THE PRIVATE RIGHTS MODEL OF *QUI TAM*

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Abstract

Qui tam is a procedural device that has been part of the American legal landscape since well before the founding era. Today, however, *qui tam* is under attack. Scholars and litigants alike have argued that *qui tam* is unconstitutional under Article II and that private plaintiffs who bring *qui tam* suits lack Article III standing. But there is something fundamentally strange about suggesting that this device, which was commonly utilized by the First Congress, is no longer compatible with our modern constitutional doctrines. Something has to give.

Drawing on the traditional public–private rights framework of justiciability, this Article seeks to resolve the tension by arguing that *qui tam* may only be used to assign the federal government's private rights claims and may not be used to assign public rights claims at all. In advancing the private rights model of *qui tam*, this Article hopes to assuage critics' constitutional concerns, bring harmony to this corner of federal courts doctrine, and preserve the vitality of this ancient mechanism for centuries more to come.

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INTRODUCTION

Qui tam is an enforcement mechanism whereby Congress enables a private individual, known as a "relator," to bring a civil action on behalf of the U.S. government in exchange for a share of the proceeds therefrom. These peculiar actions have been around for centuries, but few *qui tam* statutes remain on the books today.

Despite this historical pedigree, scholars and litigants have challenged the constitutionality of *qui tam* for decades. They have argued that relators lack Article III standing, that these statutes violate the Appointments Clause of Article II, and that they interfere with the Executive's duty to "take Care that the Laws be faithfully executed."[1] More recently, at least three Justices of the Supreme Court have expressed interest in (re)considering the constitutionality of the device.[2]

The historical pedigree of *qui tam* is not, on its own, sufficient to overcome genuine constitutional concerns. But the fact that *qui tam* as it is currently understood seems utterly at odds with modern doctrine should give us pause.

Rather than buckle under this constitutional pressure and throw out *qui tam* entirely, this Article advances a middle ground: the private rights model of *qui tam*. Tracking with the traditional public–private rights framework of justiciability, Congress should only use *qui tam* to assign the government's private rights claims to relators and should not assign the government's public rights claims at all. A closer look at critics'

1. U.S. CONST. art. II, § 3.

2. *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring) (agreeing with Justice Thomas that substantial arguments against *qui tam*'s consistency with Article II exist).

concerns with *qui tam* reveals that they ultimately stem from a misguided notion that private relators will be entitled to enforce quintessentially public rights—a power that belongs to the Executive. The private rights model of *qui tam* assuages these concerns by ensuring that *qui tam* relators have an adequate basis to bring claims in federal court and that their litigation does not undermine executive authority.

This Article proceeds as follows. Part I begins by providing a brief history of *qui tam* and continues with a description of the two *qui tam* statutes that remain on the books today. Part II outlines the various constitutional arguments that have been leveled against *qui tam* in scholarship and litigation. Part III is the heart of this Article. It begins with an overview of the public–private rights model of justiciability. It then applies that framework to *qui tam* and explains why the private rights model of *qui tam* resolves the doctrinal inconsistencies. Part IV then applies the private rights model of *qui tam* to contemporary statutes to demonstrate how the model would work in practice, and it concludes by exploring another area of law that might be amenable to *qui tam*.

I. BACKGROUND

A. *The History of* Qui Tam

Much has been written about the long and winding history of *qui tam*, but only a brief retelling is warranted here.[3] As Justice Elena Kagan put it, "[A] *qui tam* action is an unusual creature."[4] It comes from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which dates back to Blackstone and translates to "who pursues this action on our Lord the King's behalf as well as his own."[5]

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3. For an extensive history of *qui tam*, see J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 541, 549–65 (2000); Richard Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 385–91 (2001); James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 703–04 (1993); Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 871–74 (1997); Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–91 (1972); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341–44 (1989).

4. *Polansky*, 599 U.S. at 430.

5. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161 (Edward Christian ed., 13th ed. 1800) [hereinafter 3 BLACKSTONE]; Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

Most historical accounts begin with thirteenth-century common law in England.[6] *Qui tam* originated as a device for would-be litigants to bring their claims in royal court.[7] These venues typically only heard matters pertaining to royal interests, so *qui tam* provided a way for private individuals to get in the door by bringing claims on the Crown's behalf.[8] But when the royal courts extended their jurisdiction beyond royal interests, the common law *qui tam* action was rendered duplicative and gradually fell out of use.[9]

At the same time, however, due in part to the lack of other effective enforcement mechanisms, Parliament began to enact *qui tam* statutes that empowered private individuals to bring cases to redress public wrongs.[10] Thus, under English penal codes, there were three potential classes of litigants: (1) the person harmed by the alleged wrongdoing; (2) the King (a practice that mirrors modern enforcement by government officials); and (3) any other subject (even if she hadn't been injured by the wrongful conduct) via a *qui tam* procedure.[11] Although it depended on the particular statute, a *qui tam* relator often had the choice of bringing her action as either a civil or a criminal case.[12]

The common law version of *qui tam* never caught on across the pond, but statutory *qui tam* was not uncommon in early American history. Many colonies copied *qui tam* statutes exactly from England or adopted them with only minor revisions.[13] At the federal level, the First Congress passed several *qui tam* statutes of its own.[14] The first such federal provision appeared in a 1789 Act that permitted informers to sue if government officials failed to publish "a fair table of the

6. *Stevens*, 529 U.S. at 774 ("*Qui tam* actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf."). *But see* Bales, *supra* note 3, at 385 ("*Qui tam* actions had their genesis in Roman criminal law, which permitted prosecution by private citizens and offered, as a reward for successful prosecution, a portion of the defendant's property.").

7. *See Stevens*, 529 U.S. at 774.

8. *Id.*

9. *Id.* at 775.

10. *The History and Development of Qui Tam*, *supra* note 3, at 86.

11. Beck, *supra* note 3, at 550–51 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160–61).

12. *Id.* at 552.

13. *The History and Development of Qui Tam*, *supra* note 3, at 94.

14. Caminker, *supra* note 3, at 342.

rates of fees, and duties demandable by law."[15] A whole slew of federal *qui tam* provisions soon followed, mostly to regulate economic affairs.[16] Admittedly, there has been some dispute regarding the exact number of *qui tam* provisions passed by the First Congress; some scholars have distinguished those statutes that expressly allowed an uninjured relator to initiate a case from those that merely gave a bounty payment for information about unlawful conduct.[17] Even accepting critics' shrunken headcount, *qui tam* was far from a foreign concept in early American history.[18]

Unfortunately, as could be expected from laws that incentivize litigation for monetary gain, early *qui tam* statutes in England and the United States were subject to abuse.[19] Friends of wrongdoers would collude to bring a *qui tam* suit and then throw the trial, precluding future enforcement actions against the wrongdoer while helping them walk away with very

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15. Beck, *supra* note 3, at 553 n.54 (quoting Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44–45 (repealed 1790)).

16. *Id.* (collecting early *qui tam* provisions).

17. *See* Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 550 (1990) ("Indeed, many of these statutes merely allowed an informer to share in a recovery secured by a government official, or allowed an injured party to sue."); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 728 (2004) ("[C]ritics of standing doctrine have perhaps exaggerated the extent of federal *qui tam* litigation . . . . In fact, the *qui tam* statutes adopted by the First Congress gave rise to little actual litigation, and subsequent Congresses rarely used the device." (footnotes omitted)); William P. Barr, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 OP. O.L.C. 207, 208 (1989). There has also been confusion between *qui tam* statutes and what are known as moiety statutes, which allow the informer to prosecute a forfeiture proceeding in the name of the United States in exchange for half of the proceeds generated by the confiscation of crime-related property. *See* CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 33 n.207 (2021) (explaining that the Court in *Stevens* lumped two then-existing forfeiture moiety statutes in with other *qui tam* statutes); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement In a Partisan World*, 92 FORDHAM L. REV. 469, 476 (2023) (discussing one such moiety statute, which gave private enforcers half of the proceeds from successful forfeiture prosecutions of slave vessels).

18. *See The History and Development of Qui Tam*, *supra* note 3, at 94–95 (explaining that the use of informers in penal laws "was employed in two ways. First, some statutes permitted informers or aggrieved parties to sue *qui tam*. Secondly, other statutes provided rewards to informers without permitting them to sue"); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776–77 (2000) ("Like their English counterparts, some of [the informer statutes passed by the First Congress] provided both a bounty and an express cause of action; others provided a bounty only.").

19. *The History and Development of Qui Tam*, *supra* note 3, at 89.

little or no penalty.[20] Other greedy litigants would dig up old statutes with little to no contemporary relevance merely to exact penalties from unsuspecting defendants.[21]

In light of these problems with "vexatious and collusive" informers, American legislatures employed certain defensive tactics of their own.[22] Relators who lost their cases were required to pay the costs.[23] *Qui tam* statutes integrated short statutes of limitations and stringent venue provisions.[24] And fines were sometimes imposed on relators acting in bad faith.[25] Additionally, American courts (in a distinct break from English practice) restricted *qui tam* to civil actions and refused to permit *qui tam* in criminal actions.[26]

During the nineteenth century, the use of *qui tam* in the United States gradually declined.[27] It does not appear that there was a concerted effort to rid the legal system of *qui tam*.[28] Rather, these provisions were phased out piecemeal as statutes either expired or were revised.[29] At least one scholar has suggested that this trend is best explained by a reduced need for relator enforcement as public agencies became more effective.[30] In other words, *qui tam* provisions were initially useful as a supplement to public law enforcement in the fledgling nation, but were more trouble than they were worth when public enforcement mechanisms became more competent in their own right.[31] Whatever the cause, *qui tam* has largely faded into the background of American practice.

B. Qui Tam *in the Modern Era*

Although the original federal *qui tam* statutes have long since been repealed, two *qui tam* provisions remain on the books today: the False Claims Act (FCA)[32] and the Indian Protection Act (IPA).[33]

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20. *See id.*
21. *See id.*
22. *See id.* at 97.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 99.
27. *Id.*
28. *Id.*
29. *See id.* at 99–100.
30. *See id.* at 101.
31. *See id.* at 101.
32. *See generally* 31 U.S.C. §§ 3729–33 (containing the provisions of the FCA).
33. *See* 25 U.S.C. § 201.

