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Does History Defeat Standing Doctrine?

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DOES HISTORY DEFEAT STANDING DOCTRINE?

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According to the Supreme Court, the Federal Constitution limits not only the types of matters that federal courts can adjudicate, but also the parties who can bring those matters before them. In particular, the Court has held that private citizens who have suffered no concrete private injury lack standing to ask federal courts to redress diffuse harms to the public at large.[1] When such harms are justiciable at all, the proper party plaintiff is the public itself, represented by an authorized officer of the government.

Although the Court claims historical support for these ideas, academic critics insist that the law of standing is a recent "invention" of federal judges.[2] Indeed, it is frequently said that "[t]here was no doctrine of standing prior to the middle of the twentieth century."[3] According to this view, the forms of action did much of the work of standing, defining when a plaintiff had the type of injury that, together with the defendant's breach of duty, would support a claim for relief. But judges did not otherwise inquire into standing; a court would deal with standing-related concerns simply by asking "whether the matter before it fit one of the recognized forms of action."[4] Only in the

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1. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *cf.* Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) (holding that Congress can authorize private suits for harms that are widely shared, but only if each individual plaintiff's harm is sufficiently concrete to qualify as an "injury in fact").

2. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) [hereinafter Sunstein, *What's Standing After* Lujan*?*]; *see also, e.g.*, John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (asserting that the Supreme Court "fabricat[ed] the doctrine[] of standing" in the twentieth century).

3. Ferejohn & Kramer, *supra* note 2, at 1009.

4. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988) [hereinafter Winter, *The Metaphor*]; *see also* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2251-52 &

twentieth century, so the story goes, did a "distinctive body of standing doctrine" develop.[5]

For the Supreme Court's detractors, this claim has an important corollary. If the dominant view of justiciability from the Framing until the mid-twentieth century focused only on whether claims fit into the forms recognized by law and did not entail any separate notion of standing, then it more easily follows that the modern Court should not read standing doctrine into the Federal Constitution. According to widely accepted academic critiques, the Court is flatly wrong to claim historical support for a constitutional requirement of standing, and particularly for the requirement that private parties show some sort of individualized injury before they can proceed in federal court.[6] Building on prior work by Louis Jaffe and Raoul Berger,[7] an impressive article by Steven Winter suggests that the principle of public control over public rights has only recently become dogma, and that earlier eras saw no constitutional objections to "the adjudication of group rights at the behest of any member of the public, without regard to the necessity of personal interest, injury, or standing."[8] Cass

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n.63 (1999) (citing the many scholars who have suggested that "the question of standing is best treated as a question indistinguishable from whether the party has a right of action").

5. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) [hereinafter Sunstein, *Standing and the Privatization of Public Law*]; *see also* Winter, *The Metaphor*, *supra* note 4, at 1395 (asserting that what Professor Winter calls "the syllogism of the forms," under which courts simply asked whether parties were presenting their claims in the form prescribed by positive law, "predominated until the middle of the twentieth century").

6. *Compare* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04 & n.5 (1998) (indicating that history supports the "triad of injury in fact, causation, and redressability" that "constitutes the core of Article III's case-or-controversy requirement"), *with, e.g.*, Ferejohn & Kramer, *supra* note 2, at 1004 ("[N]o one seriously believes that the Framers chose [the words 'cases' and 'controversies'] with anything like the Supreme Court's doctrinal framework in mind or that the Court's justiciability rulings are anything other than a judicially invented gloss on the Constitution.").

7. *See* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818, 840 (1969) (arguing that "historically-derived constitutional compulsions" do not support "objections to the standing of a private individual to enforce a 'public right' "); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033-34 (1968) (arguing that "whether the analysis proceeds in terms of history, logic or policy," the constitutional requirement of a "Case" does not require "a plaintiff who proffers for judicial determination a question concerning his own legal status"); *cf.* Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1275 (1961) (conceding that some early American decisions were "antagonistic to citizen actions," but reading both English history and the evolution of American tradition to support some such actions).

8. Winter, *The Metaphor*, *supra* note 4, at 1381-82; *see also id.* at 1374 (asserting that there was no conception of standing as a component of a constitutional case before the twentieth century); Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 315 (2001) (noting with disapproval "[t]he Supreme Court's constitutionalization of standing doctrine over the past three decades" (footnote omitted)).

Sunstein similarly condemns the twentieth-century Supreme Court for importing what he calls "a private-law model of standing" into the Constitution.[9] Drawing primarily upon mandamus practice and *qui tam* statutes, the critics treat history as firmly establishing the constitutionality of "the 'standingless' public action or 'private attorney general' model that modern standing law is designed to thwart."[10]

This Article sees the history differently. We do not claim that history *compels* acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. The subsistence of *qui tam* actions alone might be enough to refute any such suggestion. We do, however, argue that history does not *defeat* standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.

To begin with, there was an active law of standing in the eighteenth and nineteenth centuries. To be sure, early American courts did not use the term "standing" much, and modern research tools might therefore convince one that the concept did not exist.[11] But eighteenth- and nineteenth-century courts were well aware of the need for proper parties, and they linked that issue to the distinction between public and private rights. Courts regularly designated some areas of litigation as being under public control and others as being under private control. Within the area of private control, moreover, courts paid close attention to whether the correct private parties were before them.

It is certainly true, as William Fletcher and other commentators have noted, that standing requirements often can be rephrased in

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9. Sunstein, *Standing and the Privatization of Public Law*, *supra* note 5, at 1433 ("While the model is often justified by reference to the case or controversy requirement of article III, there is in fact no basis in that article or in any other provision of the Constitution for the view that the private-law model is constitutional in status."); *see also id.* at 1434-35 (claiming that the requirement of a private-law injury in public-law actions arose in the early regulatory era); Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 170-71 (asserting that practice "from the founding era to roughly 1920" provides "no evidence of constitutional limits on [Congress's] power to grant standing"). Professor Sunstein distinguishes between the need for a private cause of action (which he does view as a constitutional requirement for private litigation) and the need for a private injury (which he does not view as a constitutional requirement). *See, e.g.*, Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 639 (1999) ("As a matter of text and history, the best reading of the Constitution is that no one can sue without some kind of cause of action.").

10. Winter, *The Metaphor*, *supra* note 4, at 1396.

11. *See, e.g.*, Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 169 & n.26 (reporting the results of a LEXIS search for the word "standing," though acknowledging that this evidence is "crude").

terms of the elements of a cause of action.[12] But the issue of the proper parties to allege public and private injuries cut across various causes of action, and it also limited the arguments available even to people with valid causes of action. Because English precedents were mixed, moreover, American courts that resolved this issue were not always simply following well-established forms. In favoring a private-injury requirement for private litigation, their decisions were influenced by American ideas about the proper role of the judiciary, its relationship to the political branches of the state and federal governments, and the legitimate allocations of public and private power.

Contrary to the claims of modern critics, moreover, the nineteenth-century Supreme Court did see a constitutional dimension to standing doctrine. Admittedly, early cases often did not specify the extent to which standing doctrine was simply a matter of "general law" and the extent to which the Federal Constitution incorporated it. But in the cases dearest to the hearts of the standing critics — actions against federal and state governmental officials — the nineteenth-century Court explicitly discussed standing in constitutional terms. The Court's language, moreover, did not suggest that the constitutional issue would always vanish if only a legislature would give the plaintiff a statutory right to sue. Rather, with the exception of *qui tam* (which we discuss more thoroughly below), such indications as there were suggested that a legislatively created cause of action would not necessarily be enough for standing.

Part I discusses some general manifestations of judicial concern for maintaining the distinctions between proper litigants of public and private rights. Part II shows that the Supreme Court saw these distinctions as having constitutional dimensions. Part III discusses whether the constitutional concerns would evanesce with congressional provision for a cause of action.

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12. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 229 (1988) (stating that a standing decision determines whether the plaintiff has a right to judicial relief in a federal court and should be seen as addressing the substantive merits of the plaintiff's claim); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974) (arguing that standing issues would better be addressed by asking whether the plaintiff has stated a claim for relief). We do not take issue with Judge Fletcher's point that standing doctrine should be sensitive "to the particular right at issue and to the proper definition of the plaintiff class for that right." Fletcher, *supra*, at 249. In certain circumstances, however, we suggest that "proper definition of the plaintiff class" may exclude private litigants altogether, even when Congress has purported to make them proper plaintiffs. *Cf. id.* at 224 (arguing for unfettered congressional power to create standing to litigate statutory rights, though recognizing restrictions on Congress's power to create standing to litigate constitutional rights).

I. THE "GENERAL LAW" OF STANDING

A. *The Traditional Distinction Between Public and Private Rights*

Because much of the traditional discourse about standing was cast in terms of the distinction between "public rights" and "private rights," we start with some working definitions of these concepts. These definitions are based on historically recognized categories, but also have modern currency.

Public rights are those that belong to the body politic.[13] They may include interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law.[14] The penal law (which includes not only criminal law but also fines and forfeitures recoverable through civil process) also defines various public rights.[15] The penalties for violations of those rights are not measured strictly by private loss; like public law more generally, penal law focuses on vindicating the claims of the public rather than on compensating individuals.[16]

Private rights, by contrast, are held by discrete individuals. Rights at the core of this category include an individual's common law rights in property and bodily integrity, as well as in enforcing contracts. While penal law also is concerned with invasions of private property and person, private rights may generally be distinguished by private law's focus on individual compensation (or the avoidance of private loss by injunctive remedies).

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13. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (discussing "the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity"); Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829) (Walworth, C.) (distinguishing between "*public* rights belonging to the people at large" and "the *private* unalienable rights of each individual").

14. *See Lansing*, 4 Wend. at 21 (Walworth, C.) (describing "[t]he right to navigate the public waters of the State and to fish therein, and the right to use the public highways" as public rights held by the people at large rather than by any individual citizen).

15. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (characterizing crimes and misdemeanors as public law).

16. *See, e.g., id.* at *7 (noting that the law strives not only to "redress the party injured" by unlawful acts, in the manner described in Blackstone's volume on "private wrongs," but also "to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquility of the whole"); *see also* Richard A. Epstein, *Crime and Tort, Old Wine in New Bottles*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 233 (Randy Barnett & John Hagel III eds., 1978) (arguing that the defining line between tort and crime is that the former decides as between two parties who should bear a loss); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15 (1975) (stating that private enforcement occurs where detection is near 100%, whereas public enforcement tends to be in areas where detection is less certain and where penalties are set not merely to measure loss but also to make up for incomplete detection).

Of course, legislatures have considerable power to create new rights and to redefine existing rights in ways that affect whether they are public or private. Legislatures may add to public law by enacting new regulatory and criminal statutes, to be enforced by governmental officials. Similarly, legislatures may create statutory duties or "entitlements"[17] owed to private persons; these entitlements can be treated as private rights for standing purposes, and the legislature may permit individuals to seek compensation for losses caused by their breach.[18] In connection with a claim for private compensation, individuals may also be accorded the ability to collect supracompensatory penalties such as treble damages, even though these awards concededly have "penal" or public aspects.[19]

Still, legislatures do not have total control over the line between public and private rights. Both state and federal constitutions limit the legislature's ability to assert public control over certain kinds of core private rights. Conversely, there are also constitutional constraints on privatizing certain core public rights.

B. *Standing and the Public/Private Distinction*

The question of which parties may properly come to court to vindicate these different kinds of legal rights is central to the issue of standing. In trying to address that question, American courts have traditionally drawn partly upon general principles of jurisprudence and partly upon distinctively American ideas about popular sovereignty, limited government, and the separation of powers. To the extent that these ideas played out differently in different jurisdictions, we will focus on the practices of the federal courts. But it is worth noting at the outset the ubiquity of the twin ideas of public control over public rights and private control over private rights.

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17. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 963-64, 987-88 (2000) (describing a category of property interests or entitlements that are protected by procedural due process but that are more easily subject to legislative divestiture than ownership interests).

18. *See, e.g.*, Huntington v. Attrill, 146 U.S. 657, 676 (1892) (reasoning that a statute making corporate officers liable for corporate debt if they signed a false certificate of capital stock created a private right "as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of the debt, it is as to him clearly remedial").

19. *See, e.g.*, ISAAC 'ESPINASSE, A TREATISE ON THE LAW OF ACTIONS ON PENAL STATUTES, IN GENERAL 3 (photo. reprint 2003) (1st Am. ed. 1822) (noting that statutes authorizing injured parties to recover treble damages are "usually termed remedial," but acknowledging that they "are . . . in some respects penal; for the sum recovered in actions under them is not generally confined to what amounts to actual amends, but goes much beyond it, and operates as a penalty against the party who has broken the statute"); *see also* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (discussing competing conceptions of punitive damages in the nineteenth century).

Critics of modern standing doctrine maintain that in the early Republic, "American law provided several constitutionally acceptable models for the adjudication of group rights at the behest of any member of the public. . . ."[20] To the extent that these alternative models existed, however, they were areas of contest. As a general matter, moreover, the requirements of public control over public rights and private control over private rights predominated in American law.

1. *Standing to Seek Criminal Punishment*

An insightful recent article by Edward Hartnett provides a straightforward argument against the Supreme Court's attempt to read a requirement of private injury into the language of Article III. As Professor Hartnett notes, criminal prosecutions brought by the United States are universally acknowledged to be "Cases" within the meaning of Article III. But federal crimes usually do not inflict any particularized injury upon the United States. For Hartnett, it follows that "the word 'case' in Article III cannot reasonably be understood to require a personal, concrete, and particularized injury in fact."[21]

This argument, however, is subject to an objection. The concept of proper parties is central to standing doctrine, and it may also infuse notions of a "Case." In particular, the requirements for a "Case" may be party-specific: just as a private plaintiff who has suffered an individual injury may be able to bring a "Case" against a defendant while other private parties cannot, so too invasions of public rights that cause diffuse injuries to the general public might support a "Case" between the public and the malefactor but not between any single individual and the malefactor. The fact that public officers can bring criminal prosecutions, then, does not disprove the hypothesis that federal courts can entertain private litigation only when private rights of a certain sort are at stake.

Americans of the eighteenth and nineteenth centuries were used to distinguishing between wrongs to private individuals and wrongs to the public at large. What distinguished crimes and misdemeanors from mere civil wrongs was that they "are a breach and violation of public rights and duties, which affect the whole community, considered as a community."[22] Thus, most early state constitutions affirmatively

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20. Winter, *The Metaphor*, *supra* note 4, at 1381.

