

Comment

The Constitutionality of *Qui Tam* Actions

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The *qui tam* action offers an unconventional means by which Congress may enlist the aid of private citizens in enforcing Federal statutory schemes.¹ In such an action, a private person maintains a civil proceeding on behalf of both herself and the United States to recover damages and/or to enforce penalties available under a statute prohibiting specified conduct. The private plaintiff shares any monetary recovery with the United States.

Despite its relative obscurity today, the *qui tam* enforcement framework is familiar to our legal tradition. “Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of

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I wrote this comment while an associate of Wilmer, Cutler & Pickering (“WC&P”) in Washington, D.C. (whose support I greatly appreciate). I previously helped the firm write an amicus brief on behalf of the Center for Law in the Public Interest (“Center”) in *United States ex rel. Gravit v. General Elec. Co.*, No. C-1-84-1610 (C.D. Ohio 1984). The amicus brief addressed a subset of the constitutional issues raised by *qui tam* litigation that I consider here. After leaving WC&P, I addressed a different subset of those issues on behalf of the Center in *United States ex rel. Truong v. Northrop Corp.*, No. CV 88-967 MRP (C.D. Cal. 1988).

The views I express here, however, are entirely mine; any reflection of the views held by WC&P, the Center, or Justice Brennan is entirely coincidental. I thank Akhil Amar, Einer Elhauge, Laura Fitzgerald, Alan Hirsch, Dawn Johnsen, Paul Kahn, Peter Schuck, Michael Small, and David Weiser for their valuable contributions.

1. The phrase “*qui tam*” is shorthand for “*qui tam pro domino rege quam pro se imposito sequitur*,” interpreted as “who brings the action as well for the king as for himself.” *Bass Anglers Sportsman’s Soc’y of Am. v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 305 (S.D. Tex. 1971). *Qui tam* plaintiffs are also frequently referred to as “informers” or “relators.”

years in England, and in this country ever since the foundation of our Government."² Indeed, *qui tam* actions were routinely authorized by the First and subsequent early Congresses,³ and as late as the turn of this century, the Supreme Court recognized that the "right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."⁴

Most early *qui tam* statutes have long been repealed; of those remaining, most lie essentially dormant.⁵ For the past few decades, Congress has chosen a different means by which to enlist the aid of private citizens in supplementing executive branch enforcement of Federal statutes: the "citizens' suit." By this device, Congress legislatively defines legal interests (overlying those already established at common law) and authorizes pri-

2. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943) (citation omitted); see Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?* 78 YALE L.J. 816, 825-27 (1969) (highlighting early history of *qui tam* actions in pre- and post-revolutionary America); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406-09 (1988) (same); cf. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U.L. REV. 275, 296-303 (1989) (early American employment of *qui tam* actions designed to supplement criminal law enforcement).

While historically the "colonies and the states employed informers' statutes in a wide variety of cases," Winter, *supra*, at 1406, and various states still employ the *qui tam* concept today, see, e.g., False Claims Act, CAL. GOV'T CODE §§ 12650-12655 (Deering 1988), I focus here solely on Federal *qui tam* statutes because they uniquely raise Federal constitutional concerns.

3. See, e.g., Adams, *qui tam*, v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by *qui tam* plaintiffs] as well as by information [by the public prosecutor].").

The First Congress employed *qui tam* actions in various forms and contexts. Six statutes imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (marshals' misfeasance in census-taking); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (same); Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133 (harboring runaway mariners); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (unlicensed Indian trade); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (unlawful trades or loans by Bank of United States subscribers); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (avoidance of liquor import duties).

Three statutes similarly imposing penalties and/or forfeitures for conduct injurious to the general public authorized informers bringing successful prosecutions to keep the entire recovery. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (import duty collectors' failure to post accurate rates); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (failure to register vessels properly); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (import duty collectors' failure to post accurate rates).

Two other *qui tam* statutes imposed penalties and/or forfeitures for conduct injurious both to the general public and more concretely to a subclass thereof. One allowed any person to sue, Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (failure of vessel commander to contract with mariners); and the other allowed suits by anyone whose private rights were violated, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (copyright infringement).

4. *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

5. Two nineteenth-century statutes explicitly authorizing *qui tam* actions remain on the books but are rarely invoked. Act of July 8, 1870, ch. 230, § 39, 16 Stat. 198, 203 (false marking of patented articles) (current version at 35 U.S.C. § 292(b) (1982)); Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733-34 (regulating Indian trade) (current version at 25 U.S.C. § 201 (1982)).

See also Act of Mar. 3, 1825, ch. 107, § 3, 4 Stat. 132, 133 (forfeiture of vessels taking undersea treasure from Florida coast to foreign nations; no express authorization for private suit, but recovery shared between informer and United States) (current version at 46 U.S.C. § 723 (1982)); Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383 (forfeiture of vessels privately armed against friendly nations; same enforcement provisions) (current version at 18 U.S.C. § 962 (1982)).

vate citizens to protect these interests through litigation seeking monetary and/or injunctive relief against persons invading them.⁶ Most such citizens' suits supplant executive branch enforcement by compelling alleged wrongdoers' compliance with statutory directives, while other such suits compel the executive itself to enforce public law obligations against suspected wrongdoers.⁷ Individuals bringing suits of either type are often called "private attorneys general," because Congress intends their individual actions, when aggregated, to benefit the public at large by effectuating important Federal policies.

Despite this trend towards policing the public interest through citizens' suits, Congress recently revitalized the *qui tam* framework in the False Claims Act,⁸ which imposes civil liability upon persons presenting false claims for payment to or otherwise defrauding the Federal treasury.⁹ Since its original enactment in 1863,¹⁰ the Act has authorized both public law enforcement officers and all private citizens to sue on behalf of the United States to recover damages and civil penalties for such fraudulent acts and to share in the recovery.¹¹ Restrictive statutory amendments and judicial interpretations of the Act drove *qui tam* actions into a period of desuetude for much of this century.¹² But in 1986, realizing that the battle

6. Congress' authorization of such citizens' suits is most pervasive in the field of environmental protection. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1982).

Congress has also statutorily created private causes of action in many different fields to redress injuries already recognized at common law. *See, e.g.*, Clayton Antitrust Act, 15 U.S.C. §§ 15, 26 (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

7. *Compare, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (1982) (authorizing private suits against polluters to compel compliance) *with id.* § 1365(a)(2) (authorizing private suits against EPA to compel performance of mandatory enforcement duties). *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982) (characterizing and comparing "private rights of action," meaning suits against alleged private wrongdoers to secure their compliance with Federal law, with "private rights of initiation," meaning suits against executive officials to enjoin them to bring public enforcement actions against alleged private wrongdoers).

Both private rights of action and private rights of initiation vary considerably in formal structure. For example, while some statutes authorizing private rights of action vest exclusive and plenary power in private citizens over whether to initiate and how to conduct such actions, *e.g.*, Clayton Antitrust Act, 15 U.S.C. §§ 15, 26 (1982), other statutes afford the executive branch substantial authority to participate in—or even preempt—privately initiated litigation. *See, e.g.*, Comment, *Environmental Law—Citizen Suits and Recovery of Civil Penalties*, 36 U. KAN. L. REV. 529, 533-35 (1988) (discussing EPA's statutory entitlement to advance notification of intended citizens' suits under various environmental statutes and its authority to preempt such suits by filing its own first).

8. 31 U.S.C.A. §§ 3729-3731 (West Supp. 1989).

9. *Id.* § 3729.

10. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was reenacted as Rev. Stat. §§ 3490-3494, 5438 (1875 ed.); later codified as 31 U.S.C. §§ 231-235; and finally recodified in 1982 as 31 U.S.C. §§ 3729-3731.

11. 31 U.S.C.A. § 3730(a) & (b) (West Supp. 1989). The specific enforcement structure of the Act is explained *infra* at text accompanying notes 40-60.

12. For example, because of perceived abuse of the *qui tam* reward structure by "informers" who in fact copied all of their information from government documents, Congress in 1943 imposed severe jurisdictional restrictions on *qui tam* suits. *See generally* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1103-06 (7th Cir. 1984) (discussing abuse and legislative response). Moreover, the Act's failure to guarantee successful *qui tam* plaintiffs a minimum share in the recovery, along with judicial interpretations of the Act imposing a "clear and convincing" burden of persuasion and requiring proof

against government fraud could not effectively be waged without private soldiers, Congress reinvigorated the Act's *qui tam* framework to enlist the knowledge and resources of the citizenry to supplement public law enforcement efforts.¹³

From Congress' perspective, *qui tam* statutes and the more familiar citizens' suit provisions serve the same purpose: Both are designed to encourage private citizens to help the executive branch deter and redress violations of Federal law. One might question the wisdom of dual public and private enforcement in general or the context or structure of particular such schemes.¹⁴ But Congress' authority to determine that dual enforcement constitutes wise social policy, and to implement that decision by enacting traditional citizens' suits provisions, is beyond serious dispute. The Supreme Court repeatedly has held that "Congress may enact statutes creating legal rights, the invasion of which creates standing" for the injured party to sue for redress.¹⁵ For many decades, courts have entertained suits brought by private citizens to vindicate legislatively defined interests, recognizing constitutional constraints on Congress' power to authorize such suits only at the extreme margin.¹⁶

In contrast to the traditional citizens' suit scheme, the constitutional status of *qui tam* enforcement remains unsettled. Indeed, defendants in recent *qui tam* suits brought to enforce the False Claims Act presently are challenging its constitutionality.¹⁷ Their attack is premised upon an as-

of "specific intent" to defraud, also contributed to the action's virtual dormancy throughout the past half-century. See S. REP. NO. 345, 99th Cong., 2d Sess. 6-7, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5266 [hereinafter S. REP.].

13. The 1986 amendments, *inter alia*, relaxed the jurisdictional bar against *qui tam* actions based on information already known to the government, increased both the damages and penalties recoverable and a successful private plaintiff's minimum and maximum share thereof, embraced a "preponderance of the evidence" burden of persuasion, and eschewed any requirement of specific intent to defraud. See False Claims Amendments Act of 1986, 31 U.S.C.A. §§ 3729-3731 (West Supp. 1989).

14. For example, debate continues over whether dual enforcement schemes lead to overdeterrence of benign conduct, overinvestment of social resources in the collective law enforcement effort, and/or fragmented or inconsistent policy implementation through decentralized litigation control. See, e.g., Crumplar, *An Alternative To Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76 (1975); Graham, *The Qui Tam Amendments: Privatizing the Civil Prosecution Function*, 49 FED. CONT. REP. (BNA) 659 (Apr. 4, 1989); Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Mashaw, *Private Enforcement of Public Regulatory Provisions: The "Citizen Suit,"* 4 CLASS ACTION REP. 29 (1975); Stewart & Sunstein, *supra* note 7.

15. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

16. Contemporary Article III standing doctrine suggests that some legislatively defined interests may be insufficiently "distinct and palpable" or otherwise inappropriate for judicial cognizance. See discussion *infra* Section III. *But see infra* text accompanying notes 198-99 (arguing that, with limited exceptions, such doctrinal constraints on adjudication of legislatively defined interests are conceptually unfounded and ought to be discarded).

17. When I wrote this Comment, defendants had raised this issue in some form in several *qui tam* suits under the False Claims Act, but only one court had ruled on such a motion, rejecting in a one-sentence order a narrow form of the more generic constitutional challenge. See *United States ex rel. Gravit v. General Elec. Co.*, No. C-1-84-1610 (C.D. Ohio Jan. 3, 1989) (unpublished order). Since the Comment went into production, the constitutional challenge has been considered and rejected in *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, No. CV 87-1840-WDK (Gx) (C.D. Cal. June 1, 1989); in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, No. C 88-20009

serted distinction in the nature of the legal interests underlying traditional private attorney general and *qui tam* actions. In a citizens' suit, private plaintiffs are conventionally understood to represent interests granted personally to them by Congress.¹⁸ "The wrongs alleged and the relief sought by such a plaintiff are unmistakably private; only secondarily are his interests representative of those of the general population."¹⁹ But in the paradigmatic *qui tam* suit, private plaintiffs are conventionally understood to represent, not interests granted personally to them, but rather legal interests granted by Congress to the public at large: "in *qui tam* actions . . . society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation."²⁰ The *qui tam* litigant is not personally injured by the defendant's challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution.²¹

Critics of the *qui tam* concept contend that this posited distinction between private and public interest representation makes a constitutional difference. While private citizens may represent their own interests in federal court, these critics contend, the Constitution prohibits Congress from empowering self-selected and financially self-interested private citizens to represent the interests of the entire polity in Federal litigation.

RPA (N.D. Cal. June 12, 1989); and in *United States ex rel. Troung v. Northrop Corp.*, No. CV 88-967 MRP (C.D. Cal. Aug. 11, 1989).

18. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(a) (1982) ("any citizen may commence a civil action on his own behalf").

19. *Flast v. Cohen*, 392 U.S. 83, 117 (1968) (Harlan, J., dissenting).

20. *Priebe & Sons v. United States*, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting).

I refer to the "paradigmatic" *qui tam* action because, while there is a historical correlation between employment of the *qui tam* enforcement concept and legislative protection of interests fairly characterized as "public" in nature, there is no *analytic* connection between the two. In theory, Congress might allow citizens to bring *qui tam* suits to remedy injuries more fairly characterized as discrete and personal. Cf. Crumplar, *supra* note 14 (proposing *qui tam* enforcement of Federal securities laws). Indeed, in isolated circumstances, the First Congress enacted *qui tam* statutes in such contexts. See *supra* note 3. In practice, however, Congress' historical employment of the *qui tam* enforcement scheme has been closely associated with the protection of interests shared by the public at large.

I focus on the paradigmatic *qui tam* action in this Comment rather than on public actions generally both because of the posture of the present constitutional challenge and because the bounty aspect of the *qui tam* scheme simultaneously raises a few unique constitutional concerns and satisfies a few others.

21. See *Marvin v. Trout*, 199 U.S. 212, 225 (1965) (paradigmatic *qui tam* plaintiff "has no interest in the matter whatever except as such informer").

Thus understood, *qui tam* authorization can be characterized as a "whistleblowing" enforcement strategy, whereby erstwhile bystanders to transactions are given incentives to detect and report (and here prosecute) suspected misconduct. See generally Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L., ECON., & ORG. 53 (1986) (distinguishing between "whistleblowing" enforcement strategies and "gatekeeping" enforcement strategies, which impose "collateral" legal liability on transactional participants who are not themselves primary authors or beneficiaries of misconduct but who are in a position to detect potential misconduct by others and prevent it by withholding their support). The oversight function of *qui tam* plaintiffs *qua* "whistleblowers" and "gatekeepers" is the same, though the incentives employed differ as do carrots and sticks; *qui tam* plaintiffs are given bounties for successful detection and prosecution, whereas conventional gatekeepers are sanctioned for unsuccessful detection and deterrence. Professor Kraakman notes that, at present, "whistleblowing duties are extremely rare, while gatekeeping duties are common." *Id.* at 58 n.11.

Two different constitutional doctrines are said to require this result. First, “[a]n enforcement remedy being pursued solely to protect the public interest, as distinguished from a private attorney general action with public interest overtones, is exclusively within the province of the Executive Branch.”²² Therefore, Article II of the Constitution precludes Congress from sharing the executive’s assigned function of public law enforcement with self-interested and unaccountable private citizens. Second, private litigants lack a “distinct and palpable” personal interest in the controversy underlying a *qui tam* action and therefore are disqualified from litigation by Article III’s standing requirements. Like the first, this second doctrinal challenge posits that courts may entertain enforcement actions designed to protect solely the public interest only when such actions are initiated by the executive.

I note at the outset that the distinction between private and public interest representation, which for purposes of these two doctrinal challenges purportedly distinguishes between the accepted citizens’ suit and the suspect *qui tam* suit, is conceptually infirm. Because the public is composed of individuals, any injury to the “public at large” can easily be reconceptualized as an injury to each constituent member, albeit one that is ubiquitous and perhaps intangible in nature.²³ There exists no pre-legal, empirical sense in which a particular injury must be viewed as inherently “public” in nature.²⁴ While injuries may fairly be placed on a descriptive private/public spectrum according to the directness of their impact on individuals, with the paradigmatic citizens’ suit falling somewhat towards the private end and the paradigmatic *qui tam* action falling towards the public end,²⁵ drawing a particular line between “private” and “public” actions for purposes of constitutional doctrine requires normative, not factual, justification.²⁶

22. Lewis, *Environmentalists’ Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. 10101, 10104 (1986).

23. The Supreme Court has often entertained suits alleging “personal” injuries that are both ubiquitously shared and intangible. *See, e.g.*, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (implicitly recognizing personal interest in preservation of endangered species); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing personal “aesthetic” and “conservational” interests in environmental protection); *cf. Mashaw, supra* note 14, at 31 (noting that “both public and private law rules of conduct have at their core notions of the general public interest”).

24. *Cf. Sunstein, Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 n.18 (1988) (“There is no prepolitical or prelegal way to decide who is a bystander [as opposed to one whose personal legal interests are invaded by misconduct]; the term is a function of law, not of anything in the world that is independent of the legal system.”).

25. *See supra* note 20.

26. For example, whether an asserted injury is sufficiently “distinct and palpable” to confer Article III standing turns on the purposes of the doctrinal requirement. *See infra* text accompanying notes 193–94.