1. The False Claims Act

Of the remaining *qui tam* statutes, the FCA is by far the most relevant. The FCA imposes a monetary penalty on any person who knowingly submits a false claim to the government.[34] It was enacted in 1863 to combat fraud perpetuated against the Union Army by defense contractors during the Civil War.[35] For instance, there were reports of inoperable rifles, spoiled food, and the resale of the same horses to the government over and over again.[36] To combat this deception, the FCA was to be enforced not only by the Department of Justice (DOJ) but also by a *qui tam* provision that would act as a sort of "whistleblower" mechanism.[37] In theory, individuals in the industry would have better access to knowledge than the officers at the DOJ, and these insiders could be incentivized to reveal fraudulent activities with the promise of a percentage of the ultimate recovery.[38] Additionally, Congress suspected that public officials were part of the problem, so it wanted to create an enforcement mechanism that would act independently of any potentially corrupt officers.[39] In particularly poignant remarks from Senator Jacob M. Howard, the sponsor and floor manager of the FCA, he explained his muse for the Act: "[T]he old-fashion[ed] idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."[40]

After the Civil War, FCA cases declined alongside military spending until the New Deal and World War II ushered in the next big boom.[41] But with a new surge in FCA cases came new problems, particularly "parasitic" lawsuits.[42] The problem stemmed from the fact that, in its original form, the FCA did not require the relator to initiate her case based on independent or privately held information.[43] Consequently, potential relators would rush to file *qui tam* actions based on public

34. 31 U.S.C. § 3729(a)(1).
35. Bales, *supra* note 3, at 388.
36. Burke, *supra* note 3, at 871.
37. *See* Blanch, *supra* note 3, at 703.
38. *See id.*
39. Bales, *supra* note 3, at 388–89.
40. DOYLE, *supra* note 17, at 6 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952, 955–56 (1863) (statement of Sen. Howard)).
41. Bales, *supra* note 3, at 389.
42. *Id.*
43. *See id.*

information contained in criminal fraud indictments.[44] In doing so, the relators did not serve Congress's objectives (to expose unknown fraud) but instead frustrated those objectives by taking a portion of a penalty that otherwise would flow entirely to the federal government.[45] As a result of these parasitic suits, Congress amended the FCA in 1943 to prohibit *qui tam* actions based on public information and to reduce the percentage of the award given to a victorious relator.[46]

Predictably, the 1943 amendments essentially eliminated the use of the FCA *qui tam* provision.[47] Since public knowledge could no longer support a *qui tam* suit, insiders fiercely guarded their information to preserve any potential claims they might wish to bring in the future.[48] In short, fraud ran rampant.[49] So, in 1986, Congress amended the FCA again to remove the bar on *qui tam* actions based on public knowledge if the relator was the source of that knowledge.[50] The 1986 amendments also increased the financial incentives for relators, added whistleblower protections, and increased the relator's control over the suit.[51] A few minor amendments have been made to reinforce the 1986 amendments,[52] but the overarching scheme of the FCA remains largely the same.

Today, there are still two ways to enforce the FCA: the Attorney General may bring a civil action,[53] or a private person may bring a civil action "in the name of the Government."[54] There are numerous procedural requirements for the latter category of FCA *qui tam* suits. A relator must file the complaint *in camera* and notify the DOJ; the DOJ then has sixty days to intervene in the case,[55] absent a showing of good cause for

44. Blanch, *supra* note 3, at 704.

45. *Id.*

46. Bales, *supra* note 3, at 389–90.

47. *Id.*

48. Blanch, *supra* note 3, at 705.

49. *See* Bales, *supra* note 3, at 390 (discussing how procurement fraud was "on a steady rise" in the mid-1980s).

50. *See id.* at 390–91.

51. *Id.*

52. The Fraud Enforcement and Recovery Act of 2009 made minor modifications, and Congress tucked a few more modest amendments into both the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. For a summary of these revisions, see DOYLE, *supra* note 17, at 9–10.

53. 31 U.S.C. § 3730(a).

54. § 3730(b)(1).

55. § 3730(b)(2).

extension.[56] If the government chooses to intervene, it conducts the action itself,[57] but the relator retains the right to continue as a party to the action.[58] Among other things, this means that the government cannot dismiss the action without notifying the relator and giving her an opportunity to be heard,[59] and the government may not settle the action without either the relator's consent or a judicial determination that the settlement is "fair, adequate, and reasonable under all the circumstances."[60] When the government chooses to intervene, the relator is still entitled to between fifteen and twenty-five percent of the proceeds from the action.[61] If the government declines to intervene, the relator proceeds with the action herself,[62] but the government may request copies of all filings, and the court may permit the government to intervene later upon a showing of good cause.[63] When the government chooses not to intervene, the relator is entitled to between twenty-five to thirty percent of the proceeds.[64]

2. Other *Qui Tam* Provisions

Besides the FCA, the IPA is the only other current federal statute that contains a *qui tam* provision.[65] Although it dates back to 1834, the IPA does not have nearly as robust a historical record or procedural apparatus as the FCA. Rather, it simply provides that informers may sue "in the name of the United States" and retain fifty percent of the amount awarded for penalties, which shall accrue under Title 28 of the Revised Statutes.[66] These penalties are for acts such as the unlawful purchase of land from an Indian nation or tribe[67] and setting up

56. § 3730(b)(3).
57. § 3730(b)(4)(A).
58. § 3730(c)(1).
59. § 3730(c)(2)(A).
60. § 3730(c)(2)(B).
61. § 3730(d)(1).
62. § 3730(b)(4)(B).
63. § 3730(c)(3).
64. § 3730(d)(2).
65. In *Stevens*, the Supreme Court also identified the Patent Act and another Indian Protection Law as *qui tam* statutes. *See* Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 768 n.1 (2000). This Indian protection statute has since been amended to remove the *qui tam* provision, and the Leahy-Smith America Invests Act repealed the *qui tam* provision in the Patent Act. DOYLE, *supra* note 17, at 4. For a discussion of the former *qui tam* provision in the Patent Act, see *infra* Section IV.B.
66. 25 U.S.C. § 201.
67. § 177.

a distillery in Indian country,[68] to name a few. However, *qui tam* suits are rarely brought under the IPA,[69] rendering this provision effectively nonfunctional.

It is worth noting that, while these may be the only explicit *qui tam* provisions currently on the books, other statutes may be amenable to *qui tam* proceedings. In *United States ex rel. Marcus v. Hess*,[70] the Court stated in dicta that "Statutes 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."[71] On this basis, environmentalists tried to bring a *qui tam* action under the Rivers and Harbors Act, which contains a provision for informer-reward.[72] The Court was quick to reject this approach, however, and it appears likely that most federal courts would similarly decline to follow Justice Hugo Black's dicta from *Hess* if invoked again today.[73]

II. CONSTITUTIONAL CHALLENGES TO *QUI TAM*

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[74] the Supreme Court held that FCA relators have standing under Article III to sue in federal court.[75] Although recognizing that "Art[icle] III judicial power exists only to redress or otherwise to protect against injury *to the*

68. § 251 (repealed 2018).

69. DOYLE, *supra* note 17, at 33.

70. 317 U.S. 537 (1943), *superseded by statute*, Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608.

71. *Id.* at 541 n.4.

72. DOYLE, *supra* note 17, at 4–5.

73. *Id.*; *see* Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 306 (S.D. Tex. 1971) ("Justice Black's dictum would appear to state the law too broadly. The *qui tam* action depends entirely upon statutory authorization, as it has never found its way into the common law. The action arises only upon a statutory grant. The fact that someone is entitled by statute to share in some penalty or forfeiture does not necessarily also give such person the right to bring an original action to recover such penalty or forfeiture. There must be statutory authority, either express or implied, for the informer to bring the *qui tam* action."); *see also* United Seniors Ass'n v. Philip Morris USA, 500 F.3d 19, 23 (1st Cir. 2007) ("There presently is no common law right to bring a *qui tam* action, which is strictly a creature of statute."); James W. Zirkle, Comment, *Standing to Bring Environmental Actions: Qui Tam and the Refuse Act of 1899*, 39 TENN. L. REV. 459, 459–60 (1972) (discussing attempts to bring *qui tam* actions under the Refuse Act of 1899).

74. 529 U.S. 765 (2000).

75. *Id.* at 774.

complaining party,"[76] the Court nevertheless concluded that the FCA effects a partial assignment of the government's claim that suffices to confer standing.[77] This "representational standing," combined with the long history of *qui tam* actions in the common law tradition, "leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing."[78]

Yet, after seeming to resolve the Article III question lingering over *qui tam*, the Court quickly qualified its conclusion in an infamous footnote: "In so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."[79] Thus, just as soon as the Court resolved one constitutional challenge plaguing *qui tam*, it drew eyes to another: Article II.

Consequently, scholars and litigants in FCA cases have challenged the statute's constitutionality under Article II.[80] Although the courts have thus far upheld the *qui tam* provisions of the FCA, it is worth considering the main arguments asserted by *qui tam*'s opponents, particularly following the Court's recent display of interest in the Article II dimensions of *qui tam*.[81] Moreover, the latest developments in the Court's standing jurisprudence cast doubt on the continued vitality of the Court's holding in *Stevens* that *qui tam* relators meet the requirements of Article III standing. Accordingly, the following Sections consider the arguments against the constitutionality of *qui tam*.

A. *Article III*

Despite the Court's decision in *Stevens*, *qui tam* rests uneasily within Article III. Recent developments in standing doctrine reveal the cracks in this status quo.

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76. *Id.* at 771 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

77. *Id.* at 773–74.

78. *Id.* at 773–78.

79. *Id.* at 778 n.8.

80. *See, e.g.*, Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 751 (5th Cir. 2001).

81. *See, e.g.*, United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1742 (2023) (Thomas, J., dissenting) ("In short, there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits."); *id.* at 1737 (Kavanaugh, J., concurring) ("I agree with Justice Thomas that 'There 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.'").

The doctrine of standing exists to "identify those disputes which are appropriately resolved through the judicial process."[82] The current black-letter law of standing has descended from the Court's opinion in *Lujan v. Defenders of Wildlife*,[83] which outlined the three components that make up the "irreducible constitutional minimum" of standing.[84] First, and arguably most important, is the requirement that the plaintiff suffered an "injury in fact," meaning an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical.[85] Second is the requirement of traceability, which requires a causal connection between the injury suffered and the conduct of which the plaintiff complains.[86] Third is "redressability," which requires that it be likely (rather than merely speculative) that a favorable decision will redress the injury.[87]

Often, the key to standing is the first requirement—injury in fact. The Court has 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.[88]

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82. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

83. 504 U.S. 555 (1992).

84. *Id.* at 560.

85. *Id.*

86. *Id.*

87. *Id.* at 561.

88. *Id.* at 573–74. For more examples of the Court's reliance on the injury-in-fact requirement, see generally Fairchild v. Hughes, 258 U.S. 126 (1922) (dismissing a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified); Massachusetts v. Mellon, 262 U.S. 447 (1923) (dismissing a suit challenging the propriety of certain federal expenditures); *Ex parte* Levitt, 302 U.S. 633 (1937) (dismissing a suit contending that Justice Black's appointment to the Court violated the Ineligibility Clause); United States v. Richardson, 418 U.S. 166 (1974) (dismissing a challenge to the government's failure to disclose the Central Intelligence Agency's expenditures); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (dismissing a suit contending that Members of Congress could not hold commissions in the Reserves under the Incompatibility Clause); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (holding that the violation of a right to have the government act in accordance with law is not a judicially cognizable injury).

This rule is grounded in the separation of powers. Deciding on the rights of individuals is the function of the judiciary, but "Vindicating the *public* interest . . . is the function of Congress and the Chief Executive."[89] To permit private plaintiffs to bring claims based on generalized public grievances without individual injury would be "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.'"[90]

At first blush, these requirements seem in tension with *qui tam*. A *qui tam* relator necessarily lacks his or her own injury and instead asserts a claim based on an injury to the United States.[91] That sounds like a "generally available grievance," the relief for which would "no more directly and tangibly benefit[]" the relator than the public at large.[92] Indeed, viewed with a discerning lens, *qui tam* does not look too different from the citizen-suit provision that was deemed inadequate to confer standing in *Lujan*. In either case, Congress essentially attempts to confer on private plaintiffs the right to sue to enforce the proper execution of laws, even if the private plaintiffs lack their own individualized injuries.