21. Hartnett, *supra* note 4, at 2249-50. While Professor Hartnett agrees with Professor Sunstein and other critics of standing doctrine about Article III, he reserves judgment about the circumstances in which congressional attempts to authorize "citizen suits" might impinge upon powers that Article II gives to the President. *See id.* at 2256-62.

22. 3 WILLIAM BLACKSTONE, COMMENTARIES *2; *see also, e.g.*, State v. Rickey, 9 N.J.L. 293, 305 (1827) (Ford, J.) ("The principles of the common law have clearly distinguished between *public* and *private* wrongs from the earliest ages to the present

required each indictment to specify that the defendant's conduct had been "against the peace and dignity of the State."[23]

To be sure, much criminal behavior violated an individual victim's private rights as well as the rights of the public at large.[24] But criminal law enforcement was conceptualized as vindicating a shared public interest in the overall protection of private rights rather than any single individual's private rights themselves. As a result, criminal behavior potentially gave rise to two separate kinds of actions — the individual victim's tort action for compensation (generated by the behavior's invasion of the victim's private rights) and the public's criminal action for punishment (generated by the behavior's invasion of the community's public rights).

Even in England, where the public/private distinction lacked the full force that it acquired in America,[25] people had long understood the tort action to be under private control and the criminal action to be under public control. Writing about the state of nature, Locke asserted that crimes against the law of nature gave rise to "two distinct rights" — the right of "punishing the crime" for the sake of deterring similar conduct and the right of "taking reparation" for the individual damage caused by the crime.[26] According to Locke, everybody in the state of nature enjoyed the right of punishment (because "in the state

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time."); Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 94 (Pa. 1815) (argument of counsel) ("That the Courts have invariably preserved this distinction, between those cases which affect individuals only, and those which affect the public, will appear from a great number of cases which might be adduced . . . .").

23. *See* DEL. CONST. of 1792, art. VI, § 21; MD. CONST. of 1776, art. LVII; N.H. CONST. of 1784, pt. II; N.J. CONST. of 1776, art. XV; N.C. CONST. of 1776, art. XXXVI; PA. CONST. of 1790, art. V, § 12; S.C. CONST. of 1790, art. III, § 2; VA. CONST. of 1776; *cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *268 ("All [criminal] offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment.").

24. 4 WILLIAM BLACKSTONE, COMMENTARIES *5 ("[E]very public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."). To a large extent, indeed, criminal law protected the same interests as private law; a crime's violation of the public rights lay in its tendency, if not punished, to set a "public evil example" encouraging other malefactors to steal private property or otherwise to invade private rights. *See Sharpless*, 2 Serg. & Rawle at 94 (argument of counsel) (emphasis omitted).

25. Part of the conceptual blurring of the public/private distinction in England may have stemmed from the king's dual role as both individual and sovereign. Consider, for instance, Blackstone's explanation of why the king was "in all cases the proper prosecutor for every public offense": because "the majesty of the whole community" was centered in the king, the law supposed the king to be "injured by every infraction of the public rights belonging to that community." 4 WILLIAM BLACKSTONE, COMMENTARIES *2. This explanation, which effectively equated wrongs to the public at large with wrongs to the person of the king, had no counterpart in postrevolutionary America, where people saw no need to treat any particular individual as the embodiment of the public.

26. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 11 (6th ed. 1764), *reprinted in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J.W. Gough ed., Macmillan Co. 1947).

of nature every one has the executive power of the law of nature"),[27] but "the [right] of taking reparation . . . belongs only to the injured party."[28] For Locke, this distinction persisted after the formation of civil society. Of course, individual citizens no longer enjoyed executive power; the "common right of punishing" was instead put into the hands of the public magistrate. Being in charge of this common right, "the magistrate . . . can often . . . remit the punishment of criminal offences by his own authority."[29] No public officer, however, could "remit the satisfaction due to any private man for the damage he has received"; compensation for such private injuries was something that "he who has suffered the damage has a right to demand in his own name, and he alone can remit."[30]

Postrevolutionary Americans embraced this basic distinction. As John Marshall noted in 1800, "A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution carried on in the name of the United States, can without impropriety be dismissed at the will of the government."[31]

Throughout the United States, criminal prosecutions were conducted in the name and under the authority of the people in their collective capacity,[32] and the legal rights that they vindicated were understood to be those of the public rather than of any private individual.[33] In keeping with this view, rules of evidence that excluded the testimony of interested witnesses were not understood to prevent injured victims from testifying in criminal prosecutions; while victims might have some personal axes to grind, they had no legally

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27. *Id.* § 13.

28. *Id.* § 11.

29. *Id.*

30. *Id.*

31. Representative John Marshall, Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (March 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984).

32. Some early state constitutions explicitly provided that "[a]ll prosecutions shall be carried on in the name and by the authority of the State." S.C. CONST. of 1790, art. III, § 2; *see also* DEL. CONST. of 1792, art. VI, § 21 ("Prosecutions shall be carried on in the name of the state . . . ."); PA. CONST. of 1790, art. V, § 12 ("[A]ll prosecutions shall be carried on in the name and by the authority of the commonwealth . . . ."). Even in states whose constitutions did not explicitly impose this requirement, prosecutions were conducted in the name of the state or its people.

33. *See, e.g.*, Bryant v. Ela, 1 Smith 396, 413 (N.H. 1815) (observing that "[t]he State is the party injured" by crimes); Commonwealth v. Duane, 1 Binn. 601, 606-07 (Pa. 1809) (Tilghman, C.J.) ("[T]he proceeding by indictment is not the *right* of the *injured party*, but of the *public*.").

cognizable interest in the vindication of public rights.[34] For the same reason, the Supreme Court held early on that the federal government's prosecution of someone accused of attacking a Spanish diplomat was not a "Case[] affecting . . . [a] public Minister" within the meaning of the Federal Constitution's Original Jurisdiction Clause.[35] As the Court explained, the case was entirely between the United States and the defendant, and the minister "has no concern . . . in the event of the prosecution" even though "he was the person injured by the assault."[36]

It is theoretically possible, of course, for a legal system to view criminal prosecutions as actions by the public to vindicate public rights while simultaneously allowing victims or other private individuals to conduct the prosecution on behalf of the public. That possibility is part of the historical debate about standing.[37] Under English practice, although public officers remained in ultimate control of most criminal prosecutions (through the king's ability to grant pardons and Parliament's ability to enact statutes that effectively scuttled prosecutions), private individuals had considerable authority to initiate and prosecute criminal cases in the king's name.[38] This practice

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34. *See, e.g.*, State v. Rickey, 10 N.J.L. 83, 84 (1828) ("The idea that a private person may be interested in a public prosecution, seems to be utterly discarded in law."); *cf.* United States v. Murphy, 41 U.S. (16 Pet.) 203, 210-13 (1842) (acknowledging that special rules of law occasionally did give alleged victims a private interest in a successful prosecution, as when the law "entitled [a robbery victim] to a restitution of his goods upon conviction of the offender," but observing that even victims with such interests were often allowed to testify in prosecutions aimed at "suppress[ing] . . . public crimes" rather than serving "the interest of the party aggrieved").

35. U.S. CONST. art. III, § 2.

36. United States v. Ortega, 24 U.S. (11 Wheat.) 467, 469 (1826).

37. Even today, some of the historical discussions of private prosecution are in service of arguments favoring greater individual involvement (or at least victim involvement) in prosecution. *See, e.g.*, Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 358 (1986); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 586 (1984). *See generally* BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998).

38. *See, e.g.*, Cardenas, *supra* note 37, at 360 ("The right of any crime victim to initiate and conduct criminal proceedings was the paradigm of prosecution in England all the way up to the middle of the Nineteenth Century."); PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 20 (1958) (indicating that even police prosecutions were "in theory" private prosecutions); *cf.* Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 LAW & HIST. REV. 1, 8 (2001) (observing that "by the mid-nineteenth century, most prosecutions were private in name only, as the 'private' prosecutor was in most instances a policeman," but adding that "Parliament did not pass legislation to set up a national system of public prosecutors until 1879"); Philip B. Kurland & D.W.M. Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 497-99 (discussing the long-unsuccessful movement, dating back to the late eighteenth century, that led up to the 1879 statute). Even the 1879 statute did not "establish[] a system of public prosecution similar to the one that exists in the United States." Cardenas, *supra* note 37, at 363; *see also* Klerman, *supra*, at 8 ("It was only with the passage of the 1985 Prosecution of Offenses Act that England established an

made its way to the American colonies. Ultimately, however, Americans rejected it.

Joan Jacoby claims that "[b]y the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies."[39] This statement is something of an exaggeration; some cities and states continued to give private individuals a substantial role not only in pressing charges, but even in conducting trials.[40] But Jacoby is correct that a consensus was developing against giving private individuals free rein to represent the public. The Supreme Judicial Court of Massachusetts, for example, noted that practice in England, where criminal trials ordinarily "are conducted by counsel employed by the private prosecutor," was "entirely different" from practice in Massachusetts, where the public attorney general was in charge of all criminal prosecutions.[41] Other courts also emphasized this "striking and important difference in prosecutions for criminal offences here and in England."[42]

In explaining America's movement away from private prosecutions, courts emphasized the dangers of putting public power in the hands of private individuals who were neither selected by nor responsible to the people at large. In the course of asserting that "no indictment ought to be sent to the grand jury without the sanction and approbation of the solicitor-general," Tennessee's highest court highlighted the risk that "leaving prosecutions to every attorney who will take a fee to prosecute" would permit "the innocent to be oppressed or vexatiously harassed"; private prosecutors would not

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effective system of public prosecution, and even this legislation preserved a limited right of private prosecution.").

39. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 19 (1980).

40. *See, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 5 (1989) (describing the aldermen's courts of nineteenth-century Philadelphia, in which "private citizens brought criminal cases to the attention of court officials, initiated the process of prosecution, and retained considerable control over the ultimate disposition of cases"); Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & SOC'Y 443, 448-59 (1995) (noting that in New York City during the first half of the nineteenth century, private prosecutors or complainants not only initiated indictments but often were represented at trial by private counsel, who operated with the assistance of the district attorney).

41. Commonwealth v. Tuck, 37 Mass. 356, 364-65 (1838).

42. State Treasurer v. Rice, 11 Vt. 339, 343 (1839). The *Rice* court explained:

> In this state, prosecutions for offences before the county court, which has original and exclusive jurisdiction of most offences, are conducted by a public officer appointed for that purpose, and responsible for the manner in which he discharges his duty. In England they are usually instituted and conducted by private prosecutors . . . .

Id.; *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 23, at 15 (Boston, Brown, Little & Co. 1866) ("In all the States of our Union, and in the tribunals of the United States, criminal prosecutions are carried on by a public officer, learned in the law, and chosen for this particular purpose.").

necessarily "feel the responsibility imposed by the oath of the solicitor-general[,] by his selection for the discharge of these duties, [and] by the confidence of the public reposed in him."[43] The Supreme Court of Louisiana likewise worried that private prosecutions would reflect "the promptings of envy, malice, and all uncharitableness."[44] Even in states that continued for a time to permit private prosecutions, courts expressed concern that such prosecutions "are often commenced in very doubtful cases and for the most trivial offences," simply "to vex and harass an opponent."[45]

While some states may have taken longer than others to follow the general trend, the federal government put public officers in control of prosecutions from the start. When the Judiciary Act of 1789 set up the federal courts, it also required a federal district attorney to be appointed for each of the thirteen judicial districts, and it gave this officer a "duty . . . to prosecute in such district all delinquents from crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned."[46] Although private prosecutions occasionally occurred in territorial courts and in the courts of the District of Columbia, Article III courts were different: they did not recognize private citizens as the proper people to prosecute public offenses.[47] As the U.S. Supreme

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43. Fout v. State, 4 Tenn. 98, 98-99 (1816). The court went on to cast the role of the publicly appointed prosecutor in constitutional terms: "The designs of the [state] constitution are disappointed by suffering the interference of any other . . . ." *Id.* at 99.

44. Markham v. Close, 2 La. 581, 587 (1831) (rebuffing a private individual's attempt to appear as public prosecutor, and invoking various considerations "which induce[] the state to take the prosecution of offences against her peace and her dignity into her own hands, and forbid[] the interference of private passions with the vindication of her justice").

45. Waldron v. Tuttle, 4 N.H. 149, 151 (1827).

46. Judiciary Act of 1789, § 35, 1 Stat. 73, 92.

47. *See, e.g.*, United States v. McAvoy, 26 F. Cas. 1044, 1045-46 (C.C.S.D.N.Y. 1860) (No. 15,654). The *McAvoy* court wrote:

> [T]here is no power conferred, by statute or usage, on the courts of the United States, to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the [Judiciary Act of 1789].

Id.; *see also* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 293-96 (1989) (noting that after ratification of the Constitution, private individuals occasionally "helped initiate prosecutions [in federal court] by contacting the grand jury," but conceding that "they did not control the prosecutions once begun"); *cf.* Charge to Grand Jury, 30 F. Cas. 992, 994 (C.C.D. Cal. 1872) (No. 18,255) (Field, J.) ("You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.").

Qui tam statutes, which we discuss in Part III, may mark a limited exception to the idea that only public officers could bring criminal prosecutions to court in the name of the United States. Although most *qui tam* suits proceeded as civil actions in debt, common law practice

Court put it in 1842, "from the very nature of an indictment and the sentence thereon, the government alone has the right to control the whole proceedings and execution of the sentence."[48] At least when it came to criminal prosecutions, then, private individuals were not understood to be able to go to federal court to vindicate public rights, whether on their own behalf or in the name of the American people at large.

2. *Standing to Seek Civil Remedies for the Invasion of Public Rights*

Even civil remedies for violations of public rights were not generally available at the behest of private plaintiffs, at least in the absence of some connection to a private injury.[49] The law of "public nuisances" — a catch-all term for various invasions of public rights, ranging from corruption of public morals to obstruction of public highways[50] — illustrates the point. Public authorities could get courts involved in suppressing such nuisances, either by imposing criminal punishments on those responsible[51] or by issuing injunctions against ongoing violations of the public rights.[52] But private individuals were much more limited in their ability to seek judicial relief for public nuisances. From Independence on, American courts enforced the "familiar" principle that "[t]he public authorities alone can complain of nuisances, while they remain public or general."[53] Indeed, courts

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traditionally gave the relator the option of proceeding instead by the criminal process of information.