The same conceptual line-drawing difficulties arise when one attempts to ground a public/private distinction in the nature of relief sought in particular suits, as opposed to the nature of the interests sought to be protected. For example, from the perspective of the relief sought, antitrust suits to recover private damages may seem more “private” in nature than suits to recover civil penalties payable to the Federal treasury. But many types of suits would seem to occupy some middle position on this descrip-

For present purposes, however, I am willing to set aside my general quarrel with the conceptual public/private distinction underlying the *qui tam* challenge and instead indulge the premise that *qui tam* litigants represent interests belonging solely to the public at large rather than their own personal legal interests. Given this starting point, both the Article II and Article III challenges to *qui tam* authorization raise a common inquiry: Who is entitled to define the interests of the national polity for the purpose of engaging in litigation on its behalf? By tradition, if not by constitutional design, we tend to assume that the United States' interests²⁷ in enforcing Federal law through litigation are properly represented by the executive branch. Whether this assumption is valid in particular contexts,²⁸ and what follows from it,²⁹ remain largely unexplored questions.

tive spectrum, including private suits for broad injunctive relief benefiting the public at large; citizens' suits seeking both injunctive relief *and* monetary penalties payable to the Federal treasury, *see, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1319(d), 1365(a) (1982); and, of course, *qui tam* suits seeking monetary recovery to be shared by the Federal treasury and the private litigant. Even the treble damages aspect of private antitrust suits and punitive damage awards in private civil litigation may fairly be characterized as providing a public-oriented remedy of enhanced deterrence rather than a private-oriented remedy to compensate for personal economic injury. *Cf. Browning-Ferris Indus. v. Kelco Disposal*, 109 S. Ct. 2909, 2920 (1989) (punitive damages advance "governmental interests . . . of punishment and deterrence").

Indeed, the difficulty of defining a pre-legal distinction between "private" and "public" actions often is compounded when one focuses simultaneously on both the nature of the underlying legal interest and the nature of the remedial scheme. How ought we characterize a citizens' suit brought under various environmental statutes, which seems to allege injury to a personal interest in pollution avoidance, when the litigant must first notify Federal and state authorities who can then preempt private litigation by filing an action of their own? *See supra* note 7.

27. Unless otherwise stated, I refer to the United States, the national polity, and the public interchangeably. *See infra* text accompanying notes 35-39 (explaining equation).

28. This assumption is certainly dubious when the executive branch intervenes in litigation to challenge the constitutionality of Federal legislation on the ground that the legislation infringes on the executive's constitutional prerogatives. *See, e.g., Morrison v. Olson*, 108 S. Ct. 2597 (1988). By making this argument, the executive branch appears to be representing its own *institutional* interests, rather than purporting to define and then represent the broader interests of the national polity. *See Miller & Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51 (1979) (discussing constitutionality and propriety of executive attacks on statutes); *cf. United States v. Providence Journal Co.*, 108 S. Ct. 1502, 1510 (1988) (executive official representing United States in Supreme Court litigation expected to speak "with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people").

Of course, one might attempt to equate the two sets of interests by defining the preeminent interest of the polity to be the avoidance of unconstitutional governmental behavior; then the executive's constitutional challenge to legislation as infringing upon executive prerogatives serves this national interest. But all branches of government are responsible in various contexts for assessing the constitutionality of legislation, *see Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 445-46 & n.12 (1989) (citing examples and canvassing scholarship), and Congress and the judiciary may have views that differ from those of the executive as to the proper understanding of executive prerogatives. Why should the executive branch's view "count" as the one best implementing the United States' hypothesized preeminent interest in constitutional observance? It seems to me that the executive branch in such cases cannot meaningfully be said to represent the "United States" as opposed merely to itself. *Cf. Providence Journal Co.*, 108 S. Ct. at 1514 (Stevens, J., dissenting) ("When faced with a difference of view between the Executive Branch and a coordinate branch of government . . . the Solicitor General [charged with representing the "interests of the United States" before the Supreme Court] faces a conflict of interest that undeniably would be intolerable if encountered in the private sector."). Rather, the "United States" essentially goes unrepresented or, arguably, is represented by the judicial branch, which is assigned the responsibility in our tripart-

The question whether the *qui tam* concept conforms to contemporary constitutional doctrines reflects a specific variation on this larger theme: Does the Constitution empower only the executive branch to define and then secure through Federal litigation the interests of the United States with respect to particular public grievances, or does our "constitutional system [which] imposes upon the Branches a degree of overlapping responsibility"³⁰ permit Congress to diffuse this power by authorizing private citizens to represent the United States in Federal litigation?

I explore this question here by identifying the constitutional values potentially threatened by the *qui tam* device and by analyzing the validity and persuasive force of the arguments they inspire. I conclude that the authorization of *qui tam* actions remains a constitutionally acceptable means by which Congress may shape and secure the interests of the United States. With only limited exceptions, important constitutional values underlying Articles II and III are no more threatened by "public" *qui tam* actions than by conventional "private" citizens' suits. And the few exceptions are relatively trivial and/or adequately addressed by various features of the *qui tam* concept in general or the False Claims Act in particular. The lesson to be learned, therefore, is that Congress' power to create new legal interests enforceable by private citizens in Federal court is not bounded by a public/private distinction; Congress may entitle private citizens through *qui tam* actions to enforce legal interests granted the United States on its behalf.³¹

tite government for assessing the constitutionality of government behavior in particular cases and controversies.

29. For example, may the executive branch, absent legislative authorization, bring suit in Federal court? Compare *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (executive has no nonstatutory standing to enforce Fourteenth Amendment rights of individuals) with *id.* at 207 (Gibbons, J., dissenting from denial of rehearing). See generally Note, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566 (1972) (arguing that executive ought to enjoy nonstatutory standing only in specified "emergencies"). And if so, can Congress expressly prohibit this practice under certain conditions? See, e.g., *United States v. Marion County School Dist.*, 625 F.2d 607, 611 (5th Cir. 1980) (answering in the affirmative). And, for these purposes, should it matter whether the executive purports to represent its own institutional interests or rather the overall interests of the United States?

30. *Mistretta v. United States*, 109 S. Ct. 647, 659 (1989).

31. This conclusion has ramifications extending well beyond the constitutional defense of a single *qui tam* statute. Should *qui tam* enforcement of the False Claims Act ultimately be viewed as a successful strategy for effectuating Federal objectives, Congress likely will experiment with alternative versions of the concept in different substantive legal contexts. For example, as suggested to me by Professor Peter Schuck, Congress might enforce Federal immigration law by authorizing *qui tam* suits against persons knowingly employing unauthorized immigrants. See also Crumplar, *supra* note 14 (proposing *qui tam* enforcement of Federal securities laws); Note, *Domestic Covert Action and the Need for National Security Qui Tam Prosecutions*, 16 AM. J. CRIM. L. 207 (1989) (proposing *qui tam* enforcement of laws and regulations constraining domestic covert action undertaken by executive agencies). While I focus on the constitutional validity of the False Claims Act's contemporary version of the concept, my analysis implicitly establishes a framework for evaluating the validity of continuing efforts to privatize enforcement of Federal laws, both through alternative versions and applications of the *qui tam* concept, and through various unconventional versions of the citizens' suit model. Cf., e.g., *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988) (rejecting Article II challenge—similar to that advanced against the *qui tam* concept—to provision of

I. THE NATURE OF *Qui Tam* REPRESENTATION OF THE UNITED STATES

Given the uniqueness of the *qui tam* litigation concept, the nature and relationship of the interests and parties involved are not self-evident. Evaluating the contemporary constitutional status of the *qui tam* framework therefore requires first exploring its various facets in greater detail. In this section I explore the relationship created by *qui tam* litigation among the United States, the executive branch, and private plaintiffs.

A. *The Injury to the United States*

The False Claims Act was originally enacted to “stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War.”³² Some things never change: Today, “perhaps ten percent of the Federal budget is being lost each year due to fraud against the taxpayers,”³³ and there are “indications of massive procurement abuses occurring in the recent military buildup.”³⁴

Illegal false claims practices injure the entire public in several ways. Because “the United States holds its general funds [in the Federal treasury] . . . as surrogate for the population at large,”³⁵ each member of the public is injured by the loss of financial resources that were generated by the public (primarily through taxes) and intended to be spent on the public’s behalf. Financial concerns aside, false claims practices may generate other diffuse injuries, including threats to national security.³⁶

The False Claims Act’s authorization of litigation on behalf and in the name of the United States³⁷ reflects the understanding that the United States, as “sovereign,” represents the interests of the public at large.³⁸ Through litigation, the United States attempts to redress the public inju-

Federal Water Pollution Control Act authorizing citizens to seek monetary penalties payable to Federal treasury).

I intend in the future to provide a more complete account of the related constitutional issues raised by the entire range of current and proposed versions of private Federal law enforcement schemes by developing and defending a more comprehensive theoretical constitutional framework than space and time considerations permit here.

32. *United States v. Bornstein*, 423 U.S. 303, 309 (1976).

33. 134 CONG. REC. S16,705 (daily ed. Oct. 18, 1988) (statement of Sen. Grassley).

34. 132 CONG. REC. H6479 (daily ed. Sept. 9, 1986) (statement of Rep. Brooks).

35. *Flast v. Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting).

36. For example, certain types of military contractor fraud (e.g., falsely certifying compliance with required performance or safety standards) do much more than undermine the economic value of goods procured; they also potentially threaten the nation’s military security. *See S. REP.*, *supra* note 12, at 3 (many false claims practices in military procurement “cause[] not only a serious threat to human life, but also to national security”). Both to deter such non-economic injuries and to deter the mere provision of false information, which is considered to be a public evil in itself, the False Claims Act establishes liability and imposes civil penalties even when a defendant’s submission of false claims to the United States results in no monetary loss. *See id.* at 8.

37. 31 U.S.C.A. § 3730(b).

38. *See, e.g.*, *United States v. Raines*, 362 U.S. 17, 27 (1960) (“Congress [may] authorize the United States to be the guardian of th[e] public interest in a suit for injunctive relief.”).

ries created by false claims practices, both by recouping siphoned treasury funds and by deterring future threats to economic and national security.³⁹

B. *Representation of the United States Through Litigation*

1. *The Qui Tam Enforcement Scheme*

The "United States" can act only through the agency of persons. *Qui tam* provisions establish a dual enforcement scheme whereby both public officials and private citizens are permitted to represent the United States in litigation to enforce statutory mandates. The False Claims Act permits the executive branch, namely the Department of Justice (DOJ), to litigate on behalf of the United States. The DOJ may file its own actions,⁴⁰ and it enjoys exclusive and plenary control over such litigation.⁴¹

But concerned that Federal officials, acting alone, cannot adequately protect the United States' interest in remedying and deterring fraud, Congress has also authorized any private citizen to initiate litigation and to share in any resulting recovery.⁴² First, Congress recognized that detecting fraud against the Federal treasury often is extremely difficult for the government without the aid of "informers," both because individuals do not suffer personal injuries sufficiently palpable to provoke complaints, and because often the only persons who know about frauds are associated with the perpetrators (usually subordinates, but sometimes unwilling participants) and are therefore reluctant to notify the authorities.⁴³

In addition, given the "harsh reality of today's funding limitations of . . . the budgets of the government's prosecuting agencies,"⁴⁴ public officials often cannot commit the time and resources necessary for the success-

39. Because the economic injury to the public is filtered through the Federal treasury, the role of the United States as plaintiff in a False Claims Act suit arguably may be characterized in an alternative manner. If one conceives of the United States government as owning the funds in the Federal treasury, then it may sue in a "proprietary" as opposed to "sovereign" capacity to protect its "personal" pecuniary interests.

I find this perspective wanting, both because I agree with Justice Harlan's view that the treasury belongs to the public and because this perspective fails to account for the non-pecuniary injuries potentially generated by false claims practices. See *supra* text accompanying notes 35-36. More importantly for my purposes here, this perspective diverges from the traditional application of the *qui tam* concept in which the United States clearly acted in a sovereign rather than proprietary capacity. See, e.g., *Flast*, 392 U.S. at 120 (Harlan, J., dissenting) (citing *qui tam* actions as examples of suits brought by private citizens solely as "representatives of the public interest") (quoting *Scripps-Howard Radio v. Federal Communications Comm'n*, 316 U.S. 4, 14 (1941)); *Priebe & Sons v. United States*, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting) (same).

In any case, the sovereign/proprietary distinction is not important for present purposes because it does not influence the relevance or importance of the constitutional values underlying separation of powers doctrine.

40. 31 U.S.C.A. § 3730(a) (West Supp. 1989).

41. *Id.* § 3730(b)(c).

42. *Id.* § 3730(b)(1), (d).

43. See S. REP., *supra* note 12, at 4 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities.")

44. 132 CONG. REC. H9388 (daily ed. Oct. 8, 1986) (statement of Rep. Berman).

ful prosecution of fraud even when they have already somehow managed to detect it.⁴⁵ Congress determined that the best solution was to “deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.”⁴⁶

Another justification underlying Congress’ original decision to authorize private enforcement may have also partly motivated Congress’ recent decision to reinvigorate it. In 1863, many public officials were thought to be intimately involved in the corrupt practices of Civil War defense contractors, and Congress feared that public law enforcement officers might therefore hesitate to prosecute offenses diligently.⁴⁷ Today a related concern seems plausible. Government agencies may be sufficiently dependent upon (or co-opted by) specific players in the military-industrial complex that the desire to prosecute wrongdoers diligently is compromised.⁴⁸

None of these purposes served by *qui tam* authorization would similarly be served by replacing it with a reward incentive regime authorizing the DOJ to offer informers a monetary reward for disclosing their knowledge of fraudulent activities if and when the DOJ successfully litigated an action based on their information.⁴⁹ Congress determined that potential rewards alone would not provide sufficient incentive for disclosure; many potential informers are reluctant to come forward because they refuse to accept the “personal and financial risk” involved absent any “confidence in the Government’s ability to remedy”⁵⁰ the misconduct, a fear rectifiable only by allowing for participation in the litigation.⁵¹ Second, such a reward regime would not utilize the resources of the private citizenry to supplement the limited public resources with which the DOJ can enforce the Act. Finally, such a regime would not discourage executive complacency.

45. See, e.g., S. REP., *supra* note 12, at 7 (“[P]erhaps the most serious problem plaguing effective [fraud] enforcement is a lack of resources on the part of Federal enforcement agencies. . . . Federal auditors, investigators, and attorneys are forced to make ‘screening’ decisions based on resource factors. Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset. . . .”) (footnote omitted).

46. 132 CONG. REC. H9388 (daily ed. Oct. 8, 1986) (statement of Rep. Berman).

47. See Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 Nw. U.L. REV. 446, 453 n.32 (1972).

48. Cf. 132 CONG. REC. H6483 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell) (expressing concern that executive branch might occasionally refuse to prosecute potentially meritorious False Claims Act suits for inappropriate “political reasons”).

49. Cf. Act of Sept. 13, 1978, 31 U.S.C. § 329 (1982) (court has discretion to award portion of criminal fine to person(s) providing information leading to conviction); Refuse Act of 1899, 33 U.S.C. § 411 (1982) (same).

50. S. REP., *supra* note 12, at 25.

51. *Id.* To avoid the possibility that employees who themselves “planned and initiated” a false claims practice would bring a *qui tam* suit against their employers or colleagues and thereby profit from their own misconduct (as opposed to policing the misconduct of others), Congress recently amended the False Claims Act to eliminate for such plaintiffs the guarantee of any minimum recovery and in extreme cases to exclude any recovery. See Major Fraud Act of 1988, 102 Stat. 4631, 4638 § 9 (Nov. 19, 1988).

While providing for private initiation of lawsuits, the 1986 amendments to the False Claims Act also offer the executive branch an opportunity to share the responsibility for prosecuting such suits.⁵² After a *qui tam* plaintiff files an action, the DOJ has sixty days (or more, with court consent) in which to investigate the *qui tam* plaintiff's allegations and decide whether to enter and direct the litigation.⁵³ If the DOJ so elects, "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action."⁵⁴ The *qui tam* plaintiff remains a party to the action,⁵⁵ but she cannot dictate the DOJ's actions or override its decisions.⁵⁶

Alternatively, the DOJ may leave the primary responsibility for directing the litigation to the *qui tam* plaintiff and monitor her progress and performance.⁵⁷ The DOJ must consent prior to any dismissal of the action.⁵⁸ And, the DOJ may change its mind and intervene at any later date, upon a showing of good cause, to assume a more significant role in the litigation.⁵⁹ The Act therefore provides the DOJ with substantial control over *qui tam* litigation, even while it offers strong incentives for private initiative.⁶⁰

52. In this respect, the present *qui tam* structure of the False Claims Act is novel. The Act prior to 1943, as well as all other *qui tam* statutes, provided that actions would be controlled exclusively by the initiating plaintiff. Between 1943 and 1986, the False Claims Act allowed the Department of Justice to intervene and assume exclusive responsibility for litigating *qui tam* actions; the original private plaintiff could continue the prosecution only if the DOJ declined to enter or if the "United States . . . fail[ed] to carry on such suit with due diligence . . ." Act of Dec. 23, 1943, 57 Stat. 608-09.

53. 31 U.S.C.A. § 3730(b)(2)-(4) (West Supp. 1989). As of summer 1989, the DOJ had taken over 23 *qui tam* suits filed under the 1986 amendments, had declined to take over 63 suits, and had yet to take action in 69 suits. See *Workers Who Turn In Bosses Use Law to Seek Big Rewards*, N.Y. Times, July 10, 1989, at A1, col. 1, at D3, col. 1.

