centuries preceding our Declaration of Independence and the ratification of our Constitution, the King's duty to enforce the laws was deemed compatible with the tradition of qui tam legislation.[501] A common informer sued on behalf of the King as well as for himself, suggesting that qui tam litigation was seen as supporting the King's law enforcement mission.[502] Courts that tried qui tam actions in England and the early American states were not viewed as competitors of the Executive, usurping powers of the King or governor, but were engaged in a common mission of making sure that subordinate officials stayed within legal constraints on their conduct.

Qui tam legislation does tend to undermine the ability of the executive branch to pursue optimal enforcement of a statute through establishment of enforcement priorities and exercise of prosecutorial discretion.[503] Professor Caminker argues persuasively, however, that executive judgments about whether statutory claims should be pursued "are not constitutionally protected by Article II against congressional override."[504] Congress, for instance, can dilute executive discretion through civil suit provisions, which have consequences comparable to those of qui tam statutes.[505] Zachary Price surveys authority suggesting a broad congressional power to regulate the exercise of prosecutorial discretion.[506] He notes that the Take Care Clause was drafted against the background of the English Bill of Rights, which denied the King authority to suspend or dispense with execution of parliamentary enactments.[507] While the effect of qui tam legislation on the enforcement discretion of the executive branch should no doubt be taken into account as a policy matter, it does not support the *Lujan* Court's reading of the Take Care Clause.

Lujan's understanding of the Take Care Clause also seems anachronistic. It is unlikely that late eighteenth-century Americans would have understood the provision to afford the President a semi-exclusive authority to monitor executive branch officials, since any presidential monitoring of a far-

499 *See supra* Section II.B.

500 1 WILLIAM BLACKSTONE, COMMENTARIES *226.

501 *See supra* Section II.A.

502 *Qui Tam Action*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("who as well for the king as for himself sues in this matter").

503 Beck, *supra* note 108, at 583 ("The common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good."); *id.* at 584–85 (examples of English informers pursuing inappropriate defendants); *id.* at 620–33 (examples under the Federal False Claims Act).

504 Caminker, *supra* note 137, at 359–60.

505 *Id.* at 360.

506 *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 711–16 (2014).

507 *See id.* at 689–96.

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flung federal workforce would necessarily be superficial. When the Constitution was ratified, the United States covered hundreds of thousands of square miles, stretching from Maine (then part of Massachusetts) to Georgia and from the Atlantic to the Northwest Territory (including present day Illinois and Wisconsin).[508] Those who created the Constitution anticipated that federal officials would engage in activities taking them throughout this vast territory, counting inhabitants, collecting taxes, regulating commerce among states and with Indian tribes, carrying mail, and conducting military operations.[509] The ultimate size of the federal workforce was uncertain, but it was clear that the country, still burdened by Revolutionary War debts, could not afford a large bureaucracy.[510] Travel and communication were slow and cumbersome.[511] Exclusive reliance on centralized presidential monitoring of federal agents would mean little or no monitoring at all for some very significant government functions. This explains why Congress turned to qui tam legislation in several instances where the decentralized nature of federal activity would make presidential supervision difficult.[512] In sum, the history recounted in Part II and the circumstances prevailing in the eighteenth-century United States make *Lujan*'s reading of the Take Care Clause implausible as a matter of original understanding.

C. Qui Tam Litigation and the Unitary "Executive Power"

Apart from the Take Care Clause, we should also consider the implications of qui tam history for the more general Article II executive power questions raised by cases like *Morrison*. The *Morrison* Court upheld the independent counsel statute, rejecting the argument that the legislation diverted executive power constitutionally vested in the President. The Court agreed that the independent counsel's investigation and prosecution of federal crimes constituted an exercise of "executive power," but concluded that the President maintained "sufficient control" by virtue of various provisions of the statute, including the power to remove the independent counsel for good cause.[513] Does the history of qui tam regulation of executive officials support the Court's result in *Morrison*? Does that history call into question the unitary executive theory, either in the form embodied in the majority opinion or the stronger version advocated in Justice Scalia's dissent?

The best answer to these questions, in my view, derives from Blackstone's comment placing qui tam suits in the category of "*popular* actions, because

508 *See United States, 1789*, MAPS ETC, http://etc.usf.edu/maps/pages/700/795/795.htm (last visited Nov. 27, 2017).

509 *See* U.S. CONST. art. I, §§ 2, 8; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819) ("Throughout this vast republic . . . revenue is to be collected and expended, armies are to be marched and supported.").

510 *See supra* notes 366–68 and accompanying text.

511 *See supra* notes 389–91, 439 and accompanying text.

512 *See supra* subsections II.C.2 and II.C.4.

513 *See supra* notes 70–74 and accompanying text.

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they are given to the people in general."[514] The power to bring a qui tam action was not a governmental power, but rather a power exercised by the public with legislative authorization. Under Anglo-American legal tradition, legislatures could place the power to seek forfeitures from public officials for unlawful acts in the hands of other government officers, aggrieved parties, or members of the general public. Since the power to initiate a qui tam action was "given to the people," it was not a governmental power subject to the Constitution's tripartite division among legislative, executive, and judicial powers.[515] The tradition of qui tam legislation can coexist comfortably with Article II's allocation of all "executive power" to the President because "executive power" is a subcategory of governmental power.

Qui tam legislation developed during centuries in which English and American governments wielded considerably less power than they do today. As a consequence, citizens were often called upon to participate in law enforcement activities or to help extend the government's coercive reach. A sheriff could call on a "*posse comitatus*" of armed citizens to assist in pursuing a criminal or keeping the peace.[516] The Judiciary Act of 1789 conferred a version of this authority on the federal marshal, providing that "he shall have power to command all necessary assistance in the execution of his duty."[517] Citizen jurors authorized prosecutions as members of grand juries or applied the law as members of petit juries.[518] The citizen militia could be called out to protect the community and "execute the Laws of the Union."[519] Through the power to "grant Letters of Marque and Reprisal,"[520] Congress could license "privateers," turning privately owned vessels into a naval force to target enemy shipping.[521] These traditional methods of involving citizens in law

514 3 BLACKSTONE, *supra* note 36, at *160; *see also id.* at *262 (statutory forfeitures "which regard mere matters of police and public convenience" are "usually left to be inforced by common informers, in the *qui tam* informations or actions, of which we have formerly spoken"). The term "popular action" can be traced to Roman law. *See* James E. Pfander, *Standing to Sue: Lessons from Scotland's* Actio Popularis, 66 DUKE L.J. 1493, 1500–03 & n.41 (2017).

515 3 BLACKSTONE, *supra* note 36, at *160.

516 David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 763–64 (2015) ("The sheriff in carrying out his peacekeeping duty may summon to his aid the able-bodied adults of the county.").

517 An Act to Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789).

518 *See* U.S. CONST. art. III, § 2; U.S. CONST. amends. V–VII.

519 U.S. CONST. art. I, § 8; *see* Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 306 (2007).

520 U.S. CONST. art. I, § 8.

521 *See* Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 587 (2014) ("The American Revolution itself was steeped in a story of the jury as a moment of direct citizen check on the oppressive power of the government."); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 8–11 (2007) (summarizing U.S. history of using privateers in military conflicts and eventual abandonment of the practice).

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enforcement and the projection of communal force often served as important safeguards against abuse of governmental powers.[522] In this light, we can recognize qui tam legislation as another means of involving the public in law enforcement processes in a manner that served as a check on government officials.

CONCLUSION

This Article has highlighted an important aspect of our legal history and drawn out implications for constitutional interpretation. While qui tam informers can prevent abuse of governmental power, my goal has not been to advocate widespread revival of qui tam legislation targeting public officials.[523] Whether or not popular actions against government officials should be a part of our legal future, their routine use in the legal past illuminates several questions about our constitutional design.

522 *See* John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. REV. 233, 236 (2005) (noting the Federalist Papers' argument that "standing armies pose a threat to liberty, and that militias will serve as a bulwark to this threat").

523 *See supra* note 37 and accompanying text. I have written elsewhere about the conflicts of interest that arise when we offer private financial inducements to qui tam informers for enforcing laws on behalf of the public. *See* Beck, *supra* note 108, at 608–37.

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Relator's Exhibit 5:
Non-Exhaustive Summary of Founding-Era *Qui Tam* Statutes Prepared by Counsel, Narrowed to Uninjured Informer Causes of Action.

Citation	Name of Statute	Date of Passage	Congress	Right of Action by Uninjured Informer*
Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48	An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States.	July 31, 1789	First Congress, First Session	Yes.
Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102	An Act providing for the enumeration of the Inhabitants of the United States.	March 1, 1790	First Congress, Second Session	Yes. Statute cited in *Stevens* , 529 U.S. at 777 n.6 (2000) as "provid[ing] both a bounty and an express cause of action."
Act of April 30, 1790, ch. 9 S 16, 1 Stat. 112, 116	An Act for the Punishment of certain Crimes against the United States.	April 30, 1790	First Congress, Second Session	Yes.
Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129	An Act for giving effect to an act intituled "An act providing for the enumeration of the Inhabitants of the United States," in respect to the state of Rhode Island and Providence Plantations.	July 5, 1790	First Congress, Second Session	Yes. Statute cited in *Stevens* , 529 U.S. at 777 n.6 (2000) as "provid[ing] both a bounty and an express cause of action."
Act of July 20, 1790, ch. 29, 1, 4, 1 Stat. 131, 133	An Act for the government and regulation of Seamen in the merchants service.	July 20, 1790	First Congress, Second Session	Yes. Statute cited in *Stevens* , 529 U.S. at 777 n.6 (2000) as "provid[ing] both a bounty and an express cause of action."
Act of July 22, 1790, ch. 33, 3, 1 Stat. 137, 137-138	An act to regulate trade and intercourse with the Indian tribes.	July 22, 1790	First Congress, Second Session	Yes. Statute cited in *Stevens* , 529 U.S. at 777 n.6 (2000) as "provid[ing] both a bounty and an express cause of action."
Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173	An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels.	August 4, 1790	First Congress, Second Session	Yes. While this statute was cited in *Stevens* , 529 U.S. at 777 n.7 (2000) as "provid[ing] a bounty only," closer analsis by historians reflects that Congress selectively included bounty-only provisions for revenue offenses against private parties, but permitted *qui tam* enforcement actions against collectors who failed to comply with statutory duties. Brief at 9.
Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67	An Act to establish the Treasury Department.	September 2, 1789	First Congress, First Session	Likely. While this statute was cited in *Stevens* , 529 U.S. at 777 n.7 (2000) as "provid[ing] a bounty only," Professor Beck observed that the statutory language regarding the "information" by the informer likely referred to a right of action, citing (as *Stevens* also caveats in that footnote) the Court's holding in *Hess.** Beck, Fordham L.R. at 1300-1301; Beck *TransUnion* at 22.

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Non-Exhaustive Summary of Founding-Era *Qui Tam* Statutes Prepared by Counsel, Narrowed to Uninjured Informer Causes of Action.

Citation	Name of Statute	Date of Passage	Congress	Right of Action by Uninjured Informer*
Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209	An Act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same.	March 3, 1791	First Congress, Third Session	Yes. Statute cited in *Stevens* , 529 U.S. at 777 n.6 (2000) as "provid[ing] both a bounty and an express cause of action."
Act of February 20, 1792, ch. 7, S 25, 1 Stat. 232, 239	An Act to establish the Post-Office and Post Roads within the United States.	February 20, 1792	Second Congress, First Session	Yes.
Act of May 2, 1792, ch. 27	An Act for Raising a Farther Sum of Money for the Protection of the Frontiers, and for other purposes therein mentioned.	May 2, 1792	Second Congress, First Session	Yes.
Act of May 8, 1792 ch. 32	An Act Concerning Duties on Spirits Distilled Within the United States.	May 8, 1792	Second Congress, First Session	Yes.
Act of May 8, 1792 ch. 39	An Act to Provide for a Copper Coinage.	May 8, 1792	Second Congress, First Session	Yes.
Act of May 8, 1792 Ch 36 S 5, 1 Stat. 275, 277-8	An Act for regulating Processes in the Courts of the United States, and providing Compensation for the Officers of the said Courts, and for Jurors and Witnesses.	May 8, 1792	Second Congress, First Session	Yes.
Act of March 1, 1793, ch. 19 S 12, 1 Stat. 329, 331	An act to regulate trade and intercourse with the Indian tribes.	March 1, 1793	Second Congress, Second Session	Yes.
Act of March 22, 1974, ch. 11, 4, 1 Stat. 347, 349	An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country.	March 22, 1794	Third Congress, First Session	Yes.
Act of May 8, 1794 ch. 23	An Act to Establish the Post-Office and Post-Roads Within the United States.	May 8, 1794	Third Congress, First Session	Yes.
Act of June 5, 1794, ch. 45, S 10, 1 Stat. 373, 375	An Act laying duties upon Carriages for the conveyance of Persons.	June 5, 1794	Third Congress, First Session	Yes.

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Non-Exhaustive Summary of Founding-Era *Qui Tam* Statutes Prepared by Counsel, Narrowed to Uninjured Informer Causes of Action.

Citation	Name of Statute	Date of Passage	Congress	Right of Action by Uninjured Informer*
Act of June 5, 1794, ch. 50	An Act in addition to the act for the punishment of certain crimes against the United States.	June 5, 1794	Third Congress, First Session	Yes.
Act of May 19, 1796, ch. 30, S 18, 1 Stat. 469, 474	An Act to regulate Trade and intercourse with the Indian tribes, and to preserve Peace on the Frontiers.	May 19, 1796	Fourth Congress, First Session	Yes.
Act of March 3, 1797, ch. 20	An Act to provide more effectually for the Settlement of Accounts between the United States, and Receivers of public Money.	March 3, 1797	Forth Congress, Second Session	Yes.
Act of July 6, 1797, ch. 11, S 20, 1 Stat. 527, 532	An Act laying Duties on stamped Vellum, Parchment and Paper.	July 6, 1797	Fifth Congress, First Session	Yes.
Act of June 13, 1798 ch. 53	An Act to Suspend the Commercial Intercourse between the United States and France, and the Dependencies Thereof.	June 13, 1798	Fifth Congress, Second Session	Yes.
Act of June 18, 1798 ch. 54	An Act supplementary to and to Amend the Act, Intituled “An Act to Establish an Uniform Rule of Naturalization; and to Repeal the Act heretofore Passed on that Subject.	June 18, 1798	Fifth Congress, Second Session	Yes.
Act of June 25, 1798 ch. 60	An Act to authorize the defense of the Merchant Vessels of the United States against French depredations.	June 25, 1798	Fifth Congress, Second Session	Yes.
Act of February 28, 1799, ch. 17, S 5, 1 Stat. 622, 623	An Act to alter the Stamp Duties imposed upon Foreign Bills of Exchange and Bills of Lading, by an act intituled "An act laying duties on stamped vellum, parchment and paper," and further to amend the same.	February 28, 1799	Fifth Congress, Third Session	Yes.
Act of May 10, 1800 ch. 51	An Act in addition to the act intituled "An act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country."	May 10, 1800	Sixth Congress, First Session	Yes.
Act of March 2, 1799 ch. 43	An Act to Establish the Post-Office of the United States.	March 2, 1799	Fifth Congress, Third Session	Yes.
Act of March 3, 1801, ch. 24, S 2, 2 Stat. 115, 115	An Act supplementary to the act intituled "An act concerning the District of Columbia."	March 3, 1801	Sixth Congress, Second Session	Yes.
Act of April 2, 1802, ch. 13, S 18, 2 Stat. 139, 145	An Act to regulate Trade and intercourse with the Indian tribes, and to preserve Peace on the Frontiers.	April 2, 1802	Seventh Congress, First Session	Yes.
Act of April 29, 1802 Ch 36 SS 3-4, 2 Stat. 171, 172	An Act supplementary to an act, intituled "An act for the encouragement of learning, by securing copies of maps, charts, and books to the authors and propietors of such copies during time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.	April 29, 1802	Seventh Congress, First Session	Yes.
Act of May 3, 1802, ch. 48, 4, 2 Stat. 189, 191	An Act further to alter and establish certain Post Roads; and for the more secure carriage of the Mail of the United States.	May 3, 1802	Seventh Congress, First Session	Yes.

Relator's Exhibit 5:
Non-Exhaustive Summary of Founding-Era *Qui Tam* Statutes Prepared by Counsel, Narrowed to Uninjured Informer Causes of Action.

Citation	Name of Statute	Date of Passage	Congress	Right of Action by Uninjured Informer*
Act of February 28 1803, ch. 9	An Act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American Seamen.	February 28, 1803	Seventh Congress, Second Session	Yes.
Act of March 26, 1804, ch. 38, S 10, 2 Stat. 283, 286	An Act erecting Louisiana into two territories, and providing for the temporary government thereof.	March 26, 1804	Eighth Congress, First Session	Yes.
Act of March 2, 1807, ch. 22, S 3, 2 Stat. 426, 426	An Act to prohibit the importation of Slaves into any port of place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight.	March 2, 1807	Ninth Congress, Second Session	Yes.
Act of June 26, 1812 ch. 107	An Act concerning Letters of Marque, Prizes, and Prize Goods.	June 26, 1812	Twelfth Congress, First Session	Yes.
Act of February 3, 1831, ch. 16	An act to amend the several acts respecting copyrights.	February 3, 1831	Twenty-First Congress, Second Session	Yes.
25 USC § 201	Penalties; how recovered.	June 30, 1834	Twenty-Third Congress, First Session	Yes.
Act of March 3, 1839 ch. 80	An Act to provide for taking the sixth census or enumeration of the inhabitants of the United States.	March 3, 1839	Twenty-Fifth Congress, Third Session	Yes.
Act of August 5, 1861, ch. 45, 11, 12 Stat. 292, 297	An Act to provide increased Revenue from Imports, to pay Interest on the Public Debt, and for other Purposes.	August 5, 1861	Thirty-Seventh Congress, First Session	Yes.
Act of March 2, 1863, ch. 67, 12 Stat. 696.	An Act to prevent and punish Frauds upon the Government of the United States.	March 2, 1863	Thirty-Seventh Congress, Third Session	Yes.
Act of July 4, 1864, ch. 249, S 9, 13 Stat. 390, 392	An Act further to regulate the Carriage of Passengers in Steamships and other vessels.	July 4, 1864	Thirty-Eighth Congress, First Session	Yes.
Act of July 8, 1870, ch. 230, 39, 16 Stat. 198, 203	Patent Act of 1870.	July 8, 1870	Forty-First Congress, Second Session	Yes.
Act of July 8, 1870, ch. 230, S 39, 16 Stat. 198, 203	An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights.	July 8, 1870	Forty-First Congress, Second Session	Yes.
25 U.S.C § 81	Contracts with Indian Nations.	March 3, 1871	Forty-First Congress, Third Session	Yes.
Act of Feb. 28, 1871	An Act to provide for the better Security of Lige on board of Vessels propelled in Whole or in Part by Steam, and for other Purposes.	February 28, 1871	Forty-First Congress, Third Session	Yes.
18 U.S.C. § 962	Arming vessel against friendly nation.	March 4, 1909	Sixtieth Congress, Second Session	Yes.

* The Supreme Court held in *United States ex rel. Marcus v. Hess* that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." 317 U.S. 537, 541 n.4 (1943) (*citing Adams v. Woods* , 2 Cranch 336 (1805)); *see also; Vermont Agency of Nat. Res. v. United States ex rel. Stevens,* 529 U.S. 765, 777 n.7 (2000) (reciting this rule of construction). As such, Relator's list is likely underinclusive.

CHAPTER X.

OF THE DIFFERENT STEPS PRESCRIBED BY THE LAW, FOR APPREHENDING, DETAINING, TRYING, AND PUNISHING OFFENDERS.

I NOW proceed to the different steps which the law prescribes for apprehending, detaining, trying, and punishing criminals.

A warrant is the first step usually taken for their apprehension.

A warrant is a precept from a judicial to a ministerial officer of justice, commanding him to bring the person mentioned in it, before him who issues it, or before some other officer having judicial authority in the cause.[a] This warrant should be under the hand and seal of the magistrate issuing it: it should mention the time and place of making it, and the cause for which it is granted. It

[a] Wood. Ins. 81, 1. Bl. Com. 137. 4. Bl. Com. 287.

may be either to bring the party generally before any magistrate, or specially to bring him before the magistrate only who grants it. It may be directed to the sheriff, constable, or to a private person; for the warrant constitutes him, for this purpose, an authorized officer.[b]

By the constitution of Pennsylvania,[c] no warrant to seize persons shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. Such warrant may be granted, even by any justice of the peace, for treason, felony, or any other offence against the peace.[d]

When the warrant is received by the person to whom it is directed, he is authorized, and, if a publick officer, obliged to execute it, so far as the jurisdiction of the magistrate and himself extends.[e] A sheriff may depute others; but every other person is obliged himself to execute it; though others may lawfully assist him. A warrant directed to all constables generally can be executed by each only in his own precinct: but a warrant directed to a particular constable by name, may be executed by him any where within the jurisdiction of the magistrate.[f]

The execution of the warrant is commenced by an arrest; which is the apprehending or restraining of the person, whom it mentions or describes.[g] But, besides those arrests which are made in the execution of warrants, there are others enjoined or justified by the law.

[b] 2. Haw. 85. [c] Art. 9. s. 8. [d] 2. Haw. 84.

[e] 4. Bl. Com. 288. [f] 2. Haw. 86. [g] 4. Bl. Com. 286.

All, of age, who are present when a felony is committed, or when a dangerous wound is given, are, on pain of fine and imprisonment, bound to apprehend the person who has done the mischief.[h] If the crime has been committed out of their view, they are, upon a hue and cry, obliged to pursue with the utmost diligence, and endeavour to apprehend him who has committed it. Hue and cry is the pursuit of an offender from place to place, till he is taken: all who are present when he commits the crime, are bound to raise it against him on his flying for it. Every one is obliged to assist an officer demanding his assistance, in order to apprehend a felon, to suppress an affray, or to secure the persons of affrayers.[i] In all these cases, the doors of houses may, if necessary, be broken open for the apprehension of the offenders, if admittance is refused on signifying the cause of demanding it.[j]

It is a general rule, that, at any time, and in any place, every private person is justified in arresting a traitor or a felon; and, if a treason or a felony has been committed, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.[k] If one see another upon the point of committing a treason or a felony, or doing any act which would manifestly endanger the life of another; he may lay hold on him, and detain him till it may be presumed reasonably that he has altered his design.[l] In the case of a mere breach of the peace, no private person can arrest one for it after it is over.[m]

[h] 2. Haw. 74. [i] Id. 75. [j] Id. 86. 4. Bl. Com. 289.

[k] 2. Haw. 76. [l] Id. 77. [m] Id. ibid.

Whenever an arrest may be justified by a private person, it may *a fortiori* be justified by an officer of justice.[n] In addition to their own personal exertions, they have a right to demand the assistance of others.[o] A constable may not only arrest affrayers, but may also detain them till they find security for the peace.[p] A justice of the peace may, by parol, authorize any one to arrest another, who, in his presence, is guilty of an actual breach of the peace, or, in his absence, is engaged in a riot.[q]

Whenever a person is arrested for a crime, he ought to be brought before a justice of the peace, or other judicial magistrate. This magistrate is obliged immediately to examine into the circumstances of the crime alleged; and according to the result of this examination, the person accused should be either discharged, or bailed, or committed to prison.

If it clearly appear that no crime was committed, or, if committed, that the suspicion conceived against the prisoner is entirely unfounded; he should be restored to his liberty.[r]

To bail a person is to deliver him to his sureties, who give sufficient security for his appearance: he is intrusted to their friendly custody, instead of being committed to the confinement of the gaol. At the common law, every man accused or even indicted of treason or of any felony whatever, might be bailed upon good surety: for at the common law, says my Lord Coke,[s] the gaol was

[n] 2. Haw. 80. [o] Id. 81. [p] Id. ibid.

[q] Id. 83. [r] Id. 87. [s] 2. Ins. 189.

his pledge, who could find no other: he could be bailed, till he was convicted.

This part of the common law, however, is, in England, greatly altered by parliamentary provisions, which restrict, in numerous instances, the power of admitting to bail. Indeed it is obvious, that between the law of capital punishments and that of commitments, the connexion must be intimate and inseparable. In capital offences, no bail can be a security equal to the actual custody of the person: for what is there, which a man may not be induced to forfeit to save his life?[t] One court in England, and only one—the court of king's bench, or, in the time of the vacation, any judge of that court—still possesses the discretionary power of bailing in any case, according to its circumstances; excepting only such persons as are committed by either house of parliament, while the session lasts, and such as are committed for contempts by any of the superiour courts of justice.[u]

To refuse or to delay bail, where it ought to be granted, is a misdemeanor at the common law,[v] and may be punished on an indictment. By the constitution of Pennsylvania,[w] it is declared, as an inviolable rule, "that excessive bail shall not be required;" and "that all prisoners shall be bailable by sufficient sureties; unless for capital offences, when the proof is evident or presumption great."

If the crime is not bailable, or if the prisoner cannot find sureties, the magistrate is under the disagreea-

[t] 4. Bl. Com. 294.

[u] Id. 296.

[v] 2. Haw. 90.

[w] Art. 9. s. 13, 14.

ble necessity of ordering, by a warrant under his hand and seal and containing the cause of the order, that he shall be imprisoned in the publick gaol, till he be thence delivered by the due course of law.[x] This is a commitment.

This imprisonment, it ought to be remembered, is for the purpose only of keeping, not for that of punishing the prisoner: he ought, for this reason, to be treated with every degree of tenderness, of which his safe custody will possibly admit. In particular, a gaoler is not justified, by the law, in fettering a prisoner, unless where he is unruly, or where it is absolutely necessary to prevent an escape.[y] "Solent præsides in carcere continendos damnare ut in vinculis contineantur; sed hujusmodi interdicta sunt a lege, quia carcer ad continendos, et non puniendos, haberi debeat."[z] "Custodes vero gaolarum pœnam sibi commissis non augeant, nec eos torqueant; sed, omni sævitia remota, pietateque adhibita, judicia in ipsos promulgata debite exequantur."[a] Such is the law of imprisonment, ancient and approved.

When the party is taken, and bailed or imprisoned; the next step in order is, to institute a prosecution against him. This may be done by four different methods—by appeal; by information; by presentment; by indictment.

1. An appeal is an accusation by one private person against another for some crime: it is a private action of

[x] 4. Bl. Com. 297.

[y] 3. Ins. 34.

[z] Bract. 105. a.

[a] Fleta. l. 1. c. 26.

the party injured, demanding punishment for the injury which he has suffered: it is also a prosecution for the state, on account of the crime committed against the publick.[b]

In ancient times there were appeals for a breach of the peace, for a battery, and for false imprisonment, as well as for more aggravated injuries and crimes; but they have been out of use, and converted into actions of trespass, for many hundred years.[c]

An appeal lies for mayhem, for larceny, for arson, for rape, for death. It is brought by the party ravished, robbed, maimed, or whose house was burned; or by the wife, or, if no wife, by the heir, of the person killed.[d] An appeal may be brought previous to an indictment; and if the defendant be acquitted, he cannot afterwards be indicted for the same crime: if he is found guilty, he shall suffer the same punishment as if he had been convicted on a prosecution by an indictment.[e] An appeal may be discharged by the concurrence of all the parties interested—by a pardon of the crown, and by the release of the appellant.[f]

The appeal can be traced to the ancient forests of Germany. "Luitur homicidium," says Tacitus,[g] "certo armentorum ac pecorum numero; recipitque satisfactionem universa domus."

[b] 4. Bl. Com. 308. 2. Haw. 155.

[c] 2. Haw. 157.

[d] 2. Haw. 164. 4. Bl. Com. 310.

[e] 4. Bl. Com. 311.

[f] 1. Hale. P. C. 9.

[g] De mor. Ger. c. 21.