48. United States v. Murphy, 41 U.S. (16 Pet.) 203, 209 (1842).

49. When a private plaintiff had suffered private injury, he might be able to bring a claim that had aspects of a public right. For example, parties with private injuries could often seek statutory penalties or punitive damages that exceeded their actual loss and that may have been designed at least in part to protect society as a whole from future wrongdoing.

50. *See, e.g.*, H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 22 (Albany, Jon D. Parsons, Jr. 1875) ("Public nuisances, strictly, are such as result from the violation of public rights, and producing no special injury to one more than another of the people, may be said to have a common effect, and to produce a common damage."); F.H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 482 (1949) (referring to "public nuisance" as "that wide term which came to include obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law"), *quoted in* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966).

51. *See, e.g.*, William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966) (noting that "[p]ublic nuisance was a common-law crime" and that states also enacted statutes authorizing criminal punishments for various kinds of public nuisances).

52. *See, e.g.*, Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 98 (1838) (noting that "a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general").

53. Seeley v. Bishop, 19 Conn. 128, 135 (1848); *see also, e.g.*, Harrison v. Sterett, 4 H. & McH. 540, 548 (Md. Prov. Ct. 1774) (argument of counsel) ("[P]ublic wrongs being a general injury to the community, are to be redressed and punished by a public prosecution . . . .").

portrayed this rule as simply one manifestation of a broader idea: "Upon general principles, that common interest, which belongs equally to all, and in which the parties suing have no special or peculiar property, will not maintain a suit."[54]

Commentators offered various explanations of this principle. Coke stressed the need for "avoiding of multiplicity of suites."[55] Blackstone elaborated upon the same theme, observing that it is much less harsh to subject defendants to a single proceeding by public authorities than to permit "every subject in the kingdom . . . to harass the offender with separate actions."[56] American jurists added that in cases about injuries that were common to all, courts should "look to the rights of the whole community, and not . . . those of a single individual"; the rule that "[f]or such an injury it is for the government to interfere, and not a private individual," therefore brought the proper parties into court.[57]

It did not follow that private plaintiffs could never seek judicial relief from damage caused by a public nuisance. When the maintenance of a public nuisance caused a particular individual to sustain "special damage" — "an injury different in kind from that of which the public complains" — he could bring an action at law against the person responsible for the nuisance.[58] If the nuisance was ongoing and threatened to cause him damage that was not merely "special" but irreparable, he often could also seek an injunction from a court sitting in equity. But it was well established, both at law and in equity, that "an action will not lie in respect of a public nuisance, unless the plaintiff has sustained a particular damage from it, and one not common to the public generally."[59] Whether the plaintiff had stated such a private injury was a frequent matter of contest.[60]

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54. Barr v. Stevens, 4 Ky. (1 Bibb) 292, 293 (1808).

55. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56a (London, W. Clarke & Sons 1853) (1628).

56. 3 WILLIAM BLACKSTONE, COMMENTARIES *219.

57. O'Brien v. Norwich & W. R.R. Co., 17 Conn. 372, 376 (1845).

58. Commonwealth v. Webb, 27 Va. 726, 729 (Gen. Ct. 1828); *see also*, *e.g.*, Smith v. City of Boston, 61 Mass. 254, 255 (1851) (noting that a private plaintiff may seek compensation for damage caused by a public nuisance only if the damage is "peculiar and special" rather than being "common to the public").

59. Bigelow v. Hartford Bridge Co., 14 Conn. 565, 578 (1842) (adding that "the very object of all suits, both at law and in equity," is "[t]o preserve and enforce the rights of persons, as individuals, and not as members of the community at large"); *see also*, *e.g.*, *Barr*, 4 Ky. (1 Bibb) at 293 ("[A] public nuisance is not the subject of a suit by a private individual, unless he has sustained some special injury thereby."); Harrison v. Sterett, 4 H. & McH. 540, 548 (Md. Prov. Ct. 1774) (argument of counsel) ("[A]n action will not lie for a public nuisance without special damage . . . ."); Commonwealth v. McDonald, 16 Serg. & Rawle 390, 397 (Pa. 1827) ("In the case of a public nuisance, no one can support a private action, unless for some special grievance or injury . . . ."); *Webb*, 27 Va. at 729 (stating the "rule of Law, which we find no where contradicted, that no private action can be maintained for a public nuisance, without special damage done to the party complaining"); *cf.* 3 WILLIAM BLACKSTONE, COMMENTARIES *219-20 (observing that "no person . . . can have an action

To be sure, when a public nuisance was threatening special injury to a private plaintiff and the plaintiff was able to win an injunction against the nuisance, the same remedy that protected the plaintiff against private harm also benefited the public as a whole. As a conceptual matter, however, this benefit to the public was "incidental[]"; the private plaintiff was not thought of as representing the public, but rather as protecting his own private interest.[61] As the U.S. Supreme Court put it in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, when a public nuisance was causing a special and irreparable injury to a particular individual, it was redressable as "a private nuisance to the injured party."[62]

In the *Wheeling Bridge* case, the plaintiff was the state of Pennsylvania, which complained that a bridge erected by the defendant in Virginia was obstructing the public right of navigation on the Ohio River. The Court permitted Pennsylvania to seek an injunction against this public nuisance, but not because the state was a proper plaintiff to bring suit on behalf of the people of the United States. The only reason that the state could proceed was that it was suffering "special damage" to its own property.[63] As the Court had emphasized in an earlier opinion upholding the dismissal of a suit for want of proper parties, a private plaintiff seeking to enjoin a public

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for a public nusance" unless he "suffers some extraordinary damage, beyond the rest of the king's subjects").

60. *See, e.g.*, Hughes v. Heiser, 1 Binn. 463 (Pa. 1808); *see also* O.B. Farrelly & Co. v. City of Cincinnati, 2 Disney 516, 522-37 (Super. Ct. Cincinnati 1859) (reviewing innumerable decisions on this question).

61. Sparhawk v. Union Passenger R. Co., 54 Pa. 401, 421-22 (1867).

62. 54 U.S. (13 How.) 518, 564 (1852); *see also id.* at 566 ("[A] public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual."). The Court's rhetoric sometimes departed from this conceptualization. *See, e.g.*, Miss. & Mo. R.R. Co. v. Ward, 67 U.S. (2 Black) 485, 492 (1863) (asserting that when a private plaintiff files a bill in equity to enjoin a public nuisance, he "sues rather as a public prosecutor than on his own account"); *cf. id.* (acknowledging that the plaintiff "seeks redress of a continuing trespass and wrong against himself," but adding that he "acts in behalf of all others, who are or may be injured"). Still, the conceptualization of the plaintiff as a private actor continued to drive the Court's doctrine. *See id.* ("[U]nless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard.").

63. *See Wheeling Bridge*, 54 U.S. (13 How.) at 626 (emphasizing, in the Court's decree, that the defendant's bridge was causing "special damage" to Pennsylvania's proprietary interests); *see also id.* at 561 ("[Pennsylvania] asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it."). The state had invested millions of dollars in building canals and railroads linking inland cities in Pennsylvania to cities on the Ohio River, and the defendant's bridge allegedly was frustrating the purpose of these extraordinary investments. In addition, the defendant's obstruction of navigation on the river allegedly was causing Pennsylvania to lose toll revenue on its canals.

nuisance "cannot maintain a stand in a court of equity[] unless he avers and proves some special injury."[64]

The same ideas applied as a matter of general jurisprudence in the states as well. Writing in 1899, William Hale summed up a century of case law as follows:

> The interest which an individual has in common with all other citizens or members of the state or municipality is insufficient to authorize him to maintain an action founded upon a public wrong affecting the people at large in the same manner. A party cannot vindicate the rights of others by process in his own name, nor employ civil process to punish wrongs to the public.[65]

3. *Issue-Specific Standing*

Critics of the modern Supreme Court often suggest that earlier generations had no concept of standing apart from the traditional forms of action.[66] But even when the plaintiff's allegations fit into one of the established writs and therefore enabled him to bring a case to court, separate doctrines operated at an issue-specific level to keep private parties from litigating certain matters of public right. These doctrines may have been more susceptible to legislative change than doctrines affecting whether there was a "Case" in the first place. Still, these issue-specific rules reflected the strength of the general principle against private enforcement of public rights: even in the context of otherwise justiciable controversies between two private parties, litigants often could not claim the extracompensatory benefits of a duty owed to the public.

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64. Mayor of Georgetown v. Alexandria Canal Co., 37 U.S. (12 Pet.) 91, 99 (1838) (affirming the circuit court's decree dismissing a bill that failed to allege special damage). Professor Winter describes the requirement of special damage in both *Alexandria Canal Co.* and *Wheeling Bridge* as "an artifact of the historic jurisdictional fight between law and equity." *See* Winter, *The Metaphor*, *supra* note 4, at 1420, 1421 n.269. Exactly what he means by this phrase is unclear, but one should not infer that the requirement of private injury was a special rule of equity. To the contrary, this requirement had long been enforced at law, and courts of equity quite naturally incorporated it when they began permitting some private people to seek injunctions against public nuisances. *See Alexandria Canal Co.*, 37 U.S. (12 Pet.) at 98. Throughout the nineteenth century, it was "well established" that no person could maintain a public-nuisance action in a court of law "unless he sustains a special damage therefrom, different from that sustained by the rest of the public." WOOD, *supra* note 50, at 655; *see also id.* at 835 (noting that no one could seek an injunction against a public nuisance "unless he could maintain an action in a court of law").

65. William B. Hale, *Parties to Actions*, *in* 15 ENCYCLOPAEDIA OF PLEADING AND PRACTICE 456, 472-73 (William M. McKinney ed., Long Island, NY, Edward Thompson Co. 1899) (footnotes omitted); *see also id.* at 473 (noting that "where a public wrong results in special and peculiar damage to an individual, differing in kind and not merely in degree from that suffered by the public at large, he may maintain an action individually to protect his interests").

66. *See supra* note 4 and accompanying text.

For example, courts used standing doctrines (and, in particular, the restriction on private invocations of public rights) to limit the impact of rules restricting the capacity of aliens to own land. At common law, when lands were sold or devised to an alien, "the king [was] thereupon entitled to them" and could launch proceedings to seize them; people who did not owe allegiance to the king could not "acquire a permanent property in lands," lest the nation become "subject to foreign influence."[67] Although the United States sometimes entered into treaties waiving this principle with respect to the citizens of particular countries,[68] and although individual states eventually adopted statutes deviating from the principle more generally,[69] there was a time when many states adhered to the common law rule.

Even in those states, however, private litigants generally could not assert the public's right to the land; the public (as represented by public officers) was in charge of when and whether to initiate the necessary "inquest of office" to seize the property. Thus, when a plaintiff sued someone for trespassing upon land in the plaintiff's possession, the defendant could not escape liability by proving that the plaintiff was an alien.[70] Similarly, in ejectment and other controversies between rival land claimants, the party with the otherwise inferior claim could not prevail on the ground that his opponent was an alien or had an alien in the chain of title.[71] As the U.S. Supreme Court

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67. 1 WILLIAM BLACKSTONE, COMMENTARIES *371-72.

68. *See, e.g.*, Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., art. 11, 8 Stat. 12, 18, *interpreted in* Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 270-71, 275 (1817); *see also* Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-G.B., art. 9, 8 Stat. 116, 122 (waiving the disabilities of alienage with respect to lands that were in British hands at the time of the treaty).

69. *See generally* Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152 (1999) (discussing common law rules and statutory deviations from them).

70. *See, e.g.*, Barges v. Hogg, 2 N.C. (1 Hayw.) 485, 485 (Super. Ct. 1797) (conceding that an alien's purchase of property "will be for the benefit of the public whenever the State thinks proper to exert its right by causing an office to be found," but observing that "no individual can . . . violate the possession of the alien purchaser" before then, and sustaining an alien's trespass action on the ground that her possession "is lawful as to all persons but the State").

71. *See, e.g.*, M'Creery's Lessee v. Allender, 4 H. & McH. 409, 412 (Md. Gen. Ct. 1799); Sheaffe v. O'Neil, 1 Mass. 256, 257-58 (1804); Jackson v. Lunn, 3 Johns. Cas. 109, 112-13 (N.Y. Sup. Ct. 1802) (Radcliff, J.). *But see Barges*, 2 N.C. (1 Hayw.) at 485 (dictum) ("An alien cannot maintain ejectment or any action for the recovery of a freehold."), *disavowed in* Rouche v. Williamson, 25 N.C. 141, 146-49 (1842).

The statement in the text requires one qualification. If the alien claimed to have acquired his title not by purchase, grant, or devise, but simply by operation of law, then his alienage was relevant and would defeat his claim. *See, e.g.*, Paul v. Ward, 15 N.C. 247, 248 (1833) (observing that "the law will not cast an estate on [an alien]"). For instance, when a landowner died intestate with an alien heir, the law of inheritance skipped the alien and passed the estate to "those persons who would take it, if the alien were not in being." *Id.* If the alien nonetheless tried to take possession of the land, the true heir could prevail in an ejectment action by pointing out that title to the land had vested in him because his

uniformly held in such situations, "[n]o one has any right to complain in a collateral proceeding, if the sovereign does not enforce his prerogative."[72]

Courts commonly applied the same rules to corporations that violated state laws against land ownership. Pennsylvania law, for instance, provided that if a corporation purchased land in the state without the legislature's authorization, the land would be forfeited to the state.[73] Both the Pennsylvania and the U.S. Supreme Courts analogized corporations that violated this rule to aliens who took property by purchase or devise: the corporations held a defeasible estate to the land, which could be divested only "by due course of law, instituted by the commonwealth alone."[74] Similarly, it was widely held that when a state chartered a corporation but did not give it the power to own land, "a conveyance to [the corporation] is not void, but only voidable, and the sovereign alone can object."[75]

Cognate problems arose under congressional legislation authorizing national banks but prohibiting them from owning real property except in certain circumstances. Debtors seeking to avoid foreclosure repeatedly invoked the banks' disability on land ownership. Just as repeatedly, however, the Supreme Court responded

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adversary was an alien. In this situation, the true heir was enforcing private rights that had already vested in him.