Litigants and scholars alike noticed this incongruity,[93] which culminated in the Court's decision in *Stevens* that *qui tam* relators under the FCA have standing to sue in federal court.[94] The Court rejected the theory that relators are simply statutorily designated agents of the United States[95] and the theory that the relators' financial interests in the outcome could suffice to confer standing.[96] Rather, the Court found an adequate basis for relator standing in the doctrine of assignment, which grants the assignee of a claim standing to assert the injury of the assignor.[97] The fact that the United

89. *See Lujan*, 504 U.S. at 576.

90. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

91. *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1727 (2023).

92. *See Lujan*, 504 U.S. at 573–74.

93. *See, e.g.*, Blanch, *supra* note 3, at 703; Barr, *supra* note 17, at 225 ("Under these well-established principles, *qui tam* suits are plainly unconstitutional to the extent they purport to be private actions because the relator has suffered no personal 'injury in fact' as a result of the contractor's alleged fraud.").

94. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000).

95. *Id.* at 772.

96. *Id.* at 772–73.

97. *Id.* at 773.

States suffered an injury in fact was sufficient to confer standing on the relator as a partial assignee of that claim.[98] Notably, the Court relied on the "long tradition of *qui tam* actions in England and the American Colonies" to confirm this conclusion.[99] Some scholars have pushed back on this historically based line of reasoning, arguing that history should not be dispositive of *qui tam*'s constitutionality.[100]

Whatever one thinks of the logic behind *Stevens*, the Court's recent standing decisions cast doubt on its holding. The Court in *TransUnion LLC v. Ramirez*[101] emphasized that an injury must be "concrete" to support standing.[102] Concrete injuries can include obvious tangible harms, such as physical or monetary damage, as well as intangible harms, such as reputational harm or intrusion upon seclusion, so long as there is a close relationship to a harm that was traditionally recognized as a basis for suit in American courts.[103] Importantly, this requirement is not satisfied merely by showing a statutory right; the plaintiff must also assert a concrete injury.[104] In espousing this rule, the Court stated unequivocally that "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[105] Moreover, the Court stated that "[T]he public interest that private entities comply with the law cannot 'be converted into an individual right by a

98. *Id.* at 774.

99. *Id.* This confirmation seems necessary, given the relatively short analysis given with respect to assignee standing. Query whether the history confirmed the Court's reasoning or the Court's reasoning confirmed the history.

100. *See* Blanch, *supra* note 3, at 719 ("First, although the views of the First Congress can be a useful analytical tool to help give meaning to the Constitution, they are by no means immune from Supreme Court scrutiny."); Lee, *supra* note 17, at 549 (arguing that there is no "adverse possession" of constitutionality); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 772 (5th Cir. 2001) (Smith, J., dissenting) ("Long use—even dating back to the earliest Congress—cannot insulate a practice from constitutional challenge . . . ."); Barr, *supra* note 17, at 213 ("[T]he Supreme Court has repeatedly stated that history alone can never validate a practice that is contrary to constitutional principle, even when the practice 'covers our entire national existence and indeed predates it.'") (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)); United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) ("'Standing alone,' however, 'historical patterns cannot justify contemporary violations of constitutional guarantees.'") (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)).

101. 141 S. Ct. 2190 (2021).

102. *Id.* at 2200.

103. *Id.* at 2204.

104. *Id.* at 2205.

105. *Id.*

statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.'"[106] And finally, 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."[107]

Whether these statements were intentionally contradictory or merely negligent dicta,[108] they clearly conflict, on their face, with the assignment theory of relator standing. *Qui tam* provisions allow relators to sue in federal court to redress injuries that are expressly not their own. 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.

B. *Article II*

This brings us to the next source of controversy for *qui tam* provisions: Article II. Opponents of *qui tam* have argued that the mechanism violates both the Appointments Clause and the Take Care Clause of the Constitution. This Section considers both strands of argument in turn.

1. The Appointments Clause

Some have argued that *qui tam* violates the Appointments Clause because it enables relators to litigate claims on behalf of the United States without being formally appointed as "Officers of the United States."[109] It is beyond dispute that relators are not properly appointed as "Officers of the United States" within the meaning of the Appointments Clause, which states that:

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106. *Id.* at 2206 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–77 (1992)).

107. *Id.* at 2207.

108. In *Lujan*, the Court apparently made a point to carve out a space for *qui tam*, but this is noticeably absent in *TransUnion*. *Compare* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572–73 (1992) ("Nor, finally, is it 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."), *with TransUnion*, 141 S. Ct. at 2205 ("Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court.").

109. *See* Blanch, *supra* note 3, at 702, 744; Ara Lovitt, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 860 (1997); Barr, *supra* note 17, at 221.

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.[110]

Rather than adhering to this constitutional procedure, relators essentially appoint themselves when they initiate a *qui tam* suit.

This is problematic, the argument goes, because Supreme Court precedent informs us that only officers are entitled to conduct litigation on behalf of the United States. In *Buckley v. Valeo*,[111] the Court considered whether it was constitutional for the Federal Election Campaign Act to empower congressionally appointed members of the Federal Election Campaign Commission to investigate and prosecute violations of the Act.[112] The Court held that the provisions "vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violate the Appointments Clause, because "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of that [Clause]."[113] Because relators are not appointed "Officers," it follows that it is unconstitutional for them to conduct litigation on behalf of the United States.[114] This evidence led Justice Clarence Thomas to conclude that "Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation."[115]

One counterargument raised by *qui tam*'s supporters is that the *Buckley* rule should only apply in situations where

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110. U.S. CONST. art. II, § 2, cl. 2.

111. 424 U.S. 1 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81–116, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

112. *Id.* at 140–41.

113. *Id.*; *see also* Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 768 (Smith, J., dissenting) ("The Court has twice held, first in *Buckley* . . . and then in *Morrison* . . . that persons litigating on behalf of the United States are officers of the United States."); Barr, *supra* note 17, at 221.

114. Barr, *supra* note 17, at 221–22; *see* Blanch, *supra* note 3, at 738.

115. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting); *see also Riley*, 252 F.3d at 769 (Smith, J., dissenting) ("No matter how one describes what the relator does, the fact remains that he sues under the laws of the United States, based on claims owned by the United States and to vindicate public injury.").

Congress aggrandizes its own power by encroaching on that of the Executive.[116] So even if *qui tam* infringes on executive power, it might be permissible because Congress is not arrogating power for itself, but allocating that power among private relators.[117] However, this argument was rejected (albeit not directly) in *Freytag v. Commissioner of Internal Revenue*.[118] Although recognizing that the Court's separation of powers jurisprudence has generally focused on the danger of self-aggrandizement, the Court stated that "The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."[119] Moreover, the Appointments Clause "prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint."[120] In other words, the Appointments Clause was intended not only to prevent Congress from self-aggrandizing executive power, but also to prevent the wide dispersion of executive power. It "is hard to imagine a wider diffusion of the appointment power" than *qui tam*. [121]

Others have pushed back on the Appointments Clause challenge by arguing that relators are "agents" rather than "officers." In *Auffmordt v. Hedden*,[122] the Court held that a merchant appraiser was not an "officer" within the meaning of the Clause because his position was "without tenure, duration, continuing emolument, or continuous duties," and he acted "only occasionally and temporarily."[123] Although this description accurately describes a *qui tam* relator, critics argue it is irrelevant.[124] The distinction between agents and officers would only make a difference in the analysis if agents had the same authority to litigate in the name of the United States as

116. *See* Blanch, *supra* note 3, at 739–40; *see also* United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989); United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989).

117. *Stillwell*, 714 F. Supp. at 1094.

118. 501 U.S. 868 (1991).

119. *Id.* at 878.

120. *Id.* at 885.

121. Blanch, *supra* note 3, at 742.

122. 137 U.S. 310 (1890).

123. *Id.* at 327; *see also* United States v. Germaine, 99 U.S. 508, 511–12 (1878) (holding that an individual whose duties were "occasional" and "intermittent" was not an "officer").

124. *See* Blanch, *supra* note 3, at 744.

officers, which they do not.[125] And, even if agents were permitted to litigate on behalf of the United States, it is not clear that relators are actually agents, given that there is no established fiduciary relationship between them and their alleged principal (the United States).[126]

Despite these challenges, several courts of appeals have upheld the constitutionality of the *qui tam* provisions in the FCA against Appointments Clause challenges.[127] These courts have essentially ignored the *Buckley* line of argument and have circumvented the requirements of the Appointments Clause by finding that relators are not "Officers of the United States," given that they lack a continuing and formalized relationship of employment.[128] Thus, these courts have found no Appointments Clause problem because *qui tam* relators under the FCA do not require constitutional appointment at all.

2. The Take Care Clause

In addition to arguments under the Appointments Clause, opponents of *qui tam* have argued that it violates separation of powers principles, specifically the Take Care Clause of Article II. This Clause states that the President "shall take Care that the Laws be faithfully executed,"[129] and it is generally understood to give the executive branch the power to enforce the laws of the United States.[130] Opponents have articulated several grievances against *qui tam* related to the Take Care Clause. It has been argued that *qui tam* undermines this core executive power by taking enforcement power away from the executive branch and placing it in the hands of relators.[131] Likewise, it has been said that *qui tam* diminishes political

125. *Id.*

126. *Id.* at 745–46.

127. *See* Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 758 (5th Cir. 2001); United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 815 (10th Cir. 2002), *modified*, 92 Fed. Appx. 708, *rev'd on other grounds*, 549 U.S. 457; United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 760 (9th Cir. 1993); United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994).

128. *Riley*, 252 F.3d at 757–58 ("Supreme Court precedent has established that the constitutional definition of an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government. . . . There is no such relationship with regard to *qui tam* relators, and they therefore are not subject to either the benefits or the requirements associated with offices of the United States."); *Stone*, 282 F.3d at 805 ("We are not persuaded that *Buckley* suggests that we should find an Appointments Clause violation here.").

129. U.S. CONST. art. II, § 3.

130. *See* Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).

131. Blanch, *supra* note 3, at 750.

accountability by enabling unelected relators to bring enforcement actions that otherwise would be brought by politically accountable actors within the executive branch.[132] Finally, it has been argued that the *qui tam* provisions in the FCA give the Executive insufficient control over the relator in the course of litigation.[133]

The concept of "control" is critical to this analysis. The Supreme Court has not articulated a single test with which to evaluate congressional actions that are alleged to have violated the separation of powers or the Take Care Clause. The closest applicable test comes from *Morrison v. Olson*,[134] in which the Court held that when congressional actions potentially undermine the Executive's litigative function, the pertinent question is whether the executive branch retains sufficient control over the litigation "to ensure that the President is able to perform his constitutionally assigned duties."[135] The specific amount of control necessary to thwart a constitutional challenge is often a murky and fact-laden inquiry. Opponents have focused on two main problems here: the initiation of a *qui tam* suit and the conduct of the litigation.