On this subject there is, in our law books, an immense profusion of professional learning. As the appeal is now but little used, I decline any minute inquiry concerning it: as it is still in force, it would have been improper wholly to have omitted it.

2. A second mode of prosecuting crimes and offences is by information. Some informations are brought partly at the suit of the state, and partly at the suit of a citizen. These are a species of *qui tam*[h] actions; and will be considered when we treat concerning civil suits.

Informations in the name of the state or of the crown alone are of two kinds: those which are filed *ex officio* by the publick prosecutor, and are properly at the suit of the publick; and those which are carried on in the name, indeed, of the commonwealth or crown, but, in fact, at the instance of some private person or common informer. The first have been the source of much; the second have been the source of intolerable vexation: both were the ready tools, by using which Empson and Dudley, and an arbitrary star chamber, fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes: but ingenious tyranny can torture in a thousand shapes, without depriving the person tortured of his life.

Restraints have, in England, been imposed upon the last species: but the first—those at the king's own suit, filed by his attorney general—are still unrestrained.[i] By the constitution of Pennsylvania, both kinds are effec-

[h] 4. Bl. Com. 303. [i] Id. 307.

Wilson, James, and Bird Wilson. The Works of the Honourable James Wilson, LL.D. One of the Associate Justices of the Supreme Court of the United States, and professor of law in the College of Philadelphia / published under the direction of Bird Wilson. Vol. 3, Lorenzo Press, 1804. The Making of Modern Law: Legal Treatises, 1800–1926, link.gale.com/apps/doc/F0105018528/MOML?u=camb55135&sid=bookmark-MOML&pg=141. Accessed 6 May 2024.

20th Congress, 2d Session. [Doc. No. 146.] H. of Reps. Executive.

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

TRANSMITTING,

In compliance with a resolution of the House of Representatives of 13th January, 1825,

A STATEMENT OF CONVICTIONS, EXECUTIONS, AND PARDONS,

Under the authority of the Government of the United States, since the adoption of the Constitution.

FEBRUARY 26, 1829.—Read, and laid upon the table.

To the House of Representatives of the United States:

WASHINGTON, *January* 26, 1829.

I transmit, herewith, a report from the Secretary of State, with voluminous documents, prepared and collected in compliance with a resolution of the House of Representatives of the 13th January, 1825, calling for a statement of convictions, executions, and pardons, for capital offences, under the authority of the Government of the United States, since the adoption of the Constitution.

JOHN QUINCY ADAMS.

REPORT

Of the Secretary of State, in pursuance of the following resolution of the House of Representatives, viz:

"That the President of the United States be requested to communicate to this House, a statement, showing, as far as may be in his power, 1st, The number of persons that have been convicted, since the adoption of the Constitution, of capital offences against the laws of the United States; 2d, The number that have been executed; 3d, The number that have been pardoned by the President of the United States, and of what offences they were convicted; and, also, a statement of the number that have been convicted of each particular offence."

DISTRICT OF MASSACHUSETTS—No. 2.

ACCOUNT of fines, recognizances, and appearance bonds, forfeited, &c. and moneys collected and not collected thereon, in the District and Circuit Courts of the United States, for the District of Massachusetts, together with the application of the funds arising therefrom, and the expense attending prosecution.

In what year.	Amount of Fine, or Forfeiture, &c.	For what offence imposed.	When, and by whom collected.	Not recovered, and the reason.	How applied.	Remitted, and by whom.	Expense paid by U. S.	Expense paid by the party.	Observations.
1790	Fine - $ 500	False oath at custom-house.							
1791	do - 100	Same as above.							
	do - 50	Perjury at cus. house	Dep. Mar. Bradford - -	- -	P'd to Coll'r.				
1793	do - 100	False oath at c. house	Marshall.	- -	- -	- -	-	19 66	
1794	do - 200	Serving on board a French armed vessel	S. Bradford, D'y Marshal, Feb. 1795.	- -	- -	- - -	-	16 50	
1795	do - 500	Manslaughter.							
1797	3 persons fined each, - 500								
	1,500	Forgery.							
	Fine - 50	Offering to pass counterfeit bills.							
	do - 150	Passing counterfeit bills.							
1798	do - 160	Larceny - -	- - -	Pardoned by Pres't	- -	Pres't & informer.			
	do - 100	Serving on board a French armed vessel	Clerk of Court -	- -	Unknown.				
1799	Forfeiture, 2 bonds, $ 500 each 1,000	Non-appearance -	Not collected -	Not found	- -	- - -	-	-	Neither property or bodies to be found.
	Fine - 400	Seditious publication.							
	do - 100	Forgery.							

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DISTRICT OF MASSACHUSETTS.—No. 2.—Continued.

In what year.	Amount of Fine, or Forfeiture, &c.	For what offence imposed.	When, and by whom collected.	Not recovered, and the reason.	How applied.	Remitted, and by whom.	Expense paid by U. S.	Expense paid by the party.	Observations.
1799	Fine - $500	Unknown.							
	do - 8	Contempt of Court.							
1800	5 persons fined 480	Endeavor to make a revolt on high seas.							
1802	Fine - 16 66	Not serving as juror.							
	2 persons 120 00	Resisting cus. house officer and riot.							
1805	Fine - $50	Unknown.							
	do - 300	Passing counterfeit bills.							
	do - 150	Same.							
1806	Appearance bonds, 2 of $1,250 each 2,500	Embezzlement in Post Office.	June, 1806, by George Blake, Dist. Attorney.	- -	- -	- - -	-	-	Bail for Hen'y Deming. Recognizance defaulted.
1807	Appearance bond, unknown amount.								
	3 persons, 20 dollars each, - 60	Endeavor to make a revolt.	Not collected.	Pardoned by Pres't	- -	Pres't of U. States	139 54	-	Recognizance defaulted. Bail to give evidence, don't know whether collected or not.
	Fine - 7	Delinquent juror.							
	2 persons - 80	Arming foreign vessel.							
1810	Recognizance 300	Larceny in navy yard	- - -	- -	- -	- - -	-	-	Recognizance defaulted, 1810.
1811	Fine - 50	Illegal rescue of property.	- - -	- -	- -	- - -	-	50 60	Costs appear to have been received by Clerk. Unknown as to fine.
1813	Recognizance 1,000	Obtaining Brit. license	Unknown whether collected.	- -	- -	- - -	-	-	No execution.
1814	2 fines - 2,000	Manslaughter -	- - -	- -	- -	Pardoned by Pres't.			

1815	Fine	1,000	Obtaining and using British license.	- - -	Pardoned	- -	By President.						
	do	200	Resisting custom-house officer.	Marshal -	- -	- -	- - -	-	-	-	Believed by Marshal Prince.		
1816	do	10	Enticing soldiers to desert										
	2 fines	2	Endeavor to make a revolt.	- - -	- -	- -	- - -	-	-	-	Not known whether collected or not.		
1817	Recognizance	2,000	Using British license	- - -	-	- -	- - -	-	-	-	No execution.		
1818	2 fines	10	Purchasing soldiers' clothes.	- - -	-	- -	- - -	-	-	-	Believed to have been collected by Marshal Prince.		
	Fine	25	Delinquent juror	- - -	Remitted by Court.								
1819	do	1	Misdemeanor.										
	do	5	Resisting officer of revenue.	- - -	- -	- -	- - -	-	-	-	Fine probably paid to Marshal.		
1820	do	3,000	Slave trade	- - -	Remitted by Pres't	- -	President	-	-	-	Pardoned, May, 1822.		
	do	3,000	do										
1821	Recognizance	1,000	Non-appearance as witness.										
	Fine	5	Misdemeanor.										
1822	do	2,000	Forgery.										
1815	3 fines	250	Resisting rev. officers	Clerk of Court	- -	Paid to Collector Newburyport.							
1823	Fine	50	Manslaughter	- - -	Remitted by Pres't	- -	President	-	-	-	July, 1825.		
1824	2 fines	20	Endeavoring to make a revolt.	- - -	$10 remitted by Pres't.	- -	$10, President	-	-	-	June, 1825.		
1825	4 do	20	Same.										
1826	Fine	120	Larceny - -	- - -	Remitted by Pres't	- -	President	-	-	-	February, 1828.		
1827	do	20	Larceny - -	- - -	Remitted by Pres't	- -	President	-	-	-	May, 1827.		
	do	100	Manslaughter.										
	DISTRICT COURT.												
1809	Fine	$20	Delinquent Juror.										

DISTRICT OF MASSACHUSETTS.—No. 3.

ACCOUNT of Penalties and Forfeitures recovered in the District and Circuit Courts of the United States for the District of Massachusetts, for breaches of the laws of Revenue and Navigation in that District.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Nett proceeds received by U. States.	Total.	Observations.
	CIRCUIT COURT.								
1798	Ship Alligator - -	Collect'n; appraism.	4,000 00	-	-	-	-	- -	Decreed forfeit in appeal from District Court. $4,000 paid to Collector of Boston by claimant. Afterwards refunded to claimant, excepting $350, probably remitted by Secretary of the Treasury.
1800	400 dollars penalty - -	- - -	- -	72 86	-	-	none	- -	Execution returned unsatisfied. Non est inventus 1802. Not known who paid expenses.
1801	Ship Deux Anges and cargo -	Prize to the frigates Constitution and Boston.	Unknown	none	-	-	-	- -	Decreed one moiety to the United States, the other to captors. No account of sales.
	50 dollars penalty - -	Collection -	- -	-	-	-	-	- -	It does not appear whether this penalty was paid. No execut'n.
1802	5 barrels rum - - -	do - -	- -	-	-	-	-	- -	Decreed forfeited. No papers, no record.
	550 dollars—3 penalties -	Internal revenue -	- -	-	-	-	-	- -	Execution issued for two penalties $300, but not to be found on file. $250 penalty paid by Marshal to Supervisor of Revenue.
	2,000 dollars penalty, qui tam action. Executed, but not on file.	Slave trade -	- -	195 87	-	61 96	-	311 96	

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District of Massachusetts.

No. 1.

RETURN of Commitments, Trials, Convictions, Acquittals, Discharges, Punishments, Pardons, &c. &c. for offences against the laws of the United States, in the District and Circuit Courts of the United States, for the District of Massachusetts.

IN WHAT YEARS	OFFENCES	Committed	Bailed	Tried	Convicted	Acquitted	Pardoned	Died, or fled for want of prosecution	SUBMITTED BY WHOM PUNISHED: By order of the President	SUBMITTED BY WHOM PUNISHED: By Attorney for U. States, without such order	PUNISHMENTS INFLICTED	Expenses paid by United States	Expenses paid by the party	Year of commitment, &c.	OBSERVATIONS.
1790	Taking false oath at Custom House	1		1	1					•	$500 fine, and costs 4.8 7s. 2d.				Not known whether fine was paid or not, or whether pardoned.
1791	Assaulting officer of revenue	1		1	1					•	$100 fine, and costs $11.; the other $80 fine and costs				Not known whether collected and remitted.
1792	Piracy on the high seas	1		1	1					•	$100 fine, and 19 .09 costs				Fine collected by Marshal, and paid to Collector.
1794	Piracy on the high seas	3		3	3					•	3 hanged for piracy; 1 fined $200 and costs, for entering on board a French armed vessel		16 20		Fine and costs collected, but not known how disposed of. Nothing known of expenses in all other cases.
1795	Piracy on the high seas	7		7		7				•	7 months' imprisonment, and $40 and costs, fined				Amount of expense is not known.
1797	Piracy on the high seas	1		1	1					•	1 hour in pillory, $500 fine, and 3 years' imprisonment, for forgery; 6 months imprisonment and $10 fine, for offering to pass counterfeit counterfeit bills; 1 year's imprisonment, and $100 fine, for passing counterfeit bills; 2 fined $800 each, 1 hour in pillory, and 3 years' imprisonment for forgery.				
1798	Piracy on the high seas	2	2	2	2					•	1 fined $100 and whipped 20 stripes; the other fined $100 and costs				100 dollars fine, and whipping remitted by President; the other fine and costs collected.
1799	Piracy on the high seas	8	3	3	3					•	$100 fine, and 18 months' imprisonment for seditious writing; 1 year's imprisonment and $100 fine for forgery; $5 fine and costs for an unknown offence; 30 fine for contempt of court.				
1800	Piracy on the high seas	3	1	3	3					•	1 imprisoned 6 months, and fined $750; 1 imprisoned three months, and fined $100; 1 imprisoned two months, and fined $100; and two imprisoned two months, and fined $10 each.				
1801	Piracy on the high seas	1	1	1	1					•	3 months imprisonment and costs of prosecution, for enticing soldiers to desert.				
1802	Piracy on the high seas	1	1	1	1					•					
1803	Piracy on the high seas	1	1	1	1					•	3 years imprisonment, and costs of prosecution for forgery.				
1804	Piracy on the high seas	1	1	1	1					•	18 days imprisonment, $6.- fine and costs, result at sea.				
1805	Piracy on the high seas	21	21	21	21					•	1 month imprisonment $50 fine and costs, officers unknown; 2 imprisoned 4 months, and fined $80 and costs, for passing counterfeit bills; 3 imprisoned 1 year at hard labor, same offence; 3 imprisoned six months, fined $80 and costs; 1 3 years hard labor and imprisonment for forgery.				
1806	Piracy on the high seas	1	1	1	1					•	2 years imprisonment and costs, and publicly whipped, 20 stripes, post office offence				Discharged by order of President, August, 1809.
1807	Piracy on the high seas	1					1			•					Remain unknown.
1809	Piracy on the high seas	17	8	12	7	5	5			•	2 imprisoned 3 years and hard labor, for passing counterfeit bills				Reason assigned for nolle pros. 2 discharged on recognizance, by error in finding bill for passing counterfeit bills; 3 pardoned as to fine and costs by the President.
											3 imprisoned 30 days, and fined $50 and costs, for a revolt on the high seas	139 54			
1808	Piracy on the high seas	3	1	3	3					•	1 hard labor 3 years for uttering false coin				Reason for nolle pros. not stated.
											$40 fine and costs for firing foreign armed vessel				Nolle pros. Witness absent.
1809	Piracy on the high seas	1	1	1			1			•	Pardoned by President before sentence				
1810	Piracy on the high seas	4	1	1	1	1				•					
1811	Piracy on the high seas	6	6	6	4	1	1			•	$50 fine and costs for resisting property from a revenue officer		30 60		Cause of nolle pros. not known.
1812	Piracy on the high seas	3	3	3	2	1				•	2 fined $500 and costs, and one $2.0 and costs, for resisting officers of revenue				Reason for nolle pros. not stated; the other pardoned by President.
											One hanged (31 dead for resisting away with a vessel.				
1813	Piracy on the high seas	5	1	1		1	3			•	4. Same persons named in preceding line for running away with vessel				No reason for nolle pros. in one case.
1814	Piracy on the high seas	13	13	13	11	2				•	3 years imprisonment and $1000 fine each, (pardoned as to fines,) for manslaughter in Navy Yard at Charlestown.				Same persons, for killing 2 men, were indicted for murder, and convicted of manslaughter.

District of Massachusetts.

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No. 1.—*Continued.*

RETURN of Commitments, Trials, Convictions, Acquittals, Discharges, Punishments, Pardons, &c. &c. for offences against the laws of the United States, in the District and Circuit Courts of the United States, for the District of Massachusetts.

IN WHAT YEARS	OFFENCES	Committed	Tried	Convicted	Acquitted	Pardoned	Discharged for want of prosecution: By order of the President	Discharged for want of prosecution: By Attorney for U. States, without such order	PUNISHMENTS INFLICTED	Expenses paid by United States	Expenses paid by the party	Year of commitment, &c.	OBSERVATIONS
1813		2	16	4	3	12	1	•	5				Jury could not agree in latter case. Indictment quashed in two cases. Witness not having been sworn before Grand Jury. Also, in case of four for aiding the enemy, witness testified without being sworn. Reason of nolle pros. in case of the 10 unknown.
1816		4	11	3	3	2	•	•	10				
1817		1	16	2	•	6	•	1	3		46 79		Dismissed for want of jurisdiction in 15 cases.
1818		12	6	11	0	1	•	•	9				Recognizance defaulted in case of license. Nolle pros. for want of jurisdiction in case of murder on board ship of war, and piracy and robbery on high seas.
1819		24	3	2	4	2	3	•	20				Four executed for another murder, see above; 2 pardoned by the President in 1821.
1820		17	1	6	2	1	2	•	12				Nolle pros. in case of 3 hanged for another murder. No reason assigned for nolle pros. of 9 persons.
1821		5	3	2	1	1	•	•	4				
1822		4	•	1	1	1	•	•	3				
1823		8	2	10	3	•	•	•	9				Indictments found in 1814 against six defendants never arrested. One died, one tried and acquitted in 1817, one discharged for want of evidence; three tried and sentenced in 1815.
1824		8	•	3	4	2	•	•	3				Fine of 10 dollars remitted by President.
1825		11	10	8	4	4	•	•	12				One indicted for misdemeanor in another form. Convicted of larceny.
1826		6	2	4	2	1	•	•	3				One for violating the laws against the slave trade, delivered up to civil authority of Pennsylvania.
1827		6	4	2	2	•	1	•	2				
DISTRICT COURT.													
1799		•	•	•	•	•	•	1	•				The cases of murder, piracy, and revolt, in 1827, nolle pros. entered, they being convicted for another murder in 1825, and hanged.
		182	121	140	62	31	13	8	91				

1804	500 dollars penalty - -	Collection -	- -	48 64	-	43 64	-	- -	$ 500 amount penalty paid Geo. Blake, District Attorney.
1808	1,000 dollars penalty - -	Collection, unloading without permit.	- -	234 00	-	234 00	-	1,234 00	Paid to George Blake, District Attorney.
	Schooner Louisa - -	Collection -	- -	255 68	-	-	-	- -	Decreed forfeit on appeal from Maine District Court, and ordered to be sold. Warrant for sale not on file.
1809	Schooner Betsey and cargo -	Embargo - -	2,741 92	474 25	-	-	-	- -	Nett proceeds $ 2,267 67 paid to Collector of Boston. 48 paid by Clerk to Collector of New Bedford.
1812	10 barrels flour - -	- - -	48 00						
	Shallop Phœnix and cargo -	Embargo; appraised	val. 246 12	-	-	-	-	- -	No execution.
	Sloop Industry - -	Embargo -	- -	-	-	-	-	- -	No execution. An appeal from Maine.
	Brig Gleaner - - -	Embargo -	- -	-	-	-	-	- -	Appeal by claimant from Maine. Dismissed. No execution.
	Sloop Nancy - - -	- - -	21 00						
	Brig Plough Boy and cargo -	Embargo; appraised	val. 1,950 00	169 90	24 27	145 53	1,925 63	2,095 53	Nett proceeds paid to Collector of Boston.
	Schooner Industry - -	do do	1,850 00	258 34	-	258 34	-	2,108 34	Paid to George Blake, District Attorney.
	Sch'ner Two Friends and cargo	do do	222 90	216 45	-	92 09	-	- -	Nett proceeds $6 45. Unknown how disposed of.
	Schooner Packet - -	do do	2,150 00	192 16	-	192 16	-	2,342 16	Appraised value and costs paid to George Blake, Attorney.
	Brig Greyhound - -	do do	2,000 00	88 76	-	88 76	-	2,088 76	Paid to Collector of Boston.
	Ship Argo - - -	do do	3,000 00	119 79	-	119 79	-	3,119 79	Claimant committed on execution returned, 1814.
	Schooner Two Brothers -	do do	1,900 00	191 02	-	-	-	2,091 02	No execution.
	Brig Hannah - - -	Collection -	1,350 00	185 93	-	-	-	- -	Claimant Hews committed on execution returned, 1814.
	3,200 dollars penalty -	do - -	- -	-	-	-	-	- -	Judgment of Maine Dist. Court affirmed in Circuit Court. No execution.
	Schooner Harmony - -	do - -	1,350 00	317 12	-	317 12	-	1,667 12	$ 1,333 33 paid to Collector.
	Schooner Chance - -	Non-intercourse -	1,000 00	93 28	-	93 28	-	1,093 28	987 78 penalty less Clerk's commission. Paid Collector.

DISTRICT OF MASSACHUSETTS.—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Nett proceeds received by U. States.	Total.	Observations.
1812	Brig Alligator - -	Non-intercourse -	1,000 00	93 15	-	93 15	-	1,093 15	$ 937 78 appraised value, less Clerk's commission. Paid Collector.
	One-sixteenth part of brig Wasp	do -	312 50	119 92	-	119 92	-	432 42	312 50 less Clerk's commission. ½ per cent. paid by him to Collector of Boston.
	Schooner Mars - -	do -	1,200 00	92 48	-	92 48	-	1,292 48	1,200 less Clerk's commission. Paid to Collector of New Bedford.
	10 hhds. rum - - -	do -	531 31	71 76	-	71 76	-	603 07	Appraised value less Clerk's commission. Paid to Collector of Boston.
	25 cords fire wood - -	Coasting act -	51 00	-	-	-	-	- -	$ 26 06 paid to Collector of Boston.
	Sloop Julia - - -	do -	300 00	-	-	-	-	- -	$ 182 40 paid to Collector of Boston.
1813	Ship General Blake - -	Embargo; appraised	val. 1,600 00	356 78	-	356 78	-	1,956 78	Paid less Clerk's commission to Collector of Boston.
	Boat Marstrand and cargo -	Trading with enemy	do 5,775 16	565 20	116 34	-	-	- -	$ 5,326 21 nett balance paid to Collector of Boston.
	Brig Struggle - -	Non-importation -	do 1,800 00	333 54	-	-	-	2,133 54	Appraised value less commission paid to Collector Portsmouth, N. H.
	Brig Hector and part of cargo	do -	do 1,491 50	53 59	-	53 59	-	1,544 89	$ 1,472 86 paid Collector of Bath, Maine.
	Boat Eliza and cargo - -	Coasting act -	495 00	69 32 deducted from sales	-	-	-	- -	Nett proceeds $ 425 78 paid Collector of Boston.
1814	Brig Ann - - -	Embargo; appraised	val. 1,500 00	88 50	-	88 50	-	1,588 50	Nett proceeds $ 1,423 52 paid Collector of Newburyport.

	Brig Julia and cargo - -	Declaring war ag'nst Great Britain.	do	1,600 00	-	-	-	-	- -	Condemned as prize to U. S. frigate Chesapeake. ½ appraised value 1,600 dolls. paid to Treasurer of United States.
	Brig American and cargo -	Non-importation -	do	1,857 00	94 10	-	94 10	-	1,951 10	1,857 dollars less commission paid Collector of Bath.
	Schooner Industry - -	Non-intercourse -	do	900 00	105 19	-	105 19	-	1,005 19	$ 395 50 paid to Collector of Boston.
	50 hhds. molasses, &c. -	do -	do	1,708 31	21 61 deducted	-	-	-	- -	1,687 70 paid Collector of Newburyport.
	3 boxes hardware, &c. -	do -		661 12	103 98	-	72 29	-	- -	Nett proceeds paid Collector of Boston $ 629 43.
	Schooner Resolution - -	do appraised		675 00	122 74	-	-	-	777 74	$ 671 63 paid Collector of Boston.
	Brig Teresa - - -	do do		1,200 00	80 90	-	80 90	-	1,280 90	Nett proceeds paid Collector of Newburyport.
	Cargo of Teresa 4600 bush. salt	do do		1,462 50	66 90	-	66 90	-	1,529 40	Nett proceeds paid Collector of Newburyport
	23 barrels sugar, &c. - -	do do		3,386 90	104 51	-	104 51	-	1,491 41	$ 3,368 22 paid Collector of Boston.
	Brig Mars - - -	do do		3,000 00	160 78	-	160 78	-	3,160 78	2,983 25 paid Collector of Boston.
	Brig San Antonio - -	do do		1,000 00	89 95	-	-	-	1,089 95	Defendant committed.
	Brig Diamond and cargo -	do do		15,062 00	76 39	-	76 39	-	15,138 39	$ 15,036 74 paid Collector of Portland, Maine.
	Brig Gladeen - - -	do do		1,800 00	-	-	-	-	- -	1,791 paid Collector of Plymouth.
	15 puncheons rum - -	do gross sales		1,912 43	-	-	-	-	- -	Presumed to have been paid by the Collector of Boston to Clerk.
1815	Schooner Delesdernier -	do appraised		700 00	} -	-	-	-	} -	Decree October term, 1815. No execution issued.
	95 tons plaster, cargo of do. -	do do		570 00	}				}	
	Brig Struggle - -	do do		2,500 00	117 75	-	117 75	-	2,617 75	Less commissions paid Collector of Boston.
1816	Ship Edward - - -	do do		12,000 00	148 22	-	148 22	-	12,148 22	$ 12,000 less commissions paid Collector of Boston.
	Schooner Aurora and cargo -	Coasting act -		1,276 19	176 45	-	90 50	-	- -	1,190 24 less commissions paid Collector of Wiscassett.
1817	3 casks and 2 trunks shawls, &c.	Collect'n; appraised		2,613 70	195 83	-	177 11	-	- -	2,594 98 paid Collector of Boston.

DISTRICT OF MASSACHUSETTS.—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Nett proceeds received by U. States.	Total.	Observations.
1817	Ship Mercurius and cargo -	Non-intercourse. appraised	40,967 50	272 99	-	272 99	-	- -	Moiety accruing to United States remitted by President. Moiety less commissions paid by Clerk to Collector of Plymouth.
	Ship Octavia - - -	do do	6,000 00	97 07	-	97 07	-	- -	Moiety remitted by President, and a moiety less commissions paid Collector of Boston.
1818	Brig Catherine Shepard -	Collection -	870 00	722 22	-	680 22	-	-	$ 828 paid Collector of Waldoborough, Maine.
	Sloop Leader - - -	do -	360 00	27 15	-	-	-	- -	142 85 paid Collector of New Bedford.
	Schooner Betsey - -	do appraised	475 00	135 66	-	122 08	-	- -	461 42 paid Collector of Boston.
	Sloop Abby - - -	Coasting do	650 90	136 54	-	122 09	-	- -	635 55 paid Collector of Boston.
	Barque Argo and cargo -	Non-importation do	12,000 00	703 52	-	703 52	-	- -	12,000 paid Collector of Portland.
1820	Schooner Ann and cargo -	Collection do	1,141 60	145 75	-	136 05	-	- -	1,131 89 less commissions paid Collector of Boston.
1822	Schooner Elizabeth and Jane	do do	800 00	122 64	-	116 64	-	- -	794 less commissions paid Collector of Newburyport.
1823	Brig Alexander and cargo -	Slave trade -	1,659 50	1,416 01	108 54	176 02	-	- -	The expenses include seamen's wages. Nett moiety $ 176 02 paid Treasurer of United States to George C. Read, commander of United States ship Hornet, captor.
1825	Schooner Nantucket - -	Collection—appraised	400 00	464 84	-	462 24	-	- -	$ 394 paid Collector of Nantucket.