54. 31 U.S.C.A. § 3730(c)(1) (West Supp. 1989).

55. *Id.*

56. Should the DOJ seek to dismiss or settle the case, however, the *qui tam* plaintiff is entitled to notice and a hearing. *Id.* § 3730(c)(2)(A)-(B). In part to prevent the DOJ from dismissing private suits without adequate justification, *cf. supra* note 48 and accompanying text (noting congressional concern for prospect of executive co-optation), the Act also places substantive limitations on the DOJ's authority to dismiss private suits. See *infra* note 131 (discussing such limitations).

57. *Id.* § 3730(c)(3).

58. *Id.* § 3730(b)(1).

59. *Id.* § 3730(c)(3).

60. A successful plaintiff is generally entitled to share 15 to 25% of the recovery if the DOJ intervenes to assume primary responsibility for conducting the litigation and 25 to 30% if the DOJ does not intervene, with a 10% ceiling if the suit is based upon certain publicly available information. 31 U.S.C. § 3730(d)(1)-(2). Given the Act's provision for treble damages plus penalties per each false claim, as well as the enormous scope of various alleged fraudulent schemes, a successful plaintiff's share may run well into the million of dollars. See *Workers Who Turn In Bosses Use Law to Seek Big Rewards*, *supra* note 53 (noting that DOJ has joined *qui tam* suits filed against Singer Corp. for \$77 million single damages; Litton Industries for \$25 million single damages; and Northrop Corp. for \$20 million single damages).

Because a *qui tam* suit under the Act spurs executive review and perhaps prosecution of a particular complaint and yet simultaneously purports directly to enforce private compliance, the suit partakes of various qualities of both "private rights of action" and "private rights of initiation." See *supra* note 7.

2. *The Representational Status of the Qui Tam Plaintiff*

The False Claims Act provides that “[a] person may bring a civil action for a violation of [the Act] for the person and for the United States Government. The action shall be brought in the name of the Government.”⁶¹ This modernized description of the *qui tam* concept⁶² suggests that the Act purports to authorize private litigants to represent the United States; *qui tam* suits are brought “for the person” only in the sense that the litigant may earn a reward.⁶³ To be sure, the Act specifies that *qui tam* plaintiffs are parties in their own right,⁶⁴ but so is the United States.⁶⁵ Thus the *qui tam* provisions apparently intend that “some of the present functions of the Department of Justice [be] delegated to the people at large,”⁶⁶ by authorizing private plaintiffs to represent the United States in court.⁶⁷

Admittedly, the fact that a *qui tam* action under the False Claims Act is brought in part “for the person” allows a more familiar interpretation of the statutory scheme. As explained above, the submission of false claims to the Federal treasury creates at least a financial and often a more intangible injury to all members of the public. The False Claims Act might plausibly be viewed as granting all citizens a statutory right to be secure from the various injurious effects of government fraud, just as the citizens’ suit provisions of various environmental statutes are understood to grant all citizens a statutory right to be free from injuries to intangible environmental values.⁶⁸ Indeed, members of Congress in their 1986 deliberations referred interchangeably to “*qui tam*” and “citizens’ suits,”⁶⁹ perhaps sug-

61. 31 U.S.C.A. § 3730(b)(1) (West Supp. 1989).

62. *Cf. supra* note 1.

63. See 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman) (personal share “is a critical incentive and reward for persons who come forward with information, putting themselves at risk on behalf of the Federal Treasury and American taxpayers”).

The bounty offered for successful prosecution may profitably be analogized to a partial assignment of the United States’ claim. See *infra* text accompanying note 211.

64. 31 U.S.C.A. § 3730(c) (West Supp. 1989).

65. Under this view of the *qui tam* framework, the United States is properly understood to be a party plaintiff in any action “no matter who brings it on its behalf.” *United States v. B.F. Goodrich*, 41 F. Supp. 574, 575 (S.D.N.Y. 1941); see also *Minotti v. Wheaton*, 630 F. Supp. 280, 282–83 (D. Conn. 1986) (United States is co-plaintiff even before DOJ has opportunity to enter litigation); *United States ex rel. LaValley v. First Nat’l Bank of Boston*, 625 F. Supp. 591, 594 (D.N.H. 1985) (United States is real party plaintiff in interest without regard to DOJ’s decision to enter litigation).

66. *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 234 (3d Cir. 1942), *rev’d on other grounds*, 317 U.S. 537 (1943).

67. That the plaintiff is a party to the suit in her own right but simultaneously represents a separate juridical entity is not unique to *qui tam* litigation; Congress has often delegated power to sue on its behalf to a representative party, as opposed to hiring counsel to represent itself directly. See, e.g., *Goldwater v. Carter*, 617 F.2d 697, 712 n.6 (D.C. Cir. 1979) (“where a majority of Congress approves a lawsuit by expressly authorizing a member or a committee to represent it in the courts,” the delegatee may sue on behalf of Congress); *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (“It is clear that the House as a whole has standing to assert its investigatory power, and can designate [by House Rule] a member to act on its behalf.”).

68. See *supra* note 23.

69. See, e.g., 132 CONG. REC. H6479 (daily ed. Sept. 9, 1986) (statement of Rep. Brooks); *id.* at H6482 (statement of Rep. Berman).

gesting that the False Claims Act's grant of private standing, like conventional citizens' suit standing, was conceived to vindicate private as well as public interests.

The mere fact that the same Act can plausibly be interpreted⁷⁰ as securing either solely public or also private interests⁷¹ bolsters my earlier suggestion that the asserted public/private representation distinction is unhelpful,⁷² and therefore it portends the conclusion that the Act's constitutionality ought not turn on this slippery characterization.⁷³ But I now wish to consider the constitutional challenge to the *qui tam* concept on its own terms. Understanding the *qui tam* litigation framework to authorize private citizens to represent the interests of the United States (as opposed to their own interests), does the framework comport with separation of powers values underlying Article II?

II. *Qui Tam* ACTIONS AND ARTICLE II

Litigants representing the United States are not provided with an exogenously defined list of the various interests of their client. Rather, the litigants must define for themselves the United States' interests and then decide how and when best to implement those interests through specific

70. Cf. *Browning-Ferris Indus. v. Kelco Disposal*, 109 S. Ct. 2909, 2920 n.21 (1989) (holding open question as to proper characterization of *qui tam* plaintiff's role in False Claims Act litigation); *United States v. Halper*, 109 S. Ct. 1892, 1903 n.11 (1989) (same).

71. One aspect of the False Claims Act in particular suggests, although not definitively, that the Act is more fairly characterized as protecting public-oriented rather than private interests as those terms are used in conventional parlance. The Act provides that once a suit is filed on a specific set of allegations by any plaintiff, all future suits by others raising the same allegations are barred. 31 U.S.C.A. § 3730(b)(5) (West Supp. 1989). Cf. S. REP., *supra* note 12, at 27 ("[I]f the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action."). In contrast, most traditional citizens' suit schemes that grant private rights of action theoretically allow *each* aggrieved citizen to sue the wrongdoer for redress. *But see, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1365(b) (1982) (citizen must notify EPA and state sixty days prior to initiating private action, and such action is barred if either government first brings its own suit).

In certain contexts this distinction may be of limited practical significance. For example, when citizens' suit schemes authorize private plaintiffs to seek injunctive but not monetary relief, the first successful suit may not bar by operation of statute subsequent suits on the same set of facts, but subsequent suits may fail to satisfy Article III requirements because the controversy has become moot. Moreover, in specific instances, claim or issue preclusion doctrines may bar or hinder the prosecution of subsequent suits.

Nevertheless, the statutory bar applicable to subsequent False Claims Act suits provides at least some support for the view that, as a conceptual matter, any given false claims practice ought to be understood as creating but a *single* (albeit collectively defined) injury under the Act. Courts have long interpreted the preclusion of multiple suits to support the characterization that the "true" plaintiff in False Claims Act litigation "must be the United States, no matter who brings [an action] on its behalf." *United States v. B.F. Goodrich*, 41 F. Supp. 574, 575 (S.D.N.Y. 1941).

72. See *supra* text accompanying notes 23-26.

73. Of course, "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality," *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (citation omitted), and interpreting the Act as granting private citizens private rights of action certainly falls far short of "perverting the purpose of a statute." *Id.* (citation omitted). Hence, even if one concludes that this public/private representation distinction is salient and that the Constitution prohibits private citizens from representing the United States in litigation, then the False Claims Act's constitutionality ought to be sustained through such a saving interpretation.

enforcement actions. Traditionally, Congress leaves the responsibility for making these decisions largely to executive branch officials.

Congress' strategy in authorizing *qui tam* actions is to diffuse this responsibility among both public and private actors. Congress sets in motion an enforcement machinery designed to strengthen the protection of the United States' specific interest in remedying and deterring the misconduct identified by the *qui tam* statute (here, false claims practices). Private citizens help refine and implement Congress' general wishes by filing and litigating specific *qui tam* suits. Finally, the executive branch also participates in defining and implementing the interests of the United States by filing its own enforcement actions (and, under the present version of the False Claims Act, by overseeing and perhaps taking over *qui tam* litigation).

The novel Article II challenge presently being levied against the *qui tam* concept interweaves two related arguments against this diffusion of responsibility for defining and implementing the United States' law enforcement interests. First, Article II assigns this responsibility exclusively to the President, and even partial delegation of this function to *qui tam* plaintiffs violates separation of powers principles by "prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."⁷⁴ Second, to the extent Congress *may* divest the President of plenary prosecutorial discretion by empowering an alternative and independent legal representative for the United States, that representative must at least be a properly appointed "Officer of the United States" rather than a self-selected and self-interested private citizen. I consider each of these arguments in turn.

A. *Qui Tam Litigation and Executive Prosecutorial Discretion*

Does Article II bestow upon the President the power to exercise discretion in implementing Federal law through litigation, or is the President's function in the realm of domestic law enforcement simply to follow congressional directives, including those governing the exercise of prosecutorial discretion?⁷⁵ If the former, does this independent executive law enforcement function cover only criminal actions or also civil actions vindicating solely public rights, and why does it not extend further to cover civil actions vindicating private rights but secondarily (and design-

74. *Mistretta v. United States*, 109 S. Ct. 647, 660 (1989) (quoting *Nixon v. Administrator of Gen. Serv.*, 443 U.S. 425, 443 (1977)). The term "separation of powers" is somewhat of a misnomer—generally, in the sense that our tripartite governmental scheme is more fairly characterized as one of overlapping but mutually constraining powers; and particularly in this context, in the sense that the constitutional threat posed here consists (primarily) of a vertical disintegration of executive/private boundaries rather than a horizontal disintegration of boundaries separating coordinate branches. For ease of exposition, however, I employ conventional parlance.

75. Unless stated otherwise, I use the phrase "prosecutorial discretion" to refer to civil as well as criminal cases.

edly) benefiting the public? Finally, for those types of enforcement actions within the posited executive function, what particular attributes of prosecutorial discretion must be protected from external constraint?

Answers to these questions cannot be found in the constitutional text. The Supreme Court has suggested occasionally that the “take Care” clause⁷⁶ vests the President with prosecutorial discretion over Federal law enforcement, but this clause is better viewed as a mandate to follow the will of Congress than as a grant of exogenously defined power.⁷⁷ And even if viewed as the latter, the clause certainly provides no guidance as to the contours of any such independent executive function. Moreover, while an executive function of law enforcement may derive from the clause vesting the President with the “executive Power,”⁷⁸ this textual provision provides no greater guidance. Finally, the President might claim at least a supervisory role over law enforcement pursuant to Article II’s appointments clause, but this clause fails to specify when litigants representing the United States must be “Officers of the United States” to whom the specified appointment procedures apply.⁷⁹

Faced with this paucity of textual guidance, the Supreme Court recently turned to history when asked to characterize the functions of an independent counsel empowered by Congress to enforce criminal law against executive branch officials: “[t]here is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”⁸⁰ To the extent that this

76. U.S. CONST. art. II, § 3 (President “shall take Care that the Laws be faithfully executed”). See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[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, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (referring to initiation of lawsuits on behalf of the United States as part of President’s “take Care” function).

77. The term “faithfully” itself suggests that the President acts subservient to another in the exercise of this function. See Sunstein, *supra* note 24, at 1471 (“The ‘take Care’ clause, however, is a duty, not a license. The clause requires the President to carry out the law as enacted by Congress.”) (footnote omitted).

Of course, to the extent that Congress grants discretion by statute to the President, this clause empowers—indeed commands—her to exercise that discretion. But the clause does not provide her an *independent* source of discretion such that she is empowered to ignore any specific statutory directives governing her behavior.

78. U.S. CONST. art. II, § 1, cl. 1 provides that the “executive Power shall be vested in a President . . .” See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2626–27 (1988) (Scalia, J., dissenting) (“[g]overnmental investigation and prosecution of crimes is a quintessentially executive function” assigned to President by vesting clause).

79. U.S. CONST. art. II, § 2, cl. 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

80. *Morrison*, 108 S. Ct. at 2619 (discussing Ethics in Government Act, 28 U.S.C.A. §§ 591-599 (West Supp. 1989)). Indeed, Justice Scalia queried rhetorically in his dissent: “In what *other* sense can one identify ‘the executive Power’ that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) *except* by reference to what has always and everywhere—if conducted by Government at all—been conducted never by the legislature, never by the

historical inquiry properly influences constitutional interpretation,⁸¹ it leads to the opposite conclusion here; *qui tam* actions have been authorized by Congress and adjudicated by courts for over two hundred years in this country.⁸²

Beyond text and history, separation of powers doctrine ought to reflect the structural values served by assigning particular functions to particular governmental (or private) actors. In broad terms, Congress defines legal interests and corresponding obligations based upon its view of wise social policy, and the executive branch implements those obligations in specific cases. While Congress cannot itself “execute” the laws it has enacted,⁸³ it may structure the operations of the executive branch as it finds “necessary and proper” to ensure the executive’s ability to execute the laws in a manner faithful to congressional will.⁸⁴ Limits on Congress’ power to do so derive from the competing values served by executive discretion. Hence, the appropriate separation of powers inquiry entails identifying the values purportedly served by executive control over litigation on behalf of the United States and assessing whether these values justify precluding Con-

courts, and always by the executive.” *Id.* at 2626 (emphasis in original).

81. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (First Congress’ actions “provide[] ‘contemporaneous and weighty evidence’ of the Constitution’s meaning since many of the Members of the First Congress ‘had taken part in framing that instrument.’”) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)); cf. *Mistretta v. United States*, 109 S. Ct. 647, 669 (1989) (“Our 200-year tradition of extrajudicial service [by Article III judges] is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.”). For those adhering to the originalist school of constitutional interpretation, this historical presumption may well be dispositive. See Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (defending originalist interpretive method with heavy reliance on Federal, state, and English historical practice). But see Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987) (“The modern presidency is so different from the entity contemplated by the framers that it is unrealistic simply to ‘apply’ their choices to the present situation.”).

82. See *supra* text accompanying notes 2–4. Perhaps for this reason, Justice Scalia—a self-proclaimed originalist, see Scalia, *supra* note 81—seems to have carefully preserved the possibility that private prosecution is consistent with Article II. See *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting) (criminal prosecution is executive function “if conducted by Government at all”); *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124, 2142 (1987) (Scalia, J., concurring) (criminal prosecution is executive function “at least to the extent that it is publicly exercised”).

83. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not enjoy removal power over officer performing executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto provision invalid because Congress may not control execution of laws except through Article I procedures); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (Congress may not “‘enforce [the laws] or appoint the agents charged with the duty of such enforcement’”) (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)). While Congress may to some extent “commingle the functions of the [three] branches,” *Mistretta*, 109 S. Ct. at 660, Congress may not control the precise execution of legislation through the power of appointment, removal, or veto.

Qui tam authorization does not constitute an impermissible congressional execution of its own laws. See *infra* text accompanying notes 168–71.

84. See U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”) (emphasis added). See generally Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROB., Spring 1976, at 102 (explaining contours of this congressional power).

gress from diffusing the enforcement power through *qui tam* authorization.⁸⁵

In particular, because *qui tam* statutes authorize the executive branch to bring its own enforcement actions⁸⁶ and because *qui tam* suits do not force the executive to take any significant affirmative actions such as initiating or joining litigation,⁸⁷ we must focus on the values purportedly served by executive discretion to *prevent* prosecution by private citizens of suspected wrongdoers. Only in rare and unique circumstances is it likely that the executive branch would actually prefer that no private suit be brought to remedy misconduct; the executive generally welcomes efforts by private citizens to bring to its attention statutory violations and to offer their private resources in support of the United States' enforcement effort.⁸⁸

85. The propriety of this inquiry may itself be questioned, given the wide range of methodological approaches to separation of powers doctrine proffered by various scholars. While space and time constraints preclude a fully developed defense of my methodology, two brief observations are in order.

First, some might argue that focusing on contemporary values accords too little weight to the framers' original value choices. See, e.g., Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719 (contrasting between pragmatic "evolutionary" and originalist "de-evolutionary" interpretive traditions in separation of powers jurisprudence). But the originalist tradition strongly favors the constitutionality of the *qui tam* concept. See *supra* text accompanying notes 80-82. Because only a concern for contemporary values underlying separation of powers jurisprudence may fairly justify skepticism about the *qui tam* concept's validity, this concern merits attention.