First, opponents have argued that prosecutorial discretion is an essential aspect of executive authority that cannot be divested.[136] Indeed, the Supreme Court stated in *Heckler v. Cheney*[137] that "[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch . . . ."[138] In a memorandum, then-Attorney General William Barr explained the consequences of losing all prosecutorial discretion to initiate suit in FCA cases.[139] In particular, he expressed concern with "alerting targets of criminal investigations; sometimes resulting in disclosure of key information in our possession, including our litigating positions; and sometimes complicating attempts to prepare a comprehensive plea arrangement and

132. *Riley*, 252 F.3d at 761 (Smith, J., dissenting).

133. *Id.*

134. 487 U.S. 654 (1988).

135. *Id.* at 696.

136. *See* Blanch, *supra* note 3, at 756 ("[A]n important part of the Executive Branch's authority lies in its prosecutorial discretion."); Lovitt, *supra* note 109, at 868 ("[T]he Court has never held that Congress may divest the Executive of the power *to initiate* a lawsuit to vindicate the United States' interests.").

137. 470 U.S. 821 (1985).

138. *Id.* at 832.

139. *See* Barr, *supra* note 17, at 216–20.

civil settlement."[140] He also pointed out that initiation by relators can cut off the ability of the Executive to take advantage of more informal avenues of redress where she deems it appropriate.[141] Thus, by allowing relators to usurp the executive power to initiate suit, *qui tam* deprives the Executive of an essential mechanism by which that Branch controls litigation and, in doing so, interferes with the Executive's ability to carry out its constitutionally assigned duties.

Second, opponents have expressed concerns about the lack of control retained by the Executive after a *qui tam* case has been initiated. In the specific context of the FCA, if the DOJ chooses to intervene in a case, the relator retains the right to participate and often does so in ways that are adverse to the government's interests.[142] But if the DOJ chooses not to intervene, it nevertheless must expend resources to monitor the case (even if it would have never initiated the case in the first place).[143] Additionally, should the DOJ wish to settle the case, it must get approval from the relator, and the court must determine that the settlement is "fair, adequate and just."[144] This lack of control led Judge Jerry Smith to opine that:

> The FCA's most severe violations of the separation of powers principles embedded in the Take Care Clause include the fact that unaccountable, self-interested relators are put in charge of vindicating government rights, and that the transparency and controls of the constitutional system are not in place to influence the outcome of such litigation.[145]

However, as with the Appointments Clause, the courts of appeals to consider these kinds of challenges to the FCA's *qui tam* provisions have universally held that the provisions do not interfere with the President's ability to "take Care that the

140. *Id.* at 217.

141. *Id.*

142. *Id.* at 218; *see, e.g.*, United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1724 (2023) (explaining how the relator in the case insisted on proceeding, even though the government had concluded that "the varied burdens of the suit outweighed its potential value").

143. Barr, *supra* note 17, at 218.

144. *See id.* at 219; 31 U.S.C. § 3730(c)(2)(B) (requiring settlements be "fair, adequate, and reasonable under all the circumstances").

145. Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 766 (5th Cir. 2001) (Smith, J., dissenting).

Laws be faithfully executed."[146] Notably, these courts have found that the Take Care Clause does not require that litigation by the Executive be the *exclusive* means of enforcing federal law.[147] And even so, they have concluded that the Executive retains sufficient control over litigation initiated by *qui tam* relators under the FCA.[148] By way of example, the Fifth Circuit distinguished the Court's decision in *Morrison* because FCA claims are civil, rather than criminal, and because relators bring suit *in the name* of the United States, rather than *as* the United States itself.[149] The court thus found that "Any intrusion by the *qui tam* relator in the Executive's Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which *qui tam* suits are pursued."[150]

These constitutional challenges are particularly pertinent following the Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc*.[151] There, Justice Thomas expressed genuine doubt as to *qui tam*'s survival under Article II scrutiny,[152] and Justices Brett Kavanaugh and Amy Coney Barrett expressed interest in considering "the competing arguments on the Article II issue in an appropriate case."[153] Now, more than ever, the Court needs a viable solution to the *qui tam* problem. Fortunately, the private rights model of *qui tam* provides just that.

III. THE PRIVATE RIGHTS SOLUTION

One common theme in the literature against *qui tam* is a sort of slippery-slope argument: if *qui tam* is constitutional, then Congress could "*qui tam*" everything.[154] Put differently, there would be nothing stopping Congress from attaching a *qui tam*

146. *See, e.g.*, *id.* at 753 (quoting U.S. CONST. art. 2, § 3, cl. 6); United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787, 806 (10th Cir. 2002), *modified*, 92 Fed. Appx. 708, *rev'd on other grounds*, 549 U.S. 457; United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 757 (9th Cir. 1993) (holding "that the *qui tam* provisions of the FCA do not 'impermissibly interfere' with the President's exercise of his constitutionally assigned duties"); United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994).

147. *E.g.*, *Riley*, 252 F.3d at 753.

148. *Id.*

149. *Id.* at 755.

150. *Id.* at 757 (emphasis added).

151. 143 S. Ct. 1720 (2023).

152. *Id.* at 1742 (Thomas, J., dissenting).

153. *Id.* at 1737 (Kavanaugh, J., concurring).

154. *See* Lee, *supra* note 17, at 569–70; Barr, *supra* note 17, at 210–11.

provision to every federal statute, creating universal standing for every violation of federal law and eviscerating the Executive's civil law enforcement authority.[155] As William Barr wrote in his memorandum opposing the constitutionality of *qui tam*, "Once the facial constitutionality of the device is conceded, there is no principled basis for limiting its future use."[156]

Fortunately, there is a principled limit on the use of *qui tam*. Congress may only constitutionally assign the government's private rights injuries to *qui tam* relators and may not assign public rights injuries at all.[157] This private rights model of *qui tam* derives from the long-forgotten and recently revived public–private rights framework for justiciability.[158] Grafting a version of this framework onto *qui tam* would bring harmony to Article III, relieve the biggest pressure from Article II, and leave us with a coherent theory with which to "*qui tam*" other federal statutes. Importantly, however, it does not allow Congress to "*qui tam* everything."

This Part begins by defining public and private rights. Then it explains the traditional public–private rights model of justiciability. Finally, it applies that theory to *qui tam* and explains why this model alleviates many of the constitutional concerns.

A. *Public and Private Rights, Defined*

The law has historically distinguished between public and private rights.[159] The concept of dividing rights and wrongs into

155. *See* Lee, *supra* note 17, at 569–70; Barr, *supra* note 17, at 210–11.

156. Barr, *supra* note 17, at 211.

157. *See* Spokeo v. Robins, 578 U.S. 330, 348 (2016) (Thomas, J., concurring).

158. Justice Thomas has been a consistent advocate of this approach. *See id.*; TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2216–17 (2021) (Thomas, J., dissenting).

159. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279 (2008). The public–private rights distinction is often discussed in the administrative law context as a tool for understanding when quasi-judicial tribunals are permitted to adjudicate a dispute. The general rule is that public rights disputes can be delegated to legislative courts or administrative agencies but private rights disputes cannot because they "lie at the core of the historically recognized judicial power." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 1334(a)–(b), *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 670 (2015). The Court has not always been clear or consistent when defining public and private rights in this space. The Court has said that public rights disputes are those that arise between the government and others, while private rights disputes are those that arise between

"private" and "public" speciation can be traced at least to Blackstone's Commentaries.[160]

Private wrongs consist of "an infringement or privation of the private or civil rights belonging to individuals, considered as individuals."[161] Private rights include things like "an individual's common law rights in property and bodily integrity, as well as in enforcing contracts."[162] They are typically remedied by individual compensation or injunctive relief.[163]

Public wrongs, by contrast, are "a breach and violation of public rights and duties, which affect the whole community, considered as a community."[164] Public rights belong to the body politic and include interests shared with the people at large, such as "free navigation of waterways, passage on public highways, and general compliance with regulatory law."[165] Violations of public rights are typically defined by penal law, including criminal law, as well as civil fines and forfeitures.[166]

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one individual and another. *N. Pipeline Constr. Co.*, 458 U.S. at 69–70. The Court has alternatively found private rights to be synonymous with common law rights. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986). Most recently, the Court has said that public rights are those that derive from a federal regulatory scheme, or whose resolution is essential to a limited regulatory objective, while private rights derive from state common law and do not depend on the will of Congress. Stern v. Marshall, 564 U.S. 462, 490, 493 (2011). There is certainly some overlap between this debate in administrative law and the distinction discussed in this Section, but I would caution against reading them as equivalent. The dialogue in administrative law cases is seeking to answer a fundamentally different question—when legislative courts can hear a case—from the question I am seeking to address here—how judicial power differs depending on the type of case before an Article III court.

160. *See* 3 BLACKSTONE, *supra* note 5, at 2.

161. *Id.*; 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (16th ed. 1825) [hereinafter 4 BLACKSTONE].

162. Woolhandler & Nelson, *supra* note 17, at 693; *see also* Hessick, *supra* note 159, at 280 ("Blackstone explained that private rights included the 'absolute' rights of personal security, life, liberty, and property, as well as 'relative' rights which individuals acquired as 'members of society, and standing in various relations to each other.'").

163. Woolhandler & Nelson, *supra* note 17, at 693.

164. 3 BLACKSTONE, *supra* note 5, at 2. *see also* 4 BLACKSTONE, *supra* note 161, at 5. ("[P]ublic wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it[s] social aggregate capacity.").

165. Woolhandler & Nelson, *supra* note 17, at 693; *see also* Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829); *see also* Hessick, *supra* note 159, at 279–80 ("[Public rights] include the right to navigate the public waters of the state and to fish therein, to use the public highways, and to be free from violations of the criminal laws.").

166. Woolhandler & Nelson, *supra* note 17, at 693.

Legislatures have the power to mold the boundaries of these categories by creating new rights and redefining old ones.[167] For example, "Legislatures may add to public law by enacting new regulatory and criminal statutes," and they may "create statutory duties or 'entitlements' owed to private persons . . . ."[168]

B. *The Public–Private Rights Framework of Justiciability*

Under modern Article III jurisprudence, these public and private categories have been forgotten in favor of the tripartite test for standing famously articulated in *Lujan*.[169] But the familiar three-part formulation has not always been the test for justiciability. Historically, the type of wrong being litigated—private or public—determined whether a federal court had the power to hear a case.[170] Generally speaking, for a private litigant to enforce a private right, she only had to show *injuria* (a legal injury), but to enforce a public right, she also had to show *damnum* (factual injury).[171] The general contours of the theory are as follows.

Federal courts traditionally had the power to adjudicate claims based on the alleged violation of a private right, regardless of whether the plaintiff suffered actual injury. The invasion of the plaintiff's private right was, in and of itself, sufficient to establish a justiciable injury because she suffered an injury in law, even if not in fact.[172] This remained true whether the private right derived from the common law or from a statute.[173] For a common law example, consider trespass. The right to exclude others from one's property is a quintessential

167. *Id.* at 694.

168. *Id.*

169. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

170. Woolhandler & Nelson, *supra* note 17, at 714–16. For a general discussion of this theory of standing, see generally *id.* and Hessick, *supra* note 159. For practical applications of this theory, see *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–54 (2016) (Thomas, J., concurring) and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2216–25 (2021) (Thomas, J., dissenting). *But see* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (critiquing the modern injury-in-fact requirement and suggesting that Congress may not empower "private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large").