	DISTRICT COURT.								
1790	2 chests tea, 3 horses, 1 cask and 4 bags coffee, 10 boxes lemons, 2 trunks merchandise, 1 hhd molasses, 6 saddles, schooner Bee.	Collection -	1,485 46	334 28	deducted	from sales	—no claim.		$113 03 paid Collector of Salem and Beverly. $1,017 96 paid Collector of Boston.
	Ship Neptune - -	do appraised	3,666 66	53 10	-	53 10	-	- -	3,666 66 paid Collector of Boston.
	2 penalties $400 ea. - $800	do do	800 00	29 37	-	29 37	-	828 38	Collected by Marshal.
	1 penalty $400 - -	do do	400 00	15 27	-	-	-	415 27	Execution returned not satisfied—on file.
1791	Schooner Nancy and cargo, 2 bbls. sugar, 1 bbl. and 4 bags coffee, sundry goods, &c.	do - -	415 27	181 55	-	-	-	-	$146 74 paid Coll'tor of Boston. 97 16 paid Collector of Salem and Beverly.
1792	Penalty $1000 - -	do - -	1,000 00	43 45	-	-	-	1,043 45	Execution returned. Defendant committed.
	2 cases gin, 2 cases rum, &c. -	do - -	31 6	68 19					
1793	Sundry goods - -	Collection -	1,198 23	325 58	deducted	frm. sales,	no claim.	- -	$255 71 paid col. of Barnstable
	2 bags coffee, 4 casks molasses	do - -	- -	-	-	-	-	- -	68 15 do Boston
	12 bbls. sugar, 2 hhds. rum -	do - -	- -	-	-	-	-	- -	338 95 do Dighton
	Sloop Hannah - -	do - -	- -	-	-	-	-	- -	207 84 do Salem and Beverly
	2 hhds. rum, sundry goods -	do - -	- -	-	-	-	-	- -	713 00 do Boston
	2 bbls. rum, 7 cases gin -	do - -	832 36	128 37	-	90 30	-	- -	No account sales, or costs, or payment to collector, in case of rum and gin
	41 kegs rum, sch. Commerce								
	Penalty 250 dolls. do. 400 dolls.	do - -	- -	17 40	-	417 40	-	- -	250 dolls. paid to col. of Boston 417 40 collected by marshal in court; how disposed of does not appear
	Penalty 558 36 - -	Internal revenue -	- -	25 90	-	25 90	-	584 26	Collected by marshal on qui tam action, but does not say how disposed of.
1794	3 bags cocoa - -	Collection -	- -	14 39	-	-	-	- -	No return made on warrant of sale.
1795	19 bags cocoa - -	do - -	560 98	-	-	-	-	- -	No account of costs or payment to collector.
	500 bushels salt - -	do - -	- -	-	-	-	-	- -	Net proceeds paid collector of Barnstable, 307 06.
	Penalty 1000 dollars -	do - -	- -	17 14	-	-	-	1,017 14	Execution ret. not satisfied.

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DISTRICT OF MASSACHUSETTS.—No. 3.—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U.States.	Costs paid by the party.	Net proceeds received by U.States.	Total.	Observations.
1796	244 kegs herrings, &c. -	do - -	360 74	45 22	deducted	frm. sales,	no claim.	- -	$315 52 probably paid by marshal to col. of Boston.
	2 bags cotton, &c. - -	do - -	246 76	-	-	-	-	- -	No acct. of costs or payment to collector.
	Penalty 400 dollars - -	do - -	- -	22 01	-	-	-	422 01	400 dollars paid collector of Dighton by marshal.
1797	6 penalties, $50 each, $300 -	Coasting - -	- -	103 84	-	-	-	422 84	Execs. returned not satisfied.
	Penalty $400 -	Collection -	- -	31 68	-	-	-	431 68	Exec. not found.
	3 penalties, $50 each, $150 -	Internal revenue -	- -	55 74	-	-	-	205 74	$66 96 paid dist. attor. & 70 45 paid col. of internal revenue.
	1 do. 3, 1 do. 20, is 23 dolls.	do - -	- -	24 56	-	24 56	-	47 56	47 dolls. 56 cts. paid do.
	1 pipe gin, sundry watches - 54 tierces and 4 hhds. sugars Sch. Sukey, 3 casks Geneva 1 trunk merchandize	Collection -	7,382 00	376 63	-	sundry	watches	335 63	No account of payment. $7005 34 paid col. of Boston
1798	11 elephants' teeth, 1 cask of wine, 1 chest goods, 36 bags and 2 chests coffee, 5 hhds. rum, &c.	do - -	1,566 57	20 09	-	-	-	- -	$903 95 paid col. of Boston 171 42 do Marbleh'd 489 20 do Salem and Beverly 1,564 57
	Penalty 1500 dollars - -	Internal revenue -	- -	12 61	-	-	-	1,512 61	Committed on exe. ret. 1799
	5 penalties 543 dolls. 75 cts. -	do - -	- -	57 93	-	11 22	-	535 37	411 dolls 22 cents, remitted by President and officers 67 dolls. 47 cts. paid dis attor.
1799	2 penalties 300 dollars -	do - -	- -	-	-	-	-	- -	3 execs. returned unsatisfied.
	Penalty 2000 dollars - -	Laws against slave trade	- -	13 88	-	13 88	-	2,013 88	No execution. 1000 moiety of penalty paid by marshal to Treas. U. S.
	Penalty 400 dollars - -	Collection -	- -	16 60	-	-	-	416 60	Exec. ret. not satisfied, 1800
	Sundry goods, 2 bags coffee, &c. 4 bbls. molasses, 19 kegs barley,	do - -	377 40	30 24	in 1 case.	-	-	- -	118 dolls. 34 cts. paid col. of Salem and Beverly

	17 boxes limes, &c.								259 dolls. 6 cts. paid by marshal to col. of Boston.
1800	Sch. L'Active	Letter of marque against France	2,450 00	348 19	deducted	frm. sales			$1687 94 paid Treas. U. S.
	3 bags coffee, 2 casks wine, 9 bales merchandise, &c.	Collection	150 19	222 74	-	-	-	-	146 19 paid col. of Boston
1801	Ship LeBerceau	Letter of marque against France	22,203 29	1,515 89	deducted	from pro	ceeds	-	One moiety 10,343 dolls. 70 cts. adjudged to U. S.
	1 pipe wine, 6 watches	Collection	1,602 26	328 68	deducted	from pro	ceeds		
	Sundry goods, 1 box hats	do	- -	-	-	-	-	-	$863 78 paid col. of Boston
	17 bags cocoa, 1 pipe gin	do	- -	-	-	-	-	-	161 19 do Plymouth
	2 bbls. and 1 bag coffee, &c.	do	- -	-	-	-	-	-	64 96 do N. Bedford
	12 bbls. and 1 box sugar, &c. Sundry goods	do	- -	-	-	-	-	-	70 99 do Edgartown
	Penalty 50 dollars	Internal revenue	- -	-	-	-	-	-	Qui tam action ; no exec. ; no costs taxed
1802	5 bags coffee, 1 trunk merchandise, 75 pieces bandannas, 2 trunks merchandise, sundry goods, 4 bags coffee	Collection	2,448 86	338 24	deducted	from pro	ceeds	-	No acct. sales of 5 bags coffee $1641 70 paid col. of Boston 638 08 presumed to have been paid col. of Boston.
	2 hhds. rum, &c.	Internal revenue	127 88	64 21	deducted	from pro	ceeds	.	No account sales of rum, $59 92
	Penalty 50 dollars	do	. .	13 28	qui tam	act'n, ex.	ret. not	found	$33 47 paid col. of internal rev.
	Penalty 400 dollars	Laws agt. sl. trade	. .	44 30	qui tam	.	.	.	Paid to G. Blake, dis. at. $400
	Penalty 400 dollars	do	. .	.	.	.	.	.	No exec. or account payment
	Penalty 400 dollars	Collection	. .	.	.	.	.	.	Penalty rec'd by G. Blake, d. at.
	Penalty 400 dollars	do	. .	.	.	.	.	.	Do do by marshal
	Sloop Cynthia	do	375 00	48 75	.	48 75	.	423 78	$375 recd by G. Blake, dis. at.
1803	10 hhds. rum, 1 hhd. molasses, 10 cases hair powder, 2 bags coffee	do	707 64	197 44	deducted from proceeds.	.	.	.	$122 10 paid col. of Boston 387 10 do Plymouth No acct. sales or costs taxed for coffee
	Penalty qui. tam. 2000 dolls.	Laws agt. sl. trade	. .	.	.	.	.	.	2000 dolls. penalty U. S. attor.
	Do do 2000	do	. .	15 77	.	15 77	.	2,015 77	2000 dolls. penalty and costs, collected by marshal, and a moiety paid prosecutor
	Do do 2000	do	. .	58 85	.	.	.	2,088 85	Exec. ret. not to be found
1804	Sloop Washington, 26 bags 4 chests and sundry bags coffee, 1 bag cocoa, sundry merchandise, 3 bbls. sugar, &c.	Collection	2,268 69	308 41	do. in part	28 20	.	608 20	$1881 30 paid col. of Boston No acct. sales or payment to col. $445 81, or costs taxed

DISTRICT OF MASSACHUSETTS.—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of Expenses.	Costs paid by U. States.	Costs paid by the party.	Net proceeds received by U. States.	Total.	Observations.
1805	12 bbls. and 1 hhd. sugar, 1 pipe wine, 1 bbl. honey, sundry merchandise, 8 bales cotton, &c. 2 pipes and 2 qr. casks wine	Collection -	1,064 76	350 82	deducted from proceeds, in part.	.	.	. .	$268 33 paid col. of Boston 162 30 do Edgartown 114 90 do Salem Excess of costs over proceeds to amt. few dollars, by cols.
	Penalty 100 dollars - -	do - -	. .	25 76	do	.	.	. .	Exec. issued and on file without return
1806	1 hhd. 1 tierce and 9 bbls. sugar, 2 cases French liquor, 20 boxes segars, 14 bags of coffee, 6 bbls. molasses, &c.	do - -	870 70	400 15	do	.	.	. .	$407 44 paid col. of Boston 23 48 do Salem 1 21 do Plymouth 29 99 do Gloucester ——461 12
1807	35 bags coffee, 14 bbls. molasses, 19 barrels sugar, 1 trunk lace, 265 bushels salt, bbl. segars, sch. Wiley Reynard.	do - -	2,266 08	742 05	do	.	.	. .	$596 30 paid col. of Boston 531 85 do Newburyport 526 06 do Marblehead
	Penalty 400 dollars - -	do - -	. .	18 77	.	.	.	418 77	Exec. ret. not satisfied
1808	Sch. Rebeeca - -	do - -	2,325 00	277 40	.	.	.	. .	$1675 10 paid col. of Boston, 372 50 wages and costs first deducted
	102 boxes capers, 12 bags coffee, 1 cask porter, 5 bales cotton, 4 casks rice, 8 bbls. sugar, 4 hhds. and 2 bbls. rum, pilot boat and 5 bbls. flour, sch. Victory.	do - -	1,473 03	444 69					$767 11 paid col. of Boston 48 01 do Newburyport 198 52 do New Bedford No acct. sales or acct. of costs taxed in case of sch. Victory
	Penalty 100 dollars - -	Coasting act -	. .	16 93	.	.	.	116 93	Paid Geo. Blake, dis. attor.
	Penalty 100 dollars - -	do - -	. .	19 61	.	.	.	119 61	Exec. ret. unsatisfied by attorney, order
	Sloop Humbird - -	do - -	30 00	47 20	do				
	Sloop Ruth - -	do - -	30 00	47 26	do				
	Penalty 1000 dollars - -	do - -	. .	34 87	.	.	.	1,034 87	Alias exe. not on file

	Sloop Lively and cargo, sloop Ruby, 25 bbls. flour, sch. Republican, 11 boxes dried fish, &c. sch. Clara and cargo, sch. Mary and cargo, sch. Lilly and cargo, sch. Astrea and cargo, sch. Waife, sch. Prudentia.	Embargo laws -	8,462 11	2,785 84	-	165 32	-	-	$421 36 paid col. of Edgartown 1821 92 do Newburyport 36 10 do Salem 3093 74 do Boston 282 20 do New Bedford 410 91 pd com. U.S. brig Argus 410 91 accrues to U. S. but no mention how disposed of Excess of costs 34 40, paid by collector of Barnstable Excess of costs in one case 320 62.
1809	18 hhds. and 31 barrels sugar	Collection -	26,956 91	1,588 12	deducted	from proceeds	-	-	$25,083 99 paid Coll. of Boston
	644 bolts cotton bagging -	- - -	- -	-	-	-	-	-	88 24 do N. Bedford.
	A boat and merchandise -	- - -	- -	-	-	-	-	-	No account of payment to Collector, or of costs; $196 56 seized at Gloucester. ;
	7 bales broad cloth - -	- - -	- -	-	-	-	-	-	
	Penalty, $4,069 30 -	Embargo Act -	- -	not taxed	-	-	-	-	No execution. Appeal dismissed by Circuit Court for want of jurisdiction.
	Do 4,069 30 -	Do -	- -	do	-	-	-	-	Do do.
	Do 2,325 00 -	Do -	- -	do	-	-	-	-	No execution. Dismissed for want of jurisdiction.
	Do 1,170 00 -	Do -	-	255 88	-	255 88	-	1,425 88	Penalty and costs paid Dist. Att.
	Schr. Resolution - -	Embargo -	3,400 53	768 93	deducted	from sales	-	-	No account of payment to Collector; seized at Plymouth.
	Schr. Morning Star - -	- - -	- -	-	-	-	-	-	$911 32 paid Coll'r of Boston.
	Sloop Tear - -	- - -	- -	-	-	-	-	-	713 69 do Barnstable.
	10 bbls. flour and 2 bbls. pork	- - -	- -	-	-	-	-	-	No account of sales of schooner Hannah and cargo.
	69 boxes segars, &c. -	- - -	- -	-	-	-	-	-	Seized at Newburyport.
	Schr. Hope, alias Glyde, and 12 hhds. and 3 bbls. sugar	- - -	- -	-	-	-	-	-	Sch. Glyde, gross sales $919 88 one-third paid as salvage, no mention of balance.
	Schr. Deborah Sloop William - -	- - -	- -	-	-	-	-	-	Net proceeds sloop William to pay wages.

DISTRICT OF MASSACHUSETTS.—No. 3.—Continued.

In what year.	Article or sum forfeited.	Offence, against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Net proceeds received by U. States.	Total.	Observations.
1809	Sloop Julia, alias Caraib								In some cases the costs exceed the article condemned.
	A sloop, name unknown								
	9 penalties, 21,736 dollars	Embargo		1,010 92					In 6 cases, on appeal, dismissed for want of jurisdiction; $1,741 98 penalty andcosts, paid District Attorney; one pardoned, amount 2,420 15; one committed, amount 1,648 19, 1811.
1810	50 bags coffee, 3 pieces cloth 1 bale cassimeres, boat Fancy, 8 pieces cloth, 4 hhds. and 10 bags coffee, 2 hhds. rum, 1 bbl. sugar, 14 drums raisins, 6 bbls. molasses, sch. unknown, 40 bbls. mackerel, 68 pieces linen, &c. 1 trunk English goods, 197 boxes herring, 4 barrels, 3 bags and 1 basket sugar.	Collection	7,098 26	1,090 83	deducted	50 68			$5,804 97 paid Coll. of Boston. 247 25 do Salem. Excess of costs 24 22, paid by Collector of Salem.
	Penalty, 400 dollars			68 48		41 50			Ca. sa. issued, but not returned.
	Do 50							91 51	$91 51 paid District Attorney.
	Sloop Frances	Non-intercourse	2,200 40	332 05		43 50			456 34 paid Coll'r of Dighton.
	Sloop Patty, 23 pieces cloths								1,445 01 do Boston.
	Schr. Victory, schr. George								
	4 hhds. molasses								No account of proceeds of 4 hhds. molasses.
	Penalty $826	Embargo							Appeal dismissed for want of jurisdiction.
	Do 3,826								Do do

	Do 1,000	- -	- -	- -	-	-	-	-	-	-	Do do
	Do 8,544 14	- -	- -	- -	-	-	-	-	-	-	Do do
	Do 6,588	- -	- -	- -	-	-	-	-			Do do
	2 Do 2,000	- -	- -	- -	-	-	-	-	-		Dismissed by Circuit Court.
	Do 1,000	- -	- -	- -	-	-	50 65	-	-	-	1,050 65 Committed. Pardoned by President, February, 1827.
	Do 8,000	- -	- -	- -	-	-	-	-	-	-	- - Dismissed by Circuit Court. No execution.
	Sloop General Knox	- -	Embargo	-	852 23	311 46	-	127 31	-	-	- $76 18 paid Collector Boston.
	Sloop Fame	- -	- -	-	- -	-	-	-	-	-	- 734 81 do nolle pros.
1811	4 bags pimento	- -	Collection	-	1,295 02	371 52 deducted	8 60	-	-	-	- 1,014 48 paid Coll'r of Boston.
	4 pipes gin	- - -	- -	-	- -	-	-	-	-	-	- Excess of costs in three instances, 39 79, paid by Collector of Boston.
	22 bags, 6 tierces, 2 bbls. and 2 chests coffee, 19 bbls. sugar.										
	Sloop Calnab										
	Penalty 5,000 dollars	-	Embargo	-	- -	90 88	-	-	-	5,090 88	Execution returned not satisfied, 1813.
	Do 5,000	- -	Do	-	- -	90 35	-	-	-	5,090 35	Do do
	Do 1,000	- -	Do	-	- -	84 35	-	-	-	1,084 35	Do do
	Do 2,144	- -	Do	-	- -	-	-	-	-	-	- Dismissed in Cir. Court. No execution.
	Do 700	- -	Collection	-	- -	not taxed					
	Do 800	- -	Do	-	- -	123 51	123 51	-	-	823 51	Not satisfied, March, 1817, *vs.* Peleg Tripp.
	Do 1,000	- -	Do	-	- -	17 29	8 50	-	-	1,017 29	Execution returned not satisfied, by direction of District Attorney.
1811	5 barrels molasses, &c. 8 bbls. sugar, 17 bbls. sugar, 156 watch faces, brig Betsey.		Non-intercourse	-	415 96	179 25	deducted from proceeds, in part.				$246 76 paid Coll'r of Boston. No account of sales—seized at Boston.
	Penalty $2,600	- -	Do	-	- -	-	-	-	-	-	- Dismissed in Circuit Court. No execution.
	Do 1,400	- -	Do	-	- -	36 67	-	-	-	1,436 67	Execution returned not satisfied in 1813.

DISTRICT OF MASSACHUSETTS—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Net proceeds received by U. States.	Total.	Observations.
1811	Penalty $ 400	Act concerning seamen.	-	-	-	-	-	-	Defendants dismissed in Circuit Court. No execution.
1812	24 pieces kerseys, &c. 18 pieces broad cloths, 227 dozen gloves, 4 casks cutlery and hardware, 231 pieces and 4 boxes calicoes, 42 barrels tapes, &c. 31 silver watches, 245 tons plaster, schr. Avery, schr. Lively and cargo, schr. Exchange, schr. Dromo, sundry pieces cloths, 16 blankets, 3 pieces cloths and 6 pieces kerseys, 1 trunk cambrics, 1 box vestings, 6 bales plains, bundle cloths, boat Orange, 4 bbls. cambrics, schr. Galen, schr. Eliza, boat Liberty, 5 casks wine, 6 bundles and 4 pieces flannel, &c. 2 barrels molasses, &c. 4 boxes castor oil, &c. 23 pieces broad cloths, &c. schr. Dolphin and cargo of salt.	Non-intercourse	86,903 87	5,232 28	deducted	from pro	ceeds	-	$73,266 28 paid Collector of Boston. Proceeds of schr. Avery appropriated to satisfy decree for seamen's wages. $207 09 paid Coll. N. Bedford. 234 88 do Barnstable. 106 84 do Boston. 3,810 12 do Gloucester. 1,621 76 do Newburyport. 250 90 do Ipswich. 79,497 87 paid Collectors.
	Brig Gleaner	Collection	-	-	-	-	-	-	Conditional remission by the Secretary of Treasury, and 237 dolls. paid Coll'r of Boston.
	5 pieces and 1 box cloths, 44 hats, &c. 2 pieces cloths, 3 barrels and 5 bags coffee, 8 cases cotton goods, 3 barrels	Collection	3,433 55	732 79	deducted	from pro	ceeds.	-	$2,211 07 paid Coll'r of Boston. 90 37 do Salem. 30 83 do Gloucester.

	and 1 bag sugar, 1 bbl. coffee, 45 grindstones, 3 packages calicoes.									
	Penalty $300 85	Do	-	-	53 07	-	53 07	-	353 92	Collected & paid Dis. Attorney.
	Do 6,400	Do	-	-	48 24	-	48 24	-	6,448 24	Land taken on execution, and returned satisfied. Not shown how disposed of.
	Do 200	Do	-	-	29 78	-	29 78	-	229 78	Paid District Attorney.
	90 tons plaster paris	Do	-	-	-	-	-	-	- -	No papers.
	7 pieces blue cloth, 14 pieces black handkerchiefs, 17 do. cassimere, &c. 3 do. cloths, 3 bags wire, 1 bag coffee, &c. 75 tons plaster paris, 1 box merchandise, 20 pieces blankets, 2 trunks merchandise, 276 tons plaster paris, 100 quintals fish, &c. cargo of schr. Mars, 100 tons plaster, brig Abeona, brig Hiram, 3 pieces broad cloth, shallop Phœnix and cargo	Non-intercourse	-	12,754 09	1,142 31	deducted from proceeds, in part.	345 66	-	2,060 24 1,480 61	No execution in case 100 quintals fish, valued at $211 50, Robbins claimant; execution for brig Abeona, app't and costs, $535 41; not returned. No execution—no paper in case of shallop Phœnix and cargo, appraised at $246 12. $1,296 01 paid Coll'r of New Bedford. 793 05 do Barnstable. 8,296 42 do Boston. 685 61 paid Dist. Attorney.
	1 trunk calicoes, &c.	Non-importation	-	556 10	74 32	-	-	-	- -	$481 78 paid Collector of Boston.
	120 tons plaster	Do	-	41 40	46 12	-	-	-	- -	$4 72 excess of costs paid by Collector of Boston.
	2 trunks merchandise	Non-Intercourse	-	- -	-	-	-	-	- -	Delivered up to claimant by Collector of Boston.
1812	Penalty 1,400 dollars	Embargo	-	- -	136 99	-	136 99	-	1,536 99	Penalty and costs paid District Attorney.
	Schooner Hope	Do	-	1,170 00	-	-	-	-	- -	Not shown how disposed of.
	Penalty 5,412 dollars	Do	-	- -	128 27	-	-	-	5,540 27	Execution returned unsatisfied, in 1813.
	Do 6,920 do	Do	-	- -	130 27	-	-	-	7,050 27	Same.
	Do 7,200 do	Do	-	- -	130 27	-	-	-	7,330 27	Same.
1813	Brig Truxtun	Do	appr'd	2,000 00	122 71	-	122 71	-	2,122 71	1,975 dollars paid Collector of Boston.

DISTRICT OF MASSACHUSETTS.—No. 3.—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Net proceeds received by U. States.	Total.	Observations.
1813	Schr. Lyre and cargo, 207 rolls iron wire, 8 dozen black silk hose, &c. 2 cases merchandise, schr. Cynthia, 18 pieces Ravens' duck, 6 bags ribbons, 1 trunk calicoes, a bundle spy glasses, 1 hhd. rum, 2 trunks cutlery, &c. 3 bbls. sewing silk, 2 pieces cloth, schooner Nymph, ship Admittance, schr. Donna Teresa, sloop Factor, sloop Sally, sloop Deborah, sloop Hermit, 23 bbls. sugar, &c. 1 hhd. rum, brig Medelpadria, 5 boxes hardware, 48 bales calicos, &c. schr. Calmud, 9 cases merchandise, sloop Vulture, 11 pieces broadcloth.	Non-intercourse -	24,301 53	2,754 10	deducted in part, from proceeds.	420 70	-	5,035 23	Execution for 740 dollars issued. No return. $ 10,533 20 paid Coll'r Boston. 133 00 do Dighton. 959 62 do Plymouth. 7,046 69 do Newburyport. 3,073 69 do N. Bedford. 13 88 do Barnstable. 11 pieces broad cloth not found by Marshal. No sale.
	Penalty 400 dollars -	Non-intercourse -	- -	377 73	do	-	-	777 73	Collected & paid Dist. Attorney.
	Do 3,090 do - -	do -	- -	46 84	-	-	-	3,130 84	Execution *vs.* Paul Thurlow.
	1 bale merchandise, 1 trunk calicoes, &c. 15 bags coffee, &c. schr. U. S. del Sicoro, 1 trunk sewing silk, 2 pieces calico, 21 bags coffee, 10 boxes segars, 1 barrel sugar, &c. 2 casks hardware.	Collection -	8,366 23	700 86	deducted	fr'm sales	-	653 75	$ 4,964 47 paid Coll'r of New Bedford. 2,749 95 do of Boston. Goods not found by Marshal.
	Penalty 100 dollars -	Collection -	- -	21 84	-	21 84	-	121 84	Exe'n returned satisfied, 1813.
	Do 1,000 do - -	do -	- -	19 74	-	-	-	1,019 74	Execution returned unsatisfied, 1813.

	Do 400 do - -	Collection	-	-	-	35 61	-	-	-	435 61	Committed on execution, and afterwards pardoned.
	Do 400 do - -	do	-	-	-	128 68	-	128 68	-	528 68	Collected on execution, 1814.
1814	Do 1,000 do - -	do	-	-	-	150 70	-	-	-	1,150 70	Execution returned unsatisfied, 1816.
	Do 1,000 do - -	do	-	-	-	149 54	-	-	-	1,149 54	Do do 1815.
	Do 1,000 do - -	do	-	-	-	147 62	-	-	-	1,147 62	Do do dead.
	Do 8,400 do - -	do	-	-	-	204 81	-	-	-	8,604 81	Defendant committed on execution, returned 1816.
	Do 905 do - -	do	-	-	-	-	-	-	-	- -	No execution.
	22 bags and 1 chest coffee, 21 pieces shirting, &c. 14 pieces gingham, 20 pieces calico, schr. John and cargo, 2 hhds. and 5 sacks sugar, 141 bags, 4 barrels and 1 box sugar, 6 hampers sugar, 3 cases and 2 trunks merchandise, 1 piece carpeting, 3 pieces calico, 8 pieces linen, &c. 1 tierce sugar, 100 lbs. coffee, 1 cask rum.	do	-	16,023 05		1,628 13	deducted	fr'm sales	-	- -	8 bags coffee not to be found. No sale. $11,749 38 paid to Collector of Boston. 495 73 do Newburyport. 591 93 do Ipswich. 1,051 79 do Gloucester. 57 45 do Plymouth. 185 97 do Edgartown. 295 64 do Barnstable. Excess of $33 02 paid by Collector of Barnstable.
	Penalty 20 dollars -	do	-	-	-	-	-	-	-	- -	No execution issued.
	Do 400 do - -	do	-	-	-	45 80	-	-	-	445 80	Penalty less commissions paid Collector of Ipswich.
	Do 400 do - -	do	-	-	-	52 96	-	-	-	452 96	Execution returned unsatisfied, June, 1816.
	Schooner Old Carpenter -	Non-intercourse	-	-	-	-	-	-	-	- -	Warrant of sale not returned.
	Sloop Anna Maria.										
	8 bags coffee.										
	Sch. Mary and merchandise.										
	Brig Carl Gustaf.										
	Brig Wilhelm.										
	2 hhds sugar, 1 trunk vestings.										
	Bundles broad cloths.										
	130 tons of plaster.										
	Cargo of sloop Deborah -	do	-	-	-	-	-	-	-	- -	No papers on record.
	Schooner Nysted and cargo.										
	Penalty $3000 - -	do	-	-	-	67 30	-	-	-	3,067 30	Execution returned unsatisfied,
	Schooner Maria.										1816.