72. Osterman v. Baldwin, 73 U.S. (6 Wall.) 116, 121-22 (1867); *see also* Cross v. De Valle, 68 U.S. (1 Wall.) 5, 13 (1864) ("That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish."); Governeur's Heirs v. Robertson, 24 U.S. (11 Wheat.) 332, 351-58 (1826) (holding that when a state had granted land to an alien and later had purported to grant part of the same land to someone else, the initial grant to the alien was not "void," but rather gave the alien a defeasible estate that could be divested only through appropriate proceedings initiated by the state); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 619-22 (1813) (holding that at common law, when a citizen's will devised land to an alien, the alien took the land "for the benefit of the state" but enjoyed title unless and until the state validly conducted a formal inquest of office).

73. *See, e.g.*, Act of Apr. 6, 1833, 1832-33 Pa. Laws 167, 168 (reciting that "no corporation . . . can . . . purchase lands within this state . . . without incurring the forfeiture of said lands to this commonwealth, unless said purchase be sanctioned and authorized by an act of the legislature thereof").

74. Runyan v. Lessee of Coster, 39 U.S. (14 Pet.) 122, 131 (1840) (holding that private defendants could not assert the corporation's disability in an ejectment action brought against them by the corporation's lessees); *see also* Leazure v. Hillegas, 7 Serg. & Rawle 313, 322 (Pa. 1821) (analogizing the corporation to an alien and observing that while English cases left this point in doubt, "we have the highest authority in our own country for saying, that until some Act done by the Commonwealth . . . to vest the estate in itself, it remains in the alien").

75. Nat'l Bank v. Matthews, 98 U.S. 621, 628 (1879) (citing cases); *cf.* Murphy v. Farmers' Bank, 20 Pa. 415, 418-20 (1853) (holding that even when a corporation had abused the privileges conferred upon it by the state and its charter was subject to forfeiture, the corporation's usurpations of its franchise were "public wrongs and not private injuries," and so no one "except the Attorney-General[] or other officer of the Commonwealth" could seek a writ of *quo warranto* from the state's supreme court to dissolve the corporation).

that the disability was a duty owed to the government and not to private parties.[76] Courts had the same reaction in disputes about federal land grants; when junior claimants sought to raise technical defects with the procedures that the Land Office had used to grant title to the otherwise senior claimant, courts sometimes told them that any complaints belonged solely to the government.[77]

Rules of this sort, which put the power to enforce forfeitures in public hands, both preserved the legitimate exercise of public authority by public officials and limited the vulnerability of the aliens or corporations to self-interested enforcers. When private parties sought to avoid mortgages on the ground that national banks could not hold real estate, the Court noted that the proper public authorities could use the sanction of dissolution to punish wanton violations of corporate charters, and "[a] private person cannot, directly or indirectly, usurp this function of the government."[78] Similarly, the Court praised the rules that kept private adventurers from complaining about aliens in someone else's chain of title as a means of "protect[ing] the individual from arbitrary aggression."[79]

4. *Is Mandamus a Counterexample?*

Steven Winter does not deny that most private litigation in the early Republic fits what he calls "the private rights model of adjudication,"[80] under which private litigants generally cannot initiate suits to vindicate public rights. He concedes that the common law forms of action are consistent with that model,[81] and he acknowledges that "the common law forms of action dominated the legal process and jurisprudential thought of the time."[82] He insists, however, that the

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76. *See, e.g.*, Swope v. Leffingwell, 105 U.S. 3 (1881) (affirming a state court's dismissal of a bill to enjoin the sale of real estate); *Matthews*, 98 U.S. at 629 (reversing a state court's injunction against a sale); *see also* Reynolds v. Crawfordsville First Nat'l Bank, 112 U.S. 405 (1884) (holding that the bank was not forbidden by charter from holding property in this case, and also noting the general principle that where a corporation is incompetent by charter to take real estate, a conveyance to it is not void, but voidable, and only by the sovereign).

77. *See, e.g.*, Smelting Co. v. Kemp, 104 U.S. 636, 647 (1882) ("It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation.").

78. *Matthews*, 98 U.S. at 629.

79. *Governeur's Heirs*, 24 U.S. (11 Wheat.) at 356.

80. *See* Winter, *The Metaphor*, *supra* note 4, at 1377 & n.29 (crediting this phrase to Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-68 (1973)).

81. *See id.* at 1396 (referring to "the private rights model of the seven common law forms of action").

82. *Id.*

private-rights model does not exhaust early practice. As evidence of the parallel existence of "non-individualistic, group models of adjudication," he points to actions seeking writs of mandamus against defendants accused of breaching public duties.[83] Joined by Professor Sunstein, he suggests that courts of the early Republic routinely permitted private citizens "who had no personal interest or injury-in-fact" to initiate and conduct mandamus actions on behalf of the public at large.[84]

Professor Winter concedes that mandamus practice was "underdeveloped" in the federal courts;[85] that is, early federal courts did not actually entertain mandamus actions initiated by private relators who lacked private injury. On the strength of English history and practice in the state courts, however, he suggests that federal courts *would have* entertained such actions if not for technical problems unrelated to standing.[86]

English practice with respect to mandamus is disputed. Professor Jaffe reports that King's Bench used mandamus and other prerogative writs "primarily to control authorities below the level of the central government," such as local governments and other corporate bodies that derived their powers "from statute, decree, or charter."[87] While Professor Jaffe presents cases strongly suggesting that private individuals sometimes sought mandamus against these entities without showing any special personal interest,[88] Bradley Clanton maintains that the evidence does not support this conclusion.[89] In any event, mandamus actions against "local and discrete authorities,"[90] brought by residents of the locality in question, do not present the purest possible case of public-rights litigation; members of a municipal

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83. *Id.* at 1391. Professor Winter also points to statutory *qui tam* actions, which we discuss in Part III.

84. *See id.* at 1377, 1402-03; *see also* Sunstein, *Standing and the Privatization of Public Law*, *supra* note 5, at 1434 n.9 (suggesting that mandamus practice, "especially at the origin of the republic," was inconsistent with "modern notions of injury in fact").

85. Winter, *The Metaphor*, *supra* note 4, at 1405.

86. *Id.*

87. Jaffe, *Standing to Secure Judicial Review*, *supra* note 7, at 1269-70.

88. *See id.* at 1270 (noting that "[t]he reported cases were almost uniformly ones in which mandamus served the plaintiff as a 'remedy,' " but asserting that "the lists of cases in the digests strongly suggest the possibility that the plaintiff in some of them was without a personal interest" (footnote omitted)).

89. *See* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1043-47 (1997) (acknowledging unclarity in the case reports about the nature of some parties' interests, but finding evidence in other legal writings that "mandamus was not available to 'disinterested strangers' ").

90. Jaffe, *Standing to Secure Judicial Review*, *supra* note 7, at 1270.

corporation have interests in the corporation's conduct that are not shared by members of the public at large.[91]

To the extent that English practice does support Professor Winter's "public rights model," however, American departures from that practice are all the more striking. Writing in 1834, Chief Justice Lemuel Shaw of Massachusetts identified the "general rule" as "[u]ndoubtedly" being the following:

> [A] private individual can apply for a writ of mandamus only in a case where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers exclusively to apply, where public rights are to be subserved.[92]

If the modern critics of standing doctrine are correct about English practice, then American courts that required private relators to allege some special private interest were not simply applying the settled common law forms.

It is true that some state courts did not follow Shaw's dictum; while they agreed that individuals had no litigable interest of their own in "wrongs against the public,"[93] they understood the law in their states to authorize individual citizens to seek mandamus on the public's behalf. In 1837, New York's Supreme Court of Judicature held that any citizen could initiate a mandamus action in the public's name against local governmental officers who allegedly were breaching duties owed to the public,[94] and the state's court of last resort eventually approved this practice.[95] By the Civil War, at least three

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91. *Cf.* Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923) (discussing "the peculiar relation of the [municipal] taxpayer to the corporation," which resembles in some ways the relation "between stockholder and private corporation," and observing that "the relation of a taxpayer of the United States to the Federal Government is very different").

92. *In re* Wellington, 33 Mass. (16 Pick.) 87, 105 (1834). *But see* Winter, *The Metaphor*, *supra* note 4, at 1404 n.167 (asserting that Shaw was wrong to call this proposition the "general rule," but citing no contrary American cases decided before 1837).

93. Doolittle v. Bd. of Supervisors, 18 N.Y. 155, 159 (1858).

94. *See* People *ex rel.* Case v. Collins, 19 Wend. 56, 65-67 (N.Y. Sup. Ct. 1837); *see also* People *ex rel.* Fuller v. Bd. of Supervisors, 18 How. Pr. 461, 463 (N.Y. Sup. Ct. 1860) (following *Collins*); People *ex rel.* Blacksmith v. Tracy, 1 How. Pr. 186, 189 (N.Y. Sup. Ct. 1845) (citing *Collins* approvingly in dictum).

95. *See* People *ex rel.* Stephens v. Halsey, 37 N.Y. 344, 347 (1867). Even in New York, mandamus was a limited exception to the general rule giving only public officers authority to litigate on behalf of the public. *See Doolittle*, 18 N.Y. at 158-59 (rejecting a suit for injunctive relief where "no injury peculiar to [the plaintiffs] is threatened," and adding that "[t]he general rule certainly is that for wrongs against the public, . . . the remedy, whether civil or criminal, is by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf"); *see also id.* at 163 ("No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts.").

other states had followed suit,[96] although an equal number of states had explicitly rejected the New York practice.[97]

Professors Winter[98] and Sunstein[99] emphasize the 1875 case of *Union Pacific Railroad v. Hall*, in which the U.S. Supreme Court indicated that "a decided preponderance of American authority" supported a limited version of the New York rule.[100] Although the state decisions had in fact been evenly divided, this statement led some more states toward the New York camp.[101] But whatever the practice in *state* systems, *federal* courts had never before indicated that private relators could seek mandamus on behalf of the American public without regard to their own private injury.[102] Indeed, even *Hall* was not understood to establish such a rule. In *Hall* itself, the Court held that the private parties seeking mandamus had suffered special injury of the sort required in public-nuisance cases,[103] and subsequent courts did not understand *Hall* to authorize "citizen suits" seeking mandamus on the public's behalf against errant governmental officials.[104]

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96. *See* County Comm'rs v. People *ex rel.* Metz, 11 Ill. 202, 208 (1849) (citing and following *Collins*); Hamilton v. State *ex rel.* Bates, 3 Ind. 452, 458 (1852) (same); State *ex rel.* Rice v. County Judge, 7 Iowa (7 Clarke) 186, 202 (1858) (same).

97. *See* Sanger v. County Comm'rs, 25 Me. 291, 296 (1845); People *ex rel.* Russell v. Inspectors of the State Prison, 4 Mich. 187, 188-89 (1856); Heffner v. Commonwealth *ex rel.* Kline, 28 Pa. 108, 112 (1857); *see also* People *ex rel.* Drake v. Regents of the Univ. of Mich., 4 Mich. 98, 101-03 (1856) (declining to issue mandamus at the behest of a relator "who is only interested in common with all other citizens of the state in the subject matter of complaint," though reserving the possibility of exceptions "if the attorney-general or prosecuting attorney . . . were absent, or refused to act without good cause"); *cf. Halsey*, 37 N.Y. at 347 (acknowledging that the New York rule adopted in *Collins* "differ[s] from that which prevails in many of the other States").

98. *See* Winter, *The Metaphor*, *supra* note 4, at 1404.

99. *See* Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 174.

100. 91 U.S. 343, 355 (1875) ("There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer.").

101. *Compare, e.g.*, Pearsons v. Ranlett, 110 Mass. 118, 126 (1872) ("Undoubtedly, when a private citizen applies for a writ of *mandamus*, he must show that he has some special interest in the subject matter different from the interest which every other citizen has."), *with* Attorney General v. City of Boston, 123 Mass. 460, 479 (1877) (echoing *Hall*).

102. *Cf.* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 818 (2004) ("[T]hat individuals who had suffered no particularized injury had causes of action in limited instances in English and state courts does not prove that the American constitutional structure contemplated the same practice in federal courts.").

103. *See Hall*, 91 U.S. at 355.

104. *See, e.g.*, United States *ex rel.* Alsop Process Co. v. Wilson, 33 App. D.C. 472, 479 (1909). That court wrote:

> In all the cases relied upon by relator [including *Hall*], mandamus was granted to secure to the relators rights which they were entitled personally to enjoy. Measured by this test, it is apparent that the relator has no such interest in the subject-matter of this

To explain why federal courts had never had occasion to embrace the New York rule more vigorously, Professor Winter points to limits on their subject-matter jurisdiction.[105] As a matter of constitutional interpretation, *Marbury v. Madison*[106] held that Congress could not give the U.S. Supreme Court original jurisdiction to entertain suits seeking mandamus against nonjudicial officers; as a matter of statutory interpretation, *M'Intire v. Wood*[107] held that most lower federal courts also lacked this jurisdiction. As Professor Winter concedes, however, the federal circuit court for the District of Columbia did have jurisdiction over requests for mandamus against executive officers, and the Supreme Court could review its decisions

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> controversy as to entitle it to the writ. . . . It is a mere volunteer in this proceeding, and, as such, is without standing.

Id.; *see also* United States *ex rel.* Am. Silver Producers' Ass'n v. Mellon, 32 F.2d 415, 418 (D.C. 1929) (holding that the relator must show "that he will sustain a personal injury by the threatened violation").

105. *See* Winter, *The Metaphor*, *supra* note 4, at 1405. In a separate argument, Professor Winter also points to *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), in which an evenly divided Court refused to let Attorney General Edmund Randolph seek a writ of mandamus requiring a lower federal court to entertain William Hayburn's petition for disability benefits. *See* Winter, *The Metaphor*, *supra* note 4, at 1400 ("The Court's deadlock on this issue eliminated the availability of the English relator action: The relator could hardly invoke the 'standing' of the attorney general if the attorney general had none."). The Court in *Hayburn's Case* may not actually have reached the issue of standing. *See* Maeva Marcus & Robert Teir, Hayburn's Case*: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 (inferring from Justice Iredell's notes that the issue that divided the Court instead concerned the Attorney General's ability to act independently of the President). But if Professor Winter is correct, then this aspect of *Hayburn's Case* rests on the public/private distinction: it suggests that a public officer was not the proper party to pursue Hayburn's private entitlement in court.