171. *TransUnion*, 141 S. Ct. at 2217 (Thomas, J. dissenting) (quoting *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring)).

172. Hessick, *supra* note 159, at 279.

173. *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

private right at the core of one's property interests.[174] Thus, if someone steps foot on your property uninvited, that act alone should be sufficient to establish a justiciable injury, even if your land is not literally damaged.[175] For a statutory example, consider intellectual property. If someone infringes upon a valid copyright, the copyright-holder has the right to sue the infringer in federal court, even if the copyright-holder has not suffered any economic loss as a result of the infringement.[176] Similarly, a patent-holder may bring a case in federal court against someone who illegally copies his patented machine, even if the copy never leaves the infringer's workshop.[177] It does not matter that there is no factual injury to the rights-holder in these cases because Congress created a private right for copyright- and patent-holders to exercise a limited monopoly over their original works; the infringement of that private right alone creates a legal injury. As Justice Joseph Story wrote: "Every violation of a right imports some damage."[178]

More was required, however, for private plaintiffs to sue in federal court for violations of public rights. To bring this kind of claim, an individual had to show that she suffered some kind of specialized injury from the public right violation over and above the harm suffered by the whole community.[179] That is, a plaintiff seeking to enforce a public right had to show both *injuria* and *damnum*.[180] Consider the law of public nuisance, for example. An individual who claimed no particular harm from such a nuisance beyond that to the common interests of the community could not maintain a suit.[181] But, if the nuisance caused the individual to suffer "special damage," then she could maintain a suit against the person responsible for the public nuisance.[182] The same was true of mandamus, a writ which permits citizens to bring suit against officers for breaching public duties.[183] Justice of the Supreme Judicial Court of Massachusetts Lemuel Shaw wrote that:

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174. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

175. Hessick, *supra* note 159, at 281.

176. *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

177. *Id.*

178. Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (Story, Circuit Justice, C.C.D. Mass. 1813).

179. Woolhandler & Nelson, *supra* note 17, at 701–02.

180. *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

181. Woolhandler & Nelson, *supra* note 17, at 702.

182. *Id.* (quoting Commonwealth v. Webb, 27 Va. 726, 729 (Gen. Ct. 1828)).

183. *See id.* at 709–10.

> A private individual can apply for a writ of mandamus only in a case where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers exclusively to apply, where public rights are to be subserved.[184]

As Justice Shaw's quote indicates, the different treatment of individuals bringing civil suits for public and private rights violations can be explained by the fact that the government has historically been regarded as the proper party to enforce public rights. Indeed, scholars have noted "the ubiquity of . . . public control over public rights and private control over private rights" in the early federal court system.[185] Furthermore, the Court has stated that "a plaintiff customarily alleges violations of private rights," whereas public rights are "enforced by the government through its criminal laws and otherwise."[186]

The fact that the government has been entrusted to vindicate public wrongs—particularly crimes and misdemeanors—is a consequence of its sovereign status. The government exists "to promote the interest of all . . . and to prevent the wrongdoing of one resulting in injury to the general welfare."[187] That sovereign interest suffices to give the United States standing in federal court whenever federal laws are violated.[188] And this special status goes hand-in-hand with the Constitution's command that the President "take Care that the Laws be faithfully executed."[189] Hence, the government has the privilege of litigating public rights without showing the

184. *Id.* at 709 (quoting *In re* Wellington, 33 Mass. (16 Pick.) 87, 105 (1834)).

185. *Id.* at 694.

186. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997).

187. *In re* Debs, 158 U.S. 564, 584 (1895); *see also id.* at 586 ("[W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.").

188. *See id.* at 584, 586; *see also* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000) ("It is beyond doubt that the complaint asserts an injury to the United States . . .[, an] injury to its sovereignty arising from violation of its laws . . . ."); District of Columbia v. ExxonMobil Oil Corp., 172 A.3d 412, 424 (D.C. 2017) (agreeing with the District's argument that "governmental entities have a concrete stake in the proper application of the laws of their jurisdiction, giving them a sufficient basis for Article III standing in *parens patriae* cases").

189. U.S. CONST. art. II, § 3.

individualized injury required of private parties who seek to enforce the same.

Although conceptually divisible, public and private wrongs are not necessarily mutually exclusive; the same underlying act can give rise to both kinds of claims. A simple hypothetical illustrates this point: Suppose *A* shoots *B*. *B* has suffered a private wrong insofar as *A* wrongfully violated *B*'s bodily integrity, giving *B* the right to bring a civil action against *A*. At the same time, the public has suffered a public wrong insofar as the law has been violated, and the sovereign could accordingly be expected to bring a criminal action against *A* for his illegal act.

The common law recognized this insight that the law has a "double view."[190] Blackstone explained that "Where an act is both a tort and a crime, the wrongdoer is liable both to a civil action by the person he has particularly injured and to a criminal proceeding by the state. The two proceedings are distinct, and neither is a bar to the other."[191] Similarly, in a case of public nuisance, Blackstone said that the wrongful act was punishable as a common offense against the community, but "if any individual sustains any special damage thereby . . . the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong."[192] John Locke recognized this too, asserting that crimes against the law of nature gave rise to "two distinct rights"—the right of "punishing the crime" (the public remedy) and the right of "taking reparation" for the individual harmed by the crime (the private remedy).[193] Finally, the Court has itself remarked that "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution."[194]

Although the Court has drifted away from this model of justiciability both substantively and linguistically, elements of the original framework nevertheless persist in today's standing doctrine. Much like the public–private rights model, modern standing cases continue to reaffirm that a plaintiff must have

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190. 4 BLACKSTONE, *supra* note 161, at 7 ("Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redress the party injured by either restoring to him his right . . . but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquility of the whole.").

191. *Id.* at 6 n.12.

192. *Id.* at 6–7.

193. Woolhandler & Nelson, *supra* note 17, at 696.

194. *In re* Debs, 158 U.S. 564, 594 (1895).

some kind of individualized interest to sue in federal court based on a "generalized grievance."[195] Indeed, many of the passages from *Lujan* could just as well describe the public–private rights model as they do the current tripartite test.[196]

Not until *TransUnion* did the Court take a fatal step away from this original framework by requiring plaintiffs litigating private rights to show factual, as well as legal, injury.[197] But even still, there is evidence of continuity. To illustrate his new rule, Justice Kavanaugh set out a hypothetical: Assume a factory has violated a federal environmental law by polluting in Maine.[198] He concluded that a Maine citizen whose land was polluted would have standing because she has a concrete injury, but a Hawaii citizen who alleges nothing more than the violation of the law would not have standing because she "has not suffered any physical, monetary, or cognizable intangible harm."[199] When reframed within the public–private rights framework, this is totally consistent; compliance with regulatory law is a classic public right, so only a citizen with factual injury on top of the legal injury can sue in federal court. Otherwise, compliance should be left to executive enforcement.

C. *The Private Rights Model of* Qui Tam

Critics suggest that *qui tam* refutes this historical account of justiciability; if private individuals cannot litigate on behalf of the public (absent an individual injury), then how does one explain *qui tam*?[200] The answer is simple: The government may only assign its private rights claims and may not assign public rights claims at all.

First, it is critical to recognize that not everything the government does is of a sovereign character. That is to say that the United States has private interests just like anybody else: "Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding

195. Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992).

196. *See id.* at 576 ("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.").

197. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

198. *Id.* at 2205.

199. *Id.*

200. *See* Woolhandler & Nelson, *supra* note 17, at 725.

property . . . ."[201] In *United States ex rel. Marcus v. Hess*, the Court drew a distinction between actions "brought primarily to protect the government from financial loss" and actions "intended to authorize criminal punishment to vindicate public justice."[202] The Court condemned any attempts to conflate the two: "The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic."[203] In other words, the United States suffers private wrongs in its capacity as a polity—its metaphorical physical body—that are distinct from the public wrongs it suffers as a sovereign.

Concomitant with the capacity to suffer private wrongs, the United States may seek relief for those wrongs just like you or I could. Accordingly, the United States "may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws."[204] In *Dugan v. United States*,[205] for example, the Court explained that "In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name . . . ."[206] And, in adjudicating a trespass action, the Court held in *Cotton v. United States*[207] that "As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have."[208] As the *Dugan* Court explained, "It would be strange to deny [the United States] a right which is secured to every citizen of the United States"—that is, the right to bring a claim based on a private wrong.[209]

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201. Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850). The same has been said of the States: "First, like other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court." Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.* Barez, 458 U.S. 592, 601–02 (1982).

202. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548–49 (1943), *superseded by statute*, Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608.

203. *Id.* at 550 (quoting Cotton v. United States, 52 U.S. (11 How.) at 229, 231 (1850)).

204. *Cotton*, 52 U.S. (11 How.) at 231.

205. 16 U.S. (3 Wheat.) 172 (1818).

206. *Id.* at 181.

207. 52 U.S. (11 How.) 229 (1850).

208. *Id.* at 231.

209. *Dugan*, 16 U.S. (3 Wheat.) at 181.

Second, it is well settled that certain kinds of legal claims can be assigned to third parties. In *Sprint Communications Co. v. APCC Services, Inc.*,[210] the Court held that an assignee of a legal claim for money has standing to pursue that claim in federal court.[211] The Court grounded its decision in historical practice: Section 11 of the Judiciary Act of 1789 authorized federal courts to hear suits by assignees so long as the assignor would have federal jurisdiction if she brought the suit herself.[212] Admittedly, not every claim is assignable. The traditional rule is that only claims that would survive the death of the assignor can be assigned.[213] Thus, "personal" claims, such as "child custody, personal injury, marital, or false imprisonment claims," cannot be assigned.[214] But claims vindicating traditional proprietary interests, such as those arising in contract, tort, property, and fraud, are assignable.[215] And, of course, the Court in *Stevens* found standing for *qui tam* relators through the doctrine of assignment.[216]

Thus, Congress may assign the federal government's private rights claims to *qui tam* relators because, when litigating its private injuries, the United States is essentially acting like any other private party, and private parties can assign such claims. "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, [the United States] were not entitled to the same remedies for their protection."[217] So, when the government seeks to vindicate those proprietary interests that resemble traditional private rights, it follows that it must be able to assign those claims just like anyone else.

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210. 554 U.S. 269 (2008).

211. *Id.* at 271.

212. *Id.* at 275, 278 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79).

213. Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 342–43 (2001).

214. *Id.* at 343.

215. *Id.*; *see also* 4 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 1275 (Spencer Symons ed., 5th ed. 1941) (assignable claims include "all claims arising from contract[s] express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished, or damaged").

216. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) ("We believe, however, 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.").

217. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 550 (1943), *superseded by statute*, Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608 (quoting Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850)).