DISTRICT OF MASSACHUSETTS.—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. S.	Costs paid by the party	Net proceeds received by U. S.	Total.	Observations.
	Ship Neptune, sch. Stralsund	Non Intercourse	103,583 01	14,002 48	-	278 67	-	2,943 61	
	Schooner Gottenburg	-	-	-	-	-	-	-	$51 21 probably paid to Collector of Nantucket.
	Brig Antonio	-	-	-	-	-	-	-	608 18 net proceeds probably remitted by Sec'y of Treas'y.
	Brig Crown Prince.								
	31 hhds molasses and 8 hhds sugar.								
	100 tons iron, 5 hhds sugar	-	-	-	-	-	-	-	$70,542 04 paid Col. of Boston.
	93 bbls tin plates	-	-	-	-	-	-	-	15,266 85 do Plymouth.
	53 bales woollens, &c.	-	-	-	-	-	-	-	591 00 do Dighton.
	10 boxes tin plates	-	-	-	-	-	-	-	79 51 do Edgartown.
	Sloop Cosmopolite	-	-	-	-	-	-	-	1,845 41 do New Bedford.
	Schooner Jungfruc	-	-	-	-	-	-	-	309 91 do Barnstable.
	Schooner Lively and cargo	-	-	-	-	-	-	-	123 07 do Dist. Attorney.
	Schooner Pacific.								
	Schooner Westerwick	-	-	-	-	-	-	-	Defendant committed in 1815, for $636 83, proceeds of sch. Westerwick.
	Boat and broad cloths.								
	Schooner Polly	Coasting Act	213 75	107 92	-	-	-	-	$105 83 pd Coll. of Gloucester.
	Boat Clinker	Do	165 00	156 88	-	-	-	-	8 12 do Newburyport.
	24 pieces linen cambric, 24 pieces lace, 5 bbls calicoes, &c, 48 boxes tin.	Collection	4,344 93	342 01	-	-	-	-	807 03 do Plymouth. 3195 89 do Boston.
1815	3 dozen shawls, 3 hhds sugar.								
	5 casks merchandise	-	-	-	-	-	-	-	No warrant of sale returned for 5 casks merchandise.
	5 chests hyson tea, &c.								
	2 hhds and 9 bbls rum	Collection	8,208 46	1,702 98	deducted	in part	from proceeds.		$4784 13 paid Coll. of Boston.

	10 boxes cigars, 5 bags coffee	- -	-	-	-	-	-	401 90	do New Bedford.
	2 bbls sugar, 2 bbls molasses -	- -	-	-	-	-	-	652 50	do Newburyport.
	Corvette Paz - -	- -	-	-	-	-	-	216 23	do Salem.
	287 boxes herrings - -	- -	-	-	-	-	-	390 21	do Edgartown.
	3 hhds and 1 bbl rum.								
	1 chest and 2 boxes merchd'se	- -	-	-	-	-	-	Excess of costs in several instances paid by collectors.	
	14 bags and 1 bbl coffee.								
	Schooner Raven and cargo.								
	10 yards vestings, 20 boxes cigars.								
	7 bags coffee, 3 hampers glass								
	Penalty $400 - -	Do -	-	45 88	.	45 88	-	-	Penalty less commissions paid Collector of New Bedford.
	Do $1,000 - - -	Do -	-	33 13	-	-	-	1,033 13	Believed to have been pardoned by President.
	Do $400 - - -	Do -	-	36 40	-	36 40	-	436 40	Committed and discharged.
	Do $400 - - -	Do -	-	615 60	-	36 40	-	436 40	Do do
	27 boxes tin, schooner Cave -	Non Intercourse -	2,420 90	36 49				$619 10	paid Coll. of Plymouth
	Sloop Charlotte and cargo -	Do						1116 21	do Boston.
	Schooner Orpheus.	Do							
	Schooner Caroline - -	Do -							
1816	2 pieces flannel, 2 hhds rum.	Collection -	4,620 97	1,413 57	Deducted in part from proceeds.	71 12	-	379 60	$8,219 11 paid Coll. of Boston.
	5 kegs lead, 11 casks mustard							1,673 00	do Edgartown.
	5 frails figs, 7 bags coffee, 6							73 20	do New Bedford.
	boxes raisins, 4 pipes gin, 1							246 94	do Newburyport.
	trunk glass ware, 2 bbls glass							447 70	do Gloucester.
	ware, a still head, 62 boxes							$2,816 02	paid Coll. of Boston.
	herrings, 15 boxes raisins, 4							603 19	do Edgartown.
	bags coffee, 4 casks molasses,							Excess of costs in several instances paid by collectors.	
	sundry phials, 1 keg gin, 10								
	demijohns gin.								
	1 pipe spikes & nails, 3 bbls sugar, 1 trunk pins, 12 bags								
	coffee, 1 cable, 1 chest goods,								
	13 boxes raisins.								
	Penalty $400 - -	Collection -	-	104 01	-	104 01	-	504 01	Penalty less commissions paid Collector of Edgartown.
	Do $400 - -	Do -	-	36 93	-	36 93	-	436 93	Do do of Boston.
	Do $150 - -	Internal Revenue	-	202 90	-	202 90	-	352 90	Penalty and 15 duty paid collector of Int. revenue.

DISTRICT OF MASSACHUSETTS.—No. 3.—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of Expenses.	Costs paid by U. S.	Costs paid by the party	Net proceeds received by U. S.	Total.	Observations.
	One still head - -	Internal Revenue	150 00	57 99	Deducted from proceeds	-	-	-	92 01 paid E Jones, Collector of internal revenue.
	Penalty $150 - -	Do -	-	70 38		-	-	220 38	Execution ret'd unsatisfied, by direction of Dist. Att'y, 1817.
	Penalty $100 - -	Regulating seamen	-	24 26	-	-	-	124 26	No execution issued.
1817	5 bbls molasses, 4 boxes cigars, 6 cases merchandise, 8 hhds and 2 bbls rum, schooner Washington, 12 pieces silk handkerchiefs, 9 boxes cigars, 25 pieces Bandana handkerchiefs, 5 bags coffee, 2 hampers cheese, 2 tierces merchandise, 1 pipe brandy, 8 bbls sugars, &c. ¼ ship Plato, 19 gold watches, 6 boxes cigars, 1 box boots, &c. 215 boxes herrings, 2 boxes steel, 2 hhds rum, 9 tierces salmon, 1 tin case jewelry, 35 boxes sugars, &c. 9 bales cotton, 1 bale merchandise, sloop Olive and cargo.	Collection -	12,433 03	2,359 36	9 48 Deducted in p't.	102 56			
	Penalty 150 dollars - -	Internal Revenue	-	42 68	-	-	-	192 68	Execution not returned.
	Do 10 dollars - -	Do -	-	38 27	-	-	-	48 27	10 dollars paid 9th Coll. Dist.
	Do 10 dollars - -	Do -	-	41 39	-	41 39	-	51 39	10 dollars paid Nathan Martin, Collector Internal Revenue.
	Do 400 dollars - -	Collection -	-	52 32	-	-	-	452 32	Penalty less coms. paid Col. of Gloucester.
	Do 400 dollars - -	Do -	-	31 12	-	-	-	431 12	Execution issued. No return.

	Do 400 dollars - -	Collection -	-	25 21	4 80	20 41	-	420 41	Coll'd and included in amount paid Coll. of Boston, this year, 1817.
1818	13 penalties of 150 dollars each - - 1950 2 do of 1000 dolls. each 2000 3950	Internal Revenue Do -	- -	808 00 140 62	- -	620 07 140 62	- -	2,840 00 2,140 62	$1,967 87 paid Dist Att'y. 872 13 returned not satisfied. 2,140 62 paid Dist. Att'y.
	Penalty 400 dollars - -	Collection -	-	13 80	13 80	-	-	-	Defendant committed on execution and pardoned.
	Do 600 dollars - -	Do -	-	87 89	87 89	-	-	687 89	Ret'd unsatisfied by Dist. Att'y.
	72 quintals cod fish, brig Christopher and boat, appurtenances of said brig, 21 bags and 1 box coffee, 7 yards calico, 7 yards silk, &c. 6 pairs blankets, &c. 42 boxes of ribbons, 2 pieces dowlas linens, sundry boxes merchandise, a sail boat, 1 hhd and 6 bbls molasses, 5 pieces cloth, and a box of merchandise.	Do -	4,087 50	1,117 17	6 25 Costs deducted in part.	40 60	-	-	$1,124 53 paid Coll. of Boston. 502 75 do New Bedford. 166 99 do Edgartown. 199 86 do Newburyport. 206 87 do Salem. 3 25 do Nantucket. 954 68 do Barnstable. Excess of costs in several instances paid by the seizing collectors.
1919	Schooner American Roman, 10 hhds and 10 bbls rum, 1 trunk silk goods, 2 pieces flannel, 14 bags coffee, and 1 trunk watches, &c.	Do -	2,314 97	665 95	Deducted from proceeds in part.				$160 paid Coll. of Dighton. 23 87 do of Edgartown. 1,505 83 do of Boston. $1,689 70
									Excess of costs in some cases paid by Collectors.
	4 penalties of $400 ea. $1600 Penalty 100 dollars - -	Collection - - - do - - - -	- -	102 82 42 50	- -	102 82 42 50	- -	1,302 82 142 50	$400 penalty paid col. of Boston; $862 66 ret. unsatisfied, by attorney's direction; 1 case no exec. sued out; $100 less clk's com. paid col. Nantucket.
1820	Sch. Hazard and cargo, 4 bbls. coffee, sch. Adolphus and cargo.	Non-intercourse -	- -	none taxed.	-	-	-	- -	No warrant for sale—vessels never arrested.

DISTRICT OF MASSACHUSETTS.—No. 3—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U. States.	Costs paid by the party.	Nett proceeds received by U. States.	Total.	Observations.
	4 qr. chests tea, sch. Sophia, sch. Commerce, 40 bbls. sewing silks, &c. 1 trunk silks, &c. 6 bbls. sugar, 14 bags of coffee, sch. New Hope, sch. George, 1 hhd. rum, 4 bbls. and 31 bags sugar, 2 hhds. of coffee, 1 barrel of molasses, sch. Resolution, 3 bbls. old copper, one-half of schr. Augustus, sch. Lydia and cargo, schr. Silvia and cargo, 217 bushels salt.	Collection -	7,881 39	1,896 19	75 62	614 71	-	673 55	$4812 83 paid col. Boston 1626 47 do Barnstable 23 87 do N. Bedford Excess of costs in several cases paid by collectors seizing the property—the amounts but in few cases shown.
	Penalty 400 dollars - -	do - -	- -	64 80	-	64 80	-	464 80	Penalty less coms. paid col. of Barnstable
	Penalty 400 dollars - -	do - -	- -	43 27	43 27	-	-	443 27	} Defendant committed and pardoned by President
	Penalty 100 dollars - -	do - -	- -	29 27	29 27	-	-	129 27	
	Penalty 120 dollars - -	do - -	- -	56 86	56 86	-	-	156 87	
1821	2 bbls. sugar, 31 bags coffee, 10 frails figs, 1 bale feathers, 18 hhds. and 47 bbls. rum, 2 bbls. segars, 2 bbls. old copper, 61 bags pimento, schr. Centaur, sch. Eli and merchandise, 40 lbs. of tortoise shell, 8 bags coffee, 39 boxes raisins, 32 bags pimento, sch. Little Cherub, boat King Fisher, boat Rolla, 13 bags salt, ulage hhd. rum, 25 bolts duck, 12 puncheons of rum, 85 fir	do	13,689 37	2,642 77	deducted in part fr. proceeds.	139 34			$12,144 09 pd. col. Boston 112 42 do Edgartown 968 75 do Salem 165 67 do Newburyport $13,290 90 Excess of costs in several instances paid by collectors.

	caps, 4 bbls. old copper, sch. Joseph and Mary, 46 kegs of white lead, 7 bags pimento, 2 bags tea.								
	Penalty $2052 60	do		53 04	12 86	40 18			*Note.* $2039 84 included in sum named above paid col. Boston.
	Penalty 400	do		26 27	26 27				Exe. ret. unsatisfied 1822.
	Penalty 600	do		18 45	18 45			618 45	Deft. committed, March, 1822.
1822	Three-fourths of sch. Pilgrim, 183 hhds. and 46 bbls. rum, 2 qr. casks wine, 17 bags coffee, 2 bales rags, quantity of coal, 23 bags shot, boat Drake, 28 bbls. and 4 boxes sugar, sch. Four Sisters, 5 bbls. molasses, 118 boxes raisins, 4 chests tea, 2 pieces duck, 5 casks copper.	do	16,726 44	1,782 97	110 86	281 56		10,720 18	$13,521 07 pd. col. Boston 533 23 do Nantucket 1,459 44 do Salem 29 84 do Newburypt. 10 77 do Edgartown $15,554 35 Excess of costs paid by cols.
	3 penalties 1200 dollars	do		69 94	27 05	21 55		1,269 94	400 dolls. less coms. paid col. of Newburyport. Dft. in 1 case com. for 427 05, in the other, ex. ret. not satis.
1823	Five-sixteenths of sch. Pilgrim, 1 hhd. rum, 12 pieces ravens duck, 20 bags and 3 casks of coffee, 25 bbls. cheroots, &c. 1 box cut glass, 1 hamper of cheese, 1 box tortoise shell, 3 bags cloves, 6 bbls. sugar, sch. Columbia and cargo, half of sch. Sparrow, sloop Fair American, 2 bundles bridle-bits, 1 box sugar 8 bbls. salmon	do	3,981 31	1,447 39	.	159 57		402 51	$2006 33 paid col. of Boston 35 35 do Nantucket 619 29 do Newburyport 325 00 less com. paid col. of Belfast, Me.
	Penalty 400 dollars	do		33 63	33 63	.		433 63	Exe. ret. not satisfied, June 1823
	Penalty 400 dollars	do		31 88	31 88	.		431 88	do do do
	Penalty 100 dollars	Act regulating seamen		24 30	.	24 30			100 dollars penalty, less coms. paid Treas. U. S.
1824	8 bags coffee, 45 hhds. and 10 bbls. rum, 12 bbls. sugar, 6 casks wine, 3 bales ravens duck, 8 bbls. oranges, sch. Four Sisters.	Collection	4,458 42	881 29	deducted from proceeds				$2945 62 paid col. of Salem 749 93 do Boston Excess of costs in several instances paid by collectors.

DISTRICT OF MASSACHUSETTS —No. 3.—Continued.

In what year.	Article or sum forfeited.	Offence against what law.	Gross amount of sales.	Amount of expenses.	Costs paid by U.States.	Costs paid by the party.	Net proceeds received by U.States.	Total.	Observations.
	Penalty 500 dollars	Collection law		29 99		29 99		529 99	$500 less com. pd. col. Newbu't
	Penalty 50 dollars	Post Office act		72 39		72 39		122 39	Believ'd to have been pd. dis.at.
	Penalty	do							Judgment, no exe. sued out.
1825	88 bags coffee, 6 bales cotton, 1 piece cloth, 1 trunk watch glasses, &c. sch. Richmond.	Collection	1,910 06	516 22	do.in part	103 53		501 53	$1179 51 paid col. of Ipswich 315 86 do Boston
	Penalty 400 dollars	do		72 71	72 71			472 71	Committed deft. Dec. 1826.
1826	56 kegs wine, 3 hhds. rum, 25 bags coffee, boat, 9 bbls. sugar and 7 bbls. molasses, 1 bag tortoise shell, sch. Avon.	do	1,740 89	537 48	deducted in part.	49 02		715 02	$423 14 paid col. of Boston 189 71 do Salem 666 00 less coms. Plymouth Excess of costs paid by cols.
1827	Sch. Tiger, sch. Salmon, bbl. sugar, bbl. and half wine, 21 casks of coffee, &c. 2 hhds. rum, &c.	do	1,651 35	605 88		220 18			$1356 09 paid col. of Boston
	Penalty 260 dollars	do		29 60		29 60		289 60	260 dolls. penalty less coms. pd. col. of Plymouth.
	3 penalties 400 dolls. ea. 1200	do		199 83				1,399 83	Executions not returned.
	4 cases nutmegs, &c. 1 chain cable, sch. Clara.	do	2,841 49	393 28	55 77	132 33			$2580 54 paid col. of Boston
1828	50 drums figs	do	80 68	53 70	deducted				$26 98
1813	4 bales merchandise	Non-intercourse	4,202 83	167 81	deducted				$4034 99 paid col. of Boston
	Brig Rambler	do	655 35						$647 16 ordered by Sec. Treas. to be distributed in same manner as forfeitures would have been, residue of forfeiture remitted.
	Half proceeds of flour from sch. Mysted.	do	127 50						$127 50 paid col. of Boston—the other half remitted by the Sec'y of Treasury.
		Dollars,	633,955 93	81,144 13	1,107 63	13,667 01	1,925 63	214,974 32	

NOTE.—The amount of penalties, except in few cases, has been carried into the column headed "Gross amount of Sales."

Certified in the following manner: *Boston, March* 17, 1828. Prepared and collated with the records under the superintendence of

GEO. BLAKE,
U. S. Attorney for Massachusetts District.

The following is the result found under the head of Observations, in abstract No. 3 :—

Paid Collectors of the Customs	$497,925 58
District Attorney of the United States	20,593 63
Marshal of United States	3,128 16
Supervisor and Collectors of Internal Revenue	678 47
Treasurer of the United States	3,963 96
Into Court	417 40
Collected, but not shown how disposed of	528 68
Refunded, pardoned, and remitted	33,899 74
Probably remitted by Secretary of the Treasury, but no reason assigned for the probability	608 18
Decreed to the United States, but not shown whether it has ever been paid	10,754 61
Decreed to United States, half French ship Deux Anges and cargo, but of which there is no account of sales or of payment.	
Executions issued, but not on file or returned, to amount of	9,321 36
Appraised value, &c. where no executions issued	11,985 13
Executions returned not satisfied	47,381 76
Do do do by direction of District Attorney	2,911 87
Executions, and defendants committed for	21,219 87
Defendants not found	2,490 53
Warrant of sale not on file, no account of sales and no papers	8,602 18
	$ 676,411 11

Schooners Louisa, Resolution, Victory, brig Betsey, 90 tons plaster, 5 bbls. and 41 kegs rum, 15 bags coffee, 4 hhds. molasses, 5 cases merchandise, sch. Hannah and cargo, and cargo of sloop Deborah.

Property not arrested and not found, sch. Hazard and cargo, 4 bags coffee, and sch. Adolphus and cargo, 11 pieces cloth, 10 boxes segars, bbls. sugar and 8 bags coffee, brig Eleanor pardoned.

DISTRICT OF MASSACHUSETTS—No. 4.

NUMBER of commitments, trials, executions, and pardons, for capital and other offences, against the laws of the United States, in the District of Massachusetts.

OFFENCE.	COMMITMENTS.	TRIALS.	CONVICTIONS.	EXECUTIONS.	PARDONS.	OBSERVATIONS.
Piracy and Murder, - - - - -	14	14	14—viz : Piracy on high seas 5 Murder on do. 9 — 14	12	1—convicted of piracy on the high seas.	One person, who was sentenced to death for murder on the high seas, committed suicide a short time previous to the day assigned for his execution.

Dated BOSTON, 17TH MARCH, 1828.

Prepared and collated with the Records, under the superintendence of

GEO. BLAKE,

U. S. Attorney for Massachusetts District.

REPORT

OF THE

Secretary of the Treasury,

IN

OBEDIENCE TO A RESOLUTION OF THE HOUSE,
OF THE 7th ULT.

IN

RELATION TO EXPENSES

IN THE

PROSECUTION OF OFFENCES AGAINST THE UNITED STATES,

IN

THE DISTRICTS OF CONNECTICUT, MASSACHUSETTS, NEW-HAMPSHIRE,
VERMONT, AND NEW-YORK,

FROM

The year 1803, to the year 1815, inclusive, &c. &c.

April 1, 1816.
Read, and Ordered to lie upon the Table.

WASHINGTON:

PRINTED BY WILLIAM A. DAVIS.

.....

1816.

STATEMENT of Fines and Penalties paid into the treasury of the United States from the Districts of New-Hampshire, Massachusetts, Connecticut, Vermont, and New-York, by marshals, district attorneys, collectors &c. from the year 1808, to the year 1815, inclusive.

Years.	New-Hampshire.	Massachusetts.	Connecticut.	Vermont.	New-York.	From whom recovered, and under what prosecutions.		Total.
1808.	None.	Ben. Lincoln, collector.				Fines and penalties for breach of laws against the slave trade, parties not known,	2,400	
"		James Prince, marshal.				Forfeiture of Henry Deming's recognisance charged with fraud upon General Post-Office,	2,500	
1809.		Sam. Bradford, do.				Fines imposed by Circuit Court of United States upon Isaac Barnes and Richard Holmes,	120	
1811.		James Prince, do.				Fines imposed on Luke Thorndike for resisting the officers of government in the execution of their duties,	50	
1813.		Tho. G. Thornton, do.				Penalties recovered from Nason, Atkinson and others, under the embargo laws,	814 96	
1814.		James Prince, do.				Recovered from Richard Scaro, Mulford Howes, jun. and David Howes, jun. for resisting the officers of the customs in Barstable county,	900	
"		Tho. G. Thornton, do.				Penalties recovered from Nason, Atkinson and others, for violation of embargo laws,	1,018 51	7,803 47
1812.			R. Fairchild, marshal.			Fine imposed and recovered from Josiah Rogers for resisting deputy marshal,	100	
1813.			Do.			Recvoered on a *qui tam* action by Fosdick *vs.* Rothom,	10	
"			H. Huntington, D. At.			Recovered from Miles and Amos Merwin, for a violation of embargo laws,	427 50	537 50
"				T. Hutchinson, Dis. At.		Recovered from Moses Ambler, surety of Job Barber, for resisting the marshal of Vermont in the execution of his duty,		503 75
1808.					D. Gelston, collector.	Received for a stamp duty and penalty,	10 25	
1809.					C. Clinton, Cl. Dis. Ct.	Being the United States' moiety of the nett proceeds of brig Nereid and cargo, and part of cargo of brig Hiram, captured by Frigate Chesapeake, captain Decatur, and condemned for violation of embargo laws,	7,106 25	
1810.					Hart Massey, Collector.	Received for a stamp duty and penalty,	10 10	
1812.					Henry Meigs, assistant justice 1st ward N. Y.	Received for the United States' proportion of two penalties incurred by Elisha L. Pratt and Abraham Shaw, under the act for the government and regulation of seamen in the merchant service,	30	
"					D. Gelston, collector.	Received for stamp duty and penalty,	10 10	7,166 70
								16,011 42

Treasury Department,

Register's Office, March 26, 1816.

JOSEPH NOURSE, *Register.*

Relator's Exhibit 9:

Non-Exhaustive List of Founding-Era Judicial Opinions Demonstrating the Use and Enforcement of *Qui Tam* Statutes by Uninjured Informers.

Case	Cite	Year	Jurisdiction	Likely Statute*	Right of Action by Uninjured Informer**	Additional Sources
Evans qui tam v Boller	4 Dall 342	1797	Circuit Court, District of Pennsylvania	Act of March 22, 1794, ch 11, 4, 1 Stat 347, 349 - An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country	Yes	
Talbot qui tam v The Ship Amelia	4 U S 34	1800	Supreme Court of the United States	*The Act of June 25, 1798 - An Act to Authorize the Defense of the Merchant Vessels of the United States against French Depredations.*	Yes	*See* Exhibit 13 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
Samuel Adams qui tam vs John Edwards, District Court for the District of Massachusetts (September Term 1802)		1802	District Court for the District of Massachusetts	Act of March 22, 1794, ch 11, 4, 1 Stat 347, 349 - An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country; Act of May 10, 1800 ch 51 - An Act in addition to the act intituled "An act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country "	Yes	
Shearman v The Schooner Exchange		1803	District Court for the District of New York	Act of May 10, 1800 ch 51 - An Act in addition to the act intituled "An act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country "	Yes	
United States v Simms	5 U S 252	1803	Supreme Court of the United States	Act of March 3, 1801, p 287 § 2 - An Act supplementary to the act intituled "An act concerning the District of Columbia "	Yes	
United States vs Schooner Amelia		1803	District of Georgia in Admiralty	Act of March 22, 1794, ch 11, 4, 1 Stat 347, 349 - An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country; Act of May 10, 1800 ch 51 - An Act in addition to the act intituled "An act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country "	Yes	
Morrill v The Brig Providence		1804	District Court for the District of New York	*Act of May 10, 1800 ch. 51 - An Act in addition to the act intituled "An act to prohibit the carrying on the Slave Trade from the United States to any foreign place or country."*	Yes	
Adams qui tam v Woods	6 U S 336	1804	Supreme Court of the United States	Act of March 22, 1794, ch 11, 4, 1 Stat 347, 349 - An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country	Yes	
The Cargo of the Emulous, Brown, Claimant	1 Gallis 562	1813	Circuit Court, District of Massachusetts	*Prize Act of 26 June, 1812, ch. 107 (and possibly Salvage Act of 3 March, 1800, ch. 14).*	Yes	
The Emulous v Brown	8 F Cas 697	1813		*Prize Act of 26 June, 1812, ch. 107 (and possibly Salvage Act of 3 March, 1800, ch. 14).*	Yes	
Brown v United States	8 Cranch 110	1814	Supreme Court of the United States	*Prize Act of 26 June, 1812, ch. 107.*	Yes	
Malebran's case	NY City Hall Rec 122	1820	District Court for the District of New York	Act of March 22, 1794, ch 11, 4, 1 Stat 347, 349 - An Act to prohibit the carrying of the Slave Trade from the United States to any foreign place or country	Yes	
U S v Morris	10 Wheat 246	1825	Supreme Court of the United States	Act of March 3, 1797, Ch 20, S 2, 2 Stat 512 - Collections Act	Unclear	

Relator's Exhibit 9:

Non-Exhaustive List of Founding-Era Judicial Opinions Demonstrating the Use and Enforcement of *Qui Tam* Statutes by Uninjured Informers.

Case	Cite	Year	Jurisdiction	Likely Statute*	Right of Action by Uninjured Informer**	Additional Sources
Blunt v Patten	2 Paine 393	1828	Circuit Court, Southern District of New York	*Act of April 29, 1802 Ch 36 SS 3-4, 2 Stat. 171, 172 - An Act supplementary to an act, intituled "An act for the encouragement of learning, by securing copies of maps, charts, and books to the authors and proprietors of such copies during time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.*	Yes	*See* Exhibit 15 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
Clayton et al v Stone et al ,	2 Paine 382	1829	Circuit Court, Southern District of New York	Act of May 31, 1790, ch 15, § 2, 1 Stat 124, 124-25 - An Act for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned Act of April 29, 1802 Ch 36 SS 3-4, 2 Stat 171, 172 - An Act supplementary to an act, intituled "An act for the encouragement of learning, by securing copies of maps, charts, and books to the authors and proprietors of such copies during time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints	Yes	*See* Exhibit 14 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
Dwight v Appleton	1 N Y Legal Obs 198	1840	Circuit Court, Southern District of New York	Act of May 31, 1790, ch 15, § 2, 1 Stat 124, 124-25 - An Act for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned; Act of April 29, 1802 Ch 36 SS 3-4, 2 Stat 171, 172 - An Act supplementary to an act, intituled "An act for the encouragement of learning, by securing copies of maps, charts, and books to the authors and proprietors of such copies during time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints	Yes	*See* Exhibit 16 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
U S v Murphy and Morgan	16 Peters 203	1842	Supreme Court of the United States	Act of April 30, 1790, ch 36, § 16 - An Act for the Punishment of certain Crimes against the United States	Yes Statute cited in *Vermont Agency of Nat. Res. v. United States ex rel. Stevens* , 529 U S 765, 777 n 6 (2000) as "provid[ing] both a bounty and an express cause of action "	
United States v Patterson	3 McLean 299	1843	Circuit Court, District of Ohio	Act of March 3, 1839 ch 80 - An Act to provide for taking the sixth census or enumeration of the inhabitants of the United States	Unclear - statute refers to suit or indictment, but without reference to who can sue	

Relator's Exhibit 9:

Non-Exhaustive List of Founding-Era Judicial Opinions Demonstrating the Use and Enforcement of *Qui Tam* Statutes by Uninjured Informers.