After the Court refused the motion that Attorney General Randolph filed as a representative of the government, Randolph returned to the Court as the lawyer for Hayburn, and he filed a new motion in that capacity. 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 38 (Maeva Marcus ed., 1998) [hereinafter DHSC]. Professor Winter argues that the Court's willingness to entertain the new motion cuts against modern standing doctrine. *See* Winter, *The Metaphor*, *supra* note 4, at 1401 ("The *Hayburn* Court accepted Randolph's invocation of a representational model, premised on a *part-whole* structure, that did not require allegation of specific, personal injury: Randolph, a representative of *the whole*, was allowed to proceed with the mandamus petition on behalf of Hayburn, *a part*."). This argument, however, rests on the mistaken premise that the Attorney General was still proceeding as a lawyer for the government, and that the government was being allowed to "rais[e] the rights of third parties." *Id.* In fact, Randolph was not appearing in his official capacity but rather as private counsel for Hayburn. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409 (noting that after the rejection of his original motion, the Attorney General appeared "at the instance, and on behalf of Hayburn, a party interested"); *see also* FEDERAL GAZETTE, Aug. 15, 1792, *reprinted in* 6 DHSC, *supra*, at 68, 68 (noting that after the Court divided on his motion *ex officio*, Randolph "then appeared as counsel for the invalids"). In those days, it was not unheard of for the Attorney General to represent private clients; Randolph did the same thing in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 131 (Maeva Marcus ed., 1994).

106. 5 U.S. (1 Cranch) 137 (1803).

107. 11 U.S. (7 Cranch) 504 (1813).

on appeal.[108] In exercising that jurisdiction, neither of these courts suggested that private individuals suffering no special private injury could seek mandamus to vindicate public rights. To the contrary, the Supreme Court spoke of the circuit court's mandamus jurisdiction as a means to enforce "private rights,"[109] and opinions from *Marbury* on highlighted the need for private relators to allege private injury.[110]

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The above discussion suggests that standing issues were alive and well in arguments about whether private parties could vindicate public rights, and cannot be explained entirely by reference to common law requirements for causes of action. To be sure, in public-nuisance cases, the Court was following English rules in requiring a private injury. But according to the standing critics' own history, American courts that required private injury in mandamus cases were not constrained by the established forms. The common law forms also did not compel Americans to reject private prosecution. Both of these areas reflect the influence of the more general notion that public officers pursue public rights and private parties pursue private rights. Even when a private plaintiff had stated a proper claim for relief, moreover, the American courts used issue-specific standing rules to prevent parties from usurping the power of government. Central concerns were that the control of public rights should remain in the hands of public officials and that individuals should be free from arbitrary enforcement at the hands of private actors.

II. THE NINETEENTH-CENTURY COURT AND THE CONSTITUTIONAL DIMENSIONS OF STANDING

Critics of the Supreme Court's approach to standing may respond that even if "citizen suits" were not familiar features of the common law, the federal courts still did not see standing as a constitutional issue. According to Steven Winter,

> a painstaking search of the historical material demonstrates that — for the first 150 years of the Republic — the Framers, the first Congresses, and the Court were oblivious to the modern conception either that

108. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 615-22 (1838).

109. *See, e.g., id.* at 619 (basing its interpretation of the circuit court's mandamus jurisdiction in part on the principle "that in every well organized government the judicial power should be coextensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings"); *cf.* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 97 (1860) (noting that mandamus "is not now regarded as a prerogative writ," but rather "in modern practice is nothing more than an action at law between the parties"); Kendall v. Stokes, 44 U.S. (3 How.) 87, 100 (1845) (similar).

110. *See infra* Part II.A.

> standing is a component of the constitutional phrase "cases or controversies" or that it is a prerequisite for seeking governmental compliance with the law.[111]

Cass Sunstein similarly suggests that the Supreme Court did not start discussing standing in constitutional terms until the 1940s.[112]

Contrary to the critics' claims, however, the Supreme Court did see some standing issues as constitutional, expressing particular concerns about unwarranted judicial interference with the federal and state political branches. While the nineteenth-century Court did not always make the constitutional nature of its concerns as clear as the twentieth-century Court has, the more recent decisions are continuous with historical tradition.

A. *Mandamus Continued*

Mandamus actions, though hailed by the Supreme Court's modern critics as evidence against the Court's position, actually suggest the constitutional dimensions of requiring private injury for actions against governmental officials. From *Marbury* on, the Supreme Court not only focused on private rights in mandamus proceedings against executive officers, but also portrayed that focus as an important aspect of the federal government's separation of powers. The Court disclaimed any pretensions "to intermeddle with the prerogatives of the executive" or "to enquire how the executive, or executive officers, perform duties in which they have a discretion"; instead, "[t]he province of the court is, solely, to decide on the rights of individuals."[113] But when an executive officer was illegally refusing to perform a ministerial duty, and when "an individual sustains an injury" by virtue of this refusal, the "injured individual" could appropriately seek mandamus from a court with jurisdiction.[114] The Court continued to articulate the twin requirements of a ministerial duty and an individual injury throughout the century.[115]

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111. Winter, *The Metaphor*, *supra* note 4, at 1374.

112. Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 169, 177; *see also supra* note 9.

113. *Marbury*, 5 U.S. (1 Cranch) at 170.

114. *See id.* at 170-71; *see also* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 509 (1840) (argument of counsel) (emphasizing *Marbury*'s distinction between ministerial acts "affecting individual or private rights" and "those of a public or political character").

115. *See, e.g.*, *M'Intire*, 11 U.S. (7 Cranch) at 506 ("Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power [to issue the writ of mandamus] in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States . . . ."); Kendall v. United States *ex rel* Stokes, 37 U.S. (12 Pet.) 524, 616-17 (1838) (echoing this language from *M'Intire* and holding mandamus appropriate because "the case now before the Court, is precisely one of that description"); *see also* Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1875) ("[W]hen a plain official duty, requiring no exercise of

B. *Evidence from the Supreme Court's Original Jurisdiction*

Matters brought to the Supreme Court in its original jurisdiction elicited some of the Court's clearest statements of the requirement of a private right to contest governmental action. Article III allowed the Court to exercise original jurisdiction over various "Controversies" to which states were parties, including those in which a state was proceeding against a citizen of another state.[116] One might wonder why suits brought by states would shed any light on the requirements for private litigation. But the nineteenth-century Court did not view its original jurisdiction as an appropriate place for states to prosecute the run of public rights; a state that wanted to launch a criminal prosecution or an enforcement action seeking fines or penalties had to start off in its own courts.[117] States were allowed to use the Supreme Court's original jurisdiction primarily to pursue claims for property, breach of contract, or the like — civil claims of the same sort that an ordinary private litigant might assert. As a result, the Court's view about the kinds of interests that states could pursue in its original jurisdiction reflected prevailing sentiments about the kinds of claims that private litigants could pursue in lower federal courts.

As Henry Paul Monaghan has noted, the Supreme Court's comments on this point reflected its understanding that private plaintiffs had to assert "concrete 'private rights.' "[118] What is more, the Court associated this requirement with the Constitution.

After the Civil War, for instance, the State of Georgia sought to challenge the constitutionality of federal statutes establishing military government in the South, and it asked the Supreme Court to enjoin the execution of those statutes. But in *Georgia v. Stanton*,[119] the Court held that the state's dispute with federal executive officers had not taken the form of "a case . . . appropriate for the exercise of judicial

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discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance").

116. U.S. CONST. art. III, § 2.

117. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 300 (1888) (refusing to take jurisdiction even over a suit to enforce a judgment that a state had won in a separate penal action brought in state court), *overruled in part by* Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); *see also* Huntington v. Attrill, 146 U.S. 657 (1892); Gwin v. Breedlove, 43 U.S. 29, 37 (1844). *See generally* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 422-31 (1995).

118. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1367 (1973). Professor Monaghan goes on to condemn the Court's approach to the state-as-party cases, calling it "wholly unsatisfactory." *Id.* at 1368. The specific complaint that prompts this comment, however, is not so much that the Court required private litigants to show private injury, but rather that the Court treated states like ordinary private litigants. *See id.*

119. 73 U.S. (6 Wall.) 50 (1867).

power."[120] The reason was simple: "No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill . . . ."[121] To be sure, Georgia did have some sort of interests at stake; it was seeking protection for "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges."[122] But these "merely political rights" were not interests of the sort that could support litigation. To present the court with a justiciable controversy, "the rights in danger . . . must be rights of persons or property."[123]

Stanton was no innovation; it relied heavily upon *Cherokee Nation v. Georgia*,[124] in which the Marshall Court had refused to entertain the tribe's suit for an injunction to repel Georgia's legislative and military encroachments upon Cherokee land and governance. Although resting his decision upon the fact that the Cherokee Nation was not a "foreign state[]" within the meaning of the Original Jurisdiction Clause, Chief Justice Marshall strongly suggested that at least some of the interests asserted by the tribe were not "the proper subject for judicial inquiry and decision."[125] In a concurrence, Justice Johnson declared the Cherokees' entire bill "unfit for the cognizance of a judicial tribunal," because the interests at stake did not present "a case of *meum and tuum* in the judicial . . . sense."[126]

Even Justice Thompson, who dissented, agreed that "[t]his court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed";[127] he simply believed that the Cherokee Nation had stated a justiciable claim about the deprivation of certain specific property interests (such as the tribe's right to the possession and use of some mines), and that the Court was therefore wrong to throw out the entire bill. In language that the *Stanton* Court would quote with approval, he conceded the limits on the kinds of rights that litigants could seek to protect in federal court, and he linked those limits to the constitutional separation of powers:

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120. *Id.* at 76.

121. *Id.* at 77.

122. *Id.*

123. *Id.* at 76.

124. 30 U.S. (5 Pet.) 1 (1831).

125. *Id.* at 20 ("On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.").

126. *Id.* at 28-29 (Johnson, J., concurring).

127. *Id.* at 51 (Thompson, J., dissenting).

> I certainly . . . do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.[128]

Although various Justices in both *Stanton* and *Cherokee Nation* adverted to the line between judicial and political power, their opinions cannot be written off as manifestations of the political-question doctrine rather than the constitutional dimensions of standing.[129] The problem the Justices were discussing was not that the legal issues raised by the plaintiffs were nonjusticiable, but simply that the plaintiffs were not proper parties to litigate those issues because they did not have the right sort of interests at stake.[130] The Court stood ready to decide the legality of Georgia's Cherokee statutes and Congress's Reconstruction statutes when proper parties presented themselves in appeals from criminal prosecutions[131] and habeas cases.[132] But private litigation could not proceed when "rights of persons or property" were not at stake. The Court reiterated this principle throughout the nineteenth century.[133]

C. *Private Rights of Another: State- and Private-Party Cases*

The nineteenth-century Supreme Court's tendency to hold states that invoked its original jurisdiction to the same standing requirements as private parties had a corollary: injuries to another private party did

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128. *Id.* at 75 (Thompson, J., dissenting); *see also Stanton*, 73 U.S. (6 Wall.) at 75 (quoting this passage and others to the same effect).

129. *Cf.* Winter, *The Metaphor*, *supra* note 4, at 1437 (arguing that in *Stanton*, "the Court did not apply the private rights model as an alternative to the intermediate public rights model, but rather as an alternative to viewing certain matters as nonjusticiable 'political questions' ").

130. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT, 1789-1888: THE FIRST HUNDRED YEARS 303-04 (1985) (concluding that "the trouble [in *Stanton*] was . . . not with the issue but with the party").

131. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

132. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

133. *See, e.g.*, California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893) ("The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it."); Marye v. Parsons, 114 U.S. 325, 330 (1885) ("[N]o court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property."); *see also, e.g.*, 7 Op. Att'y Gen. 229, 237 (1855) ("We provide courts of justice . . . in order that parties may have lawful means to collect debts, recover damages for private injury, and otherwise obtain adjudication of their private rights of person or property . . . .").

not ordinarily suffice to give states standing. In particular, states generally could not bring cases to vindicate the private rights of their citizens.[134] Because a state that tried to do so could not point to any litigable interest of its own, the Court did not view it as a proper party to a genuine case or controversy, even if state law purported to let the state bring suit. Thus, when New York and New Hampshire passed legislation purporting to let those states sue Louisiana on behalf of individual citizens to whom Louisiana owed money, the Court rebuffed the suits; in the Court's view, "one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens."[135] By contrast, when the individual creditors had genuinely assigned their bonds to a state, so that the right to collect upon the bonds was truly the property of the state itself, the state could properly invoke the Supreme Court's jurisdiction.[136]

This sort of analysis was not confined to the Supreme Court's original jurisdiction. In exercising its appellate jurisdiction over suits brought in lower federal courts by individual plaintiffs, the Court also treated averments of private injury as a prerequisite for private litigation. In *Williams v. Hagood*,[137] for instance, an individual plaintiff sought to challenge the constitutionality of two South Carolina laws that allegedly impaired the obligation of contracts into which the state had entered. Although the federal courts could certainly have considered the constitutionality of those laws "if the complainant had placed himself in a position to invoke our judgment," the Supreme Court held that he had failed to do so: "His bill does not aver that he has been injured, or will be injured, by this legislation . . . ."[138] In the absence of such an averment, "[t]he question presented to the court is . . . merely an abstract one; such a one as no court can be called upon to decide . . . ."[139]

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134. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 288 (5th ed. 2003) (noting the rule that "a state, when it is merely sponsoring the claims of a small number of individual citizens, has no standing to sue either another state or a private party"); *see also id.* at 289 (noting that the Court was at first equally "unreceptive" to state attempts to sue as *parens patriae*). In the twentieth century, the Court moved away from the notion that, for standing purposes, states invoking its original jurisdiction should be treated like private parties invoking the jurisdiction of a lower federal court. *See id.* at 289-92 (discussing the extent to which states can now launch *parens patriae* litigation in the Supreme Court to protect "quasi-sovereign interests — i.e., public or governmental interests that concern the state as a whole").

135. New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883).

136. *See* South Dakota v. North Carolina, 192 U.S. 286 (1904).

137. 98 U.S. 72 (1878).

138. *Id.* at 74.