Other scholars have suggested a similar framework for *qui tam*. Before his time on the bench, former Utah Supreme Court Justice Thomas Lee articulated this insight in a comment in the *Chicago Law Review* in 1990.[218] He recognized that "[t]aken to its logical extreme, the power to assign may indeed swallow Article III standing," because Congress could assign its right of action any time the government has the right to sue, which, as discussed above, is basically always.[219] "If this is allowed," wrote Lee, "Congress holds all of the keys to standing . . . . All Congress has to do to create standing for individuals is to create a right of action for the government and then 'assign' it by tacking on a *qui tam* provision."[220] Thus, Lee argued that "assignment must be allowed only where the government's suit would satisfy the distinctive injury requirement of Article III" and should not be allowed when the government's right of action falls into its "special status" category.[221]

Similarly, Professor Myriam Gilles argued that the government may only assign claims that seek to vindicate proprietary injuries.[222] She used the traditional principles of assignment as her starting point, arguing from the uncontroversial position that "personal claims" have never been assignable, but that claims vindicating "proprietary interests" have always been assignable.[223] She then applies these assignment principles to *qui tam* to argue that the government cannot assign "sovereign interests" such as "injury . . . arising from violation of . . . laws," because such injuries are "personal" to the government.[224] However, the government may assign proprietary injuries because "[s]uch claims look to compensate the government for the loss it directly suffers in its capacity as a proprietor, as the keeper of the public fisc and the owner of public property."[225] She finds that the principles underlying the separation of powers confirm her insight because an enactment which would authorize a private relator to exercise powers exclusively reserved to the Executive would undermine the executive branch's authority.[226] In short, "[t]he government's 'sovereign' interest in the enforcement of the federal laws is at

218. Lee, *supra* note 17, at 569–70.
219. *Id.* at 569.
220. *Id.*
221. *Id.* at 570.
222. Gilles, *supra* note 213, at 342.
223. *Id.* at 342–43.
224. *Id.* at 344.
225. *Id.*
226. *Id.*

the very heart of the Take Care Clause," but there is no "constitutional mandate that the government 'take care' to maximize its proprietary interests."[227]

While Lee and Gilles's intuitions are undoubtedly correct, the public–private rights framework is a better place to ground this doctrine. After all, assignment is merely a subset of our broader Article III jurisprudence. If we look back to the first principles of standing, the traditional understanding of public and private rights is a natural fit for *qui tam*, and it achieves the same results while better harmonizing with the original understanding of judicial power.

Upon closer inspection, critics' concerns about the constitutionality of *qui tam* flow from an assumption that the government will assign public rights claims to private relators. In his memo opposing *qui tam* as unconstitutional, William Barr wrote that "Through *qui tam*, Congress has attempted to create universal standing to prosecute purely *public offenses*."[228] In *TransUnion*, the "expansive understanding" of Article III that the Court was concerned about involved converting the "*public* interest" in regulatory compliance "into an individual right by a statute that denominates it as such."[229] The language in *Buckley* that purportedly dooms *qui tam* says that only Officers may conduct litigation in federal court "for vindicating *public rights*."[230] And Judge Jerry E. Smith on the Fifth Circuit decried that the "most severe" violations of the Take Care Clause included the fact that relators would be "put in charge of vindicating *government rights*."[231] But if these troublesome public rights claims are off the menu, then the arguments against *qui tam* lose a lot of their force.

There are substantially fewer constitutional concerns with a model of *qui tam* that only permits the assignment of private rights injuries. Beginning with the Appointments Clause, the principal challenge to *qui tam* stems from the language in *Buckley* that cabined the authority to conduct litigation for "vindicating public rights" to "Officers of the United States."[232] But if *qui tam* relators are limited to vindicating *private* rights

227. *Id.* at 344–45.

228. Barr, *supra* note 17, at 208 (emphasis added).

229. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2206 (2021) (emphasis added).

230. Buckley v. Valeo, 424 U.S. 1, 140 (1976) (emphasis added), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81–116, *as recognized in* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

231. Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 766 (5th Cir. 2001) (Smith, J., dissenting) (emphasis added).

232. *Buckley*, 424 U.S. at 140.

on behalf of the United States, then their status as non-officers is irrelevant.

Similarly, the Take Care Clause concerns with *qui tam* stem from a fear that Congress might use *qui tam* to create an army of private relators that would usurp the core executive function of ensuring compliance with federal law. As discussed above, the Take Care Clause enables the Executive to bring claims in federal court to enforce federal laws without specialized injury solely by virtue of the government's special sovereign status.[233] Critics are correct to argue that Congress cannot constitutionally assign that power away. However, if a relator is tasked not with pursuing a *public* injury sustained from the violation of the law, but with pursuing a claim based on a *private* injury sustained by the government in its personal capacity, then this core executive power is not implicated. In this scenario, the relator is dealing with the government as proprietor, rather than the government as sovereign. One may still quibble about the degree of prosecutorial discretion and/or control retained by the Executive over the suit, but it is not at all clear that this should be treated any different from ordinary assignment.[234] And, at any rate, the degree of specific control mechanisms in any particular *qui tam* statute is a fact-laden inquiry that is beyond the scope of this Article. Suffice it to say that, provided at least some oversight mechanisms exist, no Take Care Clause violation occurs where the government assigns its private rights claims to *qui tam* relators.

As for Article III, private plaintiffs have always lacked standing to enforce public rights violations without individualized injury.[235] Thus, a *qui tam* assignment of a public rights claim to a private relator would be outside the scope of Article III. Just as Congress cannot pass a citizen-suit provision that enables anyone to sue any time the law is violated,[236] Congress cannot attach a *qui tam* provision to any statute to create universal standing for every violation of the law. As with assignment generally, if the United States has standing to bring a private rights claim, then its assignee has standing too.

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233. *See supra* notes 188–89 and accompanying text.

234. *See infra* Section IV.A.

235. *See supra* note 88 and accompanying text.

236. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (holding that the undifferentiated public interest in proper administration of and compliance with the law cannot be converted by Congress into an individual right that serves as a basis for a citizen suit).

What about the rest of the dicta in *TransUnion*? It beggars belief that the Court implicitly intended to hold that *qui tam* is unconstitutional or to overrule *Stevens* without so much as a citation. Rather, the most plausible explanation is simply that the Court was not thinking about *qui tam* when it drafted the opinion. It is not at all clear whether, or how, the Justices think they can fit *qui tam* into the standing framework that they have created. This Article provides a safe path through the legal quagmire.

In short, *qui tam* should only be deployed as an alternative enforcement mechanism for injuries that could properly be characterized as private rights claims and should not be utilized for inherently public rights claims. This framework for *qui tam* clears up many of the constitutional challenges leveled against the ancient device. It also resolves the tension that has developed in the doctrine between *qui tam* and modern conceptions of the separation of powers. In the process, it might even restore some adherence to the traditional public–private rights model of Article III standing.

IV. APPLICATIONS AND OPEN QUESTIONS

Part III laid out the case for why *qui tam* is appropriate only in situations where the United States suffers a private wrong. The following Sections attempt to apply this theory to contemporary *qui tam* provisions to demonstrate how the theory would work in practice. Taking the theory as a given, this Part concludes by exploring another area of the law that might be amenable to *qui tam*.

A. *The False Claims Act*

Given that the FCA is by far the most prominent *qui tam* provision on the books today, it makes sense to start by considering how the private rights model of *qui tam* would apply in this context. Fortunately, the FCA is an excellent example of a constitutional application of *qui tam* under the public–private rights framework.

One way to conceptualize the theory proposed in Part III is to say that *qui tam* is appropriate only where *both* the private and the public injury from wrongful conduct inhere in the United States. We have already seen that many violations of the law give rise to both a public injury and a private injury.[237] As the Court recognized in *Stevens*, this is the case for violations

237. *See supra* Section III.B.

of the FCA: "It is beyond doubt that the complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud."[238]

In *Stevens*, the Court was not entirely precise about which claim the relator was assigned in FCA cases.[239] But, the Court did note that the "FCA can reasonably be regarded as effecting a *partial* assignment of the Government's *damages* claim."[240] There are two critical observations about this statement.

First, the FCA assigns the government's *damages* claim—that is, after bifurcating the injuries suffered by the United States, the Court made a point of stating that the statute assigns the monetary injury to the relator. This is clearly within the orbit of the private rights model of *qui tam*; the damage to the treasury suffered as a result of contractor fraud is a traditional monetary injury that would support a private rights claim.[241]

Second, the Court in *Stevens* stated that the FCA only effectuates a *partial* assignment. This could simply refer to the fact that the FCA assigns only the government's proprietary injury and does not assign the sovereign injury, so the assignment is only "partial" with respect to the whole lot of claims that the United States might have against a person who violates the FCA. Alternatively, the Court's statement could refer to the fact that the DOJ retains a degree of control over the private rights claim brought by an FCA relator, so it is only a "partial" assignment of the already-severed damages claim. This begs the question: does it matter for the constitutional analysis whether the government retains for itself the ability to

238. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000).

239. *See id.* at 772–73.

240. *Id.* at 773 (emphasis added).

241. At least one scholar has argued that the financial injury is actually of a public character because the funds in the federal treasury belong to the public. *See* Caminker, *supra* note 3, at 350 n.39. While theoretically it is true that the dollars lost through false claims are on some level public funds, this is exactly the sort of conflation that the Court cautioned against in *Hess*. *See supra* text accompanying notes 202–03. There, the Court was clear that a relator's claim under the FCA is a civil, remedial action brought to indemnify the government for the financial loss suffered from fraud, as distinct from an action "intended to authorize criminal punishment to vindicate public justice." United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 539–40, 548–49 (1943), *superseded by statute*, Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608.

intervene in a private *qui tam* action like it does in the FCA? Or would a full assignment of a private rights claim with no reversionary interest in the United States still pass constitutional muster?

It is certainly the case that the oversight mechanisms built into the FCA help give the appearance of constitutionality. Giving the United States the power to intervene in a *qui tam* case helps to assuage separation of powers concerns about prosecutorial discretion and political accountability. Then again, it is not obvious that we should give the United States special treatment for assignment; under the private rights theory of *qui tam*, we are talking about the United States as proprietor—not as sovereign—assigning private rights claims in the same way that you or I could. And, indeed, under ordinary assignment principles, you or I would be precluded from retaining control over a claim that we have assigned.[242] Then again, if you or I assign away a private claim, we are assigning away our own right to litigate our own claim. Perhaps we should think differently about the United States because *Congress* has the power to assign away claims that would ordinarily be litigated by the *Executive*. Of course, the Executive does acquiesce insofar as the President signs the bill into law, but Congress could always override a veto with a two-thirds vote.[243]

All told, the only thing made clear by this limited inquiry is that it is unclear whether the assignment of the private rights injury must be partial or could be complete. The FCA is the only meaningful *qui tam* statute that we have today, and its framework for partial assignment has (thus far) been upheld by the Supreme Court.[244] Maybe, then, it would be wise for future *qui tam* statutes to use the FCA as a model until further scholarship can chart a path through this Serbonian Bog to determine whether such procedural safeguards are constitutionally required, or merely prudential.

In any event, the FCA purports to assign the government's private rights claim and does so while retaining a degree of

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242. *See* Gilles, *supra* note 213, at 345 ("[W]here an assignor fully assigns a claim, he retains no interest in the assigned claim and lacks standing to sue."); *see also* Lans v. Gateway 2000, Inc., 84 F. Supp. 2d 112, 123 (D.D.C. 1999) ("[I]n the event of a complete assignment of title to a patent[,] only the assignee . . . has standing to claim protection rights under the patent." (quoting Gilson v. Republic of Ir., 606 F. Supp. 38, 41 (D.D.C. 1984))).

243. *See* U.S. CONST. art. 1, § 7, cl. 2.