Case	Cite	Year	Jurisdiction	Likely Statute*	Right of Action by Uninjured Informer**	Additional Sources
Ferrett & Arthur qui tam v Atwill	4 NY Legal Observer 294	1846	Circuit Court, Southern District of New York	Act of February 3, 1831, ch 16 - An act to amend the several acts respecting copyrights	Yes	*See* Exhibit 17 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
Backus v Gould	48 U S 798	1849	Supreme Court of the United States	Act of February 3, 1831, ch 16 - An act to amend the several acts respecting copyrights	Yes	
Harrison v Vose	50 U S 372	1850	Supreme Court of the United States	Act of February 28, 1803, ch 9 - An Act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American Seamen	No - requires injured plaintiff	
Stevens v Gladding	60 U S 64	1856	Supreme Court of the United States	Act of February 3, 1831, ch 16 - An act to amend the several acts respecting copyrights	Yes	*See* Exhibit 18 to the Declaration of Jennifer M Verkamp for a contemporaneous newspaper publication regarding this matter
The Laura	114 U S 411 (1885)	1885	Supreme Court of the United States	Act of Feb 28, 1871, 16 Stat 440, 454 - An Act to provide for the better Security of Lige on board of Vessels propelled in Whole or in Part by Steam, and for other Purposes	Yes	

* For cases where the applicable statute is shown in *italics*, the Court did not specifically cite a statute However, the substance and dates of the Court's opinion and statute align such that Relator has reasonably concluded the statute to be the likely source of the cause of action

** The Supreme Court held in *United States ex rel. Marcus v. Hess* that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue " 317 U S 537, 541 n 4 (1943) (citing Adams v Woods, 2 Cranch 336 (1805)); see also; Vermont Agency of Nat Res v United States ex rel Stevens, 529 U S 765, 777 n 7 (2000) (reciting this rule of construction) As such, Relator's list is likely underinclusive

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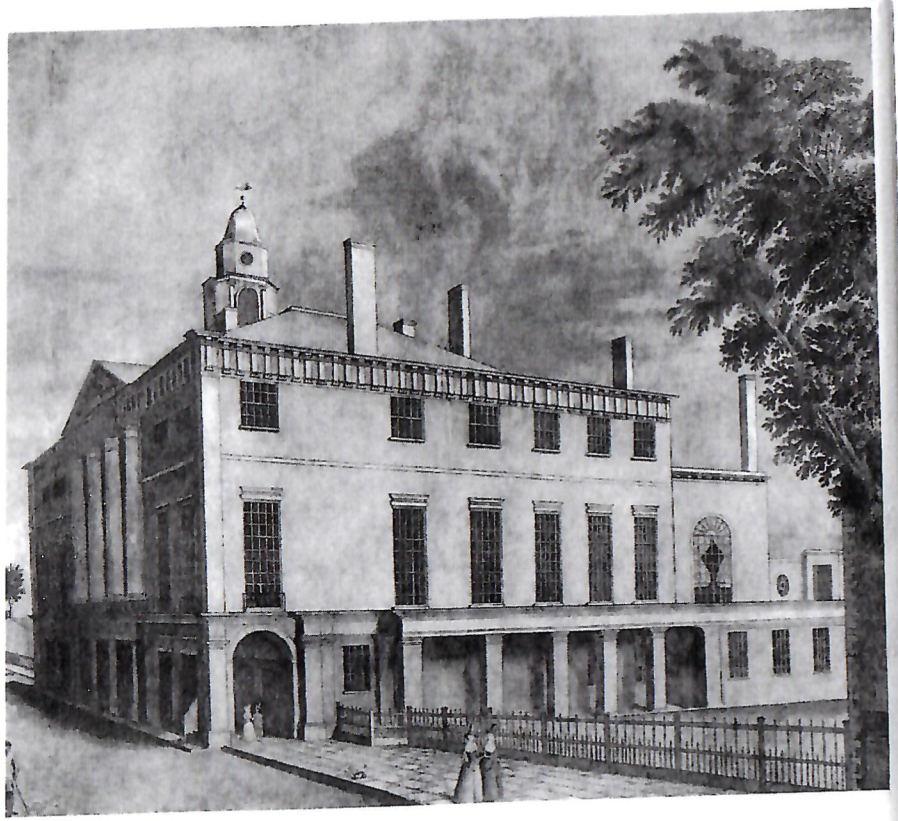

CITY HALL
at Wall and Broad streets
e were held the New York City terms of the Supreme Court of Judicature
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the City of New York

THE LAW PRACTICE OF *Alexander Hamilton*

DOCUMENTS AND COMMENTARY

VOLUME II

JULIUS GOEBEL JR., *Editor*
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Case 8:19-cv-01236-KKM-SPF Document 264-11 Filed 05/21/24 Page 2 of 19 PageID 4145

common Law Remedy, where the Common Law is competent to give it"

If we attend to this Passage it appears evident that the Congress meant to include all such Seizures as are therein described in the Description of Causes of Admiralty & maritime Jurisdiction. The only Difficulty arises from the latter Part of the Clause "saving to Suitors their common Law Remedy."—But neither the United States, nor their Attorney could properly be called Suitors, & there could be no Reason why any Thing should be saved to them—Again, Defendants, who might perhaps be considered as Suitors instead of having a Trial by Jury, have a common Law Remedy, saved to them, which implies some Wrong or Injury that they must have previously sustained—Now the Fact of their having sustained an Injury can never be known until after the Trial upon the Seizure; & consequently the Remedy contemplated must be something to take Place after such Trial. Now, the Common Law Remedy for unjust Seisures was by Action of Trespass; and the Act seems to have had it in View to exclude the Inference that might be derived (whether justly or not) from the Case of Le Caux & Eden in Douglass, and those there cited, that where an Admiralty Court has Cognizance of the principal Question, it shall also have Cognizance of the Incidents, and that no Suit at Common Law could be sustained for an Injury where the Admy Court might have given Compensation to the injured Party.

In the Case of the La Vengeance (reported in the third Volume of Dallas, but very imperfectly) the Cause was determined in the District, Circuit and Supreme Court, to be of Admiralty Jurisdiction; though it must be confessed that the Act upon which that Case depended expressly referred to the Mode of Proceeding under the Collection Act; which Circumstance does not appear to have been noticed by the Judges of the Supreme Court.—The Case however (independent of that Circumstance) does not appear to have been less properly a Case for a Common Law Trial than the one now under consideration.

Upon the whole, though I consider this Case as by no Means free from Doubt, I am of Opinion

1st. that the regular Mode of proceeding is by Libel and the Cause of Admiralty Jurisdiction—but

2dly. that as the Admiralty Jurisdiction depends upon the Seizure for the Breach of a Law of Trade "upon Waters navigable from the

Sea by Vessels of ten or more Tons Burthen" this Fact ought to have been alledged.

ISAAC SHERMAN QUI TAM v. THE SCHOONER EXCHANGE, OTHERWISE CALLED THE EL CAMBIO OR NEUSTRA SIGNORA DELOS DOLORES, JOHN DE LA VILLA, CLAIMANT

US District Court for NY, 1803

The case involved Section 1 of the Slave Trade Act of 1800, which prohibited United States citizens from having any property interest in a vessel employed in the transportation of slaves from a foreign country.[41] Edward Livingston and Rudolph Bunner were counsel for the libellant; David A. Ogden, Samuel Boyd, and Hamilton represented the claimant.

The libel of Sherman was filed (date unknown) per Livingston against the schooner *Exchange*.[42] Sherman alleged that Daniel Edes, a United States citizen, was owner of the vessel; he charged that on December 1, 1802, said schooner had been used for the transport of slaves from Africa to Havana, and therefore had become forfeit. The answer and claim of de la Villa, master, filed September 1, 1803, by Ogden, denied that Edes was presently the owner of the vessel or had been such at the time of the alleged violation.[43] Instead he averred that the schooner belonged to a Spanish citizen and had never been used in the slave trade. Restoration was prayed.

At that time Ogden read an affidavit of de la Villa, stating that the schooner was loaded and ready to sail within three days' time but was detained by the process of the court.[44] The court thereon ordered the libellant to enter a stipulation with sureties to pay the damages and costs that accrued if he failed to sustain his libel. On September 8 the libellant made the stipulation and it was recorded that the *Exchange*

41. Case Papers: RG 21, US District Court for NY, Admiralty Case Files, Box 6 (NA).

42. The Libel was not found among the case papers, nor is its filing date given in the minute book entries. For allegations of libel, see Monition, returned Sep 8, 1803, in Admiralty Case Files, *supra* n. 41.

43. Answer and Claim, in Admiralty Case Files, *supra* n. 41.

44. *Ms. Mins US Dist Ct for NY* 1802–1807, 101 *sub* Sep 1, 1803 (NA).

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had been attached.[45] Then on motion of Hamilton the cause was ordered to be heard September 19. On that date the court examined the witnesses of the parties and twelve depositions were introduced.[46] Hamilton twice made motions to read into evidence the deposition of Edes, but each time was overruled. After each side had introduced its evidence, Livingston and Bunner argued for the libellant. The court, finding it unnecessary to hear arguments for the claimants, dismissed the libel. It later awarded the claimant $812 damages, and counsel fees of $100 for Hamilton, $100 for Boyd, and $50 for Ogden.[47] Additional costs brought the judgment against the libellants to $1,287.39.

Trade with France

THE UNITED STATES v. THE BRIGANTINE HARRIOTT OTHERWISE THE JOHN, GEORGE TOPHAM, CLAIMANT

US District Court for NY, 1799
US Circuit Court for NY, 1799
US Supreme Court, 1800

This case arose under the June 13, 1798, act prohibiting trade between the United States and the territories of France.[48] Richard Harison, Robert Troup, and Hamilton prosecuted the action for the United States at the district court; Brockholst Livingston, William Cutting, and Aaron Burr represented claimant Topham. Although the case reached the Supreme Court, Hamilton's participation was limited to that at the district court level.

The brigantine *Harriott*, owned and duly registered by John Vanneman of Philadelphia, sailed in September, 1798, under the command of Topham from Virginia to St. Thomas in the West Indies. At that time trade with France and her possessions was prohibited. Before the sailing, bond was given to the United States conditioned upon the vessel's

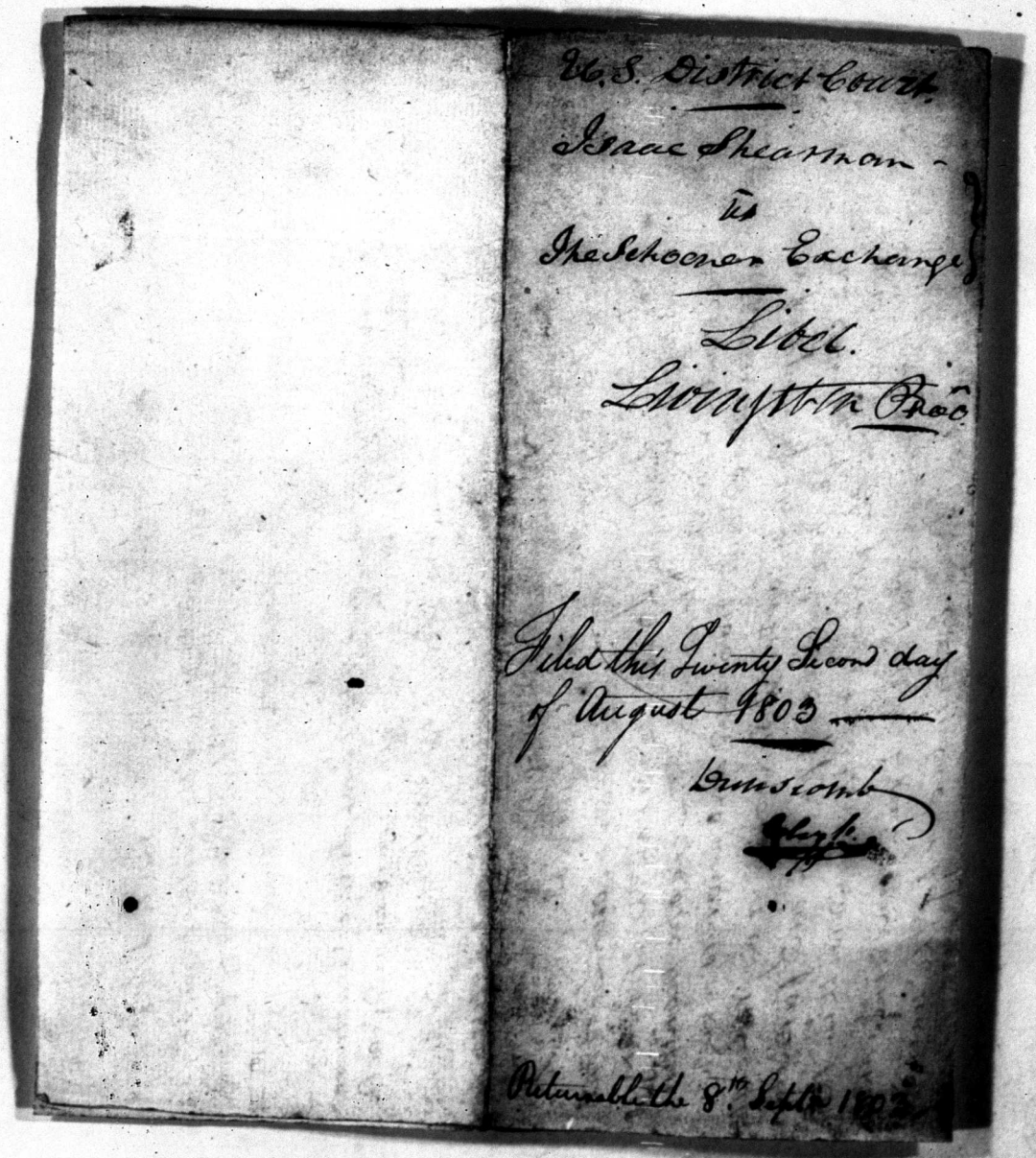
45. *Id.* at 104 *sub* Sep 8, 1803.
46. *Id.* at 112–113 *sub* Sep 19, 1803. One of these depositions, that of James Anderson, then sailing master of the schooner, has Hamilton's "pointing hand" in the margin. Deposition, filed Sep 19, 1803, in Admiralty Case Files, *supra* n. 41.
47. *Ms. Mins US Dist Ct for NY* 1802–1807, 140–141 *sub* Dec 3, 1803 (NA).
48. Case Papers: A complete record of the case is contained in RG 267, US Supreme Court Case Papers, Case No. 75 (NA). See also RG 21, US District Court for NY, Admiralty Case Files, Box 3 (NA).

not sailing to French territories.[49] Upon arrival of the *Harriott* at St. Thomas, her cargo was landed and new cargo taken aboard. Thereafter, the vessel proceeded in January, 1799, to Port Liberty on the French island of Hispaniola where the cargo was again sold and a new cargo laden. The vessel, still commanded by Topham, then set sail for the United States and put into the port of New York where she was seized.

On March 14, the libel of the United States was filed per Harison alleging that the *Harriott* proceeded to a French possession in violation of the above statute; forfeiture of the vessel was prayed.[50] The following month Topham filed his answer and claim (no attorney was denominated).[51] He stated that upon arrival in St. Thomas the vessel was sold to John Imlay Jr., a Danish resident of the island. With Danish papers, under Danish colors, and carrying a cargo of dry goods owned by Imlay, the *Harriott* proceeded to Hispaniola. There Topham sold the dry goods and purchased sugar and coffee with the proceeds, laden with such cargo, the brigantine returned to the United States. Since the vessel had become Danish, he averred that no violation had occurred and prayed the return of the brigantine. On April 23 the court, John Sloss Hobart J., ordered the cause to be heard at the next term in May.[52]

Meanwhile, a second libel had been filed on April 9 per Cutting for Robert Thurston *et al.*, seven mariners who had served on the above voyage.[53] Libellants stated that their wages had not been paid, and requested the condemnation and sale of the brigantine to satisfy the amounts due them. The answer and claim was filed by Harison in behalf of the United States on May 8;[54] he stated that a libel had previously been filed by the United States in this case, and prayed that the court dismiss this second libel. That same day, on motion of Livingston, advocate for the libellants, and by consent of Harison, the court ordered the *Harriott* to be sold upon fifteen days' notice, the

49. Such bond was required by the above statute in order to obtain a clearance for a foreign voyage. See 1 *US Stats at Large* 565.
50. Libel, in US Supreme Court Case Papers, *supra* n. 48.
51. Answer and Claim, filed Apr 4, 1799, in US Supreme Court Case Papers, also in Admiralty Case Files, *supra* n. 48.
52. *Ms. Mins US Dist Ct for NY* 1798–1800, 111 *sub* Apr 23, 1799 (NA).
53. Libel, in US Supreme Court Case Papers, also in Admiralty Case Files, *supra* n. 48.
54. Answer and Claim, *id.*



U.S. District Court

Isaac Shearman -

vs

The Schooner Exchange

Libel.

Libel & Process

Filed this Twenty Second day of August 1803

Dunscomb

Clerk

Returnable the 8th Septr 1803

To the Honorable John Sloss Hobart Judge of the District Court of the United States for the District of New York.

Humbly sheweth your libellant, Isaac Sherman of Boston in the State of Massachusetts, and giveth the said Court now here to understand.

First, that a certain Daniel Edes being a citizen of the United States and residing within the same before the day of the filing of this libel, and after the tenth day of May in the year of our Lord one thousand eight hundred, to wit on the first day of December in the year of our Lord one thousand eight hundred and two had, and now has, a right or property in a certain Schooner or vessel called the Exchange her tackle apparel and furniture now lying in the port of New York and within the Jurisdiction of this Court and sometimes known by the name of the Excambio or by the name of Nuestra Signora delos Dolores of the burthen of one hundred and eighty tons or thereabouts.

Second, that the said Vessel was on the day and year aforesaid employed and made use of in the transportation of Slaves from one foreign place to another, to wit, from Africa to the Island of Cuba contrary to the form of the act in such case made and provided by reason whereof and also by force of the said Statute and the filing of this libel the said Schooner or vessel became forfeited to the use of the said Libellant.

Lastly, that all and singular the premises were and are true public and notorious of which due proof being made he humbly prays the usual process and Monition of this Court in this behalf to be made and that all persons interested in the said Schooner by whatsoever name she may be known be cited in general and special to answer the premises and all

proceedings being had that the said Schooner or Vessel or the interest or property of the said Daniel Edes therein at the time aforesaid may for the causes aforesaid and others appearing be condemned by the definitive Sentence and decree of this honorable Court as forfeited to the use of the said Libellant according to the form of the Statute in such case made & provided.

And he will ever pray &c.

Edw Livingston
Proctor & Advocate
for Libellant

U.S. District Court
Isaac Shannon
vs
Skeskonon Exchange
Libel.
Libel filed
Filed this twenty second day of August 1803
Summons
Returnable 8th Sept 1803

District Court.

John de la Villa
Plaintiff Van
Ness
Isaac Sherman
Defendant

Plaintiffs
Bill

Filed 5th Sept. 1803.
Dunscomb
Clerk

To the Honorable John Hoss Hobart Esq
Judge of the District Courts of the United
States for the New York District

The Answer and Claim of John McCa
Villa the Master of the Schooner or Vessel
called Elambie Austra Signora Delos
Dolores, formerly known by the Name
of the Exchange, now lying in the
Port of New York and within the
Jurisdiction of this Court, of the
Burthen of One Hundred & Eighty
Tons or thereabouts, in behalf of Don
Joseph Maria de Arrabigal of the
Havanah in the Island of Cuba, the
sole owner of the said Schooner or
Vessel, to the Libel filed by Isaac
Hearman of Boston against the said
Schooner or Vessel.

Respectfully sheweth.

First - That Daniel Coles named in the
said Libel is not, neither was he
on the first day of December
in the Year of our Lord One Thousand
Eight Hundred and Two the
Owner of the said Schooner or
Vessel called the Elambie Austra
Signora Delos Dolores, formerly called
the Exchange, but the said Schooner
or Vessel was really and truly the sole
Property of the said Don Joseph Maria

de Mazabal. a Subject of his
Majesty the King of Spain. residing at
the Havanah in the said Island
of Cuba —

Secondly. That the said Schooner or Vessel
was not at the said time and when
last aforesaid or at any other
period employed or made use
of in the Transportation of Slaves
from one Foreign Place to another
to wit. from Africa to the Havanah
in the said Island of Cuba
contrary to the Form of the Act of
the Congress of the United States in
such case made and provided

Wherefore the said John de Las
Villas the Master of the said Schooner
or Vessel called the Columbia in
behalf of the said Don Joseph Maria
de Mazabal. submits himself to
the Judgment of this Honorable
Court. and prays that the said
Schooner or Vessel may be restored
to him. together with his reasonable
costs & Charges sustained by him. by reason
of the Premises — Juan de la Villas

Sworn the first day

At a Special District Court of the United States held for the District of New York at the City of New York on thursday the first day of September 1803 at 11 O'Clock, A. M —

Present

The Honorable John Sloss Hobart Esquire
Judge of the District

The Schooner Ebcambio, Nustra Signora Delos Dolores, lately called the Exchange her Tackle Apparel &c, John De la Villa in behalf of Don Joseph Maria de Aenabedel Claimant

adsm

Isaac Shearman, Libellant

John De la Villa Master of the said Schooner or Vessel this day came into Court and in behalf of Don Joseph Maria de Aenabazel of the Havannah in the Island of Cuba the sole owner of the said Schooner or Vessel filed an Answer and Claim to the Libel filed in this Cause and the said Answer and Claim being read thereupon and on Motion of Mr. David A Ogden Proctor for the Claimant in this Cause and on Reading and filing the affidavit of the said John De la Villa the Claimant above named Stating "that the "above named Schooner Ebcambio Nustra Signora Delos Dolores "is now nearly laded and ready for Sea, that her Laden can be "Compleated in the course of one Day, and that She would be ready "to Sail to Teneriffe in the Course of three days at furthest "if not detained by the Process of this Honorable Court and this "Deponent further Saith that he is informed and believes the

"the libellant resides out of the Jurisdiction of this Court "to wit at Boston in the State of Massachusetts"

It is ordered by the Court that the libellant in this Cause enter into Stipulation with two Sufficient Sureties to be approved of by the Court on or before the eighth day of September Instant to pay all such Damages and Costs as shall accrue to the Claimant in this Cause by reason of the filing of the Libel in this Cause in case the said libellant shall fail to sustain his said Libel.

(Attest a Extract from the Minutes)

Edward Dumscomb
Clerk

State of New York } We the undersigned do hereby
Report to the Honorable District Court
of the United States of America for
the New York District

That we have appraised the
Spanish Schooner Nother Senora Delores
Cambia with her Tackle Furniture
and Apparel at Three Thousand Two
Hundred and Fifty Dollars

In Testimony whereof we
have hereunto subscribed our names
this first Day of September in the
Year of our Lord One Thousand Eight
Hundred and Three

James Farquhar

P Blagge

G Bunker

New York District Court United States

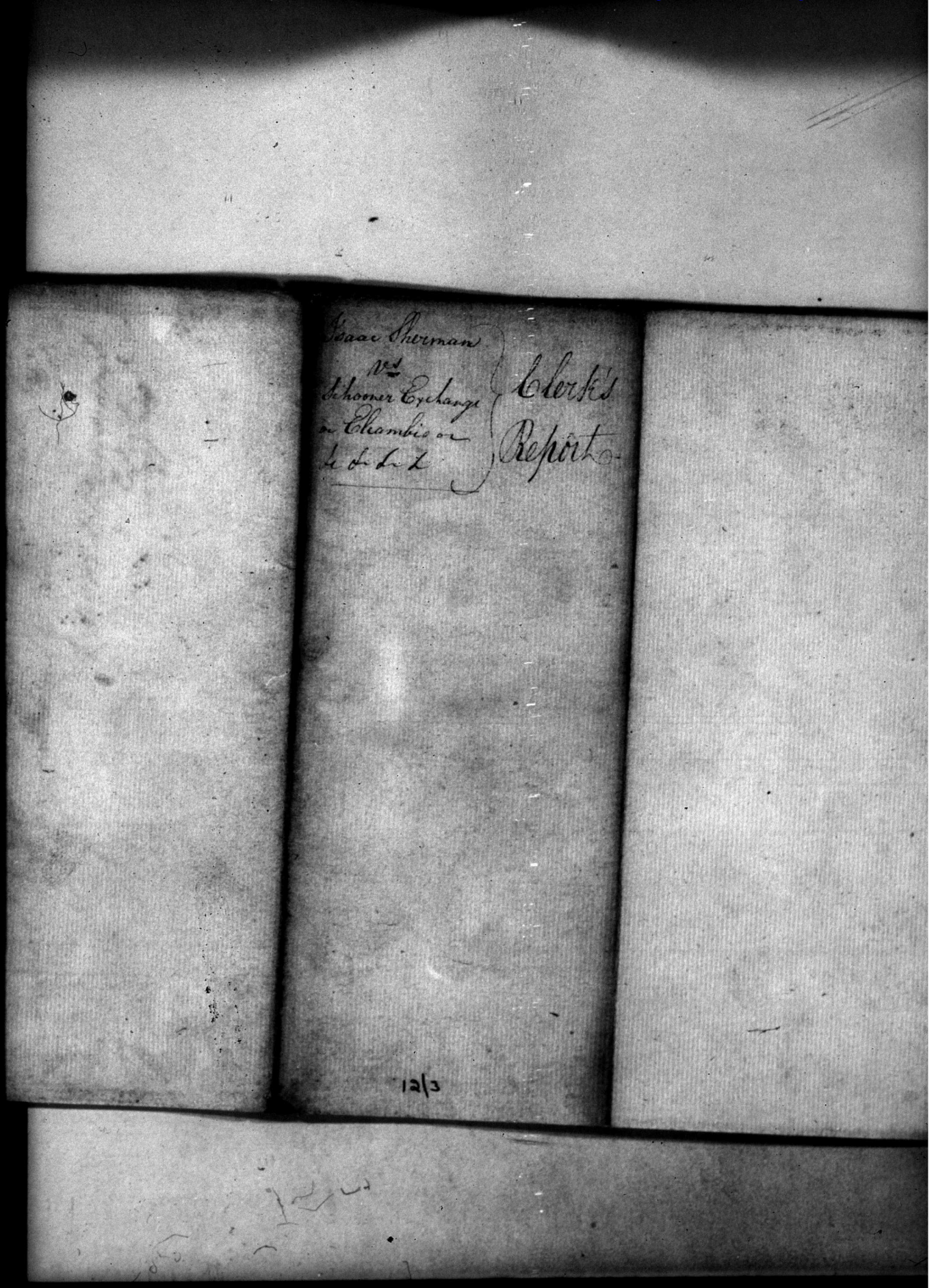
The Schooner Eleambra Neustra
Segnora Delos Dolores, otherwise
called the Exchange her tackle
apparel &c. } notice
John de la Vallee in
behalf &c. Claimant
adsm
Isaac Sherman Libellant } for

You will be pleased to take notice

That Edward Dunscomb Esqr the Clerk of the District Court of the United States, in and for the District of New York, will pursuant to a Rule of the said Court, on Saturday the Twelfth day of November Next, at ten o'clock in the forenoon of that day at his Chambers, No. 49 Wall Street, assess the Damages sustained by the Claimant in the above Cause, by reason of the seizure and detention of the above named Vessel, on the Libel filed by the above named Isaac Sherman in this Court, against the said Vessel her Tackle apparel & furniture — Dated 6th 29th 1803.

To Edward Livingston Esqr
Proctor for Libellant

Yours &c.
Daniel A Ogden Proctor
for Claimant


Isaac Sherman
Vs
Schooner Exchange
in Chambers on
the 2d day of
Clerk's
Report.
12/3

Isaac Sherman, Libellant

vs.

The Schooner Exchange, her Tackle, Apparel and furniture, otherwise called the Elcambio, or the Nuestra Signora Delos Dolores, John De la Villa Master of the said Schooner, in behalf of Don Joseph Maria De Omazabel of the Havannah in the Island of Cuba sole Owner of the said Schooner her Tackle, Apparel and furniture, Claimant.