Second, some might argue that my approach undervalues the importance of a relatively rigid separation of functions between various governmental branches. See, e.g., Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-48 (1987) (contrasting between "formalistic" and "functional" approaches); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (contrasting between "separation of powers," "separation of functions," and "checks and balances" approaches). As an initial matter, while the "formalist" and "functionalistic" traditions offer distinct approaches to evaluating the validity of a particular legislative interference with a function concededly assigned to the executive branch, their approaches are far less divergent with respect to the prior question whether a particular function is assigned to the executive branch in the first instance. The answer to this prior question, it seems to me, necessarily turns on an evaluation of structural values, at least when (as here) the text is indeterminate.

Moreover, the Supreme Court's most recent separation of powers cases clearly reflect a more functionalist methodology. See *Mistretta v. United States*, 109 S. Ct. 647 (1989); *Morrison v. Olson*, 108 S. Ct. 2597 (1986). Embracing a values-oriented approach here allows me to provide more helpful guidance for the courts that are now or soon will be assessing the constitutionality of the *qui tam* concept. See Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 351-54 & n.39 (1989) (observing that *Mistretta* and *Morrison* reflect "meticulously context-specific approach[es]" and suggesting courts addressing separation of powers challenges should focus carefully on a law's "particular objectives and . . . distinctively complex structure").

86. Recall that the False Claims Act in particular also allows the executive to take over actions initiated by *qui tam* plaintiffs. See *supra* text accompanying notes 52-59.

87. Compare private suits brought to enjoin nondiscretionary agency regulatory or enforcement action. See *supra* note 7 and accompanying text; see, e.g., *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (entertaining suit under Administrative Procedure Act to force executive enforcement action).

88. Even when the Department of Justice declines to take over a privately initiated prosecution, it typically does so based on its belief that the United States will be adequately represented by the *qui tam* litigant, and/or its belief that the potential monetary recovery is too small to justify the expenditure of scarce public funds. See, e.g., *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1102 n.2 (7th Cir. 1984) (quoting submission of DOJ):

[I]t is because [governmental] interests will be served by the relator's control of this action that the United States has declined to enter The relator . . . has developed a special exper-

But in such rare circumstances, allowing *qui tam* litigants to initiate enforcement actions may undermine two values assertedly secured by executive prosecutorial discretion. First, vesting discretion not to prosecute in the executive branch ensures that the task of weighing competing public policy objectives in order to devise a law enforcement strategy best serving the overall interests of the United States falls to a politically accountable and unitary actor. Second, vesting discretion not to prosecute in the executive provides a political check against the unwarranted employment of litigation as a tool of oppression, thus advancing due process norms. When these contentions are carefully dissected and explored, it turns out that the underlying values either are not worthy of rigid constitutional protection or are not significantly threatened by *qui tam* litigation.

1. *Coordination of Competing Public Policy Objectives*

That a particular illegal act injures the public does not mean that prosecuting the wrongdoer necessarily serves the *overall* public interest, which is composed of many competing objectives. Most obviously, public resource scarcity typically requires an executive agency charged with enforcing the law to assess not only "whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action . . . best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."⁸⁹ We need not explore here whether these difficult decisions entailed by limited prosecutorial resources *must* be made by the accountable and unitary executive branch, for private *qui tam* litigation does not require such decisions to be made.⁹⁰

Nor should we be concerned that *qui tam* litigation may supersede a judgment by the executive that particular statutory objectives are too unimportant to pursue. Even assuming that such executive judgments actually turn on a view of the statute's merits and not on resource con-

tise in the detection and investigation of Frauds of this type Further, the relator possesses the ability, manpower and resources with which to pursue this action. Thus, the *qui tam* plaintiff herein is the proper party to conduct this action.

The DOJ has suggested in at least one *qui tam* case that it would not intervene because it found after its preliminary investigation "insufficient evidence to demonstrate that the acts of the defendants resulted in damage or injury to the United States." U.S. Department of Justice, Press Release No. 88-523 (Dec. 16, 1988), referring to United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., No. CV 87-1840 WDK (C.D. Ca. 1987). But even this judgment alone does not suggest disapproval of the *qui tam* plaintiff's subsequent effort to surpass the DOJ's expectations through informative discovery.

89. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). See also Easterbrook, *On Not Enforcing the Law*, REGULATION 14, 15 (Jan.-Feb. 1983) ("Effective enforcement of the most important rules usually entails reducing the number of prosecutions of some offenses by a very great deal.")

90. Cf. Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 1006 (1983) ("In situations where the Justice Department chooses not to exercise its prosecutorial discretion because of a shortage of resources, there [are] obvious advantage[s] to allowing others to act on behalf of the government.")

straints,⁹¹ such judgments are not constitutionally protected by Article II against congressional override. Perhaps in specific contexts a policy of executive nonenforcement might inspire fruitful public debate as to the merits of particular statutes and might even encourage legislative reconsideration.⁹² But the ultimate judgment as to the relative importance of enforcing various statutes properly rests with Congress, the branch most directly responsible for such broad policymaking decisions. Congress usually implements its policy judgments by shaping the environment within which executive prosecutorial discretion is exercised, either crudely by compartmentalizing and controlling the budgets for various law enforcement activities, or more carefully by dictating the priorities by which executive officials must be guided when enforcing discrete statutes.⁹³ But Congress may also ultimately determine relative enforcement levels of statutes more indirectly by supplementing executive efforts with citizens' suits, and *qui tam* suits pose no greater constraint on executive discretion to determine the relative importance of enforcing specific statutes than does the more conventional mode of dual enforcement.

Concerns about resource allocation and the wisdom of Congress' general objectives aside, are there persuasive reasons to prevent *qui tam* plaintiffs from potentially interfering with the executive branch's traditional ability to determine how best to use available enforcement tools to bring wrongdoers to justice in specific cases? Many forms of misconduct are actionable by the executive branch through criminal, civil, and perhaps even administrative proceedings as well.⁹⁴ Typically, the executive branch can decide which avenue or combination thereof promises best to promote the goals of compensation, deterrence, and (when appropriate) retribution. Moreover, executive officials usually can determine the optimal timing of various enforcement measures. For example, the DOJ might wish to delay civil prosecution of a particular fraudulent practice until after it had more time to investigate the facts, or until after it had brought criminal or administrative proceedings against the wrongdoer (and maybe even only if such proceedings were unsuccessful), or until after it had been able to establish judicial precedent in another case with a

91. See, e.g., Easterbrook, *supra* note 89, at 14-16 (comparing views of Carter and Reagan Administrations on desirability of enforcing antitrust and antidiscrimination statutes with respect to specific categories of offenses).

92. See, e.g., Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 897 (1983) ("Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.").

93. See *infra* text accompanying notes 98-100; see also Krent, *supra* note 2, at 284-85 & n.45 (discussing Congress' manipulation of agency budgets to dictate enforcement priorities).

94. Many false claims practices giving rise to civil liability also subject the wrongdoer to criminal liability under the criminal version of the False Claims Act, 18 U.S.C.A. § 287 (West Supp. 1989), and some may also be actionable through various administrative proceedings; see, e.g., Civil Monetary Penalties Law, 42 U.S.C.A. § 1320a-7a (West Supp. 1989) (imposing penalties for Medicare fraud).

more favorable factual background or procedural posture.⁹⁵ By dictating the forum and timing of an enforcement action against a particular false claims practice, initiation of a *qui tam* suit might lead to a resolution of that particular case which is less than optimal from the executive's point of view.

The False Claims Act specifically accommodates many of these case-specific concerns about optimal case management.⁹⁶ But even ignoring such accommodations, is the ability of the executive branch to proceed against particular wrongdoers as it believes optimal so important that plenary control over case management must be considered an executive prerogative that Congress may not circumscribe? Such a conclusion cannot easily be defended. When evaluated from a case-by-case perspective, unfettered executive discretion over case management decisions may best tailor remedial and punitive objectives with respect to each discrete instance of wrongdoing. But the central premise underlying *qui tam* authorization is that, when viewed from a more global perspective, the set of targeted misconduct is underenforced in a regime of exclusive executive discretion.⁹⁷ Whether the United States' overall law enforcement interests would be furthered or retarded by encouraging a greater number of enforcement actions even at the expense of frustrating the optimal management of specific prosecutions is a policy determination most appropriately left to Congress.⁹⁸ Indeed, the Supreme Court has held that "Congress may limit an [executive] agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will

95. The executive branch's discretion over the choice between and timing of various modes of enforcement is circumscribed to some extent by the contours of the underlying legal schemes (e.g., statutes of limitation) and also by factual events (e.g., threatened bankruptcy of putative defendant). Moreover, such discretion may also be circumscribed by constitutional rules. For example, in *United States v. Halper*, 109 S. Ct. 1892 (1989), the Supreme Court recognized that in rare cases a civil penalty assessed against the defendant in a civil False Claims Act proceeding may be "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" for purposes of applying the Fifth Amendment's double jeopardy prohibition against multiple punishments in multiple proceedings. *Id.* at 1898. Imposition of a punitive sanction in a criminal proceeding precludes the government from subsequently seeking an additional civil sanction rising to the level of "punishment" in a second proceeding. *Id.* at 1902. Presumably the bar operates equally in the opposite temporal direction. Hence, should the executive wish to prosecute an alleged false claims practitioner both civilly and criminally, this double jeopardy rule requires it either to bring the two claims in a single proceeding, *id.* at 1903, or else ensure that the civil award does not rise to the level of "punishment."

96. For example, the Act provides for a stay of discovery where it would interfere with the DOJ's diligent efforts to investigate or prosecute the same wrongdoing in a separate criminal or civil proceeding, 31 U.S.C.A. § 3730(c)(4) (West Supp. 1989), and the DOJ may elect to pursue the false claims allegations through any available alternative administrative proceeding. *Id.* § 3730(c)(5). And, of course, the DOJ can shape the order in which legal issues are presented at least within each case by electing to take over the primary responsibility for conducting the prosecution.

97. See *supra* text accompanying notes 42-48.

98. *Cf., e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (It is the "exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws . . .").

pursue."⁹⁹ Congress usually gives effect to judgments of this type by directing specific executive behavior.¹⁰⁰ But this same judgment underlies Congress' decision to enact citizens' suit enforcement schemes. For example, while private actions against wrongdoers to compel compliance with statutory obligations generally do not preclude the executive branch from subsequently bringing its own enforcement actions,¹⁰¹ such private suits certainly affect the timing and circumstances of judicial resolution of specific legal issues. Such suits may also prompt a wide variety of actions by defendants (e.g., destruction of evidence or bankruptcy) that ultimately frustrate the executive's ability to shape its subsequent enforcement efforts in the optimal fashion. Even more clearly, "private rights of initiation"¹⁰² to compel executive enforcement of statutory obligations circumscribe executive discretion over case management decisions in precisely the same way as do *qui tam* suits (in addition to requiring the affirmative investment of agency resources).¹⁰³

99. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (holding that Congress could have, but did not, prescribe such enforcement priorities for Food and Drug Administration, and therefore agency's non-enforcement decisions were not judicially reviewable).

100. *See, e.g., id.* at 832-33 (presumption of nonreviewability under Administrative Procedure Act of agency nonprosecutorial discretion "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"); *Dunlop v. Bachowski*, 421 U.S. 560, 563 n.2 (1975) (upholding judicial review for Secretary of Labor's failure to bring enforcement action where substantive statute provided that "Secretary shall investigate such [administrative] complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action. . . .") (emphasis added).

There is no principled basis for suggesting as a general rule that Congress may establish enforcement priorities for all executive agencies in charge of law enforcement except the Department of Justice. *Cf. Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974) ("[T]he exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory . . . limits enforceable through judicial review.").

101. The bar on subsequent suits under the False Claims Act (even by the DOJ) on a given set of facts, *see supra* note 71, creates the theoretical possibility of collusive suits. For example, an employee might sue her company but intentionally fail to develop her case adequately or agree to settle for a pittance, simply to shield her company from a more vigorous prosecution by the DOJ. As an empirical matter, this scenario is unrealistic, because the intentional disclosure of fraud would subject the defendant to alternative governmental sanctions, ranging from criminal prosecution to administrative sanction to contract cancellation. And, as a normative matter, such a collusive suit would hurt the United States only if the DOJ already knew or was about to learn of the fraud and would have chosen to prosecute; otherwise, the United States is no worse off than it would have been absent the suit. Finally, even if the threat of collusive suits were both real and damaging, the False Claims Act specifically averts this threat by requiring DOJ consent to settlement or dismissal and by allowing the DOJ to assume responsibility for the prosecution. *See supra* text accompanying notes 52-59.

Presumably a successful *qui tam* action recovering penalties sufficiently extreme so as to constitute "punishment" for double jeopardy purposes, *see supra* note 95, would bar the DOJ from subsequently initiating a criminal proceeding with respect to the same false claims practice. But the executive can circumvent such a potential bar either by seeking a stay of the civil *qui tam* action before it proceeds to judgment and then bringing and resolving the criminal charges first, or by intervening in the *qui tam* suit and then joining criminal charges in the same proceeding. The executive loses some control over the timing of, but not its ability to initiate, a criminal action. But, as explained here, unfettered executive control over such timing is not so critical as to warrant invalidating *qui tam* actions on this ground alone.

102. *See supra* note 7.

103. *See supra* text accompanying note 89. Moreover, even when the executive intervenes as of right in a traditional "private right of action," *see, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1365(c)(2) (1982), the executive's ability to represent as it chooses the United States' inter-

The posited private/public distinction between the interests underlying citizens' suits and *qui tam* suits does not affect the extent to which dual enforcement circumscribes executive case management discretion. Nor is executive participation in policy implementation through the exercise of that discretion intrinsically more important in suits vindicating public rights rather than private rights designed to serve the public interest.¹⁰⁴ Hence, given that congressional authorization of private citizens' suits is constitutionally acceptable, the value of executive policymaking thought to underlie executive prosecutorial discretion does not persuasively justify invalidation of the *qui tam* concept.¹⁰⁵

Indeed, in *United States ex rel. Marcus v. Hess*,¹⁰⁶ the Supreme Court appeared to endorse Congress' authority to circumscribe the executive's discretion to promote its own view of case-specific interests in enforcing the False Claims Act. At a time when the Act provided for *no* executive intervention into *qui tam* actions, the executive asked the Court to interpret the Act's grant of jurisdiction over *qui tam* suits to exclude "parasitic" suits brought by informers possessing no independent knowledge of the alleged fraud.¹⁰⁷ The executive asserted

that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control [over False Claims Act enforcement] is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; . . . and finally that conditions have changed since the Act was passed in 1863.¹⁰⁸

But the Court dismissed these arguments, explaining that they were "addressed to the wrong forum. . . . The very fact that Congress passed this statute shows that it concluded that other considerations of policy out-

ests is potentially circumscribed by the private plaintiff's authority to take differing positions on various legal and strategic questions arising in the litigation.

104. One might object at this point that the nature of the underlying interest is relevant simply because the executive is responsible for overseeing litigation on behalf of "its" client, the United States, in a way it is not responsible for overseeing litigation on behalf of private parties. But this objection begs the very question at issue here: What structural values are promoted by executive discretion over enforcement of public (but not private) legal interests such that this function *ought* to be viewed as being exclusively within the executive's domain and requiring *plenary* prosecutorial discretion?

105. Perhaps Congress cannot *itself* fine-tune the optimal balancing of competing general and case-specific interests for every discrete proposed prosecution, either because of practical constraints on its ability to do so imposed by Article I lawmaking procedures, *cf.* *INS v. Chadha*, 462 U.S. 919 (1983) (Congress cannot fine-tune legislation through one-house veto), or because at some point such fine-tuning approaches an impermissible congressional aggrandizement of power. *See* discussion *supra* at note 83. But the important point here is that no weighty Article II values appear to prohibit Congress from strongly influencing the ultimate balance of competing general and case-specific interests by authorizing private citizens to supplement executive law enforcement efforts. *Cf. infra* text accompanying note 171 (*qui tam* authorization does not impermissibly aggrandize Congress' power).

106. 317 U.S. 537 (1943).

107. *See supra* note 12.

108. 317 U.S. at 547.

weighed those now emphasized by the [executive]."¹⁰⁹ Given the Court's insistence on interpreting ambiguous statutes to avoid constitutional concerns,¹¹⁰ it seems fair to read the Court's rejoinder as suggesting that the executive's concern for unitary control over case selection and management, while voiced in terms of statutory construction, also lacked constitutional dimension.

This conclusion dovetails with the Court's recent rejection of an Article II challenge to the Ethics in Government Act,¹¹¹ which vests substantial prosecutorial discretion over the initiation and conduct of criminal proceedings against high-ranking executive officers in a court-appointed independent counsel.¹¹² The Court understood the Ethics Act to "reduce[] the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."¹¹³ Nevertheless, the Court held that certain provisions of the Act reserved for the "executive branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."¹¹⁴ First, only the Attorney General can request appointment of an independent counsel and his decision not to do so is unreviewable; the Act therefore retains for the Attorney General a "degree of control over the power to initiate an investigation by the independent counsel."¹¹⁵ Second, the Attorney General may remove an independent counsel for "good cause."¹¹⁶ Finally, once appointed, an independent counsel's jurisdiction is defined with reference to facts submitted by the Attorney General, and the counsel must "abide by Justice Department policy unless it is not 'possible' to do so."¹¹⁷

The Court's conclusion that these features secured the executive constitutionally "sufficient" control over criminal law enforcement validates Congress' authority to determine that the United States' general interest in zealous enforcement of particular statutes supersedes any potentially competing case management interests governing specific prosecutions. The Ethics Act requires the Attorney General to seek appointment of an independent counsel unless his initial 90-day-maximum investigation—which can itself be triggered by congressional request—reveals "no reasonable

109. *Id.*

110. *See supra* note 73.