244. *See Stevens*, 529 U.S. at 773.

executive oversight. Thus, the Court's clarification with respect to the scope of the government's assignment in FCA *qui tam* cases is useful but not necessary to conclude that the FCA is constitutional. Whether the Court recognized the consequences of the conceptual difference or not, it is clear that violations of the FCA give rise to both public and private rights injuries and that both claims belong to the government. While technically it is important to distinguish which type of claim is assigned to relators in these cases, it is not practically consequential here. The important things are that the United States has a private rights injury from the fraud and that this injury can be assigned to private relators.

One might argue that statutory specificity with respect to the claim being assigned *is* consequential because of the implications for the eventual damages that will be awarded from the action. That is, the total potential damages from any given statutory violation should be apportioned between the private rights claim and the public rights claim, and the relator's award should be limited to the former so that the relator does not collect more than her assigned claim is worth. Thus, it might be problematic that the FCA provides not just for a civil penalty but also for treble the amount of damages actually sustained by the government from the wrongful conduct.[245] Perhaps those treble damages reflect the value of the sovereign injury. However, the FCA also limits the relator's award to at most thirty percent of the proceeds of the action or settlement.[246] So, whether by intentional design or fortunate happenstance, the FCA already accounts for and addresses this concern—an FCA relator will never collect more than the value of the civil penalty. Nevertheless, any future *qui tam* provisions should pay careful attention to damages to ensure that relators are compensated only for the value of the private rights claim they are assigned.

B. *The False Marking Statute*

Contrast the FCA with the False Marking Statute (FMS),[247] a provision of the Patent Act that, until relatively recently, contained a *qui tam* provision.[248] The FMS assigns statutory

245. 31 U.S.C. § 3729(a)(1).

246. § 3730(d).

247. 35 U.S.C. § 292.

248. *Compare* 35 U.S.C. § 292(b) (2006) (including the *qui tam* provision), *with* 35 U.S.C. § 292(b) (2012) (eliminating the *qui tam* provision).

penalties for labeling products with false patent markings.[249] For example, if a hat manufacturer labeled a hat with a patent marking even though that product was unpatented, the manufacturer would be liable under the FMS. The *qui tam* provision enabled relators to identify these false markings and to sue on behalf of the United States.[250] These relators were entitled to keep half of the damages recovered from the action.[251]

The problem with this provision FMS is that, unlike violations of the FCA, the United States does not suffer a private injury from false patent markings. There is a plausible claim that competitors and consumers could be injured from such markings. Continuing the analogy, competing hat manufacturers might be injured if consumers buy the falsely marked hats instead of their properly labeled ones, and consumers might be injured if they buy a falsely labeled hat believing it to be a patented design. But any injury to the United States would be entirely speculative and attenuated from the wrongful conduct; the most plausible case would likely rely on damage to the economy from lack of competition as a result of the false markings, but that is almost certainly too abstract and conjectural to support a private rights claim.[252] In short, the United States has a public injury from violations of the FMS, but no assignable private injury.

A handful of district courts adjudicating FMS claims recognized this issue. In *United States ex rel. FLFMC, LLC v. Wham-O, Inc.*,[253] the district court acknowledged that, for violations of the FMS, "[T]here is no quantifiable, concrete injury to the United States or to the FLFMC; the only injury that has been alleged is the quasi-criminal violation of the false marking statute, a 'sovereign injury.'"[254] The court in *Wham-O* held that "[T]he government cannot assign a purely 'sovereign injury,'" and thus, that the plaintiff had no standing.[255]

249. 35 U.S.C. § 292(a).

250. *See* 35 U.S.C.A. § 292(b) (2006).

251. *Id.*

252. *See* Stauffer v. Brooks Bros., Inc., 615 F. Supp. 2d 248, 255 (S.D.N.Y. 2009) ("That some competitor might somehow be injured at some point, or that some component of the United States economy might suffer some harm through defendants' conduct, is purely speculative and plainly insufficient to support standing."), *rev'd*, 619 F.3d 1321 (Fed. Cir. 2010).

253. No. 10-CV-0435, 2010 WL 3156162 (W.D. Pa. Aug. 3, 2010), *vacated as moot sub nom.* FLFMC, LLC v. Wham-O, Inc., 444 Fed. Appx. 447 (Fed. Cir. 2011).

254. *Id.* at *5.

255. *Id.*

Similarly, the district court in *Stauffer v. Brooks Bros.*[256] stated that it "[D]oubts that the Government's interest in seeing its laws enforced could alone be an assignable, concrete injury in fact sufficient to establish a *qui tam* plaintiff's standing."[257] The Federal Circuit, however, rejected this distinction between proprietary and sovereign injuries and instead concluded that *qui tam* relators under the FMS had standing even if the injury assigned to them was purely sovereign in nature.[258]

Lower courts considering FMS claims also expressed concern with the lack of procedural safeguards in place for executive oversight. Unlike the multitude of procedural safeguards in the FCA, the FMS had none. Instead, it merely stated that "Any person may sue for the penalty, in which event one half shall go to the person suing and the other to the use of the United States."[259] Thus, "The relator, by bringing the suit, is the master of the suit and—unlike in the False Claims Act context—remains as such."[260] Accordingly, a handful of district courts concluded that the FMS violated Article II because it failed "to provide the Executive Branch sufficient safeguards 'to ensure that the President is able to perform his constitutionally assigned duties.'"[261]

Before many higher courts could opine on this Article II dilemma, however, the *qui tam* provision in the FMS was repealed by the American Invents Act in 2011.[262] A large part of the impetus for repealing this provision was the flood of false marking claims that arose following a decision from the Federal Circuit holding that statutory fines in the FMS apply for each article that is falsely marked.[263] This drastically increased the

256. 615 F. Supp. 2d 248 (S.D.N.Y. 2009), *rev'd*, 619 F.3d 1321 (Fed. Cir. 2010).

257. *Id.* at 254 n.5. *But see* Pequignot v. Solo Cup Co., 640 F. Supp. 2d 714, 724 n.15 (E.D. Va. 2009) ("Although some scholars have argued that the government can assign only proprietary, and not purely sovereign, interests, . . . the Supreme Court made no such distinction in its discussion of assignment in *Vermont Agency*, and this Court declines to adopt this distinction.").

258. *See* Stauffer v. Brooks Bros., Inc., 619 F.3d 1321, 1326 (Fed. Cir. 2010).

259. 35 U.S.C. § 292(b) (2006).

260. Rogers v. Tristar Prods., Inc. 793 F. Supp. 2d 711, 725 (E.D. Pa. 2011), *vacated*, *appeal dismissed*, 449 F. App'x 921 (Fed. Cir. 2011).

261. *Id.* at 724 (quoting Morrison v. Olson, 487 U.S. 654, 696 (1988)); *see also* Unique Prod. Sols., Ltd. v. Hy-Grade Valve, Inc., 765 F. Supp. 2d 997, 1005 (N.D. Ohio 2011), *reconsideration granted*, *order vacated*, 813 F. Supp. 2d 854 (N.D. Ohio 2011), *and vacated and remanded*, 462 F. App'x 967 (Fed. Cir. 2012).

262. *See* Leahy-Smith America Invents Act, ch. 31, sec. 16, 125 Stat. 283, 329 (2011).

263. *See* Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1301 (Fed. Cir. 2009).

damages awards available for such actions and, consequently, the number of *qui tam* suits brought.[264]

Evidence in the legislative history of the FMS indicates that some members of Congress were also concerned with the lack of oversight and control that the government could exercise in such actions. Senator Charles E. Grassley noted that, while he supported *qui tam* mechanisms generally, the provisions of the FMS were constitutionally problematic because they did not allow the federal government to intervene and control the litigation.[265] He specifically compared the FMS to the FCA, which, in his opinion, represented a model of executive oversight in *qui tam* actions.[266] He also noted in the record that a federal court had struck down the *qui tam* provision in the FMS as unconstitutional for interfering with the Take Care Clause.[267] Similarly, Senator Jon Kyl thought the proposed revisions to the FMS would "restore some equilibrium to [that] field of litigation," particularly by repealing the *qui tam* provision, which lacked "any of the protections and government oversight that normally accompany *qui tam* actions."[268]

Whether or not these statements accurately reflected congressional intent, it is clear that Congress was correct to repeal the *qui tam* provision in the FMS. There were legitimate constitutional concerns with the statute's interference with core

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264. H.R. REP. NO. 112-98, pt. 1, at 53 (2011) ("To address the recent surge in litigation, the bill replaces the *qui tam* remedy for false marking with a new action that allows a party that has suffered a competitive injury as a result of such marking to seek compensatory damages." (emphasis added)); *see also Crossing the Finish Line on Patent Reform: What Can and Should Be Done: Hearing on H.R. 112-98 Before the H. Subcomm. on Intell. Prop., Competition, & the Internet, of the Comm. on the Judiciary*, 112th Cong. 26 (2011) (statement of Carl Horton, Chairman, Coalition for 21st Century Patent Reform, and Chief IP Counsel, General Electric) ("Failure to modernize the marking statute, including elimination of the *qui tam* provision, has opened the door to costly and unproductive litigation."); *Review of Recent Judicial Decisions on Patent Law: Hearing Before the H. Subcomm. on Intell. Prop., Competition, and the Internet, of the Comm. on the Judiciary*, 112th Cong. 28 (2011) (statement of Andrew J. Pincus, Partner, Mayer Brown LLP, on behalf of the Business Software Alliance) ("A new form of abusive patent litigation has recently emerged. The False Marking Act . . . is a *qui tam* provision that imposes a $500 fine for each instance that an individual falsely marks an item as patented in order to deceive the public. In *Forest Group* . . . , the Federal Circuit interpreted the Act as imposing a separate $500 fine for *each* item marked. Following this decision, an enormous number of False Marking complaints have been filed. In 2010 alone, over 600 such cases were filed.").

265. *See* 157 CONG. REC. 3421 (2011) (statement of Sen. Grassley).

266. *See id.*

267. *See id.*

268. *Id.* at 3425 (statement of Sen. Kyl).

executive functions due to the lack of governmental oversight. More importantly, even if the oversight issues could have been resolved, the United States had no private injury that could properly be assigned to relators; it had only the public injury from the violation of the law. Thus, relators under the FMS lacked Article III standing, and they further undermined Article II by litigating quintessentially public claims without a private injury.

C. *The Indian Protection Act*

If the FCA is clearly a constitutional application of *qui tam*, and the FMS is clearly not, then the IPA is a case study in the gray area in between. The IPA authorizes *qui tam* actions for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe;[269] (2) driving livestock to feed on Indian land;[270] (3) settling on or surveying Indian land;[271] (4) setting up a distillery in Indian country;[272] and (5) trading in Indian country without a license.[273]

At first glance, a constitutional problem might exist insofar as the IPA does not include any procedural mechanisms for executive oversight. Like the FMS, it simply provides that actions may be brought "in the name of the United States" in federal court and that penalties shall be allocated "one half to the use of the informer and the other half to the use of the United States."[274] So, to the extent that this complete assignment raises separation of powers concerns, the IPA might be susceptible to a challenge on those grounds.