Clerks Report.

I Edward Dunscomb Clerk of the District Court of the United States for the New York District in pursuance of the Decree and Order of the said Court made and pronounced in this cause on the nineteenth day of September last. do most respectfully Report To this Honorable Court, That I have enquired into the Damages Sustained by the Claimant in the above Cause, by reason of the Seizure and Detention of the said Vessel on the Libel filed in this Cause, and for the purpose of ascertaining the same, have duly affirmed Samuel Hicks, Jacob Barker and Silvanus F Jenkins all of the City of New York Merchants witnesses produced to me on the part of the said Claimant, and that from the affirmations of the said Witnesses it has appeared to me that there is due to the said Claimant for Twenty nine Days Demurage of the said Schooner at Twenty eight dollars per day, the sum of eight hundred and twelve dollars, and that he has paid to Alexander Hamilton Esq.r for fees as Counsel one hundred dollars and to Samuel Boyd Esq.r fees as Counsel the like sum of one hundred dollars, and to David A Ogden Esquire as his fees fifty dollars, and for the Costs and Charges of the Marshal of the District one hundred and forty two Dollars and Twenty Cents, and to B Fee for his services as interpreter when attending his Counsel fifty dollars, making the sum of Twelve hundred and fifty four Dollars and Twenty Cents, and do also Report, that there is due to me for my Costs in this Cause the sum of thirty three Dollars and nineteen Cents, making together the Sum of Twelve hundred and eighty seven dollars and thirty nine Cents. All which

is

is most respectfully submitted to this Honorable Court.
Dated this ~~Third~~ 1st day of December 1803

Edward Duncomb
Clerk
Off

At a Special District Court of the United States held for the District of New York at the City of New York on Saturday the third day of December 1803 at 12 O'Clock M,

Present

The Honorable John Sloss Hobart Esquire

Judge of the District,

Isaac Norman Libellant

vs

The Schooner Exchange, her Tackle apparel and furniture, otherwise called the Elcambio or the Nuestra Signora, de los Dolores, John Dela villa, Master of the said Schooner in behalf of Don Joseph Maria De Ormazabel of the Havanah in the Island of Cuba, Sole owner of the said Schooner, her tackle, apparel and furniture, Claimant

On motion of Mr Boyd in behalf of Mr D, A. Ogden Proctor for the Claimant, It is ordered that the Report of the Clerk filed in this Cause, Stand Confirmed unless the Libellant Shew cause to the contrary on the eighth Instant, at the Opening of the Court on that day, or as soon thereafter as Counsel can be heard, and it is also

Ordered, that the parties in this cause be heard at the same time, on the Claim made by the Claimant for an Increase of Damages in the same

A true abstract from the minutes

Edward Dunscomb

Clerk

Isaac Thomas

The Schooner Exchange

&c —

Libel

Isaac Thomas Libellt

The Court having confirmed the Report made by Edward Duncomb Esq. the Clerk of this Court in this above cause, whereby he reports that the Claimant by reason of the Libel filed in this Cause hath sustained Damages to the Amount of Twelve Hundred and Eighty four Dollars and Thirty Nine Cents — Thereupon on Motion of Mr. David Ogden Proctor for Claimants it is Ordered by the Court that John Murray Junr. of the Co. of N.Y. Brewer and William Gilbert Sloum of said Co. Merct. then cause on the 28th day of December Inst. at Eleven O'Clock in the forenoon of that day, why Execution should not issue against them according to the Terms of the Stipulations entered into by them respectively in the above Cause

Dated the 8th of Decemr 1803

At a Special District Court of the United States held for the District of New York at the City of New York on Thursday the eighth day of December 1803 at 11 O'Clock a. m.

Present

The Honorable John Sloss Hobart Esquire Judge of the District.

Isaac Sherman Libellant

vs.

The Schooner Exchange, otherwise called the Chamberlin, otherwise called Nuestra Signora Delos Dolores, her Tackle, apparel and furniture John De la Villa, Master of the said Schooner, in behalf of Don Joseph Maria De Arnazabel of the Havannah in the Island of Cuba Sole owner of the said Schooner her Tackle, apparel and furniture Claimant.

The Court having confirmed the Report made by the Clerk of this Court in this Cause, whereby he Reports that the Claimant hath sustained damages by Reason of the Libel filed in this Cause to the Amount of Twelve hundred and eighty Seven dollars and thirty nine Cents Thereupon and on Motion of Mr. David A Ogden Proctor for Claimant

It is ordered by the Court, that John Murray Junior of the City of New York Brewer and William Fellinghast Slocum of said City Merchant shew cause on the twenty sixth day of December Instant at eleven O'Clock in the forenoon of that day why execution should not issue against them, according to the terms of the Stipulation entered into by them respectively in the above Cause

A true Abstract from the Minutes of
Edward Livingston
Clerk

I Jacob Barry of Lawful age do testify & say that I Sailed saw Capt Brown in Lunenburg about the fourth of August 1803 when I was Shipped on board the Schooner Mary Ann of which Capt. Taylor was master.

Question by Mr. Putnam

Was there a man on board the Mary Ann by the name of John Thompson who acted as Cook?

Answer — Yes. —

Question. What was the Character of John Thompson on board the Vessel?

Answer He was a drunken fellow & a great liar

Question Did you ever hear John Thompson say that the Captain of the Vessel was a Dutchman?

Answer Yes. —

Question Did he ever tell you that Capt. Brown had any Command on board the Industry?

Answer. He said — Capt. had no command on board her.

Question Did he ever tell you that the Dutch Capt used to flog him often?

Answer. Yes he said that he complained to Mr. Brown meaning Capt. Brown that the Dutch Capt used him cruelly, &

Captain Brown said he could not help it, he was only a passenger in the vessel?

Question. Did you ever hear John Thompson say he wished he could be with this old master - meaning Capt. Brown?

Ans. Yes.—

Question by Mr. Adams.

Were you in Surinam when Capt Brown arrived there in the Industry?

Ans. No — I do not know whether I was at Cayenne or at Sea.

Question. What was the name of the vessel the Capt. in which you came to Surinam?

Answer The Greenwood Schooner Capt. Green of Philadelphia —

Question How long after you arrived at Surinam before you shipped on board the Mary Ann?

Answer I do not recollect, but I believe five or six days, after I left the Schooner.

Question Who first spoke to you to go on board the Mary Ann, who agreed with you for your wages?

Answer Captain Brown told me, I might go

well go on board the Schooner Capt. Taylor
would employ me. And Capt Taylor agreed
with me for my wages.

Question How long passage had you from Savannah
to Boston, ? when did the Conversation
with Jacke take place?

Answer I never keep any accounts, &
do not recollect what passage we had.
I do not recollect, when the Conversation
with Jack took place exactly.

Question Since your arrival at Boston
who has employed you? & do you not
expect to go to sea. again with Capt Brown?

Answer. For Dr Putnam sometimes on board the Schooner
Sometimes in the Distillery, I expect to go to sea
again with Capt. Brown who is frequently on
board the vessel.

Question Have you seen the Mate Hinds
along side of the vessel?

Answer I once saw him, I know him
in Charlestown his
Jacob X Bany
mark

22 Octo.

Commonwealth of Massachusetts.

Suffolk ss. On the twenty second day of October, in the year of our Lord One thousand Eight Hundred & three the aforesaid Deponent was examined, & cautioned & sworn agreeable to Law, to the Deposition aforesaid by him subscribed taken at the request of Thomas Brown to be used in an action of Debt pending, now pending between him & Samuel Adams. before the District Court of the United States for the District of Massachusetts to be holden at Boston within & for the District aforesaid on the first Tuesday of December next. And the adverse party was notified thereof; And the Deponent being bound on a voyage to sea is the Cause of taking the Deposition. Before me Henry Bourne Chief Justice of the Court of Common Pleas, for said County, within said District.

A true Copy.
Attest. Wm. M'Donald Clerk

Fees. 2..
Dep 33
Off? 30
2..63

Henry Bourne Esqr.

I Giles Taylor do testify & say that on or
about the 26th of April last I arrived at
Sumiam from New York Master of the Schoo-
ner Union; & there I did hire. I remained
there some time, & saw a Dutch Schooner Called
the Industry Capt Hadding from the Coast
of Africa, with a numbr of Passengers
among them Mr Thomas Browne was
one. I got acquainted with him.
And Mr Browne buying the schooner May
Ann; & Capt Browne being taken very
ill gave me the Command. There I
shipped a blackman for Cook, by the
name of Jack Thompson. who behaved
himself in a very bad manner.
So as to cause me to turn him on shore
but by the influence of Mr. Browne
I took him on board again, & he behaved
himself very bad again; So as that I
thought he was crazy. But
Compassion led me to bring him to Boston.
— at hear — I paid him his wages
took his resate & turned him on
shore. Jack the Cook came to me

told me that there were Constables after him for debt & begged me to get him a passage on board Capt. Lemore. Capt Lemore told him he would give him 10 Dollars per month — so he parted from me.

Question by Mr Adams. What passengers were on board the Industry; were they black & white, & did you see the vessel arrive?

Ans. I saw the vessel arrive, there were 4 or 5 gentlemen passengers among them Capt Browne was one.

Q. How many blacks were there?

Ans. Twenty or more. & Capt. told me that a French or Dutch Gentleman (I do not recollect which,) paid him for the passage of the blackmen

Q. Did Jno. Thompson behave in such a manner that you struck him on the passage home?

Ans. No. I did not strike him: but Ordered him out of the Cabin for his behavior.

Q Where Does Capt. Lepine live: what was the vessel in which you procured him a passage?

the River at Hartford. I dare say he is in
Port now, the vessel was afloat that day at the
end of Long Wharf: outside of another vessel.

2. Since you have arrived at Boston
have you been frequently with Capt Browne.
Ans. Now & then — in the Early Spring.

Question by Capt Browne. Had I any
knowledge of the bargain, or any part of the
transaction with Capt. Seymour about Jack
Thompson until after he had agreed
with Seymour.

Ans. NO. Capt. Browne had not.
He never knew Capt. Seymour
till after ward. —

Question Did not Jack Thompson
request of you, to let him have the
boat to carry him to Seymours vessel?
Answer Yes. He had it.

Quest. Did Jack say I would go in
the boat or I was obliged to go.
Any what?
Answer Yes. Giles Taylor

4 Comm^wlth of Mass^ts. Suffolk ss. On the 22?
day of October A.D. 1803. the aforesaid Deponent
was examined & cautioned & sworn agreeable
to law, to the deposition aforesaid
by him subscribed taken at the
request of Thomas Browne to be used in an
action of debt & assumpsit now depending between
him & Samuel Adams before the District
Court of the United States for the District of
Massachusetts to be holden at Boston within
& for said District on the first Tuesday of
December next; and the adverse
party was notified & present, the
Deponent being bound on a voyage
to Sea: & the cause of taking the Deposi-
tion: Before me Levi Bourne
Chief Justice of the Court of Common
Pleas for ~~said~~ said County
within said District

Fees.

&c.

A true Copy	33
Attest. N Goodale Clerk	30
D.	63

I Elisha Callender of lawful age do testify & say, that about two years since, I was acquainted with Jack Thompson a blackman in North Carolina. He belonged to a Gentleman there, & his master sold him to a gentleman bound from thence to Georgia, & the reason his master sold him was, on account of his being a thief, & a liar.

Question by Mr. Adams.

Do you live in Boston & what is your business?

Answer I live in Boston. & follow the sea -

Question. What was Jack Thompson's Masters name, who sold him in North Carolina?

Answer His name was Caleb Davis a Pilot-

there.

Question What business did you follow in N. Caro-

lina.

Answer I belonged to the Diligence Revenue Cutter, John Brown Commander.

Question How long ——— since you left Wilmington in N. Carolina.?

Answer. Twelve months the 23d of April last.

Question. When did you last see Jack Thompson?

Answer. Not since he was sold & carried on board the vessel.

Question Are you going to sea?

Answer I expect to go.

Question Who requested you to come & give your deposition?

Answer - Capt. Giles Taylor

Question Who shew you to Captain Taylor & what is his name?

Answer His name Patrick is John Goodman.

Nov - 24th

Elisha Callender

Suffolk ss. On the twenty fourth day of November in the year of our Lord 1803 the aforesaid Deponent was examined, & cautioned & sworn agreeable to Law, to the deposition aforesaid by him subscribed taken at the request of Thomas Brown & to be used in an action of Debt grieving, now pending between him & Samuel Adams before the District Court of the United States to be holden at Boston within & for the District of Massachusetts on the first Tuesday of December next, and the adverse

for Browne

Elisha Callenders

— Deposition —

— Copy —

I William Walker of Lawful age do
testify & say that on or about the 25th
day of August A.D. 1802 I shipped
on board the Schooner Industry Thomas
Brown Master on a voyage from Boston
to Amsterdam, & in about thirty eight
days after we left Boston we arrived
at Amsterdam, & in a few days
after our arrival there we discharged
our cargo which consisted of sugar
staves Tobacco. Coffee, whale bone,
Pot & Pearl ashes, after we discharged
the Cargo, we began to repair the
vessel, which was much out of repair
& often heard Captain Brown, while
there, say he intended to sell the vessel
if he could: before the vessel was ready
for sea, Capt. Brown came on board
& told all hands the vessel was sold, &
paid me off & one other hand & all hands
were discharged, Capt. Brown took from the
vessel his trunk, quadrant & chart &
all he had on board. After Capt

Brown had discharged me, the Dutch Cap.
of the same vessel employed me to work
on board him five days at Dock pay, I heard
the Mate of the Schooner say, that She was
bound to the Coast of Africa, with a Cargo
for the Dutch Government, during the
five days I was employed by the
Dutch Captain he had the command
of the Vessel, after I was discharged
by Captain Brown, he told me that
the Dutch Captain would employ me
on board, which would save my
board on Shore

Question by Mr Putnam

Had Captain Brown any Command
on board the Vessel, whilst you was to work
for the Dutch Captain.

Answer — No —

Question Did the American Consul at
Amsterdam tell you the Schooner
was sold?

Answer — Yes —

Question Was there a negro man by the name
of John Thompson on board the Industry
during the voyage, who acted as Cook &

what was his general Character

Answer – There was: He was a very great liar,
it was a common saying on board
that no body could believe what Jack
said.

Question. Was John Thompson on board any
of the time you worked on board
for the Dutch Captain?

Answer. No he was not; I saw him on
shore frequently drunk.

Question By Mr. Adams.

How long was it after you sailed from Boston
when Captain Brown said he had orders
from his owners to sell the vessel if he could?

Answer. I suppose it was about twenty days.

Question. When Capt. Brown says he had
Orders to sell the vessel, who did you un-
derstand the owners to be?

Answer. I understood by the Captain that it belonged
to Dr. Putnam.

Question. How long after you arrived at Amsterdam
was it, before you was discharged from
the vessel?

Answer. Two or three weeks while I worked on
board for Captain Brown

Question. After you was discharged by Capn
Brown how many times did you see
him on board?

Answer Two or three times

Question Did One of your men who
went from Boston, ship in Amsterdam
to go to africa as a Mate?

Answer. To the best of my recollection, the Dutch
Captain shipped one of the hands, which
went from Boston as mate.

Question What was the American Consuls name.
who told you the vessel was sold?

Answer I do not know his name nor did he shew
me any papers.

Question Might not John Thompson have been on
board & you not see him?

Answer I do not think he could, but he
might be.

William Walker

22 Octobr

Ques by Mr Adams

Did you ever hear John Thompson
tell a lie, & what about?

Answer. Yes, he told the mate that Captain Brown
told him to come on shore & wait on him

which Captain Brown said was a lie. William Walker

Question by Mr Adams

Do you know Mr Edward Smith, & where he lives?

Answer Yes he lives in North Square

Qu — Was you ever in Smith's House?

Answ. Yes I went to see Hicks sometime last week, & found him at Smiths'.

Question What conversation took place?

Ans. We talked about the voyage to Amsterdam: — How merry we were on board &c.

Qu What conversation took place between Cap. Brown & the Mate, upon the outward bound passage to Amsterdam?

Answer I know of none.

Qu. Have you seen Hicks at Charleston since you arrived?

6

Ans. Yes. Once when Jacob Law

Lain [illegible]

William Walker

Commonwealth of

Massachusetts.

Suffolk ss. On the twenty second day of Octo-
ber in the year of our Lord One thou-
sand Eight Hundred & three, the above nam-
deponent was examined, & cautioned & sworn, agree-
ably to law to the deposition aforesaid. -
by him subscribed. taken at the request
of Thomas Brown, to be used in
an action of Debt. pui tam,
now pending between Lain & Samuel
Adams, before the District Court of the United
States for the District of Massachusetts
to be holden at Boston within
& for said District on the first Tuesday
of December next

and the adverse party was notified
thereof, and the deponent being
bound on a voyage to sea is
the cause of taking this deposition.

Before me Sheay a Bourne
Chief Justice of the Court of
Common Pleas, for the said
County & within said District.

Fees. 2 . . .
Dep. . . 33
Officer . . 30
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The foregoing are true copies
Wm. McDonald Clerk

Copy 4/ — for Trans —

Wm Wallace's Depo.

in favor of Brown

— ad. Sec.

Sam. Adams.

I Daniel Marston of Boston in the
County of Suffolk Mariner testify & say
that sometime in the latter end of Septem-
ber, or beginning of October last past I was
employed by Captain Giles Taylor to go
to work on board the Schooner Mary
Ann then lying at the Long Wharf I
& I went to work with said Taylor
on board his said Schooner, & while
I was at work in said Schooner
I saw a Blackman at work on board
her by the name of John Thompson
& I heard said Captain Taylor say
that he shipped said Thompson
as a hand on board said Schoo-
ner at Lunenburg, & that said
Thompson was sent on board the May
Ann at Lunenburg by Captain Thomas
Brown, & that said Brown required him
said Taylor, to ship said Thompson,
which he did. — While I was
on board said Schooner at work

as aforesaid, Shead said Taylor Speak of
said Thompson with high approbation of his
good Character; Captain Taylor said
that Thompson was a very honest good
fellow, that he could trust him with any
thing. & was never afraid to trust
said Thompson with the vessel, or any
thing on board. & further said that
he had left said Thompson in
charge of the vessel several times.
After said Schooner had been some
days at the T aforesaid, she was
hauled to Charlestown; Said Thompson
& myself went to Charlston in said
Schooner. A few days after we
went to Charlston in said Schooner
Capt. Thomas Brown came on board
said Schooner & to John Thompson
that he had got a voyage for him

to Newyork on board of Captain
Seymours Sloop, & urged Thompson to
go with Captain Seymour told
Thompson that if he would go with
Seymour, he said Brown, would pay
Thompson his wages which he owed
him, for his former voyage, by placing
the money in the hands of Captain
Seymour, so that Seymour might
pay it over to him, but Thompson
told Capt Brown he'd not
want a voyage, but if he could
have his wages paid into his own
hands for his voyage with Captain
Brown, he would consent to go
with Captain ~~Brown~~ Seymour
In the afternoon of that day Cap-
Brown came on board the May-
Flower to Charlestown, & asked me & if
Jacob Barry to take the May Flower

Boat how him & John Thompson on board
Captain Leymons Sloop which was then lying
on the outside of another vessel at the
lower end of the long Wharf in Boston on
the North Side thereof; & we went together
in the boat as Captain Brown had desired
on board Leymons Sloop, when we
were all there Captain Brown again
told Thompson that if he would go
with Captain Leymon, he would put
into Captain Leymons hands the
money for the wages due Thompson,
but Thompson replied, that unless Capt.
Brown would pay him his wages
that were due unto his own hands
he would not go in the Sloop, Imme-
diately Thompson jumped out of the
Sloop & went on shore upon the wharf.
Captain Brown soon after desired me to
go up the wharf after Thompson, & if
I could find him to bring him on board
Leymons Sloop. And I went up

the wharf looked after him but Did
not find him, & went back informed
Captain Brown that I could not find
him. Captain Brown then told me & Barry
to take the Boat return to Charleston,
& said that he would go & look after
Thompson, & went away in the
boat to Charlestown. Captain Brown
appeared to be very anxious to get
Thompson to go away & Seymour
stop — Told him as soon
the May Flum at Charleston shou
a large parcel of hand cuffs on
board her. and by direction of
Captain Taylor took them out of
the vessel then to clean out; Afte-
wards Captain Taylor told me to put
them things out of sight, into the Run
again, which I did; Captain
Brown was frequently on board, the
May Flum while I was on board her
at Charlestown; & Captain Brown

Answer. I think he would, he trusted much to Jack.

Question by the Same. Did not Capt. Brown appear to like Thompson better than any hand on board?

Answer I cannot say that he liked him better than any other; but he put much trust in him.

Question by Atty. Putnam — Who was present when the Conversation was between Capt. Brown & Capt. Taylor about the hand Cuffs?

Answer I was present & Jacob Barry also

Daniel ✕ his Austin mark.

Commonwealth of Massachusetts.

Suffolk Ss. — On the 3d day of December in the year our Lord 1803, the aforesaid Daniel Austin the Deponent was carefully examined & duly cautioned to testify the whole truth & nothing but the truth & made solemn oath that the foregoing deposition by him Signed is true —

Taken at the request of Samuel Adams to be used in an action of Debt brought by said Adams in behalf

of the United States, as well as Equity against Thomas Brown; And is to be ~~~~ tried at the District Court of the United States next to be holden at Boston in & for the District of Massachusetts, on the first Tuesday of December Current. And the said Brown was notified & was present by his Attorney at the taking this Deposition

The Deponent being bound on a voyage to Sea is the Cause & taking this Deposition. Taken before me & in my Land writing

Wm Dennison Judge of the Court of Common Pleas.

fees. $2:50

A true Copy

Attest. N. Woodbridge

Jos. Adams Esq.
Plaintiffs Deposition

I John Thompson of Boston in the County of
Suffolk Mariner testify and say that, in the
month of August one thousand eight hundred and
two, I sailed from the port of Boston and Charlestown
in the Schooner Industry of which Thomas Brown
was Master for Amsterdam and arrived safe
at said Amsterdam in about thirty eight days,
as nearly as I can remember, and it was about
two months after our arrival there, as nearly as
I can remember, that we sailed from thence—
While I was at Amsterdam in the said Schooner
we took onboard some beef, some Musquets, Cutlapes,
Hand Cuffs, and feet Irons, some Gin, small looking
Glapses and other Articles - There were several
passengers came onboard and went in the said Schooner
The first place we Anchored at after leaving Am-
sterdam was St. Jagos - before we arrived at St. Jagos
we carried away our main boom - and we set
sail from St. Jagos and ran the main land of
Affrica down to the Grand Cefs, an Island on
the Coast of Affrica - and the same afternoon
of our Arrival at Grand Cefs King William
a blackman came onboard the Industry and
tarried onboard all night, we did not Anchor
there, but ran down to Delamina where we
came to Anchor - I was sick while at Dela-
mina for about twenty five days and was on
shore during that time - while I was onshore
the platforms and other things were made in the
Schooner for the Accommodation of the Slaves, and
when I got better I went onboard the Schooner,
and afterwards saw a number of Slaves brought
onboard, and I believe there were as many Negro
Slaves brought onboard while at Delamina

as

2.

as seventy or eighty, of which five belonged to Captain Brown – After we had taken our cargo of Slaves onboard we sailed from Delamina for Surrinam, and arrived safe at Surrinam with the Slaves, and there landed the said Slaves, except two which had died on the passage – And the said Captain Brown continued onboard the Industry as Master of her all the Voyage from Boston to Amsterdam; from thence to Delamina, and from thence to Surrinam – and Captain Brown sold the said Schooner Industry at Surrinam, and bought the Schooner Mary Ann, and returned home to the Port of Boston and Charlestown in the said Schooner Mary Ann – And I do further testify and say that as nearly as I can remember the several passages and stoppages were as follows – I think we were about thirty six or forty eight days from Boston to Amsterdam, I think we were about sixty days there before we sailed from thence, by reason of great repairs made there, and I believe we were about nine weeks from Amsterdam to Delamina on the Coast of Affrica – I believe we were at Delamina upwards of thirty days, and from thence to Surrinam about thirty seven days – I was shipped at Boston by Captain Thomas Brown to go to Amsterdam in the Schooner Industry as Cook) –

Question by Samuel Adams – Was there any other person on board the Industry but Captain Brown who pretended to be the Captain or Master

of

3.

of her between Charlestown and Amsterdam? and who was ~~Master~~ the Mate of said Schooner?

Answer. No other person pretended to be Captain but Thomas Brown aforesaid, and Thomas Hinds was Mate of said Schooner.

Question by the same. Was there any other person than Captain Brown onboard who pretended to be Captain after you left Amsterdam?

Answer. Yes, a Dutchman by the name of Hayding.

Question by the Same. Did the said Dutchman act and take upon himself to give orders as Captain of the Schooner?

Answer. No, and I do not think the Dutchman was capable of acting as Captain. And one day a dispute happened between Captain Brown and the said Dutchman and Captain Brown told him in my hearing that he (said Brown) was Master and Owner of the Industry, and would let him (the Dutchman) know it, and he struck the Dutchman. The said Dutchman remained at Surrinam, and Captain Brown came home in the Mary Ann which he bought at Surrinam and he employed Captain Giles Taylor to navigate her to Boston.

Question by the same. While at Delamina did Captain Brown act as Master of said Schooner Industry and receive the said Slaves onboard?

Answer. Captain Brown was sometimes on shore when the Negroes came along side, but generally he was onboard and was active in taking onboard the Slaves.

Question

4.

Question by Sam.l Adams – Did you see the Slaves landed at Surinam?

Answer – I saw them taken from onboard, but I did not see them landed –

Quetion by Captain Brown – Do you know to whom the goods you have mentioned belonged, and to whom they were delivered?

Answer – I do not know to whom the goods belonged, but the greatest part of them were received at Delamina by the Governor thro –

Question by Mr. Adams – Since your return in the Mary Ann has Captain Brown applied to you to go to sea in any other Vessel?

Answer – I think it was the next day after I left the Mary Ann, Captain Brown asked me to go to Sea with one Captain Seymour and he went in a Boat with me onboard Captain Seymour's Vessel with my Chest, and that without my making any bargain to go in her – Captain Brown discovered some anxiety that I should go with Captain Seymour, and an attempt was made to shove off the Vessel with me in her, and I did think an attempt was made to carry me off against my will, but I escaped

Boston 21st October 1803

John X his mark Thompson

Question by Sam.l Adams – Was you not taken out of the Mary Ann by Captain Brown and a Mr. Edmands a day or two after you arrived at the Wharf in Boston and carried to Charlestown in a boat by them and there confined in a Blacksmiths Shop four days –

5.

-and was you not afterwards carried by said Brown & others onboard Captain Seymours Vessel -in a Boat from Charlestown to Boston, to the end of the Long Whaf with your Chest?

Answer - Yes -

Question by Sam[l] Adams - After you first went on board Captain Seymours Sloop, did you not go up Long Whaf and return again after your Chest and Cloaths and when you was going down the Whaf did not Captain Brown take you by the Collar and pull you to Captain Seymours Sloop?

Answer - Yes, and I did not resist him very much because I wanted to get my Chest and Cloaths out of the Sloop - When I got onboard the Sloop Captain Brown endeavoured to persuade me to go with Captain Seymour, and told me he would pay into the hands of Captain Seymour for me my wages for my Voyage in the Industry if I would go with Captain Seymour - and he told me I did not know how to take care of my money and that Captain Seymour would pay me a little (or a quarter of a dollar) at a time, as I wanted it - and because I would not consent to go with Captain Seymour, Captain Brown would not pay me my wages - and then an attempt was made to push off the Vessel with me in her, I forbid them but they did not mind me, and I jumped onboard a ship which was along side and escaped, leaving my Chest behind, but I found my Chest afterwards onboard the Ship where it had been put after. I left the Sloop -

Question by Samuel Adams - Was you not about

6. the middle of last week, shut up in a Chamber with Thomas Hinds in the House of Edward Smith in North Square and at whose instigation was you shut up in the Chamber.?