139. *Id.* at 75 (agreeing with the lower federal court's decision to dismiss the bill); *cf.* Marye v. Parsons, 114 U.S. 325, 330 (1884) (disallowing a suit to enjoin state officers from

The twentieth-century Court's decisions in *Massachusetts v. Mellon* and *Frothingham v. Mellon*[140] — sometimes portrayed as ushering in a radical break with the past[141] — are continuous with these older cases. In concluding that neither Massachusetts nor an individual federal taxpayer had standing to challenge a federal spending program that allegedly exceeded Congress's enumerated powers and thereby invaded the sovereign authority of the states, the Court explicitly invoked the justiciability language of both *Stanton* and *Cherokee Nation*.[142] Like Georgia's challenge to military Reconstruction, Massachusetts's challenge to the federal statute implicated "[n]o rights of the State falling within the scope of the judicial power" and hence fell outside of the federal courts' jurisdiction.[143] The individual taxpayer's claim was no better; the only additional feature it presented was a suggestion that the program would increase the burden of federal taxes, and a private plaintiff's assertion "that [s]he suffers in some indefinite way in common with people generally" did not give her the basis for "a judicial controversy" in her own right.[144]

III. LEGISLATION AND CONSTITUTIONAL STANDING

The opinions discussed above suggest that, contrary to modern critics' claims, the nineteenth-century Supreme Court did see standing as a constitutional concern. But even if the critics were to acknowledge this point, they might nevertheless argue that the constitutional issues would have vanished if only legislation had given the would-be plaintiffs a statutory right to sue. Everyone agrees, after all, that Congress has considerable leeway in recognizing legal

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refusing to accept bond coupons for taxes, and explaining that because the plaintiff was not a taxpayer, the litigation was not presented in a posture that was "judicially determinable"); *In re* Ayers, 123 U.S. 443, 496 (1887) (using similar reasoning); Hagood v. Southern, 117 U.S. 52, 64-65 (1886) (similar). By contrast, the Court would decide the questions at issue in those cases when a taxpayer who had tendered the coupons presented a claim, particularly if he had suffered a seizure of property after the tender. *See, e.g.*, Poindexter v. Greenhow, 114 U.S. 270 (1884).

140. 262 U.S. 447 (1923).

141. *See, e.g.*, Ferejohn & Kramer, *supra* note 2, at 1009-10 (treating *Frothingham* as an innovation); Winter, *The Metaphor*, *supra* note 4, at 1444-45 (arguing that while "*Frothingham* makes historical sense as a case about the availability of an equitable remedy," it "raised constitutional considerations that helped lead to a modern conception of standing"); *id.* at 1376-77 (suggesting that to the extent *Frothingham* saw a constitutional dimension to standing, it had no nineteenth-century support).

142. *See Frothingham*, 262 U.S. at 483-85.

143. *Id.* at 485.

144. *Id.* at 486-89; *see also* Fairchild v. Hughes, 258 U.S. 126, 129 (1922) (indicating that "the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted" is not a private litigable interest of the sort that will support a "Case" within the meaning of Article III).

interests and creating causes of action that were unknown at common law. Some critics of modern standing doctrine see this power as sufficiently far-reaching that the legislature, if it so desires, can give each citizen a litigable interest in the legality of governmental action. Cass Sunstein, indeed, suggests that there was a determinate original understanding on this point: "[F]rom the founding era to roughly 1920[,] . . . [n]o one believed that the Constitution limited Congress' power to confer a cause of action."[145]

This suggestion of consensus is wrong.[146] To be sure, early *qui tam* statutes do provide some support to Professor Sunstein's position. As we explain below, however, that support is weaker than critics of modern standing doctrine suggest. At the same time, other historical

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145. Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 170.

146. Professor Sunstein seeks support for his suggestion from the well-accepted distinction between real-world harms (*damna*) and invasions of legal rights (*injuriae*). *See id.* at 170-71; *see also* Fletcher, *supra* note 12, at 249; Winter, *The Metaphor*, *supra* note 4, at 1397. As Professor Sunstein observes, these are distinct concepts; the legal system inevitably makes choices about which real-world interests to protect, and it is quite possible to suffer *damnum absque injuria* (harm without an actionable wrong). With this point established, Professor Sunstein slides quickly to the conclusion that *injuria* — the invasion of a legal right — has traditionally been the essential prerequisite for private litigation. *See* Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 171. In fact, however, there is considerable historical support for the proposition that private suits will not lie for *injuria absque damno* any more than they will lie for *damnum absque injuria*. *See, e.g.*, Cable v. Rogers, 81 Eng. Rep. 259, 259 (K.B. 1625) (Dodderidge, J.) ("[I]njuria and damnum are the two grounds for the having all actions . . . : if there be damnum absque injuria, or injuria absque damno, no action lieth . . . ."); Ashby v. White, 87 Eng. Rep. 810, 810-11 (K.B. 1703) (Gould, P.J.) ("[A]n *injuria sine damna* . . . will not bear an action, for both must necessarily concur to maintain the action; for things must not only be done amiss, but it must redound to the prejudice of him that will bring his action for it."); Lynn Corp. v. London Corp., 100 Eng. Rep. 933, 939 (K.B. 1791) (Kenyon, C.J.) ("[I]t is against the general principles of the law that a party, who has not received any injury, should compel another to answer him in a Court of Justice.").

Admittedly, there is historical support for the contrary proposition too. Two of the three decisions just cited were reversed by the House of Lords, albeit without any broad statements telling courts to entertain actions for *injuria* without regard to *damnum*. *See* London Corp. v. Lynn Corp., 101 Eng. Rep. 822 (H.L. 1796) (indicating that the Corporation of London could seek what amounted to a declaratory judgment about the right of its freemen to be exempt from tolls and port duties imposed by other municipalities); Ashby v. White, 1 Eng. Rep. 417, 418 (H.L. 1704) (permitting plaintiff to "recover his damages assessed by the jury" in his lawsuit against a local sheriff for maliciously and wrongfully refusing to let him vote in an election for Parliament). Early American authorities, moreover, can be cited on both sides of this question. *Compare* Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507-08 (C.C.D. Me. 1838) (No. 17,322) (Story, J.) (criticizing English authorities who continued to maintain "that injuria sine damno is not actionable," though doing so in the context of a controversy that plainly would satisfy the modern Court's requirement of injury in fact), *with* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 236 (Boston, Little & Brown 1839) (endorsing the view that "to maintain an action, both [wrong and damage] must concur; for *damnum absque injuria*, and *injuria absque damno*, are equally objections to any recovery"), *and* 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 636 (4th ed. 1852) ("Injury without damage or loss will not bear an action."). Still, the modern Supreme Court certainly is not flying in the face of some well-settled historical understanding when it suggests that both *injuria* and *damnum* are necessary for private litigation.

evidence casts doubt upon the idea that statutory rights to sue automatically sufficed to create constitutional "Cases" or "Controversies," regardless of the real-world interests at stake. We do not claim that modern standing doctrine sprang fully formed from the Philadelphia Convention or that the constitutional nature of standing was universally appreciated from day one. But neither is the opposite true; the public/private distinction upon which modern standing doctrine rests does have historical support, and the notion that the Constitution incorporates that distinction even as against Congress does not contradict any determinate original understanding.

A. *Evidence of Limits on Legislative Power to Confer Standing*

Again, we can start by considering the nineteenth-century Court's treatment of suits brought in its original jurisdiction. As we have seen, the Court's opinions frequently suggested that only certain kinds of interests — "rights of persons or property" — would support private litigation in federal court.[147] These opinions, moreover, gave few indications that a statutory right to sue would automatically supply the necessary private interest. To the contrary, when states tried to legislate to themselves causes of action — as New York and New Hampshire did in attempting to enforce their citizens' debt claims in the Supreme Court — the Court was unimpressed. Even with a statutory right to sue, the states still lacked real-world interests of the sort that would support litigation, and hence they were not parties to a cognizable case.[148]

In other respects too, the Court has traditionally held that whatever pleading rules or local statutes might say, the constitutional concept of a "Case" or "Controversy" focuses on the underlying interests that are genuinely at stake. In *Browne v. Strode*,[149] for instance, the Marshall Court focused on the concrete interests at stake to conclude that a particular suit was a "Controversy" between a citizen of Virginia and a British subject even though the parties of record were all citizens of the same state.[150] This approach was not

147. *See supra* text accompanying notes 123 and 127-128; *see also supra* note 133.

148. *See supra* note 135 and accompanying text; *see also* Woolhandler & Collins, *supra* note 117, at 443 n.216 (indicating that states generally had legislative authorization before suing in the Supreme Court).

149. 9 U.S. (5 Cranch) 303 (1809).

150. *See id.* at 303; *see also* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 68 (1809) (argument of counsel) ("The constitution does not speak of the *name on record*[,] of the *nominal* party; it speaks of '*controversies*' .... The question is not, what *names* appear upon the record, but between whom is the *controversy*; who are the *real litigants*.").

Statements of this sort might seem inconsistent with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There, the Court held that the Bank's suit against some individual officers of the State of Ohio, seeking to restrain their execution of an unconstitutional state statute, was not a "suit ... commenced or prosecuted against [a state]"

simply an excuse for extending federal jurisdiction; federal courts used the same interpretation of Article III to *reject* jurisdiction when the underlying interests at stake belonged to citizens of the same state.[151] Similar logic undergirded the Marshall Court's conclusion that *Owings v. Norwood's Lessee*,[152] an ejectment suit brought from state court, was not a "Case[] . . . arising under . . . [a] Treat[y]" within the meaning of Article III and hence did not lie within its appellate jurisdiction. Although the defendant had argued that the plaintiff's claimed title rested on a state's violation of a treaty, and although this argument (if true) would have defeated the plaintiff's right to ejectment under state law, the defendant was not claiming that the treaty protected *his own* right to the land; the Supreme Court therefore concluded that the "Case" between the plaintiff and the defendant did not arise under the treaty.[153]

Admittedly, these early decisions are only suggestive; they read Article III to incorporate a notion of proper parties (defined in terms of real-world interests), but they did not involve congressional attempts to confer standing. Conclusions on that issue are necessarily inferential, because the nineteenth-century Supreme Court rarely faced federal statutes purporting to authorize private plaintiffs to sue governmental parties without the traditional accoutrements of a suit. But in 1911, when the Court squarely confronted such a statute in *Muskrat v. United States*,[154] it held the suit-authorizing legislation invalid. A 1902 federal statute had entitled everyone who was a citizen of the Cherokee Nation on September 1, 1902, to share in the distribution of Cherokee lands and funds.[155] In 1906, Congress adopted a new statute restricting the property rights that were being distrib-

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within the meaning of the Eleventh Amendment. In explaining this conclusion, Chief Justice Marshall delivered a broad dictum "that, in all cases where jurisdiction depends on the party, it is the party named in the record." *Id.* at 857. All that *Osborn* really held, however, was that a genuine "Controversy" existed between the Bank and the individual state officers and that the state itself was not an indispensable party to a suit seeking to restrain the officers' conduct. *See Osborn*, 22 U.S. (9 Wheat.) at 846-47, 858-59; *see also In re* Ayers, 123 U.S. 443, 487-88 (1887) (taking this view of *Osborn*). Later Supreme Court decisions therefore continued to apply the rule of *Browne v. Strode*. *See, e.g.*, McNutt v. Bland, 43 U.S. (2 How.) 9, 14 (1844) (reaffirming *Browne v. Strode* and asserting that Article III "look[s] to things not names — to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law").

151. *See* Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330 (C.C.D. Pa. 1797) (holding that an ejectment action in which the real parties in interest were citizens of the same state did not trigger diversity jurisdiction even if the nominal plaintiff was a lessee from a different state, because the constitutional concept of a "Controversy" focused on the parties whose litigable interests were genuinely at stake).

152. 9 U.S. (5 Cranch) 344 (1809).

153. *See id.* at 347-48.

154. 219 U.S. 346 (1911).

155. *See* Act effective July 1, 1902, 32 Stat. 716.

uted and permitting people born after 1902 to participate in the distribution. Concerned about legal challenges, Congress also authorized a few people who had been enrolled in the tribe as of 1902 (and who therefore wanted to attack the constitutionality of the new statute) to seek what amounted to a declaratory judgment against the United States in the Court of Claims, with an appeal as of right to the Supreme Court. Despite this explicit statutory authorization, however, the Supreme Court held that the proceeding was not a "Case" or "Controversy" within the meaning of Article III, essentially because Congress had provided for the suit to be brought against the wrong defendant. Although the United States might have been thought to have some abstract interest in defending the constitutionality of its statute, this was not the sort of interest that would support litigation, even if Congress said that it was.[156] As for the people who benefited from the 1906 statute, they certainly had litigable interests adverse to the claimants, but those interests were not genuinely at stake; the private beneficiaries were not before the court and would not be bound by a judgment declaring the 1906 statute unconstitutional.[157]

Critics of modern standing doctrine might try to explain *Muskrat* as simply demonstrating that Congress cannot authorize people to seek advisory opinions from federal courts — a principle that the critics generally accept.[158] This response, however, acknowledges that Congress does not have unfettered power to define the interests that will support litigation in federal court; to distinguish requests for advisory opinions from true "Cases" and "Controversies," a court must distinguish interests that support litigation from those that do not.[159] In any event, the problem in *Muskrat* — the lack of a proper

156. *See* 219 U.S. at 361 (asserting that "the United States . . . has no interest adverse to the claimants," and explaining that the suit was not designed "to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part").

157. *See id.* at 362 (emphasizing that a declaratory judgment against the United States "will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation"). The private beneficiaries apparently were not the only possible defendants. The following year, the Court reached the merits in the context of a suit brought against individual federal officials to enjoin them from performing their duties under the 1906 statute. *See* Gritts v. Fisher, 224 U.S. 640 (1912).

158. *See, e.g.*, Hartnett, *supra* note 4, at 2251 n.61; Sunstein, *Standing and the Privatization of Public Law*, *supra* note 5, at 1474 n.206; Winter, *The Metaphor*, *supra* note 4, at 1374. *But cf.* Sunstein, *Standing and the Privatization of Public Law*, *supra* note 5, at 1479 (arguing that "the question whether an injury is merely ideological or instead legal is one of positive law; there is no pre- or post-legal metric for distinguishing between the two").