The more interesting question for the purposes of this Article is how to classify the five injuries for which *qui tam* is authorized under the IPA—are they public or private wrongs? In other words, are they proper uses of *qui tam*, or not? To preface the analysis, it is worth noting that Indian law is notoriously convoluted. The relationship between the United States and Indian tribes, and the rights that they each have with respect to reservation land ("Indian country," in the language of the statutes) are generally ambiguous and often case-specific, depending on the particular treaties that govern particular peoples and lands. That said, some general

269. 25 U.S.C. § 177.
270. § 179.
271. § 180.
272. § 251 (repealed 2018).
273. § 264.
274. § 201.

conclusions can be drawn out of the case law that shed light on the answers to these questions.

Let us begin with the first statute, which permits a *qui tam* action for the unlawful purchase of land from an Indian tribe.[275] Of all the provisions, this one has the best chance of surviving constitutional muster under the private rights model of *qui tam*. Indian land in the United States operates under a dual-land tenure system; the doctrine of discovery has long held that the United States has absolute title in the lands originally occupied by the Indian tribes but that the Indian tribes retain a right of occupancy, enabling them to reside on the lands reserved to them.[276]

Under this framework, the unlawful purchase of land from a tribe is plausibly characterized as a private rights injury to the United States. The U.S. government retains the absolute fee in the land, so the tribes have no right to sell it, and the buyer has no right to purchase it, without consent from the United States. So, if someone nevertheless purchases land without permission, the United States suffers a private wrong because its property rights have been infringed. Of course, it is not actually that simple. The United States necessarily shares its bundle of property-right "sticks" with the Indian tribes. Although Congress could extinguish the right of occupancy at any time, it would have to pay just compensation to the tribes under the Takings Clause to do so.[277] Nevertheless, one could imagine that, in the absence of a relator's intervention, the United States could bring a property-rights-style claim against a wrongful purchaser under this statute. This is a theoretically assignable private rights claim.

If this is a somewhat weak claim for *qui tam*, then the remaining statutory violations are even more frail. Driving livestock to feed on Indian land and surveying Indian land could plausibly damage the land or wrongfully intrude in some

275. § 177.

276. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831) ("Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government.").

277. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115–16 (1938) ("In this case we have held . . . that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.").

ways, but it is not clear that this would harm the United States' interest in the land. Indians occupying recognized tribal land have the full right to use its timber and minerals without creating a cognizable injury to the United States,[278] so it is hard to imagine that damage to pastures or unauthorized settlement would create a cognizable injury. If anything, this is likely a violation of the Indian occupancy right.

Similarly, it is not at all clear how the United States would be harmed by someone setting up a distillery in Indian country. Indians have traditionally been characterized as "wards" of the state,[279] so perhaps one could argue that the United States has the right to set an anti-alcohol policy for them. But this is obviously paternalistic, and even if it were still true, a violation of the law would only result in a sovereign, public rights injury, not a private wrong.

Finally, trading in Indian country without a license also does not cause any private injury to the United States. As with the distillery, trading without a license would be a violation of the law, giving a public rights style claim that the law has been violated, but the United States suffers no pecuniary or proprietary injury from this violation. There is nothing for them to permissibly assign to a *qui tam* relator.

In short, most of these *qui tam* provisions are likely unconstitutional under the private rights model of *qui tam*. Like most of Indian law, the IPA raises unique questions that are hyper-specific to our long and winding history with the natives. If anything, this factual reality tips the scales in favor of public rights in this context. Most of these claims are grounded in a particular sovereign–quasi-sovereign relationship that exists between the United States and the "domestic dependent nations" that are the Indian tribes.[280] This points to the conclusion that these claims are more appropriately adjudicated by the government itself, rather than by private citizens. It is not clear how much can, or rather should, be gleaned from this particular application of *qui tam*.

278. *Id.* at 116 ("Minerals and standing timber are constituent elements of the land itself.").

279. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("Their relation to the United States resembles that of a ward to his guardian.").

280. *Id.* ("They may, more correctly, perhaps, be denominated domestic dependent nations.").

D. *New Frontiers*

Having considered how the private rights model of *qui tam* applies to contemporary *qui tam* provisions, we should briefly consider how this model might apply to other areas of law.

At the outset, it is worth acknowledging *why* one would want to extend *qui tam* to other contexts. Since *Lujan*, the Court has gradually tightened the requirements for Article III standing, such that more and more plaintiffs are denied access to federal courts. *TransUnion* exemplifies this phenomenon; now, even a violation of your private rights, without more, is not enough to get you an audience in federal court.[281] To be sure, the private rights model of *qui tam* does not offer a floodgate; it cannot replace the citizen-suit provision or enable litigants to sue for general compliance with the laws. But, properly applied, it still offers a lot of potential to increase enforcement and compliance where there is a plausible governmental private rights claim.

One such area that might be amenable to *qui tam* is environmental law. *Lujan* specifically shut the courthouse doors pretty tightly for potential plaintiffs seeking to enforce federal environmental laws,[282] but *qui tam* could provide an alternative avenue for private persons to pursue environmental litigation. The basic idea itself is fairly simple: the United States owns a lot of land; the government has common law property rights associated with that land; when someone pollutes on that land, or causes a wildfire, or cuts down the trees, the United States suffers a private wrong insofar as its property rights are infringed. The United States is therefore eligible to bring common law property claims, such as trespass or nuisance. These are private rights claims that could be assigned to private relators.

The federal government owns a good deal of "public land," over which Congress exercises plenary authority under the Property Clause.[283] The Court has long held that "the

281. *See supra* text accompanying notes 101–106.

282. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (holding that environmental organizations lacked Article III standing to challenge regulations issued by the U.S. Secretaries of the Interior and Commerce because they failed to demonstrate that they had suffered a tangible particular harm).

283. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

Government has . . . the rights of an ordinary proprietor."[284] Accordingly, with respect to its own lands, the government has the right to "maintain its possession and to prosecute trespassers," to "sell or withhold them from sale," to "grant them in aid of railways or other public enterprises," or to "open them to pre-emption or homestead settlement."[285] Thus, in *Camfield v. United States*,[286] the Court held that the United States had the right to bring a trespass action against a private party who erected a fence around 20,000 acres of public lands.[287] The Court stated that "[N]o legislation was necessary to vindicate the rights of the Government as a landed proprietor."[288] In other words, the government has the same right to adjudicate its common law property rights in court as any other landed individual.

Case law confirms that the United States can adjudicate its common law property rights just like everyone else. In *United States v. Southern Florida Water Management District*,[289] the Eleventh Circuit considered a dispute arising from Florida's failure to enforce its state water pollution laws, which caused the pollution of the federally owned Everglades National Park and the Loxahatchee National Wildlife Refuge.[290] The court found that the United States had standing to sue because it alleged "with specificity the direct and continuing injury and damage to the ecosystems of the Park and Refuge."[291] Similarly, the court in *United States v. Illinois Pollution Control Board*[292] found that the United States had standing based on the "legitimate government interest" to "protect public lands from the effects of wastewater runoff from private parties."[293] And, in *Board of County Commissioners for Garfield County v. W.H.I., Inc.*,[294] the Tenth Circuit found that the United States had standing to challenge the blockage of a roadway that gave

284. Camfield v. United States, 167 U.S. 518, 524 (1897); *see also* Alabama v. Texas, 347 U.S. 272, 273 (1954) (per curiam) ("For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein.").

285. *Camfield*, 167 U.S. at 524.

286. 167 U.S. 518 (1897).

287. *See id.* at 524.

288. *Id.*

289. 28 F.3d 1563 (11th Cir. 1994).

290. *Id.* at 1568.

291. *Id.* at 1571.

292. 17 F. Supp. 2d 800 (N.D. Ill. 1998).

293. *Id.* at 804.

294. 992 F.2d 1061 (10th Cir. 1993).

access to national forest land both because the roadway provided citizens with access to the national forest and because the roadway crossed and accessed the United States' own property.[295] In all of these cases, the claim was based on more than just a general grievance that the law had been violated; the United States also suffered a private wrong.

One might argue that these are actually public rights claims in disguise because the United States holds all of these lands in "public trust." This means that the government has a duty to preserve the land against damage or destruction to keep the land available for public use or enjoyment.[296] However, it is not clear whether or to what extent this doctrine applies to federally owned lands. The Court has said in dicta that "the public trust doctrine remains a matter of state law."[297]

Whether or not this is so, it is likely of no consequence. Again, the same underlying act can give rise to both kinds of claims: public and private. Just as violations of the FCA give rise to both, a trespass on public land could give rise to a public claim, insofar as the public interest in the land has been infringed, and a private claim, insofar as the government's proprietary interest in the land has been infringed. Indeed, this was the case in *United States v. California*.[298] In that case, there was dispute regarding who owned the rights to several thousand square miles of land under the ocean off the coast of California.[299] California had authorized drilling for petroleum and mineral deposits on this land, and the United States sought an injunction based on a claim of trespass.[300] Given that the United States claimed that California "invaded the title or paramount right asserted by the United States," the Court stated that "[t]his alone would sufficiently establish the kind of

295. *Id.* at 1064–65.

296. *See* Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND, RES. & ENV'T L. 173, 173 (2004).

297. PPL Montana, LLC v. Montana, 565 U.S. 576, 603 (2012); *see also* Pearson, *supra* note 296, at 174 (suggesting that the public trust doctrine in federal law exists "only nominally"). *But see* Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and* Illinois Central Railroad, 45 ENV'T L. 399, 421 (2015) ("There is, in fact, widespread recognition of the existence of the federal public trust doctrine, particularly with respect to federal public lands.") (collecting cases & statutory references).

298. 332 U.S. 19 (1947), *superseded by statute*, Submerged Lands Act, 67 Stat. 29, (codified at 42 U.S.C. §§ 1301–1315), *as recognized in* Parker Drilling Mgmt. Servs. v. Newton, 139 S. Ct. 1881, 1887 (2019)).

299. *Id.* at 22–23.

300. *Id.* at 23.

concrete, actual conflict of which we have jurisdiction under Article III."[301] To be sure, the Court also recognized that the United States had rights "transcending those of a mere property owner" because it also asserted the right to protect the country against dangers located off the coastline, and because it appeared "in its capacity as a member of the family of nations."[302] But these additional bases for jurisdiction are immaterial. California's allegedly wrongful act simply gave rise to both kinds of claims: a private claim for trespass and a public claim based on sovereign interests.

Accordingly, it is not far-fetched to suggest that Congress could implement *qui tam* provisions that would enable private relators to litigate the government's property interests in federally owned land. This brief inquiry does not even scratch the surface of how this would work as a technical matter, but the point is that it is possible. Under the private rights model, there are potentially numerous other areas of federal law where a similar mechanism could be constitutionally deployed.

CONCLUSION

Qui tam has been around a long time. That historical pedigree alone does not make it constitutional. But it does suggest that we should look critically to see whether it is possible to situate *qui tam* harmoniously within the doctrine before we dismiss it as outright unconstitutional. The private rights model of *qui tam* provides such a solution. This model not only resolves the constitutional concerns plaguing *qui tam*, but also provides a logical framework for thinking about when and how *qui tam* might be used to facilitate the enforcement of other federal statutes. In this way, this author hopes that the private rights model might breathe new life into this ancient procedure and enable the principled "*quitam*ification" of other areas of federal law.

301. *Id.* at 25.
302. *Id.* at 29.