Answer- Yes, I was twice shut up in said House and Mr. Smith told us to keep the door shut fast and gave the Key to Hinds and told us not to go out ourselves, nor let any one come in and Hinds kept the Key in his pocket- and said Hinds said he had been part of the Voyage in the Industry with Captain Brown-

Question by Saml. Adams - Did you ever hear said Smith or Hinds say that they expected to get any money out of Captain Brown or Doc.r Putnam, in consequence of keeping you shut up and prevented from going abroad?-

Answer- Yes - Hinds said he had been to see Captain Brown twice, and Hinds said he had a good prospect of getting a handsome sum of money ~~f~~out of Captain Brown, and advised me to be still - Smith said he had been to see Doctor Putnam and expected to git two thousand out of him - and further said that as soon as the money was obtained Hinds and myself must be off.-

Question by the Same - When you was shut up in said Smiths Chamber with said Hinds did you not see me and Constable Lewis come to Smiths House, and did you not hear the conversation

between

7.

between Smith and myself at that time?

Answer – I did not see you but I heard you and Lewis talking with Smith, and Hinds also heard it. and Hinds said there was a row below & they would have us yet? and Lewis asked after Hinds, Smith said to Lewis that he would not find them – Lewis asked if he had seen the black boy (meaning me I suppose) Smith replied that he would not have either the blackboy or Hinds for he had them both under his own thumb –

Question by Dam'. Adams – Have you been to Captain Brown since you escaped from the Sloop?

Answer – Yes – I went to see Captain Brown and took Manuel a Man of Colour with me to Charlestown because I was ~~afra~~ afraid of being carried off – And I applied to Captain Brown for my wages, but he refused to pay me, and said he owed me nothing –

Question by the Same – Did I ever advise you to sue Captain Brown – or did I not advise you to settle with him without suing?

Answer – You never advised me to sue for my wages – but advised me to settle –

John his X mark Thompson

Boston October 21st 1803 –

Commonwealth of Massachusetts Suffolk ss

On the twenty first day of October in the year of

8

our Lord 1803, John Thompson the aforesaid Deponent was carefully examined & duly Cautioned to testify the whole truth & nothing but the truth & made solemn oath that the foregoing Deposition by him subscribed is true. Taken at the request of Samuel Adams of Boston in said County Laborer to be used in an action of debt brought by said Adams in behalf of the United States, as well as himself, against Thomas Brown of Charlestown to be tried at the District Court of the United States next to be holden at Boston in & for the District of Massachusetts District on the third Tuesday of December next. The said Thomas Brown was notified & present at the taking of this Deposition. & the Deponent being bound on a voyage to sea is the cause of taking this Deposition taken by & before me Wm Dennison Judge of the Court of Common Pleas for the County of Suffolk

Fees
£3:83

The foregoing are true Copies —
Attest. N Goodale Clerk

Copy of Thompsons Deposition.
Against
Captain Brown

Massachusetts }
District ss. }

The President of the United States
of America

To the Marshal of our District of Massachusetts, or his deputy Greeting.

Seal of Cir. Court Massachu.

We Command you to attach the goods or estate of Thomas Brown of Boston, otherwise of Charleston, Mariner & a Citizen of the United States, in our District of Massachusetts, to the value of Fifteen Thousand Dollars, and for want thereof take the body of the said Thomas (if he may be found in your District) & him safely keep, so that you may have him before Our Judge of our District Court, next to be holden at Boston, within & for our said District of Massachusetts on the first Tuesday of December, then & there in our said Court to answer

unto Samuel Adams of Boston in the District aforesaid Labor-

Our Judge of our District Court,
next to be holden at Boston, within &for
our said District of Massachusetts on the
first Tuesday of December, then & there
in our said Court to answer

unto Samuel Adams of Boston in the District aforesaid Laborer
in a plea of debt for that said Thomas at
said Boston on the first day of September
in the year of our Lord Eighteen Hundred
& two was, ever since hath been & now is
a Citizen of the United States residing
within the same, & the said Thomas being
a Citizen aforesaid at said Boston
on the said first day of September in the
aforesaid year of our Lord Eighteen hundred & two
did, within a port or place of the United
States, to wit the port of Boston aforesaid
for himself or some other person as owner
master & factor fit equip load & otherwise
prepare a certain Schooner or Vessel
called the Industry, & caused said vessel
to sail from said place or port of
Boston for the purpose of carrying on
a trade or traffic in Slaves, to some foreign
country, & for the purpose of procuring from
some foreign Kingdom place or country

11

called the ... to sail from said place or port of Boston for the purpose of carrying on a trade or traffic in Slaves, to some foreign country. & for the purpose of procuring from some foreign Kingdom place or country

1)

to wit from a foreign country called africa, the Inhabitants of said Kingdom place or country to be transported to some other foreign country port or place; which said vessel afterwards to wit between the said first day of September aforesaid & the first day of June last past pursuant to the intent & purpose aforesaid was employed in the Trade or Traffic in Slaves & in the transportation of divers of the Inhabitants of said foreign country called africa to some other foreign country port or place to wit to some port or place in the West Indies to be sold & disposed of as Slaves; — contrary to an act of the Congress of the United States, made & passed on the twenty second day of March in the year of our Lord Seventeen Hundred & Ninety four. — intitled "An Act to "prohibit the carrying on the Slave "trade from the United States to any "foreign place or Country" —

3.

called the
to sail from said place or port of
Boston for the purpose of carrying on
a trade or traffic in Slaves, to some foreign
country. & for the purpose of procuring from
some foreign Kingdom place or country

1)

to wit from a foreign country called africa, the
Inhabitants of said Kingdom place or country
to be transported to some other foreign country
port or place; which said vessel afterwards
to wit between the said first day of September
aforesaid & the first day of June last past
pursuant to the intent & purpose aforesaid was
employed in the Trade or Traffic in Slaves
& in the transportation of divers of the Inhabi-
tants of said foreign country called africa
to some other foreign country port or place
to wit to some port or place in the West
Indies to be sold & disposed of as Slaves;
— contrary to an act of the Congress of
The United States, made & passed on the
twenty second day of March in the
year of our Lord Seventeen Hundred &
Ninety four, — intitled "An Act to
"prohibit the carrying on the Slave
"trade from the United States to any
"foreign place or country" —

— Whereby & by force of the said act the said
Thomas hath forfeited the Sum of Two Thou-
sand Dollars, & an action hath

accrued to the

ines as aforesaid to demand & recover
of the said Thomas the aforesaid Sum
of Two Thousand

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Ninety four. — intitled "An Act to
"prohibit the carrying on the Slave
"trade from the United States to any
"foreign place or Country"

3.

— Whereby by force of the said act the said
Thomas hath forfeited the Sum of Two Thou-
sand Dollars, & an action hath
accrued to the said Samuel, who
sues as aforesaid to demand & recover
of the said Thomas the aforesaid Sum
of Two Thousand Dollars to the use specified
in the said Act; Yet said Thomas
though often requested hath never paid
the said Sum to the United States
nor to the said Samuel who sues as afore-
said; but detains it.

Also for that afterwards on
the first day of September in the year of our
Lord Eighteen hundred & two Some Citizen
or Citizens of the United States, or other
person or persons then residing within the
same did for themselves or some other
person or persons, as masters, as factors &
owners, build fit equip, load & otherwise prepare
a certain [illegible] under the
Industry, other than, though like unto the Schooner
aforesaid, within a port or place of the
United States, to wit within the port of Boston
aforesaid for the purpose of carrying on a
[illegible] upon the purpose

Lord Eighteen hundred & two Some Citizen or Citizens of the United States, or other person or persons then residing within the same did for themselves or some other person or persons, as masters, as factors & owners, build fit equip, load & otherwise prepare a certain [illegible] over the Industry, other than, though like unto the Schooner aforesaid, within a port or place of the United States, to wit within the port of Boston aforesaid for the purpose of carrying on a trade & traffic in Slaves for the purpose of procuring from some foreign Kingdom place or country the Inhabitants of said Kingdom place or country, to be transported to some other foreign Country port or place to be sold & disposed of as Slaves; which said vessel, so fitted, equipped, loaded & prepared as aforesaid for the purposes aforesaid, afterwards, to wit on the ~~said~~ first day of September was caused to sail from the port of Boston aforesaid to a foreign country called Africa for the purposes aforesaid. And the said Samuel who sues as aforesaid doth aver that the said Thomas Sometime between

5

the first day of September aforesaid & the last day of March last past in a certain foreign country called Africa, he the

purpose
the ~~said~~ first day of September was
caused to sail from the port of Boston
aforesaid to a foreign country called Africa
for the purpose aforesaid. And the said
Samuel who sues as aforesaid doth aver
that the said Thomas sometime between

5

the first day of September aforesaid & the last
day of March last past in a certain
foreign country called Africa, he the
said Thomas during as that time being
a citizen of the United States, did take
on board & receive in said vessel
fitted equipped, prepared & caused
to sail as aforesaid, sundry of
the Inhabitants of the said foreign
country called Africa, to wit
fifty of the Inhabitants of said
foreign country for the purpose of
their being transported in said
vessel to some other foreign Country
port or place to wit to a
certain foreign port or place
called Jamaica in the West Indies
to be sold & disposed of as slaves
— Contrary to the aforesaid Act

6

of the United States — Entitled an

vessel to some other foreign County
port or place to wit to a
certain foreign port or place
called Surinam in the West Indies
to be sold & disposed of as slaves
— Contrary to the aforesaid Act

6

of the United States — Intitled "an
"act to prohibit the carrying on
"the slave trade from the United
"States to any foreign place or
"country" Whereby & by force of
which act the said Thomas
hath forfeited the Sum of Two
Hundred Dollars for each & every
of the said fifty persons or inhabitants
so received by him on board of the said
vessel as aforesaid, amounting in the
whole to the Sum of Ten Thousand
Dollars, for the whole of the said
fifty persons or Inhabitants aforesaid
which Sum of Ten Thousand Dollars
the Plaintiff who sues as aforesaid
avers that the said Thomas hath forfeited
& an action accrues to the said Jas.

7

nel, who sues as aforesaid, to have recover
of the said Thomas, the aforesaid Sum of

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fifty persons or Inhabitants aforesaid
which Sum of ten thousand Dollars
the Plaintiff who sues as aforesaid
avers that the said Thomas hath forfeited
& an action accrued to the said Sam-

7

uel, who sues as aforesaid, to have recover
of the said Thomas, the aforesaid Sum of
Ten thousand Dollars, being two hundred
~~Dollars~~ dollars, for each & every of the
said fifty persons, received as aforesaid
on board of the said vessel to the use
specified in the said act, Yet
said Thomas although often request-
ed hath never paid said Sum
nor any part thereof, to the United
States, nor to the said Samuel
who sues as aforesaid, but detains
it.

To the damage of the said Samuel who sues as afore-
said the Sum of fifteen thousand Dollars, which shall
then & there be made to appear with other due
damages. And have you there this writ, with
your doings therein. Witness John Davis Esq. at
Boston the sixth day of October in the year of
our Lord One thousand Eight Hundred & three

Woodale Clerk

And now the said Samuel Adams who sues as aforesaid claims an appeal from the aforesaid Judgment to the next Circuit Court of the United States to be holden at Boston within & for the District of Massachusetts on the first day of June 1804.

Which claim is allowed on Condition that the said Adams files Stipulation within twenty days the 2d Janry 1804 in the sum of Two Hundred Dollars to prosecute his appeal & pay all Costs in case he does not recover Judgment in his favor.

Stipulation made according to order of Court.

The foregoing are true Copies Attest N. Goodale Clerk

United States: ~~District~~ Court. Mass.ts District.
December Term 1803

Samuel Adams qui tam
vs
Thomas Browne.

The Jury find that Thomas Browne
the Defendant is not indebted in manner & form as
the Plaintiff has alledged Jon.a Balch Foreman

affirmed in Court
Att. N.Goodale Clerk

The foregoing an true Copies —
Att. N.Goodale Clerk

It is therefore Considered by
the Court, that the said Thomas
Browne
[illegible]
recover against the said Samuel
Adams the sum of
Costs

Mass. Dis. ss.

Charlestown Oct. 8. 1803

By virtue of this Precept I Arrested the body of the within named Thomas Brown and him to bail as the Law directs.

Saml W Harvey
Deputy Marshal.

Copy - Writ - Attmt
to Martin - 1803
Circ. Court - Dist. Mass.

Service $ 2..
Bail Bond .. 50
Travel 2 Miles .. 10
2.. 60

Mr. Officer Attach to the
body of the Defendant
& keep safe
Samuel Adams

And the said Thomas Brown comes & defends &c. when &c. and says that he does not owe the said Adams in manner & form as he has above declared, & thereof puts himself on the Country

Theop Parsons
And the said Adams likewise
Geo Blake

Mass. Dist.
Term 1803

Thomas Brown
Bail
Adams

Blake & Foreman

Writ
Circ. Court
Mass. Dist.

OPINIONS

OF

FELIX GRUNDY, OF TENNESSEE:

APPOINTED SEPTEMBER 1, 1838.

PENSIONS FOR WOUNDS RECEIVED IN THE NAVAL SERVICE.

The act of 23d April, 1800, does not authorize pensions for wounds received in the line of duty prior to the passage of the act; nor can the act of 3d March, 1837, be construed to embrace such cases.

ATTORNEY GENERAL'S OFFICE,
September 3, 1838.

SIR: You state in your letter of the 31st of August last, that Commodore David Porter claims a pension for wounds received in the line of his duty in the naval service prior to the 23d of April, 1800, (the date of the law which established the navy pension fund;) and my opinion is requested whether your department has authority to grant pensions for deaths or disabilities which occurred before the pension fund was established.

My opinion is, that no such authority exists. Upon an examination of the act of 23d April, 1800, no expression is found indicating an intention on the part of Congress that the fund then provided should be subject to cases which had occurred before that time. The second section of the act the 3d of March, 1837, it is believed, cannot be so construed as to embrace a class of persons not included in former laws. The only object of that section is to make the pensions more ample in behalf of those entitled under pre-existing laws.

Yours, very respectfully,

FELIX GRUNDY.

To the SECRETARY OF THE NAVY.

DUTIES ON MILLINERY, HOSIERY, AND READY-MADE CLOTHING.

The act of 2d March, 1833, to modify the act of July 14, 1832, and other acts admitting silks, did not repeal the act of 14th July, 1832, and former acts, which impose duties on millinery, hosiery, and ready-made clothing; and those articles, of whatever material composed, are subject to duties.

The operation of the revenue laws cannot be legally suspended by the Comptroller, even though goods may have been ordered in view of an erroneous practice, and the importers wish to countermand their orders from abroad.

ATTORNEY GENERAL'S OFFICE,
September 8, 1838.

SIR: I have examined the two questions submitted for my opinion in your letter of the 4th instant. The first is, "Has the act of the 2d of

CONPENSATION OF DISTRICT ATTORNEY OF PENNSYLVANIA.

Where the district attorney of Pennsylvania had, by the direction of the Postmaster General, instituted several suits against toll-gate keepers and others, to enforce the penalties prescribed by the 9th section of the act of 3d March, 1825, for sundry interruptions of the transit of the United States mails, by exacting tolls upon passengers conveyed in the mail coaches, and a *nolle prosequi* was subsequently entered by direction of a subsequent Postmaster General in every case—DECIDED, that the said district attorney is fairly entitled to compensation from the United States for the services rendered.

The judgments in the matter, however, are not binding upon the treasury.

ATTORNEY GENERAL'S OFFICE,
November 13, 1849.

SIR: The claim of Mr. Cornelius Darragh, which you have submitted to this office, presents two questions: 1st. Is it to be considered as established by decision of the court in the case of the United States against him, in the circuit court of the United States for the western district of Pennsylvania? and, 2d. Whether, independent of that decision, and upon the facts otherwise appearing, it is established? First, the judgment of the courts. If there ever could have been a doubt on this question, none exists now. The settled question is, that such a verdict or judgment, as evidence of a claim against the United States, is a mere nullity. It neither warrants its payment by the treasury, nor can be used as a set-off, either at law or in equity, against any demand the United States may have against the claimant. In the case of the United States *vs.* James Johnson, an opinion to this effect was given by Mr. Wirt, in January, 1823, and a like opinion by Mr. Legaré, on the 2d April, 1842, in the case of Pearson Cogswell, marshal of New Hampshire. The verdict in such a case extinguishes the particular demand for which the United States sues; but in its excess, and as evidence of a debt due the defendant by the United States, it has no operation whatever. Mr. Darragh's claim, therefore, must rest upon evidence *aliunde*—the judgment to be allowed.

Is there, then, secondly, such evidence? I think there is. The facts appearing by the papers before me are these: The Post Office Department had made a contract with Lucius Stockton to carry the mail over that part of the national road running through Pennsylvania, and that State imposed a toll tax upon passengers travelling in the mail stage. The authority of this tax the then Postmaster General (Wickliffe) denied. Writing in reference to it, he, in his letter to Harwood Kennedy, the agent of the department, dated the 17th April, 1843, in reply to a letter from Kennedy, of the 15th, says: "My own opinion has been often and decidedly expressed, that the whole vehicle and its contents, which conveys the United States mail, is exempt from taxation or the payment of tolls. In this I may be mistaken. If I understand your letter, the agent of the State now claims toll for passengers in the stage which conveys the mail; they do not claim the right to tax the vehicle or horses. Is this not whipping the devil round the stump? to use an old but not unmeaning adage. Does the State exact the same tax upon all persons who travel upon the road in other carriages, public or private? I have no particular directions to give. If the authorities of the State of Pennsylvania choose to stop the mail, they must do so; and when it is done, the question will be fairly met by a presentment against those who hinder or obstruct its lawful transit. I can enter into no obligation, express or implied, conditional or otherwise, to pay the tolls upon passengers in the mail stage."

Under the authority of this letter, Kennedy afterwards instructed Darragh, then the district attorney of the United States, to institute suits, and he did institute one hundred and seventy separate actions to enforce the penalty prescribed by the 9th section of the act of Congress of 3d March, 1825, (4 *Stat. at Large*, 104,) against toll-keepers and others on the road, who, as the agents of Pennsylvania, and for the purpose of enforcing the payment of tolls under her act, had interrupted the passing of the mail stages over the road.

On the 16th of September, 1844, the then district attorney, Mr. W. H. H. Robinson, wrote to the Auditor of the department as follows: "I beg leave to call the attention of the Post Office Department to over one hundred and sixty-nine *qui tam* actions, instituted at the last October term, at the instance of the late Mr. Stockton, of Uniontown, to recover penalties for stopping the mail by toll-collectors on the national road. I have understood that these suits were authorized by the Post Office Department. If so, and there is any determination to press them, it would be of importance that I should know, since the attorneys for the defence may press the court for a judgment of abatement on account of the death of Stockton, at the next court." On this letter the Postmaster General made this endorsement: "Dr. Kennedy will take this letter, and try and make some arrangement by which these suits can be disposed of without costs to the United States. If this cannot be done, they must be prosecuted."

No such arrangement having been made as to costs, the district attorney afterwards, on the 10th March, 1845, obtained a rule for the trial of the cases at the following May term, evidently acting under the contingent direction of Mr. Wickliffe, that they were in that event to be prosecuted. But before the trial could be had, Mr. Cave Johnson, the then Postmaster General, directed the district attorney to enter a *nolle prosequi* in each case, and it was done in these words: "The United States disclaims having authorized the institution of this suit, and refuses to prosecute it." Upon these facts, I am clear in the opinion that Mr. Darragh is entitled to the fees he claims over and beyond the amount already allowed him as a set-off in the case of the United States against him, in which the judgment referred to was found.

The acts of Kennedy, the admitted agent of the department, in relation to the suits, were not only fully authorized by the letter of the Postmaster General of the 17th April, 1843, but were in substance imperatively ordered. There was no discretion given him. The point in dispute between the department and Pennsylvania was "to be fairly met by a prosecution against those who hinder or obstruct its (the mail's) lawful transit;" and this could only be done by such proceedings as Kennedy resorted to—suits to recover the penalties imposed by the act of 3d March, 1825. But if there could be a doubt as to this, it was removed by the endorsement of the Postmaster General on Robinson's letter of the 16th September, 1844, after the suits had been instituted and were pending. The letter virtually inquired whether suits had been authorized by the department; and if so, asked for instructions. The endorsement referred the matter to Kennedy, still the agent of the department, with instructions to try and make some arrangement by which these suits could be "disposed of without costs to the United States;" and added, that "if this cannot be done, they must be prosecuted."

Here was a full recognition of what had been before done. The suits were considered as having been authorized by the department, and unless an arrangement as to costs could be made, they were directed by the department to be prosecuted.

It was now, if not from the first, too late for the department to deny its authority to bring the suits. The attorney had acted upon the faith of such authority; and was not only justified in so doing, but was bound to do so. His acts were afterwards adopted by the department, and it was not in the power of the department then to repudiate what it had done under its sanction, or to defeat the attorney of the compensation due him for what was done.

My opinion, therefore, is, that Mr. Darragh's claim is a fair and legal one, and binding upon the United States.

I have the honor to be, very respectfully, sir, your obedient servant,

REVERDY JOHNSON.

Hon. JACOB COLLAMER,
Postmaster General.

THE CLAIM OF CHARLES F. SIBBALD.

The award of the 3d of June, 1847, for an amount in addition to the sum formerly allowed upon the claim of Charles F. Sibbald, must be regarded as a full and final execution of the act of 1842 and the resolution of 1846; and if it were not, the claimant is concluded by his receipt of the award.

The claim having been thus disposed of, it is not competent for the present Secretary to re-examine it, to correct errors, nor to receive other evidence in relation to it.

The whole matter is *res judicata* and terminated, and can never be reviewed, except under some future act or resolution of Congress.

ATTORNEY GENERAL'S OFFICE,
November 14, 1849.

SIR: The additional questions, which, at the instance of the claimant, you have submitted to this office, in the case of Charles F. Sibbald, for my opinion, I have considered. They are: First, admitting the act of the 3d of August, 1842, (5 *Stat.*, 864,) and the joint resolution of the 10th August, 1846, to have been executed, has the present Secretary of the Treasury the right, and is it not his duty, to review the action of his predecessor, so far as to ascertain whether there be not in it errors of facts which ought to be rectified? And second, whether there be not new evidence exhibited, which would materially change the result?

In the opinion I had the honor to give upon your former reference of this case to me, I advised you, first, that the award of Mr. Secretary Walker of the 3d June, 1847, allowing the claimant $26,029 70 in addition to the sum formerly allowed him by Mr. Attorney General Nelson, under the act of 1842, of $27,132 06, was of itself a full and final execution of that act and of the resolution of the 10th August, 1846; and secondly, that if it was not of itself such an execution, the receipt by the claimant, or his attorney, of the amount awarded, estopped the claimant from questioning its conclusiveness. I have again examined the former questions, as well as those now before me, and am strengthened in my former conclusions. For the reasons upon which they rest, without adding others, which could readily be done, I refer to that opinion.

TALBOT *against the* AMELIA.

Came on the 11th inſt. in the Supreme Court of the United States, a cauſe of great importance, both on account of the legal principles, applicable to neutral commerce, and the magnitude of the pecuniary intereſt involved in the event, being no leſs than one hundred and eighty thouſand dollars. The caſe was thus :—

Talbot Qui tam,
vs.
The ſhip Amelia, &c.

} Error from the Circuit Court for the Newyork Diſtrict.

Law of Copy-right.—By the following abstract of the opinion of Mr. Justice Thompson, of the Circuit Court of the United States, delivered on Tuesday last, in a case in which the Editors of this paper were defendants, it will be seen that we have been borne successfully through one of the most vexatious and unjustifiable pieces of litigation, that we recollect to have heard. No such case was ever tried, in this or any other country, before; and by contesting it, we have had the double satisfaction of establishing a principle heretofore unsettled, and of doing so at the expense of our opponents. The latter circumstance would not be mentioned, were it not for the fact, that, not content with trying the question on principle, they sought to recover vindictive damages in a second suit, which they may now withdraw at their leisure.

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW-YORK.

Edwin B. Clayton and al.
vs.
William L. Stone and Francis Hall.

This was an action qui tam, under the statute of copy right, for abridging an article published in a number of a semi-weekly newspaper, of which the plaintiffs are proprietors, called "The Price Current." The plaintiff's had never secured their copy-right in any number of their paper except the one now in question.

The action was tried at the early part of the present term, and the jury were, for the purpose of bringing the questions of law before the Court for revision, directed to find a nominal verdict for the plaintiffs. On Tuesday last his honor Judge Thompson delivered the opinion of the Court upon the case, which had been argued before them, ordering judgment to be entered for the defendants.

The following are substantially the reasons assigned by the learned Judge, forming but an outline of the opinion delivered.

I am inclined to think the Price Current can not be considered a book, within the sense and meaning of the act of Congress. The literary property intended to be protected by the act, is not to be determined by the size, form, or shape in which it makes its appearance, but by the subject matter of the work. Nor is this question to be determined by reference to Lexicographers, to ascertain the origin and meaning of the word book. It will be more satisfactory to enquire into the general scope and object of the Legislature, for the purpose of ascertaining the sense in which the word book was intended to be used in the statute.

It seems to be well settled in England, that a literary production to be entitled to the protection of the statutes or copy rights, need not be a book in the common acceptation of the word; a volume written or printed, made up of several sheets and bound up together.—It may be printed on only one sheet, as the words of a song on the music accompanying it. It is true that the English statute of 8th Anne, in the preamble, speaks of books and other writings. But the body of the act speaks only of books the same as in the act of Congress: and a learned commentator upon American Law seems to think the English decisions on this subject have been given upon the body of the statute of Anne, without laying any stress upon the words, "other writings in the preamble.

In determining the true construction to be given to the act of Congress, it is proper to look at the constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. "Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." (art. 1, s. 8.) The act in question was passed in execution of the power here given, and the object therefore was the promotion of science. It would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market, as falling within any class of the sciences. They are of a more fixed, permanent and durable character. The term science cannot with any propriety be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current: the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way. It must seek patronage and protection from its utility to the public and not as a work of science.

The title of the act of Congress is "for the encouragement of learning," and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. The preliminary steps required by the law to secure the copy right, cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper. The author is required to deposit a printed copy of the title of his book, in the Clerk's office of the District Court, and the Clerk is required to record the same; a copy of which record must be published for four weeks, in one or more newspapers, within two months from the date thereof: And a copy of the book is to be delivered to the Secretary of State within six months from the publication, to be preserved in his office: And all this would have to be done for every newspaper. The right can not be secured for any given time, for a series of papers published from day to day, or from week to week: And it is so improbable that any publisher of a newspaper would go through the form for every paper, that it cannot reasonably be presumed that Congress intended to include newspapers under the term book. That no such pretence has ever before been set up, either in England or in this country, affords a pretty strong argument that such publications never were considered as falling under the protection of the copy right laws.

We are accordingly of opinion, that the paper in question is not a book, the copy right to which can be secured under the act of Congress.

Judgment must accordingly be entered for the defendants

Reported for the Commercial Advertiser.

Edmund M. Blunt, qui tam, &c. vs. Richard Patten. | Present—Justices Thompson and Betts.

This action was brought for a breach of copy-right. It appeared, in evidence, that the plaintiff, in 1821, caused a survey to be made of the South Shoal of Nantucket, and that it was then ascertained, that the said Shoal had been laid down in all the charts previously in use, twenty miles too far to the southward; it being in latitude 41 deg. 4 min., instead of 40 deg. 44 min., as in the old charts.