111. 28 U.S.C.A. §§ 591-599 (West Supp. 1989).

112. *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

113. *Id.* at 2621.

114. *Id.* at 2622.

115. *Id.* at 2621.

116. *Id.*

117. *Id.* at 2621-22. It is noteworthy that the Court did not even perceive a sufficient interference with the executive's ability to accomplish its assigned duties to reach the "balancing" stage of the Court's doctrinal inquiry, according to which even an adverse impact on those duties could be "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Mistretta v. United States*, 109 S. Ct. 647, 660 n.13 (1989) (quoting *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977)).

grounds to believe that further investigation is warranted."¹¹⁸ The Attorney General's *sole* control over if and when a particular prosecution is brought consists of his power to determine whether further investigation or litigation appears patently frivolous.¹¹⁹ And even if the Attorney General may remove an independent counsel for making what the executive considers to be poor case management decisions,¹²⁰ the result is the appointment of a new counsel and continuation of the investigation or prosecution. Hence, not only did *Morrison* validate Congress' power to restructure law enforcement so as to allow the national interest in criminally prosecuting high-ranking executive officers to override competing executive concerns over optimal case management, but it upheld a congressional method—substantially directing the behavior of the Attorney General—that is far more confrontational than the *qui tam* concept.

To this point, I have considered and rejected the contention that the United States' various law enforcement-related interests in optimally managing discrete prosecutions (as interpreted by the executive branch) takes priority by virtue of Article II over the interests of the United States in zealous enforcement of particular statutes (as defined by Congress). But the United States may have interests *unrelated* to optimal law enforcement in not prosecuting specific cases, interests which perhaps deserve to be protected by vesting plenary prosecutorial discretion in the executive branch. Specifically, in rare situations, prosecution of misconduct may interfere with important national security or foreign policy interests.¹²¹ By enacting the False Claims Act in 1863 and revitalizing it in 1986, Congress made the macro-level policy determination that, on balance, rampant fraud against the government (particularly in military contracting) poses threats to the nation's security and foreign policy interests more grave than those potentially raised by particular *qui tam* suits challenging such fraud.¹²² Yet Congress cannot foresee the sensitive issues that might be

118. 28 U.S.C.A. § 592(b)(1).

119. See *Morrison*, 108 S. Ct. at 2627 (Scalia, J., dissenting) ("the condition that renders such a request mandatory . . . is so insubstantial that the Attorney General's discretion is severely confined").

120. The Court did not define "good cause" precisely. It noted only that it certainly includes counsel "misconduct," whatever that means. 108 S. Ct. at 2619–20. But see *Mistretta*, 109 S. Ct. at 675 ("good cause" removal restrictions "are specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies"); Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608–09 (1989) ("it is conventionally understood that it would not be cause for removal that . . . an administrator [removable only 'for cause'] declined to follow the President's policy preferences in favor of policy initiatives that the administrator prefers and which are also within the administrator's lawful discretion").

121. These include, for example, actions alleging military contractor fraud in secret programs, particularly when the allegations do not involve simple overbilling practices but rather false certifications of safety or performance standards, substitution of cheaper but substandard parts, or the equivalent.

122. See *supra* note 36 and accompanying text; see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943) ("one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds"). Moreover, *qui tam* authorization, by greatly enhancing the likelihood of discovery and prosecution of frauds, is intended to deter

raised in individual cases; and even one skeptical of executive motives might sleep better knowing that the decision whether the pecuniary and national security benefits of a particular false claims prosecution outweigh its potential damage to national security or foreign policy objectives lay with the executive branch rather than with a private litigant seeking financial gain.

This real concern might justify some executive oversight of particular privately initiated lawsuits; nonetheless, it does not persuasively argue for invalidation of the entire *qui tam* concept. *Morrison v. Olson* implicitly holds that Congress may structure law enforcement so as to encourage prosecutions despite potential competing national security and foreign policy concerns. Prosecutions against high-ranking executive officials practically invite conflicts between law enforcement and these other priorities. Indeed, *Morrison* itself arose out of a bitter dispute over the President's assertion of an "executive privilege" to withhold certain documents from Congress,¹²³ and Justice Scalia's dissent specifically warned of potential conflicts between prosecution and both foreign policy¹²⁴ and national security concerns.¹²⁵ Yet the Court upheld the statute despite its apparent directive that the Attorney General refrain from considering factors unrelated to an investigation's likely merits when deciding whether to request appointment of an independent counsel.¹²⁶

I acknowledge that a court-appointed independent counsel would be likely to take these competing concerns more seriously than would many private litigants seeking pecuniary gain. But the Court suggested in *Hess* that this structural tendency towards vigorous private enforcement does not invalidate the *qui tam* enforcement scheme. Rather, the Court instructed the Attorney General to take his plea that "war interests would be injured by filing suits such as this" to Congress, whose province apparently included balancing these competing concerns.¹²⁷

Indeed, the same tradeoffs are entailed by a host of private actions routinely prosecuted by citizens to vindicate their own personal rights, as these actions may also address matters affecting foreign policy interests or national security.¹²⁸ I know of no serious claim that statutory schemes authorizing citizen enforcement of *private* rights of action impermissibly

fraudulent conduct in the first place. This deterrence should reduce the need for litigation involving sensitive matters.

123. *Morrison*, 108 S. Ct. at 2605-07.

124. *Id.* at 2627 (Scalia, J., dissenting).

125. *Id.* at 2628 (Scalia, J., dissenting). Such concerns were certainly prophetic in light of those subsequently raised by an independent counsel's prosecution of Oliver North.

126. See *supra* text accompanying notes 118-20.

127. See *supra* text accompanying notes 108-09.

128. Examples include shareholders' actions challenging corporate acceptance of foreign bribes and payoffs or challenging corporate frauds against the government; securities actions challenging domestic takeovers by international conglomerates; and environmental litigation challenging the location and transportation of military arms, nuclear technologies, and radioactive wastes.

intrude on the executive's law enforcement function simply by creating the potential for specific suits to raise such problems. Instead, our concerns are mollified by the executive's ability to exert some control over individual cases in which conflicts actually arise by invoking the "state secrets" privilege,¹²⁹ which protects against unsanctioned disclosure of classified information and in extreme cases may even justify dismissal of the action.¹³⁰ *Qui tam* suits pose no greater threat to national security or foreign policy objectives than do such private suits, and hence equivalent provisions for executive influence ought to satisfy separation of powers concerns.¹³¹

In sum, *qui tam* authorization curbs certain aspects of the executive branch's traditional prosecutorial discretion and thereby affects to some extent the executive's ability to define the overall policy interests of the United States and to decide how those interests can best be secured through particular lawsuits. But one is hard-pressed to identify persuasive reasons why Congress may not diffuse the responsibility for making such policy judgments among itself and private citizens as well as the executive, through *qui tam* as well as traditional citizens' suit schemes.

129. See, e.g., *United States v. Reynolds*, 345 U.S. 1 (1953) (military and state secrets not subject to discovery in civil suit against United States); *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875) (same). See generally Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982).

130. When the United States successfully invokes its state secrets privilege to prohibit discovery and/or disclosure of information relevant to a civil suit, whether or not the United States is a party, usually the private plaintiff is entitled to proceed with the suit (if she can) though she is denied access to and/or use of the privileged information. See, e.g., *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983). But in the extreme circumstance where "the very subject of th[e] litigation is itself a state secret" and there is "simply no way [a] . . . particular case could be tried without compromising sensitive military secrets," *Fitzgerald v. Penthouse Int'l*, 776 F.2d 1236, 1243 (4th Cir. 1985), the court should dismiss the underlying action. See, e.g., *id.* (dismissing action between private parties after United States Navy intervened to assert privilege over information central to plaintiff's defamation claim); *Farnsworth Cannon v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (same); cf. *Totten*, 92 U.S. (2 Otto) at 107 ("as a general principle, . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential"). But see *Fitzgerald*, 776 F.2d at 1242 (dismissal of action based on invocation of state secrets privilege "is a drastic remedy that has rarely been invoked").

131. Recall that the False Claims Act permits the executive to take over primary responsibility for conducting privately initiated litigation and thus to proceed in a manner most consistent with national security and foreign policy interests. The Act also authorizes the executive to seek dismissal of *qui tam* suits. See *supra* text accompanying notes 52-59. While the Act provides no substantive standard for dismissal, the hearing requirement was designed to prevent the DOJ from "dropp[ing] the false claims case without legitimate reason." S. REP., *supra* note 12, at 26; see also *id.* (court should reject proposed dismissal if it finds that "dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations"). If the DOJ can show that continued prosecution would pose a substantial threat to important national interests and that no alternative to dismissal would protect those interests adequately, then dismissal would appear to be consistent with the Act (especially if such an interpretation is thought necessary to avoid constitutional concerns, see *supra* note 73).

2. *Protection Against Oppressive Law Enforcement*

Vesting prosecutorial discretion in the accountable and unitary executive branch purports to constrain the potential for oppressive enforcement of the laws: "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."¹³² Oppressive law enforcement may include frivolous prosecutions, which force innocent citizens to suffer the significant financial and social consequences of engaging in a defensive legal battle, as well as the prosecution of individuals who, while deserving of punishment, have already been subjected to alternative sanctions that sufficiently exacted retribution and encouraged deterrence.¹³³

While the due process clause affords some minimal protection against prosecutorial overzealousness,¹³⁴ "[u]nder our system of government, the primary check against prosecutorial abuse is a political one."¹³⁵ Vesting prosecutorial discretion in the executive branch creates both external and internal checks. Political accountability provides an external check; because prosecutors within the executive branch are accountable to the President and, through her, ultimately to the people, they are presumably less likely to enforce the law oppressively or overzealously. In addition, the unitary nature of the branch fosters various internal checks: Resource scarcity discourages the initiation of frivolous proceedings; requirements of personal disinterest discourage the malevolent or self-interested use of power; and the repetitive nature of discretionary decisions builds experience, both for each prosecutor and within her community, that may reinforce norms of dedication to effective and efficient law enforcement.

Individual *qui tam* plaintiffs are not subject to the same external and internal constraints. But are these constraints mandated by separation of powers values? In recent cases, the Supreme Court has held that, even in the realm of criminal law enforcement, the structural protections against prosecutorial overzealousness typically afforded by executive discretion may be significantly relaxed.

As discussed previously, the Court held in *Morrison* that several features of the independent counsel statute give the executive "sufficient con-

132. *Morrison v. Olson*, 108 S. Ct. 2592, 2637 (1988) (Scalia, J., dissenting).

133. Such sanctions may be non-legal, e.g., social opprobrium. In the False Claims Act context, alternative sanctions may include administrative proceedings to recoup funds wrongfully paid, cancellation of present or future contracts, and debarment from participation in Federal programs.

134. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (public prosecutor "may prosecute with earnestness and vigor [but] [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one"); cf. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (equal protection clause precludes decision to prosecute "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification") (citation omitted).

135. *Morrison*, 108 S. Ct. at 2638 (Scalia, J., dissenting).

trol" over law enforcement to satisfy separation of powers concerns,¹³⁶ notwithstanding Justice Scalia's impassioned plea for greater protections for criminal defendants.¹³⁷ Since the Attorney General must seek appointment of an independent counsel unless (concededly in her unreviewable discretion) she finds after a limited inquiry "no reasonable grounds to believe that further investigation is warranted,"¹³⁸ the Act provides at best for only limited executive power to preclude frivolous actions or arguably cumulative punishment.¹³⁹

The Court upheld an even greater deviation from the norm of exclusive executive discretion one term earlier in *Young v. United States ex rel. Vuitton Et Fils S.A.*¹⁴⁰ There the Court upheld a district court's power to appoint a private attorney to prosecute a criminal contempt action arising out of a civil case then before the court. Acknowledging that the "execution of the criminal law" generally is a function "in which only the executive branch may engage,"¹⁴¹ the Court held that "the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function,"¹⁴² and hence appointment of private attorneys for this purpose is within courts' inherent power.¹⁴³ The Court did counsel that "a [district] court ordinarily should first request the appropriate [executive] prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied."¹⁴⁴ This practice allows the executive to initiate prosecutions but, as under the Ethics Act upheld in *Morrison*, the executive has little power to *prevent* such prosecutions.¹⁴⁵

136. See *supra* text accompanying notes 114–17.

137. Justice Scalia protested that the statute's elimination of direct presidential control over the "vast power and the immense discretion that are placed in the hands of a prosecutor," 108 S. Ct. at 2637–38, frustrates the structural check against oppressive enforcement both by insulating the exercise of discretion from political accountability, *id.* at 2638, and by avoiding the "unifying influence of the Justice Department" over enforcement decisions. *Id.* at 2640.

138. *Id.* at 2621.

139. The Act's provision for removal of an independent counsel by the Attorney General for "good cause" provides little practical power to avert an overzealous prosecution. Even if a disagreement over the fairness of a particular prosecution constitutes "good cause," the specter of a President firing an independent counsel on this basis defies post-Watergate political reality. See also *supra* text accompanying note 120 (removal leads not to termination of investigation but to appointment of replacement counsel).

140. 107 S. Ct. 2124 (1987).

141. *Id.* at 2133.

142. *Id.* at 2131. The Court explained that criminal contempt proceedings "are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court." *Id.* at 2133. The ability of courts to initiate such proceedings was "regarded as essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches." *Id.* at 2131.

143. In this case, Justice Scalia foreshadowed his lone dissent in *Morrison*, writing an (also lone) opinion arguing that, "at least to the extent that it is publicly exercised," criminal law enforcement is the exclusive province of the executive. *Young*, 107 S. Ct. at 2142 (Scalia, J., concurring in the judgment).

144. 107 S. Ct. at 2134.

145. At best, a DOJ attorney could accept the court's initial request to prosecute and then decline to file charges, informing the court of the basis for her decision. But the court is free to appoint a new

The Court in *Young* did, however, reverse the district court's decision to appoint as contempt prosecutors private attorneys already representing a party to the underlying civil case. The Court reasoned that the attorneys' duty to represent the interests of the United States in the criminal proceeding¹⁴⁶ and their duty to represent their private client in the underlying civil case created a potential conflict of interest. Because a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision,"¹⁴⁷ the Court imposed a "requirement of a disinterested prosecutor."¹⁴⁸

Both *Morrison* and *Young* undermine the broad claim that Article II requires that criminal prosecutors be subject to all of the external and internal checks traditionally created when prosecutorial discretion is vested exclusively in the accountable and unitary executive branch. On the other hand, both cases suggest the need for some lesser level of structural protection against oppressive enforcement: in *Morrison*, a minimal degree of executive participation in the decision to appoint an independent counsel; and in *Young*, disinterest on the part of the private prosecutor. Neither structural protection cushions potential defendants against *qui tam* litigation that is either frivolous or cumulative, because *qui tam* plaintiffs are neither politically accountable for nor personally disinterested in their enforcement decisions.

Morrison and *Young*, however, address fairness concerns raised by criminal prosecutions conducted essentially with the backing of the government's full prosecutorial machinery. In contrast, *qui tam* lawsuits seek only civil remedies and bring only private enforcement machinery to bear. In this context, there are powerful reasons to provide putative defendants

prosecutor should the court find the attorney's explanation unconvincing.

146. See 107 S. Ct. at 2136 ("Private attorneys appointed to prosecute a criminal contempt action represent the United States The prosecutor is appointed solely to pursue the public interest in vindication of the court's authority.").

147. *Id.* at 2138 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980)).

148. *Id.* The reason for the Court's concern with the potential for conflicting loyalties is not obvious. The appointment practice was challenged as a violation of due process and, while the Court invoked its supervisory powers over the Federal courts as authority for its decision, see *id.* at 2138 n.21, Justice Blackmun wrote separately to suggest that due process required the same result. *Id.* at 2141. This approach signals a concern that appointment of an interested prosecutor creates an intolerable risk of unfairness to the criminal defendant. See *id.* at 2138 & n.19 (noting due process concern); see also *id.* at 2138-41 (applying traditional due process standards to determine need for reversal of conviction as remedy).

The Court also observed that interested prosecutors might be tempted to be either *too* zealous or *insufficiently* zealous in their representation of the United States' interests:

A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.

Id. at 2136. This characterization suggests that the Court may have been concerned, not just with the potential for unfair treatment of defendants, but also with the lack of a structural guarantee that the United States' interests would be represented at all. I consider the relevance of this reading of *Young* for the *qui tam* concept *infra* at text accompanying notes 182-89.

with much weaker structural protections against frivolous or cumulative litigation.