159. Suppose, for instance, that Congress passed a statute giving people a legal right to avoid psychological unease caused by uncertainty about the meaning of the U.S. Constitution, and providing that two people who disagree about the Constitution's meaning can sue each other in federal court for a declaratory judgment about who is correct. It seems highly doubtful that such a statute, purporting to give each side a personal right to the resolution of uncertainty, would suffice to transform an otherwise abstract dispute into a constitutional case. *Cf.*, *e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409, 411 note (1792) (reprinting

defendant — is normally thought of as a standing issue, currently embodied in the requirements of causation and redressability.[160]

One might be tempted to respond that having an improper defendant — that is, a defendant against whom one cannot obtain redress for the violation of a duty (no matter to whom owed) — presents a different question than having a plaintiff whose private interests will be unaffected by a decree. But whether one casts the problem in terms of standing or in terms of the constitutional bar on advisory (or nonbinding) opinions, concerns about improper defendants are closely related to concerns about improper plaintiffs. Even critics of modern standing doctrine concede that to have a constitutional "Case" or "Controversy," *both sides* must have cognizable interests at stake.[161] For an interest to be genuinely at stake, moreover, the court's decision must be binding on its owner in the event the other side wins.[162] And for private parties, the nineteenth-century Court repeatedly indicated that the requisite sorts of interests were at stake "only where the rights of persons or property are involved."[163]

To be sure, the government can maintain litigation over public rights that do not fit that description. The public's interest in punishing criminal behavior, for instance, is an interest capable of supporting litigation in federal court.[164] For a public right of this sort to be genuinely at stake, however, the public must itself be party to the case in such a way as to be bound by the resulting judgment, in the sense that a judgment for the other side would bar the government from relitigating the same claim. When a private plaintiff who lacks authority to bind the public is proceeding in his own right, this condition is not satisfied. In such situations, the plaintiff needs to have a private interest of his or her own to litigate; otherwise, no sufficient interest will be at stake on the plaintiff's side, and the clash of interests necessary for a "Case" or "Controversy" will not exist.

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letters indicating that the mere existence of a statutory right to come to court does not automatically mean that rights of person or property are at stake in the sense necessary to support a constitutional case).

160. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

161. *See, e.g.*, Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17, 18 (2002) (acknowledging that a "Case" or "Controversy" requires the existence of "two parties with adverse interests").

162. *See* Marshall, *supra* note 31, at 96 (noting that in order to have a "Case" within the meaning of Article III, "[t]here must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit").

163. *See supra* note 128 and accompanying text.

164. *See supra* note 21 and accompanying text (discussing Professor Hartnett's emphasis on this point).

Critics of standing doctrine suggest that Congress can always create the necessary private interest simply by declaring that each individual has a personal legal right to avoid his or her share of a diffuse harm to the public as a whole. To the extent that a defendant's conduct really does impose some concrete personal harm on each individual member of society, the Supreme Court has no objection to this point.[165] As the Court's doctrine suggests, however, not all public rights lend themselves to this sort of disaggregation; for instance, a citizen's naked interest in a government official's compliance with the law will not suffice. The mere fact that Congress *says* an individual has a private litigable interest in such a dispute, moreover, does not automatically make it so. As we have seen, there is considerable historical support for the view that a private lawsuit is not a "Case" or "Controversy" unless certain kinds of real-world interests are at stake,[166] and there is little historical support for the notion that each individual citizen can always be given a private litigable interest in avoiding diffuse harms to the public as a whole.[167]

Critics also suggest that even if Congress cannot always get around standing doctrine by giving individuals private interests in formerly public rights, Congress can simply authorize individuals to litigate on behalf of the public, thereby latching onto the public's ability to bring suit over diffuse public rights. But if a loss by the private individual would not bar relitigation of the polity's right by others, then that right is not really at stake in such a way as to form the basis for a case. It is far from clear, moreover, that Congress has the power to remedy this problem by authorizing private citizens to represent the public in

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165. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).

166. *See supra* notes 148-153 and accompanying text; *see also supra* text accompanying note 159 (suggesting that under the contrary view, Congress would be able to authorize federal courts to issue what amount to "advisory opinions"). Critics of modern standing doctrine correctly observe that in order to apply this idea, courts must distinguish between the sorts of real-world interests that are capable of supporting private litigation ("rights of persons or property") and other sorts of real-world interests that are *not* capable of supporting litigation (such as outrage at the mere thought of law-breaking by governmental officials). To thoroughgoing positivists, this distinction is bound to seem arbitrary. *See, e.g.*, Fletcher, *supra* note 12, at 233 (correctly noting that modern standing doctrine rests on the same kind of judicial categorization of harms as old forms of substantive due process); Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 191 (same). Indeed, even those of us willing to take guidance from common law traditions will surely be unable to draw completely satisfactory lines. Still, the fact that modern standing doctrine requires such line-drawing does not call its historical bona fides into question; earlier generations of Americans would not have recoiled at the notion of what Professor Sunstein calls "prelegal 'injuries.' " *See* Sunstein, *Standing and the Privatization of Public Law*, *supra* note 5, at 1451.

167. For instance, there is no historical tradition of statutes giving each private citizen an independent right to bring suit on his own behalf over such harms, unaffected by judgments rendered in any other private citizen's suit over the same harms. Even *qui tam* actions are no exception to this principle. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *162 (noting that the judgment secured by the first *qui tam* relator, whether he won or lost, was "a bar to all others, and conclusive even to the king himself").

court, such that the whole polity will be bound by whatever judgment the first "citizen suit" produces. Even if one could otherwise read this sort of power into the Necessary and Proper Clause,[168] scholars have pointed out that the Appointments Clause of Article II may restrict Congress's ability to set up shadow governments to enforce public rights.[169] The Supreme Court has suggested that only "Officers of the United States" can be authorized to "conduct[] civil litigation in the courts of the United States for vindicating public rights,"[170] and neither self-appointment nor appointment by Congress is among the constitutionally permissible methods for the selection of such officers.[171]

B. *What Does the History of Qui Tam Statutes Tell Us?*

For critics of standing doctrine, the history of *qui tam* statutes decisively refutes arguments that Congress may not delegate to private individuals the right to litigate on behalf of the public. In England, when a statute defined a public duty and prescribed a monetary

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168. *Cf.* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (arguing that separation-of-powers concerns restrict the kinds of laws that are "proper" within the meaning of the Necessary and Proper Clause); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351-52 (2002) (interpreting Articles I and II to keep Congress from authorizing private attorneys general to enforce federal law).

169. Professor Hartnett, whose discussion of federal criminal prosecutions we have invoked above, does not reject this possibility. To the contrary, he concludes that "what is truly at stake in current standing doctrine is not the meaning of Article III, but the meaning of Article II," and that the key question is "Who can constitutionally be empowered to represent such public interests in court?" Hartnett, *supra* note 4, at 2256, 2258; *see also id.* at 2257 ("I do not attempt to resolve that debate, or even to enter into it."). We agree with Professor Hartnett that this is one of the central questions of standing doctrine, although we are of two minds about localizing it in Article II; one of us (Nelson) largely accepts Hartnett's way of framing the issue, while the other (Woolhandler) sees more independent work for Article III to do and resists reducing separation-of-powers issues to the analysis of any one article.

170. Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam).

171. *See* U.S. CONST. art. II, § 2. One can accept this argument even if one does not embrace more extreme views of the "unitary executive," under which all exercises of the federal government's "executive" power must be under the supervision and control of the President. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (deriving this view from the Vesting and Take Care Clauses of Article II); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993) (concluding that "Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation"); *see also* Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from* Qui Tam *Litigation*, 72 U. COLO. L. REV. 93, 159-68 (2001) (agreeing that the executive branch needs to be in charge of "the enforcement of public rights," though noting that Congress can let plaintiffs who have suffered "private injury" bring suit over violations of federal environmental statutes (emphasis omitted)).

penalty for its breach, the whole penalty ordinarily was assumed to be payable to the crown.[172] But Parliament sometimes specifically provided that a private informer who brought suit upon the statute could share in the judgment, with part of the penalty going to him and the balance going either to the crown's general revenues or to some other public purpose identified by the statute. Suits of this sort were called *qui tam* actions.[173]

From the sixteenth century on, *qui tam* statutes and the informers who used them were generating substantial criticism.[174] Still, like private prosecution more generally, the *qui tam* mechanism made its way across the Atlantic to the American colonies. Unlike other forms of private prosecution, moreover, this device can claim some support from early federal practice: the First Congress enacted a handful of *qui tam* statutes, and a few more followed in subsequent years.[175] Critics of standing doctrine properly emphasize these statutes as telling evidence for their position.[176]

Although the early *qui tam* statutes do not undercut our claim that the public was the only proper plaintiff to litigate diffuse harms to the public as a whole,[177] they undoubtedly support the notion that

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172. *See* 'ESPINASSE, *supra* note 19, at 8-10; *see also, e.g.*, Fleming v. Bailey, 102 Eng. Rep. 1090, 1091 (K.B. 1804) (Ellenborough, C.J.) ("A common informer can have no right to sue for any penalty, but where power is given to him for that purpose by the statute.").

173. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *160 (noting that the informer was someone "*qui tam pro domino rege . . . quam pro se ipso in hac parte sequitur*" — who acts as much for the lord the king as for himself). On occasion, indeed, Parliament provided that the informer who launched the suit could keep the entire penalty. Suits under such statutes were sometimes called "popular" actions, *id.*, but we will lump them together with regular *qui tam* suits.

174. *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 573-89 (2000) (cataloguing complaints); *see also id.* at 589-608 (noting that after a period in which Parliament enacted few new *qui tam* statutes, Parliament returned to the device in the eighteenth century, but that the device fell out of favor again in the nineteenth century). *Qui tam* actions have now been "expelled from English law." *Id.* at 608 (discussing the Common Informers Act of 1951, 14 & 15 Geo. 6, ch. 39).

175. *See* Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 387 & n.37 (providing citations).

176. *See, e.g.*, Sunstein, *What's Standing After* Lujan*?*, *supra* note 2, at 176 (arguing that early *qui tam* statutes, and the lack of contemporaneous constitutional objections to them, operate as "extremely powerful evidence that Article III did not impose constraints on Congress' power to grant standing to strangers"); Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131, 135 (1993) (arguing for the same reason that "the historical evidence cuts very hard against the invocation of Article II"); Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 160 (2001) [hereinafter Winter, *Justice Scalia*] (agreeing that early *qui tam* actions "give the lie to the Court's Article III jurisprudence" and "also refute the claim that the Framers intended to give the President sole and conclusive authority over the enforcement of the laws").

177. *See supra* note 167 (noting that judgment in a *qui tam* action bound the public rather than simply the individual relator); *see also, e.g.*, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 207, 222 (1989) (observing

Congress could authorize private citizens to initiate and conduct litigation on behalf of the public. But early *qui tam* statutes do not settle this point or demonstrate a determinate "original understanding" of the constitutional separation of powers. Because American-style separation of powers had never been put into practical operation before the 1780s, members of the First Congress could not possibly have grasped all of the questions that it raised, let alone worked out coherent answers to them. The constitutional text itself did not fully specify the relationships among the branches of the federal government, and neither did any canonical political theory to which all members of the founding generation subscribed.[178] At most, then, the early *qui tam* statutes provide some legislative precedents that arguably started the process of "liquidating" the Constitution's meaning on these debatable points.[179]

Those precedents, moreover, are far from overwhelming. At the outset, it is worth noting that the defendants in *qui tam* actions usually were private parties rather than governmental officials, and it was in the latter context that the nineteenth-century Supreme Court most explicitly referred to the Constitution in restricting the standing of private parties. Thus, one might start by cabining the relevance of *qui tam*: even if federal courts should be more flexible when assessing statutorily authorized suits against private defendants, the private-rights model might still be appropriate when individual plaintiffs are asking courts to direct the conduct of governmental officials.[180]

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that *qui tam* relators "historically were understood to be suing in a representative capacity" on behalf of the public at large).

178. *See, e.g.*, Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 213 (1989) ("[B]y the last quarter of the eighteenth century, no single doctrine using the label of separation of powers had emerged that could command general assent.").

179. For discussion of the "liquidation" process by which many members of the founding generation expected the Constitution's indeterminacies to be resolved, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-29 (2003). Note, however, that if members of Congress simply copied the *qui tam* device unreflectively from state or English practice, the statutes that they enacted might carry little weight in that process. *See, e.g.*, Letter from James Madison to President Monroe (Dec. 27, 1817), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 54, 55-56 (J.B. Lippincott 1865) (arguing that early statutes should not be understood to resolve constitutional questions when "the question of Constitutionality was but slightly, if at all, examined by the [enacting Congress]"); *see also* Nelson, *supra*, at 527-28 (citing additional authorities for the same point).

180. *Cf.* Sunstein, *What's Standing After* Lujan?, *supra* note 2, at 176-77 (acknowledging that this distinction is "not entirely implausible" and arguing simply that it does not flow from Article III, but rather from elsewhere in the Constitution). The distinction noted in the text is also capable of handling the critics' favorite mandamus case. In *Union Pacific Railroad v. Hall*, 91 U.S. 343 (1875), the relators were proceeding against a private railroad company rather than a governmental entity, and the Supreme Court's dicta were correspondingly limited. *See supra* notes 98-104 and accompanying text (discussing *Hall*).

Even as to suits against private defendants, moreover, critics of standing doctrine have perhaps exaggerated the extent of federal *qui tam* litigation. To justify treating *qui tam* practice as significant evidence of the original understanding of the Constitution, Professor Winter asserts that suits brought by *qui tam* informers under federal law were "common and ordinary,"[181] and indeed that private enforcement of federal penal statutes was "the norm rather than the exception."[182] This claim, however, seems to rest upon a questionable reading of a single sentence in an early Marshall Court opinion.[183] In fact, the *qui tam* statutes adopted by the First Congress gave rise to little actual litigation,[184] and subsequent Congresses rarely used the device.[185]

It is true, as the Supreme Court noted in 1905, that "[l]egislation giving an interest in [a statutory] forfeiture to a common informer has been frequent in Congressional legislation relating to revenue cases."[186] But while the collection of customs duties was certainly an important feature of early federal practice, and while early statutes did offer private informants a share of the penalties that the government collected from people who sought to evade those duties,[187] these

181. Winter, *The Metaphor*, *supra* note 4, at 1409.

182. Winter, *Justice Scalia*, *supra* note 176, at 156.

183. Professor Winter's authority is *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805), one of the very few *qui tam* cases considered by the Marshall Court. In the course of his opinion (which read a limitations statute expansively in order to reject the *qui tam* claim), Chief Justice Marshall observed that "[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information . . . ." *Adams*, 6 U.S. (2 Cranch) at 341. For Winter and other critics, this stray sentence is proof that *private* "action[s] of debt" to enforce federal penal statutes were routine. This reading rests on the assumption that public prosecutors could recover statutory penalties only through criminal process, and hence that the "action[s] of debt" to which Marshall was referring must have been *qui tam* suits. *See, e.g.*, Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 342 n.3 (1989) (adding bracketed language to render Marshall's sentence as follows: "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]"). This assumption, however, is wrong; federal district attorneys could bring actions of debt to collect statutory penalties. *See, e.g.*, United States v. Wonson, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750); United States v. Allen, 24 F. Cas. 772 (C.C.D. Conn. 1810) (No. 14,431); *see also* Stockwell v. United States, 80 U.S. (13 Wall.) 531, 542-43 (1871) (noting the settled rule "that debt will lie, at the suit of the United States, to recover the penalties and forfeitures imposed by statutes"). Thus, Marshall's opinion in *Adams* says nothing to suggest that *qui tam* actions were widespread in the federal courts of the early Republic.