It was also proved, that the same year, the plaintiff projected a survey of George's Shoal, and sent a vessel, with competent surveyors for that purpose, to Boston to join a vessel which Capt. Hull, the commander on that station, permitted to assist in said survey: That the said survey was made chiefly at the expense of the plaintiff, and that it was expressly understood by Capt. Hull, that it was for the private benefit of the plaintiff. The results of the survey were placed on a chart, drawn by Mr. Edmund Blunt, and copies of the same were given to an officer of the United States, to be transmitted to the Navy Department, for the use of the Government, and to preserve the information among the public archives.

The plaintiff published these surveys on his chart, of the North Eastern Coast of the United States, in October, 1821, and the copy-right was duly secured.

In May, 1827, the defendant published his chart of the North Eastern Coast, with these Shoals substantially copied in form, position, and bearings, from the chart of the plaintiff. The plaintiff then rested, and the defendant, in his defence shewed that he had obtained a copy of the chart lodged in the Navy Department by permission of one of the Navy Commissioners, and that by being placed there it became a public document which he had a right to copy. He also attempted to shew that he had obtained the true position of the south shoal of Nantucket from a survey taken by a British officer in 1805. It did not appear however that, that survey had ever been published, or that any person except the witness produced by the defendant had ever heard of it. He produced the draftsman and the engraver of his chart, but on cross-examination, it appeared that the former was directed to ou . in the draft of Nantucket Shoal, and that the engraver copied it from a separate paper furnished by the defendant, and drawn by some person unknown.

The defendant also proved that the soundings near Nantucket Shoal on his chart were different from those on the plaintiff's, being taken from Desbarre's survey published in 1776. The defendant's counsel then contended that there could be no copyright in the location of a Shoal, that it was a thing which by nature could only be placed in one position, and that it was obviously here taken from other authorities than from the plaintiff's chart. He also contended that the chart in the Navy Department was a public document, and open to all the world, and that the plaintiff had no right to make a monoply of either that or of the true position of Nantucket Shoal.

Many respectable shipmasters were produced, who testified that they always regarded the discovery of the error in the position of Nantucket Shoal, as having been made entirely by the plaintiff, whom the mariners of the U. States, had been indebted to for most of the information now obtained concerning their own coast, and had been in the habit of relying upon as the publisher of the charts; and nautical works now in general use. They also testified that the surveys of Nantucket and George's Shoals were highly important, and that they appeared to be substantially copied on the defendant's chart from the plaintiff's.

After the testimony had been commented upon by the counsel for the parties, Judge Thompson charged the jury that the privilege of an author to the exclusive sale of his works for a limited term of years, although a monopoly, was not so in the odious meaning of the term. It was but a proper reward for his labor provided by law, and to which he was as much entitled, as to the exclusive enjoyment of any other kind of property. That the plaintiffs could not, it was true, obtain a copy right in the Shoal itself, nor in the original elements of his charts; but that he had an exclusive right to the results of his labors and surveys. The defendant might resort to the original materials of the chart and survey for himself, but he could not avail himself either in whole or in part of the surveys of plaintiff. The law was intended to secure to authors the benefits of their skill, labor and genius, for a limited time, and if in this instance the defendant had availed himself of the surveys of plaintiff in compiling his chart, the plaintiff was entitled to a verdict. In the case of Nantucket Shoal, the defendant produced a witness who stated that he had communicated to the defendant its true position, and it was a question for the jury to decide whether the defendant had copied it from the plaintiff's survey or not.—As to Georges Shoal, no doubt existed that it was copied from his survey, deposited in the Navy department, and the pretence that it became a public document from being deposited there, was entirely untenable. The survey was made chiefly at the Plaintiff's expense, and according to the understanding, it was to be for his benefit. It was of great use to the navigating community, and Capt. Hull was justified in aiding him in it, upon such terms.

The jury retired, and in less than five minutes, brought in a verdict for the Plaintiff.

Counsel for Plaintiff, D. B. Ogden and J. Blunt —for Defendant, J. Anthon.

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Suggested by Cole's four paintings representing the voyage of life.

BY MRS. SIGOURNEY.

I.

Thou poet-painter, preacher of great truth,
Far more suggestive thine than written tome.
Lo, we return with thee to that vast dome,
Dim cavern of the past. Visions uncouth,
Vague, rayless, all impalpable in sooth,
Send back the startled soul. The waters come
All tranquilly from that dim cavern forth,
The mystic tide of human life. A child,
Borne on its bosom, sports with blossoms wild.
A presence, felt, but still unseen, the boat
With gentle hand guides onward, and beguiled
With music lost in other years, they float
Upon the stream. The hours unfelt, for life
Is joy in its first voyage, with light and blossoms rife.

II.

Alas, the spirit lingers, but its hand
No more the barque sustains. The daring youth
Has seized the helm, and deeper launches forth.
His eye amid illusions of ideal land—
Bright castles, built in air, fame, glory, worth,
Fabrics, that still receding, seem to stand—
He spurns no more mid blossoms of green earth;
He hears no more the music of his birth;
The future lures him, pinnacles and towers,
And half he chides the lingering of the hours,
Unheeds their sunshine, blessedness and mirth;
For onward is his course, he asks not where,
Since fancy paints the prospect passing fair.

III.

Still onward goes the barque—the deepertide
Bears it along where breakers foam and roar,
And oaks, unbending, riven, line the shore;
Dense vapors rising, all the future hides;
And how shall he that tosses peril hide?
The guiding helm he eager grasps no more;
Time weighs the prow, the wave is deep beside;
Swift down the current, fierce the seeming strife,
The struggle and the buffetings of life.
Half he recoils, yet calmly bides the test,
With hands clasped firmly on the unconquered breast;
Nor meets alone that hour with peril rife—
Forth from on high the guardian spirit bends
With ministry of love, and holy strengthening sends.

IV.

Thy mission is accomplished—painter, sage,
Look to thy crown of glory—for thy brow
Is circled with its radiant halo now.
No more earth's turmoil will thy soul engage,
Its hopes unquiet, litiensea, or rage.
With thine own voyager thou hast heard the sound
Of that vast ocean, wordless, rayless, dread,
Where time's perpetual tribute, circling round,
Drops silent in, all passionless and dead.
When thine own voyage is o'er, and thou shalt soar
The eternal wave, thus, thus above thy head
May opening glories shield thy heart from fear—
A child again, but strong in faith and prayer,
Thou shalt look meekly up beholt, thy God is there!

In Chancery—Before the Vice Chancellor—U. H. Levy, vs. James H. ——ay.

In this case an attachment had been issued against the defendant for refusing to deliver certain property to a Receiver. It appeared last when first brought up for examination before the Master, he was wearing a gold watch, which he was requested to deliver to the Receiver; this, however, he declined to do. The next time he came up, inquiry was made for the watch, and he acknowledged that he had given it to an assignee under an assignment—the watch being included in such assignment.

His Honor said it seemed to him that parting with the possession of the watch must be considered a violation of the injunction, and as far as it was concerned, it was a *fraudulent transaction*. That he considered no such change of possession had taken place as would give the assignee a title to the property; and as the judgment creditor had filed a bill and so held a lien upon the property, he had no right to part with it afterward. The defendant was, therefore, ordered to stand *committed* until he should deliver the watch to the Receiver.

Another question was involved in the present case with regard to some articles of furniture contained in the same assignment. The defendant had confessed judgment, and an execution was issued and his property sold; he, however, had made an agreement with the *auctioneer that certain articles should be bought in*; consequently a piano and various other things were knocked down to a Mrs. Jones, (a fictitious name.) No money passed, and the goods were removed to the defendant's mother-in-law's, 53 Broome street, where himself and family resided, and had remained in his use and occupation.

He was required by the Receiver to give up this property, but refused on the ground that he had no control over it.

His Honor said that it was not shown that any other person had exercised control over it, and, therefore, he was constrained to believe that he had it in his power to deliver the said articles, and therefore, he should order him to do so, excepting such as were exempt by law, and that he *stand committed* until it is done.—*Express.*

United States Circuit Court.

Before Judges Thompson and Betts.

Timothy Dwight, et als. vs. Daniel Appleton, et als. Trial in continuation.—The Court opened at the usual hour, and Judge Thompson proceeded to deliver the opinion of the Court, upon the point of law, raised by the defendant's counsel on the previous day.

His Honor said that the Court had been able to find but few facts as precedents, on which to predicate a decision in the matter, as the question of copy-right had been so little litigated in our Courts. The English authorities on the subject were numerous, but they tended but little to enlighten the Court in the matter of arriving at a proper construction of the mere words of the act of Congress.

Section 6th of the act declares, "That if any other persons, from and after the recording the title of any book or books, according to this act, shall, within the term or terms herein limited, print, publish or import, or cause to be printed, published or imported, any copy of such work or books, without the consent of the person legally entitled to the copy-right thereof, first had and obtained in writing, signed in the presence of two or more creditable witnesses; or shall, knowing the same to be so printed, &c. publish, sell, or expose for sale, or cause to be published, &c. any copy of such books without such consent in writing, then such offender shall forfeit every copy of such book to the person legally entitled at the time to the copy-right thereof; and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed for sale contrary to the intent of this act, the one moiety thereof to such legal owner of the copy-right as aforesaid, and the other to the use of the United States, to be recovered by action of debt in any court having competent jurisdiction thereof.

This Court, continued his Honor, does not consider the law a penal enactment, but as offering the only remedy afforded the plaintiffs in the case. The procedure the Court viewed in the light of a *qui tam* action, and the words "found in his possession" must apply to every copy of the book found in the defendant's possession at any time.—If, said his Honor, the Court were in error in giving this construction of the law, or if they should have fallen into any error, they would be happy to hear the arguments of counsel, either upon a motion for a new trial or for the granting of a writ of error.

Mr. O'Conner rose and remarked that he had other points to which he would call the attention of the Court.

First—He would ask, "As the plaintiffs had only entered the first volume of the work which they claimed to be the original, could they claim thereby a copy-right of the other four volumes?"

Secondly—Having in the year 1826 published an edition of the work in four volumes, did not such act vitiate the right to recover in the present action?

Thirdly—Was not each and every volume published in this country a complete book in itself, the same as a newspaper, periodical, or other work?

Mr. O'Connor was proceeding to address the jury, when Judge Thompson interrupted him, and remarked, that as the Court were desirous of having further time to examine these difficult points, it would be desirable if the counsel on both sides would agree upon some verdict, subject to the opinion of the Court upon a case to be made. If there were any facts *deemed peculiar* within the province of the jury, they could pass upon the facts only, and leave the law to be hereafter determined.

It was the opinion of Mr. O'Connor that there were two points upon which the jury could decide as facts.

First. Was there a proper deposite in the district clerk's office of the books within six months after their publication?

Second. How many copies of the imported books had been proven to in possession of the defendants?

The Court charged that the case was one of a very novel character, and one of no inconsiderable importance to the public. It had been deemed, therefore, expedient to reserve certain questions of law growing out of the case, for the more mature deliberation of the Court, and therefore the jury would be charged with a decision, and thereby find a verdict upon certain facts which had arisen in evidence, leaving the application of the law to these facts to the Court alone. One of the questions reserved for the Court was, whether each of the volumes was required to contain a certificate of record, which has been found only in one.

Another was as to the necessity of having a copy of each of the volumes deposited in the office of the Secretary of State within six months after their publication? For the sake of expediting the matter the Court would for the present assume that it was necessary for each volume to be so deposited, and the jury could then determine from the evidence, how many and which of the volumes were deposited, within the time prescribed.

The next point for them to determine was, how many copies of the imported edition had been in possession of the defendants, at any time whatever.

With respect to the first question, it has been had evidence that the first and third volumes were deposited previous to the 10th of January, 1819. For these volumes we have the receipts from the Secretary's office, but in the absence of a receipt for the second volume, a fair inference is that it was not deposited; and from a review of the testimony a similar inference may be drawn in relation to the remaining volumes, viz.—that only the first and third volumes had been deposited within the required six months.

The next question arising, said his Honor, is, how many copies of the imported work were proven to have been sold by defendants.

The plaintiff is seeking to recover the penalty of fifty cents for each sheet found in the possession of the defendant, which sheets are made up into volumes. The plaintiffs were made by his Honor to elect whether they would proceed against the defendant for the penalty of fifty cents for each sheet found in his possession, or for the penalty of fifty cents for each sheet sold by him. The plaintiffs elected to proceed for the latter penalty.

The defendant is charged with selling two sets of copies.—Several swear to having purchased copies at his store, and one witness swears that at the time of his purchase he saw several, perhaps as many as twenty-five copies remaining. From the entry at the Custom House, it appears that the defendant imported twenty-five copies in June, 1820. There being no pretence that the books did not arrive here, the opinion of the Court is that he is chargeable with them. Another branch of this question is how many of the books were sold by defendant before the arrival of the invoice by the ship Westminster. This branch is more difficult of decision. The truth can be best arrived at by examining the testimony of the clerk, Mr. Saxton.

It had been urged by the plaintiff's counsel, that the defendants could have proven, had they called their clerks, the exact number of copies of the work sold. This testimony, had it been adduced, could not have varied the general result.

The jury, after a brief absence, returned with a verdict for the plaintiffs for $2000 of debt, with six cents costs subject to the opinion of the Court upon a case to be made, with liberty to liquidate the amount of the verdict, and with liberty to turn the same into a bill of exceptions. *And especially*—

1. Was the first volume deposited within six months after it was published? Yes.
2. Second volume? No.
3. Third volume? Yes.
4. Fourth volume? No.
5. Fifth volume. No.
6. What number of copies of the English work was in defendant's possession? 38.—*Courier.*

The United States, vs. the Executrix and Executors of Henry Eckford, deceased.—This case is on the calendar for to-day. The deceased was security for Robert Swartwout, and his liabilities it is said amount to $480,000. Dr. Lord, Jr. Esq. yesterday applied to the court to postpone the trial until the next term; he said he believed he should be able to prove that the amount was much less. The case had been entirely under the charge of F. B. Cutting, who was unexpectedly obliged to go to Europe, and it was now left with Mr. Prescott Hall and himself; but the time was too short to enable them to become masters of the case, and do it the justice it demanded.

The amount was an exceedingly heavy one, and if pressed to trial now, judgment must go by default. If Eckford were alive, it would be very different, and the interests of the United States would suffer by the delay, but under the present circumstances he hoped no objections would be offered to the postponement.

Mr. Butler said he should like the grounds of the motion put in proper form, and he should then have something to say upon the subject.

The counsel were then directed to prepare their affidavits and make the motion this morning.

The court then adjourned.—*Express.*

U. S. Circuit Court.—Saturday.

Before Judge Thompson.

NEGLIGENCE OF COUNSEL.—His Honor took his seat precisely at 10 o'clock, but not one counsel appeared in Court. After waiting until half past ten, he said—

I have now waited half an hour, and there is still no business ready; I shall proceed, therefore, now to call the general calender, and if counsel are not here, they must take the consequence of their non-attendance." He then proceeded to call the calendar, but no counsel appearing, he said "The negligence is evidently with the counsel, and my time is not to be wasted in this manner. I shall, therefore, mark off the causes, and they must take the consequences of their inattention."

Having reached the case of "The United States vs Price," Mr. Butler said he was very desirous to try the cause this term.

Court. "You are at liberty to proceed sir; the parties should have been here."

Mr. Butler—"I know, sir, that if I proceed and take an inquest in the case, a motion will be made to set it aside, and I think the time of the Court will be saved by allowing it to stand over."

Court. "Their application will have no effect with me, sir. I shall not set it aside unless they can show me a very efficient and satisfactory cause for their absence; go on and take your inquest sir."

Mr. Butler. "I have sent an officer after Mr. Morrell sir, and I expect him every minute."

Court. "You may send an officer sir, but has he any authority to bring him?"

Mr. Morrell soon after appeared in Court, accompanied by Mr. Price, and the case proceeded.

The United States, vs. Wm. M. Price.—Mr. Price appeared personally, and moved a postponement of his case until the April term of the court. He read a long affidavit, which in substance set forth that on the 15th of last May, he applied to the District Attorney, R. F. Butler, Esq., and requested that proceedings might be instituted against him at the suit of the United States, for the amount which was alleged to be due to them; and that Mr. Butler informed him that he had received no instructions, but would make application and report the reply.

That on the 19th May, Mr. Butler informed him that his instructions were to proceed against him in the usual way. That capias was accordingly issued, and his (Price's) bail justified in the suit on the first day of June last; and on the 31st day of July, the declaration was served, which contained the usual money counts.

The bill of particulars was not served until the 20th of September, and upon examination he found it altogether too general to answer the purposes for which he had applied for a bill of particulars; and on the 11th of November he again applied to Mr. Butler, and stated that it was necessary for him to go to Washington to ascertain whether the monies which had been received in his absence were to be allowed or disallowed; but indisposition had prevented his travelling, and he had not yet received the statement of the monies which had been so received.

That he believed and was informed by his counsel, John A. Morrill, that he had a good and substantial defence, which consisted of a great number and a large amount of claims against the several Executive departments of the Government, from the 15th of April, 1834, to the 6th of December, 1838; and it was necessary that he should know whether they were to be allowed or disallowed before he could go to trial.

He therefore prayed that the case might be postponed, as the interests of the United States could not suffer by the delay, and bailable process had been issued, and justified bail given in the cause.

Mr. Butler said there were some omissions in the affidavit which he should like to supply in writing, and put upon the files of the Court.

In the first place, prior to the 19th of May, he had sent to Mr. Price, at Paris, a copy of his account as settled at the Treasury Department, which contained the amount of the claims against him, and intimating that he had received a small amount due to him, which he had paid to the United States; and also that he was instructed to take certain proceedings which would be unpleasant, and asking his consent to pay any monies which were due to him while District Attorney, to the United States.

On his return to this country, he (Mr. Butler) showed him a transcript he had received from the Treasury Department, with the details of the committee of investigation, which had all been included in the bill of particulars, and which he considered sufficient to enable him to prepare his defence; and he had moreover, on more than one occasion, given every information, as he was desirous of trying the cause at the present term. He was aware that application would be made for a postponement, on the ground of the necessity of going to Washington to ascertain whether or not his claim of offsets would be allowed.

It was certainly not right to force him to trial that morning, but he conceived he might be prepared some time during the present term.

Mr. Prince made some remarks in reply to Mr. Butler, and said he had been most anxious, since his arrival, to proceed to the trial of the cause.

His Honor said he thought the application no unreasonable; it appeared the nature of the accounts would require a long and careful investigation, and it was due to all parties that it should be a full and satisfactory one; and under all the circumstances, taking into consideration the indisposition of Mr. Price, he should put off the trial until the next term of the court.—*Express.*

From the Boston Post of Saturday.

U. S. District Court.

ASSAULT ON AN OFFICER WITH AN AXE, AT SEA.—Four seamen, named Nellums, Cunningham, Tuck and Douglass, were yesterday brought before Judge Davis, for an assault on the mate of the brig Hollander, and endeavoring to create a revolt. Upon the arrival of the Hollander in the harbor the prisoners were taken into custody by Capt. Sturgis, of the revenue cutter Hamilton, who kept them on board until he had completed some official business at Salem. From the testimony of the captain (Charles A. Bennett) and the mate (Alexander H. F. Brown,) it appeared that on the morning of Nov. 22d, on the homeward voyage from Russia, orders were given to reef the foretopsail. Douglass went aloft to the ice yard arm, and Nellums to the weather arm. Douglass let out on the ice, but Nellums did not near a hand and cast the sail adrift at his yard

The mate observed that the cause of his tardiness was having mittens on, and he ordered him to take them off. Nellums said he would'n. take them off. The mate then went aloft to enforce his order, and, with Nellums, got the sail adrift, and in the top.—Again he ordered Nellums to take his mittens off, and again he said he would'nt. The mate then struck him three times with a piece of rope, and ordered him on deck. The wind was blowing fresh. The mate followed Nellums on deck, and reiterated his order to take off his mittens. Nellums again replied as before, and the mate again struck him with a rope.—Nellums then seized an ax, and struck him down by a blow on the hip.

In the next moment, Nellums and Capt. Ranlett came in contact, and the mate seized a hand-spike with the intention of striking Nellums, but did not. Cunningham, who was at the wheel, left it, after Nellums went aft, and said to the mate, "Don't hit that man!" Douglass and Tuck also interfered, by ordering the mate not to hit Nellums. The mate struck Douglass. After Douglass understood the nature of the disturbance, he bent a hand in putting the irons on Nellums. Before Nellums was mastered, Tuck called upon the hands in the forecastle to come on deck.

It did not appear that Douglass meant to offer any resistance to the mate or other officers, and he was discharged, but Nellums, Cunningham, and Tuck, were committed for trial at the next Circuit Court.

AT CINCINNATI.—On the evening of the 28th of November, the packing box manufactory of James Dunlap, in Vine street, between Second and Third streets, and two or three small dwellings adjoining, were destroyed by fire, and shortly afterward several frame buildings in Fifth street, between Ludgate Alley and Walnut street, were likewise burned.—They were occupied as stores—among the rest by Mr. Pedesta, fruiterer, and Mr. Ruffin, dry goods dealer.

PUBLIC INFORMERS.—*New way of making money.*—Mr. Atwill, the music seller, of Broadway, some time since instituted proceedings against certain persons in this city, acting as agents of Ferrett & Arthur of Philadelphia, the cheap music venders, for selling a portion of the music from the opera of the *Bohemian Girl*, as adapted by Atwill, the copyright of which he had secured to himself; and that as a *quid pro quo*, Ferrett & Arthur commenced eleven distinct suits against Atwill, to recover penalties for having, as was alleged, vended some music without having strictly complied with the provisions of the statute regulating copyrights. The statute in question provides that where any persons shall vend music, &c., without having acquired the copyright thereof, he or they shall be subject to a penalty of $100, to be recovered by any person suing, as informer on behalf of the United States and himself. Now these eleven suits were commenced by Ferrett and Arthur, there were, therefore two plaintiffs, and the question was whether such suits could be sustained? To the plaintiff's declaration in each suit demurrers were interposed, on the ground that actions, to recover the penalties in question, could only be brought by *one person*. The question was discussed at the bar with great ability, and Judge Nelson delivered his opinion that the demurrer must be sustained, and awarded judgement in favor of the defendant Atwill, thereby rendering Ferrett & Arthur liable to the cost of the eleven suits. The counsel for the plaintiffs were T. V. Townsend and Samuel Sherwood. For the defendant, M. S. Bidwell, and Samuel Owen.—*Times.*

U. S. Circuit Court.—The Court was engaged Wednesday morning in the trial of the action James Stevens vs. Gladding & Proud. This is a *Qui Tam* suit for the recovery of the penalty under the copy right law, for an alleged violation of the Plff's. copy right of a Map of Rhode Island.

Henry M. Western, Esq., of New York, for Plff. Mr. Staples, of New York, and S. Ames, Esq., of Providence, for Dfts.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA *ex rel.* DR. CLARISSA ZAFIROV,	)	
Plaintiff and Relator,	)	
v.	)	NO. 8:19-cv-01236-KMM-SPF
FLORIDA MEDICAL ASSOCIATES, LLC, d/b/a VIPCARE; PHYSICIAN PARTNERS, LLC; ANION TECHNOLOGIES, LLC; FREEDOM HEALTH, INC.; and OPTIMUM HEALTHCARE, INC.;	)	
Defendants.	)	

DECLARATION OF JENNIFER M. VERKAMP IN SUPPORT OF RELATOR'S SUPPLEMENTAL BRIEFING ON FOUNDING ERA HISTORICAL EVIDENCE REGARDING FEDERAL QUI TAM ENFORCEMENT

I, Jennifer M. Verkamp, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a resident of Ohio and over 18 years old.

2. I am an attorney with Morgan Verkamp, LLC, which represents Relator Dr. Clarissa Zafirov in the above-captioned matter.

3. I make this declaration in support of Relator's Supplemental Briefing on Founding Era Historical Evidence Regarding Federal Qui Tam Enforcement.

4. Attached as Exhibit 1 is a true and correct copy of the law review article cited as Randy Beck, *TransUnion, Vermont Agency and Statutory Damages Under Article III* (August 23, 2023), accepted for publication in Florida Law Review.

5. Attached as Exhibit 2 is a true and correct copy of the law review article cited as Nitisha Baronia et al., *Private Enforcement and Article II* (draft published May 8, 2024).

6. Attached as Exhibit 3 is a true and correct copy of the law review article cited as James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement in a Partisan World*, 92 Fordham L. Rev. 469 (2023).

7. Attached as Exhibit 4 is a true and correct copy of the law review article cited as Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1254 (2018).

8. Attached as Exhibit 5 is a non-exhaustive summary of founding era *qui tam* statutes prepared by counsel, narrowed to uninjured informer cause of actions.

9. Attached as Exhibit 6 is a true and correct copy of an excerpt from 3 James Wilson and Bird Wilson, *The Works of the Honourable James Wilson, L.L.D.* 144 (Philadelphia: Lorenzo Press 1804).

10. Attached as Exhibit 7 is a true and correct copy of a Message from President of the United States John Quincy Adams dated January 26, 1829 regarding *qui tam* recoveries.

11. Attached as Exhibit 8 is a true and correct copy of a Report of the Secretary of the Treasury in Relation to Expenses in the Prosecution of Offences Against the United States dated April 1, 1816, regarding *qui tam* recoveries.

12. Attached as Exhibit 9 is a non-exhaustive list of founding era judicial opinions and other publications, prepared by or at the direction of counsel, which demonstrate the use and enforcement of *qui tam* statutes by uninjured informers.

13. Attached as Exhibit 10 is a true and correct copy of excerpts from Julius Goebel, Jr. and Joseph H. Smith, *The Law Practice of Alexander Hamilton Documents and Commentary Volume II* (New York: William Nelson Cromwell Foundation by Columbia University Press, 1969) and a handwritten legal opinion in the matter captioned *Sherman qui tam v. The Schooner Exchange*, U.S.D.C. New York (1803).

14. Attached as Exhibit 11 is a true and correct copy of handwritten legal opinions from the National Archives in the matters captioned *Samuel Adams qui tam vs. John Edwards*, (September Term 1802) (downloaded from the National Archives at https://catalog.archives.gov/id/6803655) and *Samuel Adams qui tam vs. Thomas Brown* (December Term 1803) (downloaded from the National Archives at https://catalog.archives.gov/id/7290794), reflecting *qui tam* enforcement actions.

15. Attached as Exhibit 12 is a true and correct copy of a Presidential Message Transmitting Opinions of the Attorney General dated September 1, 1838, and James Hadden, *A History of Uniontown: The County Seat of Fayette County,*

Pennsylvania (Uniontown: James Hadden, 1913), regarding the enforcement of 169 *qui tam* actions relating to the imposition of tolls on postal carriers.

16. Attached as Exhibit 13 is a true and correct copy of a newspaper publication regarding the case *Talbot qui tam v. The Ship Amelia*, 4 U.S. 34 (1800).

17. Attached as Exhibit 14 is a true and correct copy of a newspaper publication regarding the case *Clayton et al. v. Stone et al.,* 2 Paine 382 (2d Cir. 1829).

18. Attached as Exhibit 15 is a true and correct copy of a newspaper publication regarding the case *Blunt v. Patten*, 2 Paine 393 (2d Cir. 1828).

19. Attached as Exhibit 16 is a true and correct copy of a newspaper publication regarding the case *Dwight v. Appleton*, 1 N.Y. Legal Obs. 198 (2d Cir. 1840).

20. Attached as Exhibit 17 is a true and correct copy of a newspaper publication regarding the case *Ferrett & Arthur qui tam v. Atwill*, 4 NY Legal Observer 294 (2d Cir. 1846).

21. Attached as Exhibit 18 is a true and correct copy of a newspaper publication regarding the case *Stevens v. Gladding*, 60 U.S. 64 (1856).

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 21st day May 2024.

/s/ Jennifer M. Verkamp
Jennifer M. Verkamp
Counsel for Relator Dr. Clarissa Zafirov