First, as reflected in our application of far more stringent procedural safeguards in criminal than in civil proceedings, our legal system generally considers criminal behavior to be more opprobrious than civil misconduct and criminal sanctions to be both quantitatively and qualitatively more severe than civil sanctions.¹⁴⁹ The structural check against oppressive prosecution in the form of frivolous suits or excessive punishments that is created by executive oversight and discretion ought to be much more stringent in the criminal than the civil context,¹⁵⁰ just as due process safeguards are more stringent against erroneous conviction than erroneous civil liability.¹⁵¹ The fact that Article II's only explicit structural protection against prosecutorial oppression—the President's exclusive power to grant pardons¹⁵²—applies to criminal and not civil cases¹⁵³ reinforces the propriety of erecting greater political as well as procedural checks against abuse in the criminal context.¹⁵⁴

149. While the distinctions often are somewhat fuzzy, criminal and civil sanctions are generally distinguishable both by their nature (imprisonment vs. monetary exactions) and by their purposes (besides deterrence, punishment vs. compensation). These differences both reflect and generate different levels of stigma and opprobrium. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW 12-16 (2d ed. 1986) (evaluating distinctions between criminal and civil sanctions); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402-06 (1958) (same).

150. Cf. *Young*, 107 S. Ct. at 2139 (“It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.”).

151. Defendants in *qui tam* suits under the False Claims Act may claim to deserve greater protection against frivolous prosecutions and the threat of excessive punishment than that accorded defendants in other civil proceedings simply because their financial exposure may be significantly greater than mere compensation. In fact, the Supreme Court has recognized that “in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment” as opposed to compensation. *United States v. Halper*, 109 S. Ct. 1892, 1898 (1989). However, the Court recently made clear that “proceedings and penalties under the civil False Claims Act are indeed civil in nature” for the purposes of defining general procedural safeguards. *Id.*; cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (punishment of citizenship forfeiture, despite “civil” label, is in fact sufficiently criminal in nature as to require established procedural safeguards provided in criminal proceedings).

To be sure, if the Court's holding in *Halper* that a successful criminal prosecution precludes a subsequent civil judgment under the False Claims Act in an amount so large as to constitute “punishment” is applied to subsequent *qui tam* suits, see *infra* note 157 (discussing such applicability), then the need to devise structural protections against overzealousness in the form of overpenalization is largely mooted. But in any case, since the False Claims Act does not trigger the heightened procedural protections afforded criminal defendants notwithstanding the potential for large monetary sanctions, no persuasive reason suggests that the Act—any more than various private rights of action seeking treble damages for the plaintiffs, see, e.g., Clayton Antitrust Act, 15 U.S.C. § 15 (1982), or monetary penalties for the Federal treasury, see *infra* note 184 and accompanying text—ought to trigger the heightened structural protections afforded criminal defendants by executive prosecutorial discretion.

152. U.S. CONST. art. II, § 2, cl. 1 (President “shall have Power to grant Reprieves and Pardons for Offences Against the United States, except in Cases of Impeachment”).

153. See *Ex Parte Grossman*, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”).

154. Interestingly, one might argue, as suggested to me by Professor Akhil Amar, that the President's pardon power is sufficient *by itself* to secure the prosecutorial discretion purportedly vested in her by Article II. The reach of the pardon power is coextensive with the range of criminal prosecu-

Independent of this criminal/civil distinction, the need for structural protections against oppressive law enforcement is greater when prosecutions are controlled by public rather than private prosecutors. Because of the wide range of illegal conduct within the scope of their charge to enforce the law, overzealous public prosecutors have the power to "target" a particular defendant for prosecution and then spend whatever investigatory resources are necessary to "find" a prosecutable offense.¹⁵⁵ *Qui tam* plaintiffs authorized to bring suit only for a particular statutory violation lack the equivalent opportunity to target defendants rather than specific illegal practices. In addition, public prosecutors have at their command "a terrible array of coercive methods to obtain information" which, when misused, "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers."¹⁵⁶ Defending against frivolous lawsuits brought by the executive thus entails much more serious intrusions and harassment than defending against frivolous lawsuits brought by private citizens with only the traditional tools of civil discovery at their command. Even when only civil sanctions are at stake, therefore, publicly initiated prosecutions uniquely threaten to trigger various abuses of law enforcement power.¹⁵⁷

tions that the executive may initiate: The President cannot grant pardons in cases of impeachment, *see supra* note 152, but neither does she exercise prosecutorial discretion in such cases. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). The President can use the pardon power, though perhaps only at high political cost, as a means of securing unfettered prosecutorial discretion over criminal cases by pardoning suspected wrongdoers, even prior to indictment. *See Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866). Hence even if Article II requires that the President exercise "sufficient control" over criminal law enforcement to ensure structural values of executive discretion, *see Morrison v. Olson*, 108 S. Ct. 2597, 2622 (1988), the scope of the President's pardon power suggests that the specific avenues of control identified in *Morrison* are redundant and the Court's inquiry is misguided. Defending *Morrison's* approach would entail proposing that the President must have means of exercising prosecutorial discretion that are less visible and thus less politically risky than granting pardons. In essence, the argument would be that criminal defendants deserve the protection from prosecutorial overreaching promised by vesting political responsibility for overseeing prosecutorial discretion in a President who is publicly accountable, but not *too* much so.

155. *See Morrison v. Olson*, 108 S. Ct. 2597, 2638 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, Attorney General of the United States, later Associate Justice of the Supreme Court):

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it [but] of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm . . . that the greatest danger of abuse of prosecuting power lies.

156. *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2134, 2139-40 (1987) (coercive methods include "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power") (quoting C. WOLFRAM, *MODERN LEGAL ETHICS* 460 (1986)). For public prosecutors, the costs of such enforcement tools—as with all other costs associated with prosecution—are subsidized on a non-contingent basis. While budgetary ceilings constrain enforcement efforts in the aggregate, *see supra* text accompanying notes 44-46, they generally do not preclude prosecutorial overreaching in specific cases.

157. *Id.* at 2141 (because "[t]hat [prosecuting] state official has the power to employ the full machinery of the state in scrutinizing any given individual, . . . we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the

Finally, *qui tam* plaintiffs are subject to unique economic constraints against frivolous litigation. While they stand to gain by successful prosecutions, they also stand to lose by bringing baseless ones (unlike public prosecutors, independent counsel, and even court-appointed criminal contempt prosecutors¹⁵⁸), both because civil litigation is extremely costly and because frivolous suits may be sanctioned by adverse attorneys' fees awards.¹⁵⁹ Even attorneys with favorable contingency fee arrangements would not often risk initiating prosecutions when their initial evaluations of the informer's allegations provide "no reasonable grounds to believe that further investigation is warranted."¹⁶⁰

At bottom, civil *qui tam* actions pose no greater risk of oppressive law

attainment of justice").

The Supreme Court invoked precisely this distinction between litigation conducted by public authorities and that conducted by private citizens, irrespective of the conceptual nature of the interest underlying the sanction sought, in holding that the Eighth Amendment's excessive fines clause does not limit the size of punitive damages awards in privately prosecuted civil actions. *Browning-Ferris Indus. v. Kelco Disposal*, 109 S. Ct. 2909 (1989). The Court acknowledged that punitive damages "advance the interests of punishment and deterrence," which are traditionally understood to be "governmental interests." *Id.* at 2920. But the excessive fines clause is designed to serve the structural value of "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 2916; *see also id.* at 2915 (clause concerned primarily with "potential for governmental abuse of its 'prosecutorial' power"). Hence the clause protects defendants from "only those fines directly imposed by, and payable to, the government." *Id.* at 2916; *see also United States v. Halper*, 109 S. Ct. 1892 (1989) (multiple punishment strand of double jeopardy doctrine is "not triggered by litigation between private parties," *id.* at 1903, because the clause is designed to "protect[] against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *Id.* at 1903 n.10.).

Both *Browning-Ferris*, 109 S. Ct. at 2920 n.21, and *Halper*, 109 S. Ct. at 1903 n.11, expressly declined to declare whether the respective constitutional rules they established apply to *qui tam* suits. But their reasoning makes clear that the applicability of various constitutional rules designed to protect defendants from prosecutorial overreaching may turn on the public nature of the prosecuting authority rather than on the nature of the sovereign's interest in the litigation—precisely my contention with respect to fairness concerns purportedly justifying exclusive executive prosecutorial discretion.

Analogously, the same distinction between the United States as a juridical entity and the government as an institutional entity applies to particular procedural rules governing adjudication of *qui tam* actions as well. *See, e.g., United States ex rel. Petrofsky v. Van Coit, Bigley, Cornwell & McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978) (where United States declines to intervene in *qui tam* action, it is not "party" for purposes of applying special lengthened deadline for filing appeals contained in Fed. R. App. P. 4(a), because DOJ does not itself decide whether to appeal), *cert. denied*, 444 U.S. 839 (1979); *Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) (where United States declines to intervene in *qui tam* action, it is not "party" for purposes of assessing attorneys' fees as sanction for frivolous action, because DOJ did not make decision to sue).

158. *See Young*, 107 S. Ct. at 2137 n.17 (prosecutors paid by government).

159. *See* 31 U.S.C.A. § 3730(d)(4) (West Supp. 1989) (court may award defendant fees and expenses if defendant prevails and action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment").

160. *Morrison v. Olson*, 108 S. Ct. 2597, 2621 (1988) (citing Ethics Act, 28 U.S.C. § 592(b)(1) (West Supp. 1989)). *See Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 226 (1983) (private attorneys unlikely to pursue costly litigation absent substantial likelihood of victory).

Moreover, we must keep in mind that, even though the Department of Justice may declare after its initial limited evaluation of a False Claims Act *qui tam* suit that the suit appears to lack merit, *see supra* note 88, this declaration does not make it so. *See United States ex rel. Coates v. St. Louis Clay Prods. Co.*, 68 F. Supp. 902, 904-05 (E.D. Mo. 1946) (DOJ may conclude that *qui tam* suit under Act lacks merit, but "[t]his Court may draw a different conclusion from the same facts and a jury may do likewise").

enforcement than do the vast array of privately prosecuted civil enforcement actions routinely initiated by self-interested plaintiffs to vindicate their own rights. Like such "private attorneys general," *qui tam* plaintiffs are not politically accountable to the public and generally are isolated from the tempering influence of experience with similar cases. But both types of private plaintiffs lack the awesome power to visit criminal sanctions upon selected defendants, both lack the targeting capacity and coercive and intrusive investigatory tools enjoyed by public prosecutors, and both face sufficient financial constraints to reduce to a tolerable level the inevitable risk that self-interested plaintiffs may initiate civil proceedings even when the executive might believe litigation is unwarranted. In the end, therefore, the policy-based and fairness-based values thought to underlie the constitutional assignment of law enforcement authority to the executive ought not require significant, let alone exclusive, control over civil actions brought on behalf of the United States.

B. *Private Representation of the Public Interest*

Even if Article II permits litigants who are not completely accountable to the executive branch to represent the United States in court, critics of the *qui tam* concept also contend that such litigants must at least be government officers selected pursuant to the appointments clause.¹⁶¹ This rule would assure both that the executive enjoy at least some oversight of private litigants and that the interests of the United States not be defined by self-interested individuals lacking a commitment to public values. But, once again, it is difficult to discern a firm foundation in constitutional values for this proposed rule against private litigation on behalf of the United States.

The appointments clause does not specify the class of "Officers" whose appointment it governs. It is well established that citizens litigating Federal causes of action to vindicate their own legal interests do not fall within this class. Why must the same citizens be considered officers when they purport to vindicate legal interests assigned to the national polity? Concededly, the Supreme Court declared in *Buckley v. Valeo*¹⁶² that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating *public rights* . . . may be discharged only by persons who are 'Officers of the United States' within the language of [the appointments clause]."¹⁶³ But it is difficult to understand this declaration as enshrining a public/private interest distinction governing the applicability of the appointments clause.

To begin with, the scant case law defining the term "Officers" focuses

161. See *supra* note 79.

162. 424 U.S. 1 (1976).

163. *Id.* at 140 (emphasis added).

primarily on the extent, not the governmental nature, of the powers exercised by a particular person. *Buckley* held that the appointments clause prohibited Congress from appointing individuals to the Federal Elections Commission (FEC) which, among other things, was authorized to bring civil enforcement actions to encourage compliance with campaign fairness regulations. Members of the FEC were deemed to be "Officers," not merely by virtue of their litigation roles, but also due to their prescribed tenure in an established office and their "primary responsibility" for law enforcement. The Court has long held, however, that a person whose "position is without tenure, duration, continuing emolument, or continuous duties [and who] acts only occasionally and temporarily" is more appropriately characterized as an "executive agent" rather than an "Officer" as defined by the appointments clause.¹⁶⁴

Admittedly, because several of these attributes must be evaluated in relative terms, it is difficult to discern clear lines between agents and officers from the Court's traditional interpretive test.¹⁶⁵ But compared to the FEC members deemed to be officers in *Buckley*, *qui tam* plaintiffs enjoy significantly less, and more ephemeral, authority. Particularly given the False Claims Act's invitation for executive takeover of *qui tam* litigation, *qui tam* plaintiffs are not readily characterized as enjoying "primary responsibility" for enforcing the statutory scheme. More like citizens litigating conventional private rights of action, individual *qui tam* litigants are merely one-shot actors rather than tenured repeat players involved in the ongoing implementation of Federal law.¹⁶⁶

The extent of litigation powers exercised by *qui tam* plaintiffs suggests that, like conventional plaintiffs litigating private rights of action and unlike members of the FEC, *qui tam* plaintiffs ought to be considered executive agents and not officers subject to the dictates of the appointments

164. *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

165. Indeed, in *Morrison*, the Court used the same attributes to draw lines between "inferior" and "principal" officers for the purpose of classifying the independent counsel. *See Morrison v. Olson*, 108 S. Ct. 2597, 2609 (1988).

166. In *Morrison*, the Court assumed without analysis that an independent counsel appointed pursuant to the Ethics Act is at least an inferior officer for appointments clause purposes, *id.* at 2608 n.12, though the counsel can also be characterized as a one-shot actor. But unlike a *qui tam* plaintiff, an independent counsel enjoys *sole* responsibility for enforcing criminal law in specified contexts, is publicly subsidized on a non-contingent basis, and may herself appoint new governmental employees as well as command the aid of present Department of Justice employees in executing her statutory powers. *See id.* at 2604.

Interestingly, the Court implied in *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124 (1987) that a one-time private contempt prosecutor who apparently, like a *qui tam* plaintiff, cannot appoint or otherwise command the aid of subordinate executive agents is not an officer as defined by the appointments clause. In *Young*, the Court ruled that a district court can "appoint" a private prosecutor for a criminal contempt action despite the fact that Congress had provided no statutory authorization for the practice. *See id.* at 2130 (considering but rejecting contention that Fed. R. Crim. P. 42(b) purported to authorize such appointments). Such an "appointment" conforms to the procedures prescribed by the appointments clause no more than does a *qui tam* plaintiff's self-selection, though concededly such a non-authorized judicial appointment may uniquely serve to ensure the competence of litigants representing the United States. *See infra* note 180.

clause. But does *Buckley's* unexplained declaration that civil litigation vindicating "public rights" may be discharged only by governmental officers mean that the *nature* of *qui tam* plaintiffs' function of representing the public requires the contrary conclusion?

The separation of powers value identified by the Court in *Buckley* certainly does not support this latter reading.¹⁶⁷ The Court's primary concern in *Buckley* was the avoidance of congressional aggrandizement of power.¹⁶⁸ The Court stressed that Congress could not, through the guise of appointing specific government officeholders, retain for itself any significant power to execute its own laws,¹⁶⁹ and the concern motivated the Court to declare broadly that "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility" of Federal law enforcement by seeking judicial relief.¹⁷⁰ But this concern is not triggered here; *qui tam* plaintiffs are neither appointed by, removable by, nor beholden in any way to Congress.¹⁷¹

This worry aside, is some other important structural value served by characterizing litigants on behalf of the United States as officers? One might propose that the appointment of such litigants serves the President's ability to "take Care that the Laws be faithfully executed" by giving her some role in selecting the United States' legal representatives.¹⁷² But this perspective does not easily justify a distinction between litigation on behalf of public and private rights. As explained previously, the contention that the take care clause (or any other provision of Article II) assigns to the President an independent law enforcement function requiring her to enjoy significantly greater control over the judicial vindication of public rather

167. Cf. *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987) (*Buckley* "does not stand for the proposition . . . that private persons may not enforce any Federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

168. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 244-46 (2d ed. 1988).

169. See *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (Congress may not "enforce [the laws] or appoint the agents charged with the duty of such enforcement") (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)); see generally *Buckley*, 424 U.S. at 124-31 (discussing concern about congressional aggrandizement); see also discussion *supra* note 83.

170. *Buckley*, 424 U.S. at 138. This general rule does not preclude Congress from participating to some extent in Federal litigation. Congress (or the Houses separately) occasionally submits amicus briefs in litigation defending the constitutionality or proposing a particular construction of its own statutes.

171. Cf., e.g., *Morrison v. Olson*, 108 S. Ct. 2597, 2620-21 (1988) (despite Congress' power to request that Attorney General apply for appointment of independent counsel under Ethics in Government Act, "Congress retained for itself no powers of control or supervision over an independent counsel" and therefore Act "simply does not pose a 'dange[r]' of congressional usurpation of Executive Branch functions") (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 816 (N.D. Ill. 1988) (in traditional citizens' suit pursuant to Clean Water Act, "there is no possibility here of private litigants being subject to congressional control").