184. *See* Beck, *supra* note 174, at 541-42; *see also id.* at 542 n.8 (reporting the infrequency with which the phrase "qui tam" appears in Westlaw's "ALLFEDS-OLD" database).

185. *See* Bales, *supra* note 175, at 387.

186. Marvin v. Trout, 199 U.S. 212, 225 (1905) (rejecting a federal constitutional challenge to a *state* law that authorized "proceedings in the nature of *qui tam* actions").

187. *See, e.g.*, Collection Act of 1799, § 91, 1 Stat. 627, 697; Collection Act of 1789, § 38, 1 Stat. 29, 48.

statutes are not important examples of *qui tam* practice at the federal level. For the most part, the early Collection Acts simply provided for private informers to receive a financial reward after the official collector of customs successfully brought suit upon their information.[188]

To the extent that *qui tam* practice seems entrenched in federal law, it is mostly because of a single statute.[189] Although it was enacted during the Civil War, the *qui tam* provision in the federal False Claims Act produced little litigation before 1930.[190] Indeed, when a brief wavelet of suits arose between 1930 and 1943, Congress responded with statutory amendments that "all but eliminated the use of the FCA *qui tam*."[191] As a result of amendments adopted in 1986,

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188. The first Collection Act made this arrangement clear:

> [A]ll penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States, . . . by the collector of the district where the same accrued, and not otherwise, unless in cases of penalty relating to an officer of the customs; and such collector shall be, and hereby is authorized and directed to sue for and prosecute the same to effect, and to distribute and pay the sum recovered . . . according to law.

Collection Act of 1789, § 36, 1 Stat. at 47. Later statutes, though less explicit, seem to have continued this practice. *See* Collection Act of 1799, § 89, 1 Stat. at 695; *see also* United States v. Morris, 23 U.S. (10 Wheat.) 246, 290 (1825) (discussing this statute and noting that "[i]t is made the duty of the Collector to prosecute").

Under the Collection Acts, the collector himself also received a portion of the recovery generated by suits that he prosecuted for the government. *See* Collection Act of 1799, § 91, 1 Stat. at 697 (providing for half of the recovery to go to the federal Treasury and the balance to be divided among the collector, certain other enforcement officers, and any informer); Collection Act of 1789, § 38, 1 Stat. at 48. This arrangement looks odd to modern eyes, but it operated as part of the collector's compensation; it was common in the early Republic for government officials to be paid from fees generated by their work. *See* LEONARD D. WHITE, THE FEDERALISTS 406, 413 (1948) (noting that the U.S. Attorneys and Marshals were paid by fees); LEONARD D. WHITE, THE JACKSONIANS 388 (1951) (indicating that many federal law-enforcement officials continued to be paid by fees). As the Supreme Court made clear, the collector who prosecuted suits for statutory penalties was doing so "as the agent of the government" rather than as a private citizen. *Morris*, 23 U.S. (10 Wheat.) at 290. Vesting the collector with authority to conduct litigation on behalf of the American people, moreover, raises no constitutional problems; the collector was a purely executive officer "subject to the authority of the Secretary of the Treasury, who may direct the prosecution to cease." *Id.* In a conscious departure from English practice, indeed, the Supreme Court held that the Secretary of the Treasury could remit the statutory penalties at any stage of the litigation, thereby releasing the share that would have gone to the collector as well as the share that would have gone to the Treasury. *See id.* at 290-92; *see also id.* at 302 (Johnson, J., concurring) (criticizing the losing side's "attempt to modify the operation of our laws, and to regulate the rights and powers of our officers, by some fancied analogy with the British laws of trade, and British revenue officers").

189. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 & n.1 (2000) (noting that the U.S. Code contains "[t]hree other *qui tam* statutes," but that the *qui tam* provision in the False Claims Act is "the most frequently used"); Valerie R. Park, Note, *The False Claims Act*, Qui Tam *Relators, and the Government: Which is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1061 (1991) (agreeing that "the only significant federal *qui tam* provision" is the one in the False Claims Act).

190. *See* Bales, *supra* note 175, at 389.

however, *qui tam* actions under the False Claims Act have become a significant part of federal practice.[192]

A constitutional challenge to the False Claims Act recently reached the Supreme Court, and the Court largely ducked. As analyzed by the Court, the Act's *qui tam* provisions do two things: they make the private relator "the statutorily designated agent of the United States" (with respect to the portion of the recovery that will go to the Treasury) and they partially assign to him a chose in action previously owned in full by the government (with respect to the portion of the recovery that the relator gets to keep).[193] The Court held that *if* Congress has the power to do these things, then the resulting suits can proceed in federal court; the public certainly has standing to seek to recover public money that defendants obtained by fraud, and someone suing pursuant to a valid assignment can benefit from the assignor's standing.[194] But the Court explicitly reserved judgment as to whether Congress can authorize private citizens to act as attorneys in fact for the public, or can seek to achieve the same result by purporting to effect a "partial assignment" of the government's claims to a private individual.[195] As one might infer from the Court's willingness to leave this question open, the *qui tam* statutes passed by the early Congresses were neither so numerous nor so significant as to settle the constitutionality of federal *qui tam* provisions.

In any event, even if historical practice really did compel the Court to uphold the *qui tam* provisions of the False Claims Act, and even if the Court were to extend this conclusion to other *qui tam* provisions too,[196] the lessons of *qui tam* would still be limited. The history of *qui tam* runs counter to the tradition of public control over public rights — a tradition that, particularly at the federal level, has been far more

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191. *Id.* at 389-90.

192. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 48 (2002) ("Before 1986, the DOJ received about six qui tam cases per year. Since the 1986 amendments went into effect, and through October 30, 2000, 3326 qui tam cases have been filed and $4.024 billion has been recovered.").

193. *See Stevens*, 529 U.S. at 772-73.

194. *See id.* at 773-74.

195. *See id.* at 778 n.8 (reserving judgment about whether the *qui tam* provisions of the False Claims Act violate the constitutional relationship between Congress and the executive branch, which is normally in charge of litigation on behalf of the public).

196. Special provisions in the False Claims Act give the executive branch somewhat more control over the statutory *qui tam* actions than public officers in England traditionally enjoyed. *See, e.g.*, Bales, *supra* note 175, at 392-95 (discussing statutory provisions permitting the Department of Justice to intervene, and noting that "[t]he DOJ, once it has intervened, may end the litigation or limit the participation of the informer in several ways"). Proprietary interests of the sort covered by the False Claims Act, moreover, may be more assignable than other sorts of interests that the government can bring suit to protect. *See* Gilles, *supra* note 8, at 341-45 (drawing this distinction).

prominent than *qui tam*. Faced with these competing claims from history, the Court could sensibly conclude that the historical lineage of *qui tam* protects *qui tam* itself, but not other statutory arrangements that lack the same pedigree. One can portray *qui tam* practice as a decisive blow to modern standing doctrine only if one considers the logic of the law so inexorable that any counterexample to the general requirement of private injury "proves" that the Constitution has been understood to impose no such requirement at all.[197]

For critics of modern standing doctrine, moreover, *qui tam* is a double-edged sword. Although it is the primary historical poster child for private litigation of public rights, it is hardly an attractive one; there are obvious dangers in a system that permits prosecutorial discretion to reside in each of 250 million autonomous decisionmakers who are self-appointed and out for their own financial gain. Perhaps not surprisingly, then, *qui tam* practice manifested the problems that led to the rejection of private criminal prosecution and the more general limitations on private pursuit of public rights. As early as the sixteenth century, Sir Edward Coke noted that some informers were "viperous vermin" who had used *qui tam* statutes "to vex and depauperize the subject . . . for malice or private ends, and never for love of justice."[198] In the United States, state courts recognized the penal nature of *qui tam* statutes and strictly construed those that came before them.[199] According to one lawyer, indeed, "*[q]ui tam* actions are judged with great jealousy, because the plaintiff does not seek to recover anything that he has lost, nor to redress any individual wrong, but only to expose the faults of his neighbor and turn them to his own profit."[200]

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197. *Cf.* Bellia, *supra* note 102, at 818 ("If historical practice is to be our guide, we must acknowledge not only its allowances, but its limitations as well."). To bring this point into sharper focus, it helps to ask whether the critics of standing jurisprudence would acknowledge *any* limits on lessons of *qui tam*. Suppose, for instance, that Congress went from authorizing *qui tam* suits to authorizing other forms of private prosecution: any "private attorney general" who believed that a federal criminal statute had been violated could seek an indictment and conduct the prosecution of the suspected offender, in the hopes of collecting a cash bounty for a successful prosecution. Would the logic of *qui tam* inevitably defeat all constitutional objections to such a scheme? Or would people come to agree that *qui tam* is at best an anomaly, and that the existence of one historically grounded exception to a general principle of constitutional law does not require repudiation of the entire principle?

198. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *194, *cited in* Beck, *supra* note 174, at 578.

199. *See, e.g.*, Leonard v. Bosworth, 4 Conn. 421, 424 (1822); Melody v. Reab, 4 Mass. 471, 473 (1808); Washburn v. M'Inroy, 7 Johns. 134, 136 (N.Y. Sup. Ct. 1810).

200. Vaughn v. McQueen, 9 Mo. 330, 331 (1845) (argument of counsel). In *Vaughn* itself, the court was unwilling to construe the statute as narrowly as counsel wanted, but it did not reject the principle of strict construction. *See also* Taft v. Stephens Lith. & Eng. Co., 38 F. 28, 29 (C.C.E.D. Mo. 1889) ("Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million

As for the federal level, private *qui tam* actions were relatively rare. But even governmental officials who sought their moieties caused problems by attempting to pursue actions after higher-level officials (moved to mercy by the absence of willful violations) had remitted penalties.[201] This historical experience tends to bear out the work of modern law and economics scholars who suggest that offering bounties for law enforcement will lead to over-enforcement.[202] Such modern analyses reinforce traditional concerns that private discretion over public rights would enhance the chances for the arbitrary exercise of power.

CONCLUSION

This Article has sought to show that standing doctrine has a far longer history than its modern critics concede. That history, moreover, casts concerns about standing in a far more sympathetic light than most modern-day discussions suggest. Standing doctrines not only placed decisions about public rights in the hands of politically accountable officers, but often operated to protect individual citizens against inequitable enforcement of the law by private adventurers.

Standing doctrine has many dimensions. One focus is on the particular parties before the court, and whether the rights that they are invoking are really theirs to control. When discretion to pursue a claim properly belongs to a private person who has not been made a party to the action, standing doctrine operates to protect that person against usurpation of his or her rights. Conversely, rules that preclude enforcement of public rights by private citizens operate to protect the

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dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy.").

201. *See, e.g.*, United States v. Morris, 23 U.S. (10 Wheat.) 246 (1825) (holding that the collector and surveyor of Portland, Maine, were not entitled to their moiety after the Treasury Secretary's statutorily authorized determination to remit the fine for lack of willful negligence or intention to defraud). The Court was concerned that the executive maintain control over public rights and that the objects of enforcement receive relief for excusable violations. *See id.* at 291, 296; *see also id.* at 302-03 (Johnson, J., concurring). Justice Johnson noted that he had seen many similar cases on circuit. *Id.* at 296; *see also* The Laura, 114 U.S. 411 (1885) (holding that where a statute empowered the Secretary to remit fines, the right of the informer was inchoate and subject to the Secretary's power of remission before the right was ascertained and established by the court).

202. *See* Landes & Posner, *supra* note 16, at 15, 38 (responding to Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974), which recommended private enforcement of criminal law). Landes and Posner surmised that where there was incomplete apprehension, a legislature might set a fine higher than social costs of the activity to minimize enforcement costs. Such enhanced fines, however, would lead private prosecutors to devote more resources to apprehension. *See id.* at 15. Prosecutors motivated by the prospect of financial gain will also have little interest in reining in the penal law's tendency toward overbreadth. *See id.* at 38.

political process and to prevent dissenting individuals from making end runs around it.

At the same time, the issue of standing necessarily implicates the proper role of the judiciary in a democratic government and the relationship between that government and individual defendants. Exercise of judicial power at the instance of an improper plaintiff risks injecting the judiciary prematurely in decisions that are not its to make. By the same token, defendants have interests in freedom from judicial coercion at the instance of a private citizen who has no private rights at stake.

Because of the multidimensionality of standing disputes, standing doctrine implicates not only Article III but also a variety of other constitutional concerns, including the relationships among all three branches of the federal government, the relationship between the federal government and the states, and the demands of due process.[203] That there may be many ways to restate a standing problem perhaps manifests the fundamental nature, in a regime of limited government, of the distinction between public and private rights.

Standing critics speak in glowing terms about the desirability of allowing private citizens to litigate public rights. In the words of Professor Winter, "[o]nly this model affirms the ability of the individual citizen to be heard above the din of pluralistic, self-interested, majoritarian politics, and to participate directly in the normative process."[204] Our governmental institutions, however, have developed upon a different premise: the unique advantage of the courts lies in protecting private rights, not in representing the public more wisely than the political branches can.

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203. Our inclusion of due process in this list might seem peculiar. But at least in modern times, private prosecution of certain criminal offenses would surely raise some such concerns. *Cf.*, *e.g.*, State v. Eldridge, 951 S.W.2d 775 (Tenn. Crim. App. 1997) (concluding that even when a prosecution remains nominally under the control of public officers, the participation of the victim's civil lawyers as co-counsel violates the Due Process Clause). Potential due process issues also arise when a private party seeks to litigate the right of another private person who has not been brought into the proceedings. Thus, concerns about the absence of "indispensable" parties, or about the res judicata effect of judgments on absent parties, are often cast in terms of due process.

204. Winter, *The Metaphor*, *supra* note 4, at 1508.