172. The Court suggested a link between the take care and the appointments clauses in *Myers v. United States*, 272 U.S. 52, 164 (1926) (noting that President's "power of appointment and removal of executive officers . . . [is] confirmed by his [take Care] obligation").

than private civil statutory obligations is quite weak.¹⁷³ And, in any case, the specific procedures of the appointments clause are particularly ill-designed for this proposed oversight function. For example, since Congress can choose to vest the power to appoint inferior officers¹⁷⁴ in Federal judges,¹⁷⁵ the degree of presidential accountability actually secured by the appointment power is often extremely attenuated both by distance (judges' independence makes it difficult to hold presidents accountable for judges' appointment decisions) and by time (judges' life tenure often means that those making appointments will not themselves have been appointed by the current President).¹⁷⁶

Moreover, the take care clause is better understood as a directive that the President must execute the law consistently with Congress' will, rather than as a grant of exogenously defined power,¹⁷⁷ and the power of appointment is not necessary to ensure *qui tam* plaintiffs' faithful observance of their statutory role. For the most part, *qui tam* litigants serve their statutorily defined function merely by bringing actions and prosecuting them zealously in order to advance their own pecuniary interests. To the extent that the False Claims Act imposes particular limits on *qui tam* plaintiffs' conduct, the Act provides the executive with specific means of enforcing such limits.¹⁷⁸ Thus, self-selection of litigants does not in any significant sense hamper the executive's ability to "take Care" that congressional goals are fulfilled through execution of the law; indeed, self-selection is designed specifically to *ensure* fulfillment of congressionally defined objectives.¹⁷⁹

173. See *supra* text accompanying notes 89–131. To the extent the nature of *qui tam* litigation requires any greater executive oversight than traditional citizens' suit litigation, such oversight is provided by provisions of the Act itself and need not be secured through the executive's appointment of *qui tam* litigants. See *supra* notes 96, 131.

174. At most, *qui tam* plaintiffs can be characterized as inferior, not principal, officers. Cf. *Morrison*, 108 S. Ct. at 2608–09 (independent counsel is inferior officer).

175. See *id.* at 2610–11.

176. Indeed, the Court in *Morrison* made no reference to the appointment power as a means of ensuring presidential oversight of law enforcement activity, even while holding that the "take Care" clause requires that the President "retain[] ample authority to assure that [an independent counsel] is competently performing her statutory responsibilities in a manner that comports with the provisions of the [statute being enforced]." *Id.* at 2619.

177. See *supra* note 77 and accompanying text.

178. See, e.g., 31 U.S.C.A. § 3730(c)(2)(C) (West Supp. 1989) (DOJ may move to curtail private plaintiff's participation where it would "interfere with or unduly delay" DOJ's prosecution of case).

179. See L. TRIBE, *supra* note 168, at 253 (scope of take care "'duty is necessarily limited' by the substantive and structural content of the laws Congress enacts") (quoting *Bowsher v. Synar*, 478 U.S. 714, 762 (1986) (White, J., dissenting)) (emphasis added).

For the same reason, the take care clause does not require the President to have removal power over a *qui tam* litigant with whose prosecution decision and litigation strategy the President disagrees; presidential removal in such cases would frustrate, not "faithfully execute," the congressional design. In any event, at the very most the President's take care duty entails a power of removal only "for good cause," not "at will." See *Morrison*, 108 S. Ct. at 2619–20. The DOJ's ability under the False Claims Act to dismiss a particular *qui tam* suit, see *supra* notes 56, 131, provides far more than the functional equivalent of termination "for cause" since it results in the termination of the proceeding, not merely in the replacement of one litigant with another.

Finally, the appointments clause challenge to *qui tam* actions may reflect the belief that, completely apart from securing a minimal level of executive control, conformity with appointments clause procedures would ensure that prosecutors representing the United States will be "qualified" to do so.¹⁸⁰ But whether self-selection of public interest litigants precludes constitutionally satisfactory representation turns on the necessity of any particular qualifications. With respect to prosecutorial competence, Congress has decided that *qui tam* plaintiffs' possession of otherwise publicly unattainable information about false claims practices makes them sufficiently (indeed uniquely) qualified to bring suit, and their pecuniary interest in enforcement makes them sufficiently zealous to allow them to litigate (through private attorneys) on behalf of the United States: "[H]old[ing] out . . . a strong temptation . . . is the safest and most expeditious way . . . of bringing rogues to justice."¹⁸¹

One might also object that only publicly appointed prosecutors will truly "represent" the best interests of the United States, whereas self-selected *qui tam* plaintiffs will likely focus primarily on their own pecuniary and potentially competing motives.¹⁸² But now we have come full circle. Of course, if one defines a priori the policy-based "interests of the United States" to be those defined by the President, then *qui tam* plaintiffs likely will not adequately "represent" their client.¹⁸³ But, as concluded earlier, no independent executive law enforcement power precludes Congress from authorizing private citizens to participate in the process of defining the United States' interests, with the congressionally intended result of strengthening the United States' commitment to particular law en-

180. Cf. THE FEDERALIST No. 76, at 455 (A. Hamilton) (C. Rossiter ed. 1961) (presidential nomination creates "great probability of having the [office] supplied by a man of abilities, at least respectable").

While *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124 (1987), upheld judicial appointment of contempt prosecutors despite a failure to satisfy appointments clause procedures, see *supra* note 166 and accompanying text, arguably judicial appointment of prosecutors at least serves the goal of securing competent legal representation.

181. CONG. GLOBE, 37th Cong., 3d Sess. 995-96 (1863) (statement of Sen. Howard); see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (observing that *qui tam* plaintiffs may be zealous representatives of United States' interests, not because of laudable concern for public interest, but rather because of "the strong stimulus of personal ill will or the hope of gain") (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)); cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) ("state legislature 'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)).

It is worth noting that, while *qui tam* plaintiffs are unlikely to be repeat litigants, their private attorneys are likely to be experienced civil litigators and perhaps even false claims specialists. Cf. *supra* note 88. In general, the competence of such attorneys probably compares favorably with that of Department of Justice attorneys despite their different institutional environments. See *supra* text accompanying note 135.

182. See *supra* note 148 (observing that *Young* may be understood to raise similar concern).

183. Note that this potential for inadequate representation is by no means unique to private litigants. As suggested earlier, see *supra* note 28, executive branch challenges to the constitutionality of Federal statutes prompt the identical concern because the executive appears to represent its own institutional interests irrespective of the overall interests of the polity.

forcement objectives. Hence, by constitutionally permissible congressional definition, *qui tam* plaintiffs *do* adequately represent their sovereign client even if they simultaneously pursue personal ends.

Moreover, this concern about adequate representation is not easily cabined to *qui tam* actions. I have focused my comments on litigation “on behalf of the United States” in the specific sense that the United States represents the public and it is the public’s legal rights being vindicated. But private litigation may implicate the policy interests of the United States in a variety of other ways. For example, traditional citizens’ suits, while conceptually brought to vindicate personal rights, are designed by Congress to secure public policy objectives. Indeed, certain such citizens’ suits allow private citizens to seek monetary penalties payable solely to the Federal treasury,¹⁸⁴ and private suits seeking punitive damage awards serve the sovereign’s interest in punishing and deterring aggravated misconduct.¹⁸⁵ If the Constitution prohibits self-interested private plaintiffs from litigating on behalf of the United States in the sense underlying *qui tam* actions (i.e., representation of the United States’ legal interest), why not in any or all of these other policy senses as well?

Finally, the Supreme Court has declared occasionally that the United States’ overriding interest in law enforcement is not to “win a case, but [to see] that justice shall be done,”¹⁸⁶ and one might worry that self-interested private plaintiffs might not prove faithful to this norm. But this norm reflects a commitment to due process values, and such values are seriously threatened by potentially overzealous prosecution only in cases involving government-initiated prosecutions, particularly of criminal offenses.¹⁸⁷ The norm “justice over victory” responds to concerns triggered by the government’s institutional involvement—not the United States’ sovereign interest—in the litigation,¹⁸⁸ and therefore the norm ought not govern *qui tam* representation.¹⁸⁹

At bottom, the contention that only disinterested prosecutors (secured by appointments clause observance) will adequately represent the interests

184. See, e.g., Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1365(a)(1), 1319(d) (West Supp. 1989) (civil fines up to \$25,000 per day per violation).

185. See, e.g., *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989).

186. *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[s]ociety wins not only when the guilty are convicted but when criminal trials are fair”). But see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (“[p]rosecutors need not be entirely ‘neutral and detached’ . . . [and] are necessarily permitted to be zealous in their enforcement of the law”) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972)); *Berger*, 295 U.S. at 88 (public prosecutor “may prosecute with earnestness and vigor”).

187. See *supra* text accompanying notes 149–60.

188. Cf. *supra* note 157 (distinguishing between United States’ involvement in litigation as juridical as opposed to institutional entity for purposes of applying various legal rules).

189. In contrast, both *Morrison v. Olson*, 108 S.Ct. 2597, 2608 n.12 (1988), characterizing an independent special counsel as an inferior officer, and *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S.Ct. 2124, 2130, impliedly characterizing a judicially appointed contempt prosecutor as an agent not governed by the appointments clause, see *supra* note 166, trigger this normative concern.

of the United States reflects simply a disagreement with Congress over its definition of optimal enforcement of particular statutory obligations. Since no Article II values appear to prohibit Congress from defining the United States' litigation interests through privately prosecuted civil suits, and since empowering private citizens to volunteer as litigation representatives for the United States contravenes no identifiable *independent* structural values secured by the appointments clause, we are left with the conclusion that, at least with respect to Article II, "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it" ¹⁹⁰

The only remaining constitutional concern is whether Article III values preclude Federal courts from facilitating this congressionally prescribed process of defining the interests of the United States by entertaining and adjudicating *qui tam* suits.

III. QUI TAM ACTIONS AND ARTICLE III

The Article III challenge to the *qui tam* concept contends that *qui tam* plaintiffs lack standing because they have not suffered an injury in fact sufficiently "distinct and palpable" to be judicially cognizable.¹⁹¹ As is apparent from the present disarray of modern standing doctrine,¹⁹² however, these terms are not self-defining. Particularly "with respect to nontraditional forms of litigation,"¹⁹³ "[d]etermining Art[icle] III's 'uncertain and shifting contours' . . . requires reference to the purposes of the case-or-controversy requirement."¹⁹⁴

The Supreme Court has recently suggested that "the law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers."¹⁹⁵ Two separate strands of this theme emerge from recent cases. First, standing doctrine secures judicial competence by "limit[ing] the business of Federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."¹⁹⁶ Second, standing doctrine precludes judicial aggrandizement of power by "defin[ing] the role assigned to the judiciary in a tripartite

190. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 542 (1943).

191. A plaintiff seeking to invoke the power of a Federal court must have suffered a "distinct and palpable" "injury in fact" which is fairly traceable to the alleged misconduct of the defendant and which can be redressed by available and appropriate judicial relief. *See, e.g.,* Allen v. Wright, 468 U.S. 737, 751 (1984). Beyond these constitutional requirements, prudence dictates that courts generally ought not allow even injured parties to assert the rights of others or to seek judicial redress for "generalized grievances" more appropriately addressed by the representative branches. *Id.*

192. *See, e.g.,* Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 228-50 (1988).

193. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980) (citation omitted).

194. *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 87 (1968)).

195. *Allen*, 468 U.S. at 752.

196. *Flast*, 392 U.S. at 95.

allocation of power to assure that the Federal courts will not intrude into areas committed to the other branches of government."¹⁹⁷

At the outset, I confess a general agreement with recent scholarship suggesting that modern standing doctrine lacks a coherent conceptual foundation and that, with limited exceptions not applicable here,¹⁹⁸ Article III standing requirements ought to be considered satisfied whenever the plaintiff seeking to invoke the Federal judicial power asserts a cause of action pursuant to a congressional statute.¹⁹⁹ According to this view, *qui tam* plaintiffs clearly possess standing. But one need not go this far to defend the *qui tam* concept. Not only have *qui tam* actions been "historically viewed as capable of [judicial] resolution" for over two hundred years, but the unique structure of *qui tam* litigation comfortably secures the various values presently said to underlie modern standing doctrine.

A. *Judicial Competence*

The Supreme Court has frequently proclaimed that "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."²⁰⁰ The injury in fact requirement secures these attributes of an Article III case by requiring that "the party seeking relief . . . 'allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues'"²⁰¹

Since *qui tam* statutes impose penalties for specific misconduct, all suits under such statutes (perhaps as opposed to ones asserting causes of action under vague constitutional provisions) satisfy the "imperative" that issues be presented in a "concrete factual setting." Specifically, the submission to the government of false claims for payment creates a concretely fact-bound legal controversy between the miscreant and the United States. Hence the United States has standing to sue the defendant; the only question here is

197. *Id.* While the Court has never expressly acknowledged this fact, these two articulated strands of standing doctrine neatly track the separation of powers inquiry triggered by interbranch disputes. First, does Congress' *qui tam* authorization impair Federal courts' ability to function properly? *See, e.g., Morrison v. Olson*, 108 S. Ct. 2597, 2621 (1988) (inquiring whether particular statute "impermissibly undermine[s]" the powers of another branch or prevents it "from accomplishing its constitutionally assigned functions") (citations omitted). Second, does Congress' *qui tam* authorization aggrandize judicial power at the expense of the other two branches? *See, e.g., Mistretta v. United States*, 109 S. Ct. 647, 659 (1989) (inquiring whether statute "accrete[s] to a single branch powers more appropriately diffused among separate branches").

198. *See infra* note 217.

199. *See, e.g., Currie, Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Fletcher, *supra* note 192, at 253-54; Sunstein, *supra* note 24, at 1461-80; *cf. Amar, Law Story* (Book Review), 102 HARV. L. REV. 688, 717-19 (1989) (generalizing same point to other Article III doctrines such as ripeness and mootness).

200. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980).

201. *Flast*, 392 U.S. at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

whether a *qui tam* plaintiff is a proper party to invoke the Federal judicial power as the United States' representative.

Congress' decision to embrace *qui tam* plaintiffs as the United States' legal champions by itself requires an affirmative answer. The United States requires *some* agent to act on its behalf. While Congress usually assigns this responsibility to attorneys within the Department of Justice, other executive or independent agencies,²⁰² or even to private attorneys hired by the government,²⁰³ *qui tam* statutes simply "enable a private party to invoke the standing of the government to collect a civil penalty."²⁰⁴ Whether the action is brought by one of the United States' public or private agents, the action presents a case or controversy in the same manner as if the suit were brought by the United States itself.

Defendants presently challenging *qui tam* standing maintain that private citizens lack a sufficient "personal stake" in the controversy to ensure their zealous advocacy of the public interest. But, even if the Court's focus on "personal stake" in early standing decisions was ever intended to serve such a purpose, more recent developments make it clear that the "essence of standing 'is not a question of motivation [for zealous advocacy] but of possession of the requisite . . . interest that is, or is threatened to be, injured'"²⁰⁵ Not only does the Court's treatment of plaintiffs' standing to vindicate statutorily defined private interests underscore this view,²⁰⁶ but—more to the point here—none of the United States' more common legal representatives, such as Department of Justice attorneys, enjoy a "personal stake" in the outcome of their litigation in any pecuni-

202. See generally Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1057 (1978) (thirty-one executive branch and independent agencies are authorized to conduct at least some litigation on behalf of United States).

203. See, e.g., Federal Debt Collection Practices Act, 31 U.S.C.A. § 3718 (West Supp. 1989) (private attorneys hired by contract); Farm Credit Amendments Act, 12 U.S.C.A. § 2244(c) (West Supp. 1989) (private attorneys "designated" by Farm Board).

204. 13A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.13 (1984); see *supra* notes 61–67 and accompanying text (*qui tam* plaintiff best characterized as legal representative of United States).

205. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 n.21 (1982) (quoting *Doremus v. Board of Educ.*, 342 U.S. 429, 435 (1952)); see also Scalia, *supra* note 92, at 891 ("if the purpose of standing is 'to assure that concrete adverseness which sharpens the presentation of issues,' the doctrine is remarkably ill designed for its end") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

206. The Court has long held that Congress can legislatively create an interest whose invasion constitutes an injury sufficient to confer standing, even where no such cognizable injury previously existed. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 514 (1975); see *supra* text accompanying note 15. But as an empirical matter, Congress' determination that the interest should be protected does not somehow magically enhance the adversarial zeal of a private plaintiff asserting that interest. Compare, e.g., *Warth*, 422 U.S. at 512 (asserted interest in "living in a racially and ethnically integrated community" not judicially cognizable) with *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (statutorily created interest in same is judicially cognizable).

For this reason, the Court's admonition in *Warth* that a plaintiff asserting a statutory interest "still must allege a distinct and palpable injury to himself," 422 U.S. at 501, is most sensibly understood as evincing concern for judicial encroachment on the prerogatives of the other branches, see *infra* notes 218–21 and accompanying text, rather than concern for judicial competence.

ary or other traditional sense.²⁰⁷ Rather, it is the concrete adversarial relationship between the defendant and the United States created by the defendant's alleged invasion of the United States' legal interests, not any relationship between the defendant and the United States' particular legal representative, that is sufficient to confer standing.²⁰⁸

In any case, a *qui tam* plaintiff's entitlement to share in monetary recovery gives the plaintiff a personal stake in the litigation and provides strong motivation for vigorous prosecution. To be sure, this observation meets with the objection that the plaintiff's interest in the litigation arises from the structure of the litigation itself and not from the defendant's misconduct. For example, the Court held in *Diamond v. Charles*²⁰⁹ that an intervenor lacked standing to appeal an adverse decision on the merits despite a clear pecuniary interest in avoiding his erstwhile duty to pay his opponents' attorneys fees; an adverse fee award was not a judicially cognizable injury because "[t]he fee award is wholly unrelated to the subject matter of the litigation."²¹⁰ But a *qui tam* plaintiff's monetary stake in the outcome of litigation is not similarly unrelated to the underlying controversy. Rather, the civil recovery in which the successful *qui tam* plaintiff shares consists of the damages and penalties assessed the defendant because of the latter's illegal conduct. In this respect, the plaintiff's personal stake fairly resembles that created by a "partial assignment" of the underlying claim from the United States to her, in return for her being the first *qui tam* litigant asserting the claim.²¹¹

207. Indeed, as discussed earlier, public prosecutors wielding the formidable investigative and prosecutorial powers of the government should *not* have any such personal relationship to the litigation. See *supra* text accompanying notes 146-48.

208. Even Justice Harlan, no friend of liberal court access rules, recognized that "individual litigants have standing [as parties] to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits." *Flast v. Cohen*, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting).

209. 476 U.S. 54 (1986).

210. *Id.* at 70. The Court seemed to hold that the intervenor's interest failed to constitute an adequate "injury" because it was collateral to the underlying dispute. See *id.* at 70-71 ("[T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III."). It seems to me that, to the extent collaterality of factual injury is a concern, it is more appropriately considered part of the inquiry whether the plaintiff's asserted injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

In any case, the Court has frequently found standing to exist even when the litigant's asserted injury arose as a by-product of, and not as the progenitor of, the suit. See, e.g., *ASARCO v. Kadish*, 109 S. Ct. 2037 (1989) (Court has jurisdiction to review state court judgment despite original plaintiffs' failure to assert sufficiently distinct and palpable injury to satisfy Article III standing requirements, reasoning that petitioners (original defendants) appealing adverse state court judgment suffered concrete injury from that adverse judgment).

Moreover, since the collateral nature of a pecuniary interest in the outcome of litigation in no way affects the plaintiff's incentive for zealous advocacy, *Diamond* reinforces my view that the Court's continuing reference to "personal stake" can sensibly be read as referring only to a litigant's legal, not factual, interest in the controversy. See *supra* text accompanying notes 205-08.

211. I offer this as a helpful analogy only, not suggesting that Congress actually intended to assign the United States' claims in the conventional sense. I note, however, that claims for economic injuries have traditionally been viewed as freely assignable by mutual agreement to non-injured as-

Finally, the focus of contemporary standing doctrine on "distinct and palpable" injury also "reflects a due regard for the autonomy of those most likely to be affected by a judicial decision."²¹² To protect this autonomy, "the decision to seek [judicial] review must be placed 'in the hands of those who have a direct stake in the outcome.'"²¹³ But concerns for third-party autonomy have no place here. It is axiomatic that no individual member of the public has a greater interest at stake in public rights litigation than does the actual plaintiff, so a denial of standing to the latter can hardly be thought necessary to protect the autonomy of the former. Second, while arguably the United States can be viewed as an entity whose "autonomy" is more directly affected by litigation than the autonomy of any given private plaintiff, Congress has already declared that *qui tam* plaintiffs shall be deemed to represent, not compromise, the interests of the United States such that the autonomy of the latter is not threatened.²¹⁴

signees. *See, e.g.*, *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1282-83 (9th Cir. 1983) (upholding assignability of treble damages claims under Federal antitrust statutes); *In re Fine Paper Litigation*, 632 F.2d 1081, 1090 (3d Cir. 1980) (upholding partial assignability of same). And the force of this analogy is not undermined by the fact that the precise share received by the plaintiff for successfully prosecuting the United States' claim is judicially determined from within fixed statutory ranges. There is nothing extraordinary about the fact that the consideration received by the plaintiff for her service to the United States is contingent on the need for and quality of that service. Nor is the force of this analogy undermined by the fact that the posited "assignment" is effectuated by, and not prior to, the plaintiff's filing suit. Congress' inability to identify in advance the appropriate *qui tam* relator for an as-yet-unknown fraud demands its use of a unilateral contractual offer.

212. *Diamond*, 476 U.S. at 62.

213. *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)); *see also* *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982) ("standing [doctrine] also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order").

In *Diamond*, the Court decided that the State of Illinois, which chose not to appeal the appellate court's invalidation of its abortion statute, was much more directly interested in the controversy than was the private intervenor. Therefore, granting the intervenor standing to defend the statute through further appeal would be inconsistent with due "concerns for state autonomy." 476 U.S. at 65.

214. Since Congress can override the prudential standing rule which generally precludes plaintiffs from vindicating interests more directly affecting other private individuals, *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), it follows that Congress may similarly waive the prudential standing barrier on behalf of the United States. *Cf. Diamond*, 476 U.S. at 65 n.17 (suggesting Illinois legislature could have created an interest sufficient to confer private standing to defend the constitutionality of its abortion statute).

One might suggest (though the Supreme Court never has) that Article III standing requirements also serve to protect the autonomy of potential *defendants*; individuals may be sued in Federal court (and thus forced to expend energy and resources in defense) only after having engaged in conduct which can fairly be alleged to injure another member of society. *Cf. supra* text accompanying notes 132-35 (protection of individuals from prosecutorial overreaching constitutes value underlying Article II separation of powers doctrines). But any standing limits appropriately inspired by this perspective turn on a normative inquiry about the importance of redressing particular injuries: What "injuries" are sufficiently deserving of protection as to justify subjecting people allegedly causing them to civil suits? I believe this value judgment ought to be left to Congress. *Cf. Fletcher, supra* note 192, at 233 (judicial refusal to entertain legislatively defined interests constitutes form of unwarranted "substantive due process"). But in any case, I see no justification for distinguishing as a categorical matter between "public" and "private" injuries for purposes of this analysis. Indeed, individuals arguably ought to be subject to prosecution *more* easily for "public" than "private" injuries because of the more widespread impact of such misconduct. Moreover, *qui tam* schemes subject defendants to *less* potential abuse than traditional citizens' suit schemes, because for any given misconduct a defendant may have

B. *Judicial Encroachment on the Prerogatives of the Representative Branches*

Because *qui tam* actions satisfy the “imperatives of a dispute capable of judicial resolution”²¹⁵ and do not undermine the autonomy of interested nonparties, *qui tam* standing fully comports with Article III values unless it fails to respect the “‘properly limited . . . role of the courts in a democratic society.’”²¹⁶ But judicial cognizance of congressionally authorized private litigation to redress “generalized grievances” arising from private misconduct does not transgress any such limits.²¹⁷

Since few private actors are positioned to create “generalized grievances” by injuring the public at large, the Court’s reluctance to resolve such disputes finds expression in cases involving challenges to congressional or executive action. Adjudication of such challenges arguably threatens to disturb the delicate relationship between the judicial and other branches.²¹⁸ But neither this reason to view adjudication “as a tool of last resort”²¹⁹ nor the related desire to avoid unnecessary adjudication of constitutional issues²²⁰ counsels against judicial cognizance of statutory claims privately litigated on *behalf* of the government against private defendants, no matter how “generalized” the underlying interest at stake.²²¹

to defend herself against numerous citizens’ suits but only one *qui tam* suit. *See supra* note 71 (noting statutory bar against multiple *qui tam* prosecutions).

215. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 403 (1980).

216. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

217. In rare contexts, a general grievance may arise from Congress’ performance of a non-legislative function, such as Senate confirmation of public officers’ appointments. A congressional grant of private standing to litigate the constitutionality or erstwhile propriety of Congress’ exercise of such non-legislative functions arguably represents an attempt by Congress to abdicate its assigned functions by transferring them to the judiciary. *See, e.g.*, *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho) (refusing to grant standing based on statute expressly authorizing members of Congress to litigate validity of Senate’s confirmation of Abner Mikva to Federal bench despite arguable violation of ineligibility clause), *aff’d mem. sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981). Congressional grants of standing to enforce statutes ordering private conduct neither raise this concern nor the related one of impermissibly seeking an advisory judicial opinion. *Cf. Muskrat v. United States*, 219 U.S. 346, 357 (1911) (Congress lacks power to seek advisory judicial opinions).

218. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)):

[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

219. *Id.*; *cf. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (adjudication of “important constitutional issues in the abstract would . . . open the Judiciary to an arguable charge of providing ‘government by injunction’”).

220. *See, e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

221. Indeed, in the context of statutory claims against private defendants, the only possible “head-on confrontation” between the courts and Congress consists of the courts’ *refusal* to accept a congressionally defined legal interest as an acceptable basis for standing. At bottom, judicial refusal to acknowledge standing under these circumstances limits Congress’ ability to create new legal interests

The only sense in which the nature of the underlying interest might be relevant is that judicial resolution of generalized grievances might be viewed as entailing a *judicial* definition of the interests of the United States. As articulated by now-Justice Scalia, courts are “specifically *designed* to be bad at” resolving disputes over majoritarian interests.²²² Therefore, courts should be restricted by standing doctrine to “their traditional undemocratic role of protecting individuals and minorities against impositions of the majority,”²²³ and excluded from “the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.”²²⁴

But this contention, even if persuasive,²²⁵ is inapposite here; courts entertaining *qui tam* actions do not themselves decide how best to serve the United States’ interests. Rather, those interests are defined by other public and private actors. As discussed earlier, the congressional scheme supplementing executive enforcement with *qui tam* litigation creates a shared, operational definition of the “interests of the United States” compatible with Article II values; judicial cognizance of *qui tam* actions under the statutorily specified circumstances serves to implement, not frustrate, this definition of the public interest. The adjudicating *court* is not required to make its *own* policy determinations to any significant degree about how best to serve the public interest—for example, by dictating the executive branch’s deployment of scarce resources or its exercise of prosecutorial discretion.²²⁶ Rather, it merely follows congressional orders and adjudi-

supplementing those recognized at common law—a form of Lochnerism all over again. See Fletcher, *supra* note 192, at 233; cf. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987) (discussing role of common law baselines in standing and other areas of public law).

222. Scalia, *supra* note 92, at 896 (emphasis in original).

223. *Id.* at 894.

224. *Id.* (emphasis in original); see *United States v. Richardson*, 418 U.S. 166, 188–89 (1974) (Powell, J., concurring).

225. Without disputing that courts are the least “democratic” of the three branches, *but see, e.g.*, Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 817–46 (1974) (cataloging ways in which Congress is undemocratic), it is worth noting that the assumption underlying the Court’s “generalized grievance” standing bar—that the legislature and executive are likely to respond in an accountable fashion to the perceived grievance given its generalized nature—ignores much political science literature concerning the collective action problems facing political movements seeking redress for ubiquitous and intangible injuries. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971); Stewart & Sunstein, *supra* note 7, at 1227. This concern may explain why Justice Scalia appears to limit the application of his reasoning to widely shared “concrete injur[ies]” as opposed to abstract ones, see Scalia, *supra* note 92, at 895, though he does not expressly acknowledge the above critique.

Moreover, the assumption of executive accountability is particularly weak where, as here, Congress has specifically found that the executive *cannot* respond adequately to the grievance without the aid of private informers. See *supra* text accompanying notes 42–51. And the executive cannot easily be held publicly accountable for refusing to prosecute apparent violations of which it does become aware, since ordinarily the public will not learn of its decision and motives therefor, particularly if those motives are considered improper. See *supra* text accompanying note 48.

226. Cf. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (judicial review of criminal prosecutorial discretion disfavored because courts are “particularly ill-suited” to make necessary policy judgments). Indeed, this challenge to judicial cognizance of generalized grievances applies much more forcefully to conventional “private rights of initiation” than to *qui tam* actions.

cates the controversy presented to it under the congressionally defined substantive law.²²⁷

In sum, none of the structural or substantive values claimed to underlie contemporary standing doctrine argues persuasively against judicial cognizance of *qui tam* actions, despite their failure to redress "distinct and palpable" private injuries. The unique structure of *qui tam* litigation both guarantees the functional requisites of a judicially resolvable concrete controversy and avoids the need for any impermissible judicial participation in the project of defining the interests of the United States.

IV. CONCLUSION

Because the False Claims Act was originally signed by President Lincoln and became popularly known as the "Abraham Lincoln Law,"²²⁸ it is fitting that his words so aptly describe the present quandary about the appropriate roles to be played by the United States' institutional agents and private citizens in defining and implementing its interests: "If we could first know *where* we are, and *whither* we are tending, we could better judge *what* to do, and *how* to do it."²²⁹ Various snippets of doctrine, fleshed out by intuitions derived from modern practice, tend to suggest

227. To be sure, the governing substantive law may in certain instances leave substantial room for judicial discretion. For example, the False Claims Act does not specify a substantive norm governing dismissal of *qui tam* actions upon motion by the Department of Justice. But even should the legislative history provide insufficient guidance as to Congress' intended standard, *but see supra* note 131, it seems to me that a court could easily avoid any charge of usurping executive discretion by embracing a clearly legal standard such as "arbitrariness" or even "good faith." *Cf. Morrison v. Olson*, 108 S. Ct. 2597, 2620 n.33 (1988) (judicial review of President's removal of officer for "good cause" merely implements "will of Congress" and does "not inject the Judicial Branch into the removal decision").

In any case, even should delegation of highly discretionary decisions to courts be considered a difficulty of constitutional magnitude, it is one that arises not from the *qui tam* enforcement provisions, but from the substantive law itself. Indeed, other statutes enforceable *only* by executive officials raise this difficulty more directly. *See, e.g.*, 15 U.S.C.A. § 16(e) (West Supp. 1989) (court can enter consent judgment proposed by United States in antitrust action only after finding that it serves "public interest"); 15 U.S.C.A. § 45(m)(3) (West Supp. 1989) (FTC settlements of unfair competition actions require court approval); 30 U.S.C. § 820(k) (1982) (Mine Safety Commission settlements of penalty actions require court approval). *But see Maryland v. United States*, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting from summary affirmance) (suggesting that "legal" determination of "public interest" really involves judicial policymaking better performed by and hence appropriately left to the executive). Authorization of *qui tam* suits may increase the *frequency* of occasions in which a court exercises some control over the disposition of suits brought on behalf of the United States, but the identity of the plaintiff does not affect the *nature* of the court's reviewing function. Hence this concern speaks to the wisdom, not the constitutionality, of whatever procedural and substantive limits are imposed by the Act on the executive's ability to dismiss or settle *qui tam* cases.

More generally, the fact that the *qui tam* structure creates the possibility of simultaneous prosecution by two plaintiffs who might disagree as to law or strategy poses no unique concerns about judicial oversight of executive discretion. Courts frequently confront this two-plaintiff situation after the government intervenes in a private lawsuit to represent the United States' interests, and no court has seriously suggested that whatever "refereeing" case management may entail under such circumstances constitutes an impermissible judicial intrusion into the executive's exclusive domain. *See supra* note 103.

228. *See* 132 CONG. REC. H6479 (daily ed. Sept. 9, 1986) (statement of Rep. Glickman).

229. A. LINCOLN, *Acceptance Speech to the Republican Convention (June 16, 1858)*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (R. Basler ed. 1946) (emphasis in original).

that Congress cannot authorize and Federal courts cannot entertain private litigation on behalf of the United States. But, after a more careful inquiry into “whither we are tending” with contemporary Article II and Article III doctrines, it appears that the *qui tam* concept, particularly as structured in the present False Claims Act, comports with the values lying beneath. Authorizing private citizens to enforce the United States’ legal interests through *qui tam* actions, no less than authorizing citizens to enforce their own legislatively created interests as an indirect means of implementing public policy objectives, is within Congress’ power to “judge *what* to do, and *how* to do it.”²³⁰

To many, the *qui tam* concept may seem an anachronistic vestige of an earlier time when, prior to the growth of the modern executive, the responsibility for enforcing legal obligations necessarily fell to private citizens rather than public officers. But when contemporary values support the constitutional legitimacy of a once robust and routine law enforcement scheme, the decision as to whether that scheme deserves burial or resurrection properly lies with Congress.²³¹ Perhaps it is somewhat prophetic that *McCulloch v. Maryland*,²³² in which the Supreme Court articulated a strong reluctance to interpret the Constitution’s structural provisions to “deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances,”²³³ resolved a controversy litigated by a private plaintiff in a *qui tam* action.²³⁴

230. *Id.* (emphasis in original).

231. To the extent one believes that contemporary legislative views of expediency do not justify the constitutionality of novel structural modifications of interbranch relationships, *see, e.g.*, *Mistretta v. United States*, 109 S. Ct. 647, 683 (1989) (Scalia, J., dissenting) (“in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous”), one ought equally to believe that an *absence* of need for a particular structure previously thought legitimate does not *erase* its longstanding constitutional imprimatur. *Cf.* *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943) (rejecting executive’s argument that *qui tam* jurisdiction must be interpreted narrowly because “conditions have changed since the Act was passed in 1863”).

232. 17 U.S. (4 Wheat.) 316 (1819).

233. *Id.* at 415.

234. *Id.* at 321–22 (private action of debt brought against officer of United States Bank to recover monetary penalty imposed by Maryland for avoiding state tax, said penalty to be recovered “one half to the informer, and the other half to the use of the State”).